

Berlin Court orders WhatsApp to provide Terms & Conditions in German

Berlin Court of Appeal, Case No. 5 U 156/14

On 8 April 2016, the Berlin Court of Appeal issued a judgment against WhatsApp Inc., prohibiting the use of English Terms & Conditions on its website for contracts with consumers in Germany, unless German Terms & Conditions are provided as well.

In a press release dated 17 May 2016¹, the Federation of German Consumer Organisations ('VZBV') announced that the Court of Appeal Berlin² issued a judgment against WhatsApp Inc. ('WhatsApp'), prohibiting the use of English Terms & Conditions on its website for contracts with consumers in Germany, unless German Terms & Conditions are provided as well ('Appeal Judgment')³. Further, the Berlin Court of Appeal ruled that WhatsApp shall be obliged to provide on its website a second communication channel, in addition to WhatsApp's (already indicated) email address. The Appeal Judgment is not yet binding.

Facts of the judgment

WhatsApp advertised its messenger service to customers on its German language website. Potential customers have to first register and agree to the 'Terms of Service' and the privacy policy, which are only available in English. Further, WhatsApp's website did not indicate its representatives, its business seat, a communication channel other than its email address and the public register, in which WhatsApp is registered.

In its capacity as a so-called registered consumer organisation under Section 4 of the German Class Action Act⁴, the VZBV has the right to sue companies, i.e. file injunctions or legal actions, for use of unfair terms and conditions and/or unfair business practices in the meaning of the German Act against Unfair Competition ('UWG')⁵.

Default judgment of 9 May 2014

Since WhatsApp showed no reaction to two warning letters issued by the VZBV on 19 July 2012 and 9 October 2012, the

VZBV initiated court proceedings before the District Court of Berlin⁶. On 9 May 2014 the VZBV obtained a default judgment⁷ against WhatsApp⁸. The default judgment was issued without prior oral hearing, since WhatsApp failed to declare, to the District Court of Berlin, its willingness to defend against the VZBV's legal action, i.e. it refused to accept the formal delivery of the statement of claim.

Under the default judgment, WhatsApp was ordered to render on its website the following information, pursuant to Section 5 of the German Telemedia Act ('TMG')⁹: (1) its representatives; (2) the geographic postal address, i.e. business seat; (3) a second communication channel, i.e. in addition to its already indicated email address; and (4) the public register upon which WhatsApp is registered and the corresponding registration number. Finally, the default judgment put an obligation on WhatsApp to (5) use German Terms & Conditions on its website in regards to its consumers in Germany (the substance of orders (1) to (5) above are hereinafter referred to as 'Item (1) - Item (5)').

First Instance judgment of 25 November 2014

After WhatsApp filed a complaint against the default judgment, the District Court of Berlin issued a First Instance judgment dated 25 November 2014¹⁰. The First Instance judgment upheld the default judgment only in relation to Items (2) and (4) above. All other orders contained in the default judgment, including the order to use German Terms & Conditions *vis-à-vis* customers in Germany, i.e. Item (5), were dismissed.

Item (3)

The District Court of Berlin expressly accepted that WhatsApp

did not provide a telephone or fax number in addition to its email address, but only Twitter and Facebook account information. In the Judges' view WhatsApp customers are typically familiar with modern means of communication. Therefore, communication via social networks like Twitter and Facebook shall be acceptable for WhatsApp customers.

Item (5)

The District Court of Berlin held that, pursuant to Section 1 of the German Class Action Act¹¹, the VZBV would only be entitled to attack terms and conditions that are 'unfair' on the substance. The scope of the VZBV's rights under the German Class Action Act shall not cover the question of whether certain terms and conditions are made a part of a contract. In the view of the District Court of Berlin terms and conditions in the English language do not form part of a contract, unless the relevant customer is able to understand them. Upon this assumption, the District Court of Berlin concluded that terms and conditions shall not be deemed unclear and incomprehensible according to the meaning of Section 307(1) s. 2 of the German Civil Code ('BGB')¹² only because they are drafted in a foreign language. Rather, a breach will occur only if so-called 'material' circumstances, which lead to an unreasonable disadvantage for the customer, are given¹³. WhatsApp's English Terms of Service shall not qualify as unfair competition, in particular a misleading commercial practice pursuant to Section 5(1) UWG; the District Court of Berlin was apparently convinced that customers would understand that WhatsApp intends to use the English version of its Terms of Service¹⁴.

Appeal judgment of 8 April 2016

Upon appeal by the VZBV, the Court of Appeal of Berlin partly set aside the First Instance judgment. In addition to the District Court of Berlin's First Instance judgment, the Court of Appeal granted the VZBV's motions in relation to items (3) and (5). The reasoning substantially differed from the District Court of Berlin's view:

Item (3)

Contrary to the District Court of Berlin, the Court of Appeal concluded that WhatsApp shall provide on its website a second communication channel, in addition to WhatsApp's already indicated email address. In the Court of Appeal's view, the existing hyperlinks to WhatsApp's Twitter account and Facebook page were not sufficient. Section 5(1) no. 2 TMG originates from Article 5(1)(c) of the E-Commerce Directive 2000/31/EC ('Directive') pursuant to which 'In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information: (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner.' The Court of Appeal expressly made reference to the Court of Justice of the European Union ('CJEU'), which held in Case C-298/07¹⁵ that under Article 5(1)(c) of the Directive the service provider is required to offer recipients of the service a rapid, direct and effective means of communication "in addition to his electronic mail address"¹⁶. Further, the Court of Appeal Berlin relied

on the CJEU's binding Opinion that Article 5(1)(c) of the Directive requires "communication without an intermediary"¹⁷. Against this backdrop, the Court of Appeal concluded that the hyperlinks to WhatsApp's Twitter and Facebook accounts would not be in line with those legal principles as established by the CJEU, since WhatsApp does not "follow" its users on Twitter and WhatsApp's Facebook page does not allow users to send messages to WhatsApp. Further, the Court of Appeal pointed out that WhatsApp's argument that the breach was minor, is irrelevant since the information to be provided to users are deemed essential on the level of EU legislation. In this context, the Court of Appeal relied on a previous judgment of the Federal Court of Justice ('BGH')¹⁸ dated 7 May 2015, Case No. I ZR 158/14.

Item (5)

In the Court's view the fact that a complex set of contractual terms and conditions is only available in the English language leads to the conclusion that the whole set of contractual Terms & Conditions shall be deemed void¹⁹ because of a breach of Section 307(1) BGB. Pursuant to Section 307(1) BGB clauses in terms and conditions provided *vis-à-vis* consumers shall be void if they unreasonably disadvantage the other party to the contract with the party using the terms and conditions. Such an 'unreasonable disadvantage'²⁰ may also arise from the fact that the relevant clause is not sufficiently clear and comprehensible.

The Court held that such breach shall be given in particular if consumers are required to accept a complex set of terms and conditions which contain a high number of clauses drafted in difficult legal language in English, such as WhatsApp's Terms &

Conditions. Further, the Court emphasised that consumers would not expect terms and conditions to be in the English language, since the whole website, including the relevant hyperlinks to the Terms & Conditions and the privacy policy, is offered in the German language, thereby aimed at the German market. Consequently, the Court concluded that the whole set of WhatsApp's Terms & Conditions shall be invalid and unenforceable, irrespective of whether the individual clause would, if they were drafted in the German language, be valid and enforceable according to their scope and substance.

Even though the Court has not admitted Third Instance cassation proceedings before the BGH²¹, WhatsApp is now seeking to override this decision. On 30 May 2016, WhatsApp filed a non-admission complaint²². If the complaint is successful, WhatsApp will be permitted to attack the Appeal Judgment by cassation appeal²³ before the BGH. The non-admission complaint is currently pending before the BGH, Case No. I ZR 111/16.

Item (1)

Finally, the Court dismissed the VZBV's further motion, i.e. to impose an obligation on WhatsApp to indicate a competent representative pursuant to Section 5(1) no. 1 TMG. The Court explained that a breach of a national statutory provision of a Member State, such as Section 5(1) no. 1 TMG, shall be deemed unfair competition only if the violated national statutory provision is based on European law. However, Section 5(1) no. 1 TMG does not originate from EU legislation. In the Court's view, the Unfair Commercial Practices Directive 2005/2009/EC shall contain an exhaustive list of unfair

commercial practices between companies and consumers. Consequently, the Court held that the VZBV shall not be entitled to file an injunction for breach of Section 5(1) no. 1 TMG.

Conclusions

“Companies’ terms and conditions are frequently lengthy and generally hard to understand for consumers. It is an important message to other international companies that the millions of German users of WhatsApp will not have to contend themselves with terms of use in a foreign language,” said Klaus Müller, Executive Director of the VZBV²⁴. However, the Appeal Judgment has not yet become final and absolute. Even if it should become binding, this will not establish a general requirement for international companies to provide customers/potential customers in Germany with terms and conditions in the German language. The Appeal Judgment will have an *inter partes* effect. Further, the Appeal Judgment dealt with a very specific case, i.e. a scenario where a company requires its customers to agree on a complex set of terms and conditions containing a high number of clauses drafted in difficult legal English language, whereas the company’s services and offerings as such are entirely offered to customers in the German language and even the hyperlink to the terms and conditions is presented in German.

The present proceedings clearly demonstrate that the underlying statutory provisions of the BGB and the UWG, in conjunction with Section 5 TMG, apply internationally, provided that a company targets consumers in Germany²⁵. In particular those requirements cannot be waived by way of a governing law clause.

In any event, the upcoming decision from the BGH to be followed by a third instance judgment, whether it confirms the Appeal Judgment or, alternatively, permits the cassation proceedings, will provide further legal clarity.

In the meantime, it is worth recommending that companies, which target consumers in Germany, take the principles set forth in the Appeal Judgment of 8 April 2016 from Berlin’s Court of Appeal into account.

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1. http://www.vzbv.de/sites/default/files/en_kom_2016-0513_pm_whatsapp_ib_u.pdf
2. Kammergericht Berlin.
3. Kammergericht Berlin, judgment dated 8 April 2016, Case No. 5 U 156/145; full text available at http://www.vzbv.de/sites/default/files/whatsapp_kg_berlin_urteil.pdf
4. Unterlassungsklagengesetz - UKlaG.
5. Gesetz gegen den Unlauteren Wettbewerb - UWG.
6. Landgericht Berlin.
7. So-called ‘Versäumnisurteil’ pursuant to Section 331(3) of the German Code of Civil Procedure (Zivilprozessordnung - ZPO).
8. Landgericht Berlin, judgment (Versäumnisurteil) dated 9 May 2014, Case No. 15 O 44/13; full text available at http://www.vzbv.de/cps/rde/xbcr/vzbv/WhatsApp-LG-Berlin-15_0_44_13.pdf
9. Telemediengesetz - TMG.
10. Landgericht Berlin, judgment dated 25 November 2014, Case No. 15 O 44/13; full text available at <http://www.vzbv.de/sites/default/files/downloads/WhatsApp-LG-Berlin-2014-11-25.pdf>
11. Unterlassungsklagengesetz - UKlaG.
12. Bürgerliches Gesetzbuch - BGB.
13. Landgericht Berlin, judgment dated 25 November 2014, Case No. 15 O 44/13, pages 11 et seq.
14. Landgericht Berlin, judgment dated 25 November 2014, Case No. 15 O 44/13, pages 12 et seq.
15. CJEU, judgment dated 16 October 2008, C-298/07, VZBV v. deutsche internet versicherung AG; full text available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d597f42af1bf154f4e815dd9c7d781b874.e34KaxILc3qMb40Rch0Saxu>

- Tahz0?text=&docid=66600&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1233475
16. CJEU, judgment dated 16 October 2008, C-298/07, para. 25.
 17. CJEU, judgment dated 16 October 2008, C-298/07, para. 31.
 18. Bundesgerichtshof - BGH.
 19. Kammergericht Berlin, judgment dated 8 April 2016, Case No. 5 U 156/145, pages 49 et seq.; full text available at http://www.vzbv.de/sites/default/files/whatsapp_kg_berlin_urteil.pdf
 20. In German: unangemessene Benachteiligung.
 21. Bundesgerichtshof - BGH.
 22. ‘Nichtzulassungsbeschwerde’ pursuant to Section 544(1) s. 1 German Code of Civil Procedure (Zivilprozessordnung - ZPO).
 23. ‘Revision’ pursuant to Section 542 et seq. German Code of Civil Procedure (Zivilprozessordnung - ZPO).
 24. http://www.vzbv.de/sites/default/files/en_kom_2016-05-13_pm_whatsapp_ib_u.pdf
 25. Targeting on the German market also triggers jurisdiction of German courts. According to Section 32 of the German Code of Civil Procedure (Zivilprozessordnung - ZPO), the court in the jurisdiction in which the tortious act was committed shall have jurisdiction; in this context unfair competition is deemed a tortious act.