

Rechtsprechung

Rechtssachenbeschreibung

Nationale Kennung: 5 W 92/07

Mitgliedstaat: Deutschland

Gebräuchliche Bezeichnung: N/A

Art des Beschlusses: Sonstiges

Beschlussdatum: 19/06/2007

Gericht: Oberlandesgericht

Betreff:

Kläger:

Beklagter:

Schlagworte: Rechtsprechung Deutschland Deutsch

Artikel der Richtlinie

Distance Selling Directive, [Article 6, 1.](#)

Leitsatz

Wie und wann der Hinweis auf die Haftung des Käufers für Verschlechterungen der Sache nach Ausübung des Widerrufsrechts gemäß § 357 Abs.3 S.1 BGB zu erteilen ist, richtet sich für den Fernabsatz von Waren nach den §§ 312c Abs.1,2 BGB i.V.m. § 1 Abs.1 Nr.10 und Abs.4 Nr.1 BGB-InvoV. Hierbei handelt es sich um Spezialvorschriften für den Fernabsatz, die in ihrem Anwendungsbereich § 357 Abs.3 S.1 BGB vorgehen.

Sachverhalt

The applicant had applied to the Regional Court for a court order prohibiting the respondent to keep offering or selling audio and hifi-products to consumers on eBay while stating – in the context of the of the information on the right of withdrawal and return regarding distance sale contracts – that the obligation to pay compensation could be avoided by not using it as extensively as a regular owner would. The Regional Court has rejected the application.

Rechtsfrage

Entscheidung

The Higher Regional Court has rejected the applicant's complaint against the Regional Court's decision. It held that the Regional Court had correctly rejected to issue the desired cease and desist order, since there had been no interference with fair competition under § 4 no. 11 UWG in conjunction with §§ 312c(1) (1) BGB, § 1(1) no. 10 BGB-InvoV due to faulty information on the legal consequences of the exertion of the withdrawal right or the returning of the goods respectively.

§ 357(3)(1) BGB states that the consumer, notwithstanding § 346(2)(1) no. 3 BGB, must pay compensation for value for any deterioration caused by putting the purchased good to its intended use, if, at the latest upon conclusion of the contract, his attention was drawn to this legal consequence and to a possibility of avoiding it in text form. The respondent's contested instruction regarding the obligation to pay compensation (of which the appellant only objects to the last sentence) has been drafted applying this provision and nearly is a copy of the model instruction from Schedule 2 to § 14 BGB-InvoV. However, the consumer was arguably not provided with the instruction in text form upon the conclusion of the contract as is necessary under § 357(3)(1) BGB. This is because an instruction relating to online auctions posted on eBay does not meet the legal prerequisites for the text form under § 126b BGB. It can only be met by providing the consumer with an instruction permanently embodied in a written document, on a disk, CD-Rom, in an e-mail or in a computer fax. With respect to eBay auctions, the contract of sale is concluded at the end of the auction between the seller and the highest bidder. It is at least to be doubted whether the fact that the consumer is subsequently provided with the instruction in text form can still be deemed as "upon the conclusion of the contract" in the terms of § 357(3)(1) BGB.

The §§ 355 et seqq. BGB do, however, only contain general rules relating to the provisions granting a right of withdrawal. § 312c BGB contains special rules for the distance sale, determining at what time and in which form the instruction on the right of withdrawal with the content defined by § 1(1) no. 10 BGB-InvoV (including the legal consequences of the withdrawal) has to be communicated. The obligation to pay compensation in the case of the deterioration of the purchased goods is a legal consequence in the terms of § 1(1) no. 10 BGB-InvoV.

There is a decisive difference between the information duties under § 312c(1) BGB and those under § 312c(2) BGB. The former have to be fulfilled by providing clear and comprehensible information in good time before the consumer makes his contract declaration, in a manner appropriate to the means of distance communication used, but this does not necessarily have to be in text form under § 126b BGB. Thus, these information duties can be fulfilled by posting the instruction in connection with each single auction, as was done by the respondent.

The information duties under § 312c(2) BGB can on the other hand only be fulfilled by providing the consumer with an instruction in text form. With respect to the supply of goods, the instruction must at the latest be communicated to the consumer before the receipt of the goods (§ 312c(2)(1) no. 2 BGB). These provisions on the instruction in distance sale contracts are to be qualified as a set of special rules on the time and modalities of the instruction about the withdrawal's legal consequences which (in their limited scope of application) supersede § 357(3)(1) BGB.

Thus, the respondent can maintain the buyer's liability for the deterioration of the supplied goods by informing him about the legal consequences of the withdrawal within the context of the auction according to Schedule 2 to § 14 BGB-InvoV, as long as he provides the consumer with the instruction on his right of withdrawal in text form before the goods are supplied to him.

Volltext: [Volltext](#)

Verbundene Rechtssachen

Keine Ergebnisse verfügbar

Rechtsliteratur

Keine Ergebnisse verfügbar

