

CASE NOTE: GERMANY

CASE CITATION:
BGH of December 12, 2000 –
XI ZR 138/00

NAME AND LEVEL OF COURT:
German Federal High Court
(Bundesgerichtshof)

DATE OF VERDICT:
12 December 2000

In his decision, the German Federal High Court has established that clauses in general terms and conditions meant to exclude the liability of on-line banks for temporary restrictions and interruptions of access to banking services caused by any kind of technical or operational problems are in breach of Section 11 no. 7 German Act on Standard Terms and Conditions (AGB-Gesetz - “AGBG”), if they lead to the bank not being liable, even in case of gross negligence.

In the given case, the defendant on-line bank (‘Bank’) offered on-line services to all its clients holding a giro account. In a separate agreement for these services, the Bank’s clients were allowed to download information and to make transactions by means of electronic systems operating day and night (home-banking). The consumer protection association took legal action against the Bank to bar it from using certain clauses in their terms and conditions concerning the on-line services contracts. The clause in examination (‘Clause’) in the court’s sentence was the following one:

“Temporary restrictions and interruptions of the access to (...) on-line services caused by technical or operational matters are potential. Temporary restrictions and interruptions can be based upon matters beyond the control of the bank, changes and improvements of the technical facilities or upon other measures, e.g. maintenance or repair workings necessary for a faultless or optimised (...) on-line banking service, or upon other occurrences, e.g. overload of the telecommunications nets.”

Contrary to previous decisions in relation to similar cases, the Court ruled that the first sentence of the Clause was in breach of Section 11 no. 7 AGBG, currently Section 309 no. 7 b of the German Civil Code (Bürgerliches Gesetzbuch – ‘BGB’).

The court stated that the Clause was subject to judicial control according to Sections 9 to 11 AGBG (current Sections 307 to 309 BGB), as it did not constitute a mere description of the legal duties, but a restriction of the Bank’s originally agreed duty to provide for access to the banking services without any time limits.

The court furthermore held that the Clause was to be seen as an exclusion of liability in the Bank’s favour. Even if the Clause did not state an express non-liability, the restriction of the duty to provide a round-the-clock access to the banking services naturally resulted in an exclusion of liability: where there is no more duty to guarantee unlimited access to the on-line services, a restriction or interruption of the access will not lead to a breach of duty. Without a breach of duty in turn, there will be no more liability of the Bank for any damages caused. Thus, the entire risk of not being able to obtain access to the on-line services was imposed unilaterally on the Bank’s clients.

The court called for a clear distinction in regard to the causes of potential restrictions or interruptions of the access to on-line services. The Clause in its given form, which referred to any “other measures” and any “other occurrences” as a possible reason for the temporary failure of the on-line service, was intended to constitute non-liability even in case of failure caused by grossly negligent behaviour by the Bank’s employees or any person within the Bank’s responsibility. The exclusion of liability was not confined to restrictions or interruptions based upon conditions or measures in which the Bank did not accept liability, but in any situation however it was caused. Given that the Clause had to be classified as an exclusion of liability even in case of gross negligence, the court classified it as a generally forbidden and hence it was an ineffective clause in terms of Section 11 no. 7 AGBG (current Section 309 no. 7 b BGB).

Consequences

An express exclusion of liability by use of general terms and conditions can be in breach of Section 11 no. 7 AGBG (current Section 309 no. 7 b BGB), but a restriction of the agreed duties, which leads to an exclusion of liability as a logical consequence, can also be a breach. On-line banks offering day and night on-line services cannot, by the use of general terms and conditions, impose the risk of inaccessibility unilaterally on their clients. They need to make a clear difference between the causes and the different levels of negligence, if they intend to exclude their liability in case of slight or normal negligence.

The ruling of the court, besides its importance for the sector of on-line banking, might have consequences also for the general terms and conditions of other kinds of internet service providers in their contractual relationship to consumers.

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