

TELEVISION

*"pay TV subscription" consumers right
to withdraw from contract*

Federal Supreme Court

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Law: Article 505 of the German Civil Code which replaces a corresponding regulation in the German Act Concerning Credits Relating to Consumer Goods states:

"Article 505—Hire-Purchase System

The consumer has (...) a right of withdrawal in the case of a contract with a business if the consumer's agreement relates to the conclusion of a contract which:

(...)

concerns the periodical supply of identical goods;

(...)"

Facts: The defendant operates the German Pay-TV-channel Premiere. It concluded subscription agreements with customers without a notice on the right of withdrawal.

After commissioning the Pay-TV service by telephone subscribers received a written declaration that the contract had been concluded, a decoder which remained the defendant's property and a monthly programme journal. The subscription agreement had a duration of one year and unless it was terminated by giving notice at the end of each year it is or will continue for another year.

The plaintiff, the federal association of consumer centres and associations of consumers, considered that the defendant an unfair competition advantage because it did not provide potential subscribers with information on their rights of withdrawal which is envisaged by the law in the case of the acquisition of consumer goods by a hire-purchase system. The defendant argued that the rights of withdrawal would be applicable only in the case of goods but not in the case of services.

Held: The exclusion of services from the scope of the regulation of the right of withdrawal in Art.505 of the German Civil Code (formerly in the Act Concerning Consumer Goods) is not a non-systematical omission by the legislator which could be filled in by the courts' jurisprudence by a way of analogy. It was the purpose of the legislator to protect consumers in the case of a hire-purchase system relating to goods.

However, the purpose of this regulation could provide an argument in favour of its application by way of analogy to consumer contracts on services; *i.e.* the right of withdrawal should ensure that consumers, without thought and under pressure of negotiation, which is initiated and led by the other party, undertake onerous obligations.

This purpose is identical, whether the subject-matter of the contract concerns the periodical supply of goods or services.

The consumer's economic obligations are mostly more onerous in the case of contracts on the regular supply of services than in the case of long term contracts on the supply of goods; nevertheless, the law does not envisage a right of withdrawal in such cases.

However, since the right of withdrawal constitutes an exception to the general principle of the freedom to contract, the drawing of an analogy cannot create a general principle from an exceptional rule. The principle of the reservation of the law, recognised by Art.20(3) of the German Basic Law, and the guarantees, offered by a state governed by the law, ensure a degree of legal certainty, which is indispensable in the interest of the right of freedom.

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