

Case name (date):
The “AHK case” (July 2018)

KEYWORDS:

Competence of the Legal clinic; unfair commercial practices (Directive 2005/29/EC); nullity of contract; gym subscription; languages

FACTS:

In this case, a non-French-speaking user filled and signed a document in a gym that was presented to him by the employee as an information form. The document was in French and the employee did not mention that it was a fully binding contract that he was presenting. Thinking it was just a document to request additional information on the gym classes, the user did not mention his bank details on the contract but signed it, nevertheless.

The user did not go to any of the classes, nor did he go to the gym itself. He learned that the document he signed was a contract eight months later when he received an SMS and an invoice of several hundred euros for the monthly fees.

Upon receiving the SMS and invoice, he called the gym immediately to tell them that there had been a mistake and that he had not entered any contract with the gym. The gym answered that he had signed a contract.

So, a few days after, he went to the gym to try and talk directly with the employee that made him sign the contract. There, the employee had an intimidating behaviour and told them that the gym would sue him if he kept on refusing to pay the pending invoice.

Between the moment he received the invoice and his request to the Clinic the gym kept on sending reminders that he had to pay for the subscription.

The user is asking if it is possible to cancel the contract and if he could legally refuse to pay the amount that the gym was asking him.

LEGAL ANALYSIS:

Competence of the Clinic

The Clinic is competent only for cases in which the user can be considered a consumer and the other party can be defined as a trader, in accordance with article L.010-1 of the Luxembourgish Consumer Code. At least one of the Luxembourgish Consumer Code's provisions must be applicable to the case. Lastly, the overall amount at stake should not exceed a 5,000 EUR threshold.

The user had signed a contract with the gym and could be considered as acting outside the scope of his trade, business, or profession. As a result, he could be considered as a consumer. The gym, whose professional activity is to provide access to fitness equipment and furniture could be considered as acting within the framework of its professional activity and as such, could be considered as a trader. The amount at stake did not exceed the 5,000 EUR threshold.

Languages

Even though the provision of the Luxembourgish Consumer Code were applicable, the first step in the Clinic's reasoning was to see if we could not take advantage of the fact that the consumer had signed a contract in French, when not speaking the language and thus, not fully understanding what he was signing.

In Luxembourg, there are three official languages: Luxembourgish, German and French. It turned out that even though English is widely spoken among the people who work and live in Luxembourg, demanding contracts to be written in English is not possible. Hence, arguing that contracts are invalid only because the user who is signing cannot understand either French, German or Luxembourgish is not possible.

Unfair commercial practices

Aggressive commercial practice

According to article L. 122-5 of the LCC, a practice is deemed to be aggressive if it alters or is likely to significantly alter, by coercion or unjustified influence, the freedom of choice or conduct of the average consumer with respect to a product. This practice is likely to cause him/her to make a business decision that he /she would not have made otherwise.

In this case, several facts may have been used to demonstrate the use of an aggressive commercial practice from the trader. Firstly, the article mentions “undue influence”. If by itself, the fact that the consumer does not speak the official language of the country may not be of use the fact that the employee did not mention that the document was a contract could be considered as an undue influence. Secondly, when the consumer went back to the gym, the manager of the company tried to intimidate the consumer into paying the subscription. Lastly, the consumer was receiving regular reminders and calls in order to tell him that legal action would be taken if he persisted in not paying the invoices.

Moreover, it should be mentioned that the directive 2005/29, from which originates article L. 122-5 of the LCC does not state that a valid contract must be signed in order for it to be applicable. Knowing this fact, a second legal argument had to be brought up.

Non-existence of the contract

In Luxembourgish Contract law and according to article 1109 of the Luxembourgish Civil Code, an “erreur obstacle” may be characterised when a user wrongfully signed a contract, without even knowing that the document they were signing was a contract. Such a thing accounts for a total absence of consent and subsequently the non-existence of the contract. This specific case, although rare, exceeds even the nullity of the contract, as the contract was not supposed to exist in the first place.

In this case, the user did not know had absolutely no intent or entering into a contract. As a proof of this statement, he did not understand that the document was contract, did not provide his bank account and details, never went to the gym afterwards.

However, had the user eventually paid the amount that the gym was asking, it could have been interpreted as an indirect proof of consent.

LEGAL SOLUTION:

Because of the “erreur obstacle” from the consumer, the contract could not be considered as valid and binding. Thus, no payment was legally due.

On top of this, if an aggressive commercial practice could be proven by the consumer, the trader could have been given a fine amounting to 251, up to 120,000 EUR.

SOLUTION SUGGESTED BY THE CLINIC:

From a strategic standpoint, the Clinic mentioned first that no payment was due by the consumer, because of the “erreur obstacle”. We also warned that should the consumer decide to pay the amount, it would account for an implicit consent to the contract and would result in the contract being effectively binding.

The Clinic told the consumer that one of his options was to write a registered letter to the gym mentioning that there had been an “erreur obstacle” and that no payment would be done from his side.

On top of this, the Clinic also told the consumer that the aggressive commercial practice could be considered from a legal standpoint as trying to trick the consumer into paying, hence making the contract valid and fully enforceable and that such practices were sanctioned in Luxembourgish Law, by a fine going from 251 to 120,000 EUR, under article L. 122-5 of the LCC.