

Case Details

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National ID	10 Ob 70/07b
Member State	Austria
Common Name	10 Ob 70/07b
Decision type	Supreme court decision
Decision date	28/01/2009
Court	Supreme Court
Subject	
Plaintiff	Verein für Konsumenteninformation (Consumer Information Association)
Defendant	Visa
Keywords	proof of intention, terms and conditions, unfair terms

Directive Articles

Unfair Contract Terms Directive, [Article 4, 2.](#) Unfair Contract Terms Directive, [Article 5](#)

Headnote

- (1) A clause stating that a specific behaviour of the consumer will be considered as a declaration of intent is void.
- (2) A clause may contain two different and independent provisions, even in one sentence. It is crucial for determining whether the provisions can be viewed independently to identify whether they have an objectively independent content.
- (3) A reference within a contract to another clause in a contract does not automatically lead to a lack of transparency of the clause. But in certain cases the consequence of the combination of both clauses in its entirety may be unclear. If the clause which is referred to is void, the clause referring to it will also be void.

Facts

The defendant is a credit card institute which offers services within Austria. The plaintiff filed a cease-and-desist order to prohibit certain clauses of the general terms and conditions used by the defendant when concluding contracts with consumers.

- (1) According to one clause the card holder acknowledges the general terms and conditions with signing and/or using the card.
- (2) Another clause states that the card holder has to sign the card immediately after receipt (part 1) and that, in case of failure to do so, he will be fully liable for all damages arising from using the card after loss or theft (part 2).
- (3) The clause summarizes the contractually prohibited use of a card by way of reference to various other clauses in the general terms and conditions.

Legal issue

- (1) According to the Court this clause is not confirming a fact, rather it is stipulating a specific behaviour of a consumer to be a declaration of intent. These clauses are effective if the entrepreneur grants the consumer an adequate period of time to render the declaration of intent and if the entrepreneur informs the consumer at the beginning of this period of time on the significance of his behaviour. These requirements were not met. Thus the Court confirmed the decision of the appellate court that the clause is void, although the lower instances qualified the clause differently as a -void- confirmation of facts.

(2) According to the opinion of the Court it is possible that two different and independent provisions are contained in one clause or even in one sentence. For the qualification of a clause as a single/independent clause it is crucial if the provisions have an objective independent content. Regarding the clause in question this is the case (two different provisions in one clause) so that the clauses can be viewed separately.

The court decided part 1 of the clause to be admissible.

However, part 2 of the clause regarding the liability of the consumer is regarded void as it is of gross disadvantage for the consumer as defined under Article 3.1. and 4.2. Directive 93/13 (implemented into Austrian law by § 879 Sec 3 General Civil Law Act), as the consumer is also liable for any damage e.g. if the consumer notifies a theft of the card and the institute fails to block the card immediately.

(3) The reference within a contract or made to a price list does not automatically lead to a lack of transparency as defined under Article 5 Directive 93/13 (implemented into Austrian law by § 6 Sec 3 Consumer Protection Act). But in certain cases the consequence of the combination of the clauses in its entirety may be unclear and therefore the clause may be lacking transparency. According to the court will the referring clause be void if the clause referred to is deemed to be void.

The Court found various other clauses of the general terms and conditions in question to be void.

Decision

(1) Is a clause admissible stating that a specific behaviour of the consumer will be considered as a declaration of intent?

(2) Is it possible to review parts of a clause separately when assessing its admissibility?

(3) Is the reference within a contract to another part of a contract affecting its transparency?

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Result

The appeal was partially successful, the decisions of the prior courts were amended.