

Case law

Case Details

National ID: VIII ZR 219/08

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 09/12/2009

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [Article 6, 1.](#) Unfair Contract Terms Directive, [Article 7](#) Unfair Contract Terms Directive, [ANNEX I, 1.](#) Distance Selling Directive, [Article 5, 1.](#) Distance Selling Directive, [Article 5, 2.](#) Distance Selling Directive, [Article 6, 1.](#) Distance Selling Directive, [Article 6, 1.](#)

Headnote

a) The following clause of the standard business terms that are used for contracts of sale with consumers on the internet platform eBay is invalid:

"[The consumer may return the received goods without stating a reason within a month by returning them.] This period begins at the earliest with the reception of the goods and this information."

b) From the legal requirement that information be as comprehensive, unambiguous and, from the perspective of the consumer, direct as possible, there is no duty to indicate for each article sold in distance contracts whether the consumer has the right of return.

c) The following clause in the aforementioned standard business terms is invalid:

"[In case of a valid return, restitution of reciprocal performances is to be made and use (ex. benefits arising from use) is to be reimbursed.] Compensation may be required if the goods have deteriorated. This is excluded if the deterioration of the goods is purely the consequence of their examination, as the consumer would have been able to do in a shop.

Facts

The claimant is the Bundesverband der Verbraucherzentralen und Verbraucherverbände [Federal association of consumer advice centres and consumer associations]. The defendant trades on the internet sale platform eBay with various home textiles, children's and baby's clothing as well as baby equipment. The claimant requested an injunction against the defendant, prohibiting her from using certain clauses, which the defendant uses in contracts of sale concluded through her internet page on eBay. The court of appeal issued an injunction prohibiting the defendant to use three clauses.

Legal issue

The first clause read: "[The consumer may return the received goods without stating a reason within a month by returning them.] This period begins at the earliest with the reception of the goods and this information."

The Federal Court of Justice declared the clause invalid. It did not contain sufficient indication of the beginning of the return period and therefore did not meet the statutory requirement that information be comprehensive, unambiguous and – from the perspective of the consumer – as direct as possible (articles 312d paragraph 1 sentence 2 and paragraph 2, 356 paragraph 2, 355 paragraph 2 of the German Civil Code). Their form-like use caused a danger of misleading consumers and putting them at an inappropriate disadvantage (article 307 paragraph 1 sentence 2 of the German Civil Code). Under articles 356 paragraph 2, 355 paragraph 2 sentence 1 of the German Civil Code, the return period begins when the consumer has been informed in writing by a clearly formulated notice of his right of return, which must contain inter alia an indication of the beginning of the return period. From the perspective of an unbiased average consumer, which is the legal standard, the clause could give the impression that the consumer had already been informed when he merely took notice of the clause, without it having been given to him in a written form meeting the legal requirements, i.e. in a document or by some other means of permanent reproduction through letters (article 126 German Civil Code). Furthermore, the consumer may infer from the clause due to its use of the words "at the earliest" that the beginning of the return period depends on further requirements, but is unclear about which requirements these are.

The second clause read: "The right of return, by virtue of article 312d paragraph 4 of the German Civil Code, does not exist amongst others for contracts concerning

* delivery of goods that have been produced to customer specifications or have been tailored to his particular needs, or that are unsuited to return due to their nature, or may perish quickly, or whose expiration date would pass;

* delivery of audio and video recordings (i.a. also CDs and DVDs) or of software, if the data medium has been opened by the consumer or

* delivery of newspapers and magazines."

The Federal Court of Justice has judged the clause to be invalid. It did not meet the statutory requirements. The defendant was not required to indicate for each individual article whether the customer had a right of return, and thus have had to use different versions of her standard business terms for distance contracts of sale in e-commerce. Information which leaves the assessment of whether the goods acquired fall under the exception is not unambiguous. Doubts over this assessment would not be eliminated if the defendant merely informed the consumer that no right of return existed for those sale contracts which fell under the exception. The consumer would receive far less information than if he were informed of the statutory formulation of the exceptions. Rather, this allows him to form a dissenting opinion and to work towards a resolution. Even her use of the limiting addition "amongst others" does not make the clause clear as the consumer may merely infer from this that the article 312d paragraph 4 of the German Civil Code contains other exclusion rules that do not apply to the distance selling business of the defendant.

The third clause read: "[In case of a valid return restitution of reciprocal performances is to be made and potential use (ex. benefits arising from use) is to be reimbursed.] Compensation may be required if the goods have deteriorated. This is excluded if the deterioration of the goods is purely the consequence of its examination – as the consumer would have been able to do in a shop.

The Federal Court of Justice has judged the clause to be invalid. The law does not require information to cover all of the potential legal consequences of the

exercise of the right of return. The information must, however, contain an indication of the consequences of article 357 paras. 1 and 4 of the German Civil Code. On the facts, this was not the case. Under article 357 paras. 3 and 1 of the German Civil Code, the customer must also, should he exercise his right of return, compensate the seller for any deterioration if he employs the thing for its intended use, but only if he is informed of this consequence and the possibility of avoiding it, in writing and at the latest at the time of the conclusion of the contract. If information, meeting the requirements of article 357 paragraphs 3 and 1 of the German Civil Code, was unavailable at the time of the conclusion of the contract on eBay because contracts were formed without the possibility of providing the required information in writing at that time, then this clause was misleading as it contained no indication that for the deterioration through the use of the thing as intended no compensation must be made. Even if the defendant could provide information which met the requirements of article 357 paragraphs. 3 and 1 of the German Civil Code in writing before the reception of the goods (article 312c paragraph 2 sentence 1 number 2 of the German Civil Code), then the third clause would still have to indicate that a duty to compensate for any deterioration arising out of the intended use of the thing only existed under these conditions (article 312c paragraph 1 of the German Civil Code combined with article 1 paragraph 1 number 10 of the Regulation on duties to supply information in civil law (BGB-InfoV)). Such an indication was also lacking. The form-like use of the information not meeting the statutory requirements caused a danger of misleading the consumer and put consumers at an inappropriate disadvantage (article 307 paragraph 1 sentence 2 of the German Civil Code).

Decision

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