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***Legal Issues in Online Auctions  
in Germany and the U.S.A.***

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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# *Legal Issues in Online Auctions*

## *A. Introduction*

Auctions in general have a remarkable history. Since ancient times mankind has used this kind of trade usage to sell or buy goods.

However, not only things like goods were sold by auction, but also people were on offer. It is reported by the historian Herodotus that in ancient Babylon women fell under the hammer in the course of a marriage market annually. In ancient Rome and Greece the trade in slaves played a major role, whereas in Rome the sale at auction of other things was common as well. When the Roman Empire collapsed the conclusion of contracts by way of auction was buried in oblivion. This changed only in the late middle Ages.

In the thirteenth century the sale at auction of impounded goods of debtors who were not willing to pay was established in Central Europe. Since the fourteenth century auctions started to develop as a model to sell goods preferably in big deals first at emporiums of the Hanseatic League. In particular perishable goods like fish, fruits or flowers were sold by way of auction. Later especially colonial goods were sold at central import locations in Europe.

In England first provider of auctions were founded in the seventeenth and eighteenth century and some of them like Sotheby's (founded 1744) and Christie's (founded 1766) do still exist. Later and in more modern times the same kind of goods were still on offer. Besides, auctions were used more and more for goods like art, antiques, stamps, coins and jewellery. However, auctions were still used only by a few people and experts and not by the masses.

This changed when people started to use the Internet for commercial and business purposes. While in the United States Internet Auctions<sup>1</sup> took place from 1995 on, in Germany the first Internet Auctioneers started business only in 1998. Since this time Internet Auctions became quite popular. Though we are still talking about an only recent development, you can say by now that so far no other E-Commerce branch is as successful as Internet Auctions. Internet Auctioneers belong to the small group of E-Commerce winners. While in E-Commerce from an economic point of view there is mostly stagnation or losses the big Internet Auctioneers (above all the biggest of the world "eBay.com") achieve huge profits.

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<sup>1</sup> The terms „Internet Auctions“ and „Online Auctions“ shall be used synonymously.

This is best illustrated with the example of eBay the biggest online auction house of the world and its very impressive business data over the past years<sup>2</sup>:

In 1998 eBay generated net revenues of US \$ 86, 1 million. In 1999 this sum was US \$ 224, 7 million, in 2001 US \$ 431, 4 million, in 2002 US \$ 1, 21 billion, in 2004 US \$ 3, 27 billion and in 2005 US \$ 3, 24 billion so far without taking into account the fourth quarter's announces. In 2005 net revenues of more than US \$ 4 billion are considered to be in all probability. If this number were around US \$ 4, 3 billion net revenues would be fifty times more in 2005 than in 1998.

The net income was US \$ 10, 8 million in 1999, US \$ 90, 4 million in 2001, US \$ 249, 9 million in 2002, US \$ 778, 2 in 2004 and US \$ 802, 9 for the first three quarters of 2005. It's in all likelihood that the net income for the full year will exceed US \$ 1 billion. The net income in 2005 would be hundred times more than in 1999.

One can easily see that the rate of increase is tremendously high to this day.

Not only seller which are active only on the virtual market use this opportunity to sell their goods, but also many traditional seller of goods and services have discovered Internet Auctions as a profitable channel of distribution. The difference to traditional auctions where above all especially used articles are sold is that in Online Auctions also new products are offered. This makes Internet Auctions very attractive for buyer, because they might get a cheap price and save a lot of money.

Because of the multiplicity of commercial operations which are transacted by way of Internet Auction it is unavoidable that some of them end up in front of the court. The number of legal procedures and judicial decisions around Internet Auctions is consequentially increasing, because there is more and more business transacted by way of Internet Auction.

These judgments were rendered in various fields of law so that one cannot say that there exists a special "Law of Internet Auctions".

In fact there are well known problems in traditional fields of law presented in a new context. In the following this paper will examine these Legal Issues in the context of Internet Auctions and deal with the law of the United States of America and Germany with respect to the question how these countries handle these legal issues.

It will afterwards go on with a comparative view as to the legal practices of the two countries, then address the International Civil Procedural Law and lastly close with a final statement.

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<sup>2</sup> Statistics taken from <http://investor.ebay.com/releases.cfm>, accessed 14<sup>th</sup> of November 2005.

## **B. Germany**

In order to examine the Legal Issues in Online Auctions in Germany we will have to take a look on various fields of law and see which effect the combination with Online Auctions has on these fields of law. We will first picture some general points of Online Auctions to get a better understanding of what is exactly going on in an Online Auction.

After that this paper will illustrate the Contract Law in Online Auctions. Then it will examine the connection between Online Auctions and Industrial Law, Consumer Protection, Competition Law and Data Protection. Furthermore this assignment will analyse the question of liability of auctioneers as a provider.

### **I. General points**

At this point this paper will take a look at the definition of the term “auction”, the different types of auctions and the usual course of an online auction.

#### **1. Definition of the term “auction”**

The term auction is derived from the Latin term “augere” which means “grow, increase, expand”. The real fetched price is a result of the competition between the prospective buyers and their bids.<sup>3</sup> In German law a uniform legal definition of the term “auction” does not exist.<sup>4</sup> Neither in art. 156 German Civil Code nor in art. 34 b German Industrial Code is described exactly how to take this term; the German Decree on Commercial Auctions does not help either.<sup>5</sup> The district court of Hamburg has with reference to a decision of the higher regional court of Oldenburg and the literature defined the term auction as follows: “To auction means to call on a majority of individuals to purchase an object or right within a time wise and spatial limited event in the way that these persons within a mutual competition starting from a minimum bid make their bids towards the auctioneer who accepts the highest offer himself or on behalf of another person. Thus auctioning is an activity directed towards the conclusion of a contract that unlike normal conclusions of a contract requires the existence

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<sup>3</sup> Reichwald, Hermann, Bieberbach, p. 542.

<sup>4</sup> Spindler/Wiebe, p. 13.

<sup>5</sup> Ernst, p. 304, 305.

of a majority of individuals who want to purchase a specific item or particular right and for that reason vie with one another.”

So this definition does not require a particular medium of communication. That’s why internet auctions fit into this definition as well as traditional auctions. However, it is noticeable that apparently it is the assumption that an auction is a spatial limited event. This condition has not to be interpreted in the sense that an auction has to be at a certain (real) place.<sup>6</sup> Online auctions take place in “virtual space” namely on a certain website within the World Wide Web that is accessible by every user of the internet.<sup>7</sup> Hence a spatial limit exists anyway, since this virtual space is limited by the number of connected computers.<sup>8</sup> A personal presence is neither necessary nor possible. The character of an auction is not restricted this way and at the most only the auction’s course is concerned and not its essence.<sup>9</sup> Basically there is to say that an auction is a process of finding the price as the price is the only variable being at disposal. Other variables like kind, quantity and quality of the objects being auctioned are given and cannot be changed by the bidder.<sup>10</sup>

One additional condition of the definition of an auction is the temporal limit. The interested persons shall be able to observe the auction and competing bids in order to put up the own one accordingly. Internet auctions meet this requirement. They usually end at a before exactly fixed point in time regardless whether further bids are made or not.<sup>11</sup> On the relevant website or homepage of the Internet is normally exactly fixed when the auction begins and when it ends. The time of the system of the internet platform where the auction takes place is the deciding factor. Bids that are made after the fixed end of the auction are ignored even if it is only one second late in time. Thus each participant is able until the end of an auction to wait and see how things develop and adapt his behaviour to the changes if necessary. At an auction an auctioneer in person is not necessarily required. At online auctions the auctioneer is replaced by the running of a computer program.<sup>12</sup> It takes the bids and displays them on the auctioneer’s website. It is also able to realize who made the highest bid at the fixed end of the auction.<sup>13</sup>

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<sup>6</sup> Spindler/Wiebe, p. 14.

<sup>7</sup> Spindler/Wiebe, p. 14.

<sup>8</sup> Spindler/Wiebe, p. 14.

<sup>9</sup> Spindler/Wiebe, p. 15.

<sup>10</sup> Schafft, p. 393, 395.

<sup>11</sup> Spindler/Wiebe, p. 15.

<sup>12</sup> Ernst, p. 304, 306.

<sup>13</sup> Ernst, p. 304, 306.



## **2. Types of online auctions**

There are five types of auctions that come into question for online auctions. However, most online auctioneers apply only one or at the most two types of auctions.

### **a) Long-term auction (English auction)**

The long-term auction is the best-known and most frequently used type of online auction. It is a transparent type of auction. That means the different bidders are able to see the bids of the other user. The seller quotes the minimum price which is the starting point for the particular auction. This minimum price increases by the bidders' demands. The bidders are able to make an offer several times and not only once. The object goes to the bidder with the highest price. The difference between traditional auctions in the presence of people and online auctions is that in traditional auctions the bidder with the best offer gets the award by the auctioneer if after a certain time no more bids are made. In online auctions the period within which it is possible to bid is set in advance. After this time limit runs out the bidder who offered the highest price will get the award. The big advantage for the bidder is that he has enough time to think about his bid, to calculate and scrutinize it maybe for weeks without being under pressure.

### **b) Reversed auction (Dutch auction)**

This type of auction is a reversed auction. In the beginning a high price is quoted, which decreases step-by-step during the auction. The first person who makes a bid gets the award to the price that the object has at that moment. The best-known example for the reversed auction and also the reason why it is called Dutch-auction is the flower-auction in Holland.<sup>14</sup>

In general one could say this kind of auction is not appropriate for all kind of items. The reversed auction is often used for selling goods that are exposed to a dramatic drop in prices like for example cut flowers, tobacco or fresh fish.<sup>15</sup> However, it will only make sense to sell these kinds of goods by way of internet auction if they are restricted to regional marketplaces. Furthermore it is common to sell odd pieces with a great value and hence a high price by way of reversed auction. For example the car rental company "Sixt" auctioned each Tuesday at 7 p.m. 4 used cars. The price fell every 20 seconds by 250 German marks until the first bidder got the award. Whether the procedure in this particular case is permissible or not, when it

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<sup>14</sup> Schafft, p. 393.

<sup>15</sup> Reichwald, Hermann, Bieberbach, p. 542, 548.

comes to this type of auction the participants can wait to achieve a lower price but bear the risk that another bidder snatches the award away from them.

Reversed auctions do not fit in the definition of the term auction.<sup>16</sup> The bids are not made in a mutual competition between the bidders, since in the end only one participant reacts in an active way to the price cuts of the seller or auctioneer. Furthermore the requirement of an increasing price is not met, because as shown above a falling price is a main feature of the reversed auction.

Another different type of reversed auction is that one where the buyer quotes the sum he is willing to pay and the interested sellers underbid each other with cheaper offers. At this form of reversed auction the bids are made by the sellers and not – as usual – by the buyers.

### **c) Live auction**

Live auctions are announced in advance and held “live” on a certain date. An auctioneer, most of the time called moderator, is in charge of the auction and prospective buyers are able to observe the current state of affairs on the website and make bids online.<sup>17</sup> Before the auction starts usually a schedule is available as to the objects that are on offer and concerning at what time exactly they come under the hammer. The auctioneer decides when the auction finishes. He communicates with the bidders in real time and calls on them to make a last bid before he awards the object.<sup>18</sup> The live auction is the type of auction that is most similar to the traditional auction, because the auctioneer encourages the participants to make higher bids. Also the live auction does not end at a certain moment like for example the long-term auction. Rather the auctioneer can wait until no more bids are made.

### **d) First-Price-Sealed-Bid-Auction**

The First-Price-Sealed-Bid-Auction is some kind of secret maximum price auction. Each bidder makes a hidden offer that cannot be raised afterwards. The bidder with the highest price gets the award.<sup>19</sup> This type of auction works like a public call for tenders. However, most internet auctioneers do not make use of it.

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<sup>16</sup> Compare above B. I. 1..

<sup>17</sup> Hollerbach, p. 2001.

<sup>18</sup> Dilger, p. 125.

<sup>19</sup> Reichwald, Hermann, Bieberbach, p. 542, 547.

### **e) Vickrey-Auction**

The Vickrey-Auction or Second-Price-Sealed-Bid-Auction works very similar to the First-Price-Sealed-Bid-Auction. Again each participant makes a secret bid and the object goes to the bidder with the best offer. But this time the successful bidder does not have to pay the price of his own offer but the price of the second highest bid.<sup>20</sup> This type of auction is because of its procedure not appropriate for online auctions since most customers are not familiar with it and most likely will be irritated.

There is still another type of auction, but it is not really a typical auction. It is the straight sales method auction. The price of the goods is here already listed and the first bidder gets the object at the listed price. The seller offers to sell the item immediately without going through the whole auction process. The presentation of the product is already a binding offer by the seller and is accepted by the first bidder.

## **3. Typical course of an online auction**

Basically the courses of auctions at the different auction platforms are pretty much the same and differ only in terms of additional services. Therefore the typical course of an online auction and further remarks are illustrated by the auction platform eBay.<sup>21</sup>

### **a) Registration**

To participate in an online auction firstly bidders and sellers have to register. The person has to be at least 18 years old, since eBay is only for people who are able to conclude a legally binding contract. Moreover the person has to give his name, address, a phone number and his date of birth. From the 21<sup>st</sup> of October 2002 on the German Community for the Protection of General Security of Credits<sup>22</sup> checks whether the given personal data is correct or not. However, according to a judgment of the district court Westerstede the operator of an auction platform is not obliged to examine the participant's identity and creditworthiness.<sup>23</sup> When registering you choose a still available username and a password. These two details have to be given every time when participating. Further an email address has to be put down. It is for the other party of the contract to take up contact if an item is successfully bought at an auction.

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<sup>20</sup> Reichwald, Hermann, Bieberbach, p. 542, 546.

<sup>21</sup> Compare: <http://www.ebay.de>, accessed 14/02/2005.

<sup>22</sup> SCHUFA.

<sup>23</sup> Hoffmann, p. 2602, 2604.

To this email address eBay sends an email with a confirmation code with which the person is able to complete the registration. The confirmation code serves also to see if the before given email address works duly. Finally the general terms and conditions and the requirements of the declaration for data protection have to be accepted by clicking on the relevant button. In addition to that after the registration the new member receives the general terms and conditions per email. The current general terms and conditions can be viewed constantly on the relevant website.<sup>24</sup>

## **b) Bidding**

At eBay auctions are basically held in the form of long term auctions. After the member has registered with its username or email address and password, it is entitled to participate in all current auctions. There is also the possibility to make a bid via an agent. In this case eBay makes permanent bids on behalf of the member just as high as necessary to be the highest bidder.<sup>25</sup> The benefit for the bidder is that he can quote the maximum price he is willing to pay and then does not have to follow the course of the auction. After the confirmation of the bid the participant is informed by eBay whether the object went to him or not. The confirmation of the bid is made per email, which contains the most important data such as a description of the item, the present bid, when the auction ends and a link to the auction's website. If another bidder tops the own bid, an email will be sent to you that informs you about this fact. Once again there will be a link in the email that leads directly to the desired commodity in order to enable the bidder to put up his price.

One additional service of eBay is "voicebidding". Voicebidding calls the member 2 minutes before the auction finishes off and informs him about the current situation of the auction. The member can decide whether it wants to make further bids live by phone or not. In this case the long term auction turns into a live auction. When the auction ends the seller and the highest bidder are informed by eBay via email. Both parties shall within 3 working days get in touch with each other in order to come to an arrangement as to the payment and delivery of the item.<sup>26</sup>

Another possibility to purchase an object is the "Sofort-kaufen!" ("instant-buy!") option. Here a contract concerning the purchase of an item to the before in the option determined fixed price is concluded - irrespective of the ending of a fixed time limit for bids and without the realization of an online auction - already at that moment in which a buyer takes the instant-

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<sup>24</sup> For example: <http://pages.ebay.de/help/policies/user-agreement.html>, accessed 16/01/2005.

<sup>25</sup> Compare: <http://pages.ebay.de/help/buy/proxy-bidding.html>, accessed 16/01/2005.

<sup>26</sup> Compare: <http://pages.ebay.de/help/buy/winning-ov.html>, accessed 17/01/2005.

buy option. Though an instant buy is only possible if there has not been made a bid for the relevant item so far.

## **II. Contract Law**

When we talk about business transactions in Online Auctions it is essential be aware of the contractual relationships that are existent in such deals.

First we will take a look on the general rules of the contract law concerning Internet business. Thereafter we will examine the contract situation in particular with respect to Online Auctions.

### **1. General rules in terms of contracting via the Internet**

Via the Internet contracts can normally be concluded in the same way as in normal business life. However, one has to bear in mind that a homepage is regularly only deemed an “*invitatio ad offerendum*”.<sup>27</sup> That means that the offer is made by the orderer or buyer. It is entirely up to the content-provider whether he accepts the offer or not. Automatically generated declarations are also declarations of intention in terms of the German Civil Code.<sup>28</sup> This applies particularly to the conclusion of contracts via autonomous electronic agents. This is like that because in the arrangement of the agent lies a deliberate action which prepares the whole procedure and on the basis of this preparing action are the agent’s declarations attributable to the users.<sup>29</sup> In contrast an e-mail which states that the order on hand is processed is not considered a declaration of intent.<sup>30</sup> However, if the e-mail quotes that the order will be executed it will be again a declaration of intention.<sup>31</sup>

Specialties are to take into consideration within the scope of the insurance industry. There are two different kinds of contract models in existence namely the application model and the policy model. Both practices are equal in a legal respect.

When choosing the application model the contract is executed while the client makes a binding application for the conclusion of insurance and the policy holder accepts this offer by way of sending the insurance certificate. When the policy holder makes his application the

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<sup>27</sup> OLG Oldenburg, CR 1993, p. 558; LG Essen, MMR 2004, p. 49.

<sup>28</sup> Köhler, AcP 182, p. 126, 132.

<sup>29</sup> Cornelius, MMR 2002, p. 353 ff.; see also the regulations in Sec. 14 of the Uniform Electronic Transaction Act of the U.S.A. and Sec. 21 of the Canadian Uniform Electronic Commerce Act.

<sup>30</sup> LG Essen, NJW-RR 2003, p. 1207; LG Hamburg, MMR 2005, p. 121; AG Butzbach, CR 2002, p. 765.

<sup>31</sup> LG Köln, MMR 2003, p. 481; LG Gießen, NJW-RR, 2003, p. 1206.

essential, written given consumer information are according to art. 10 a German Insurance Supervision Act already left to him. If the application for insurance is a written one the policy holder will have the chance to recall his declaration of intent in written form provided that he complies with art. 8 para. 4 German Insurance Supervision Act. The fourteen-day period for the revocation begins to run only when the insurer in has informed the policy holder about his right of withdrawal and the policy holder has accepted this information by way of signature. If the application is made verbally, it is contentious whether the policy holder has the right of withdrawal or not.

Within the policy model the contract is concluded in the following way: the policy holder and the insurer agree upon concluding an insurance contract. At this point in time the policy holder still has either not received consumer information according to art. 10 a German Insurance Supervision Act or the given consumer information (insurance terms and conditions inclusive) is not complete. Hence the policy holder is according to art. 5 a para. 2 German Insurance Contract Act entitled to disagree in written form within fourteen days after the receipt of the insurance documents. The fourteen-day period starts to run only with the complete abandonment of the documents and the insurance certificate provided that the policy holder with the handing over of the insurance certificate has been informed in written form about the point in time when the fourteen-day period starts and ends. Otherwise the right to objection expires only one year after payment of the first premium. The insurance contract is validly concluded then based on the insurance certificate, the General Conditions of Insurance and the consumer information material to the subject matter of contract, unless the policy holder does not cancel within fourteen days after the abandonment of the documents. Until the end of the time limit in which the policy holder has the chance to object the contract is neither valid nor invalid. The validity of the contract depends on the policy holder's decision.

## **2. Concluding the contract in online auctions**

The conclusion of a contract in online auctions shows some differences to the above said:

### **a) General points**

Typical of an online auction is that three parties are involved.<sup>32</sup> There is a contractual relationship between the operator of the auctioneer, the seller and the buyer. The relationship between operator and seller and operator and buyer is a user-relationship whereas the relation

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<sup>32</sup> BGH CR 2002, p. 213, 216.

between seller and buyer is more a market-relationship.<sup>33</sup> The problems that might arise because of this are special ones with regard to the contractual relationships and the contractual obligations of each party.<sup>34</sup> With the registration and the acceptance of the operator's general terms and conditions by the user a contract between the user and the operator about the utilization of the operator's websites is concluded. This contract grants the user the right to offer and purchase commodities and services independently. The operator does not offer any items and does not become a party to the contracts concluded between the users. Also the fulfilment of via the operator's website concluded contracts takes place solely by the users. A fundamental decision of the German Federal High Court says that any kind of auction, whether traditional auction or online auction, is not a game in terms of art. 762 German Civil Code.<sup>35</sup> The purpose of each auction is to achieve the conclusion of a contract about an exchange of items or rights and that is normally already sufficient to assume a serious economic business purpose.<sup>36</sup> The seller of a product has the chance to influence the course of the auction by laying down the method of the bidding and the duration of the auction as well as the fixation of the starting price. Furthermore he is able to rule out his risk to sell at cut-price by quoting a minimum price for his product. Merely the point if there is little or great demand for his product is beyond his control.<sup>37</sup> However, this fact does not turn an online auction or traditional auction into a game in terms of art. 762 German Civil Code.<sup>38</sup>

### **b) Offer and acceptance**

Contracts are concluded by two corresponding declarations of intent that are aimed at the conclusion of the contract.<sup>39</sup> As a rule these declarations of intent are offer and acceptance in terms of art. 145 German Civil Code.<sup>40</sup> In auctions bid and award in terms of art. 156 German Civil Code represent the declarations of intent.<sup>41</sup> With the connection of the offer containing website at an online auction the auctioneer makes a statement in that way that he accepts already at this point in time the highest bid that is validly made. The clearance of a website that contains an offer is no invitation without obligation to make an offer (invitation ad offerendum) but a valid offer in terms of art. 145 ff. German Civil Code.<sup>42</sup> The declaration of

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<sup>33</sup> KG CR 2002, p. 604.

<sup>34</sup> BGH CR 2002, p. 213, 216.

<sup>35</sup> BGH CR 2002, p. 213.

<sup>36</sup> Schafft, CR 2001, p. 393, 395.

<sup>37</sup> BGH CR 2002, p. 213, 216.

<sup>38</sup> BGH CR 2002, p. 213, 216.

<sup>39</sup> BGH CR 2002, p. 213, 214.

<sup>40</sup> BGH CR 2002, p. 213, 214.

<sup>41</sup> BGH CR 2002, p. 213, 214.

<sup>42</sup> AG Erfurt, CR 2002, p. 767.

intent of the offeror is indeed not addressed to a concrete named person (ad incertam personam). However, it complies with the requirement of certainty since the offer is only for that person that makes the highest bid within the indicated period.<sup>43</sup> The bidder accepts this binding offer by making a bid by using a computer.<sup>44</sup> Hence there are two corresponding declarations of intent aimed at the conclusion of a contract.<sup>45</sup> These declarations of intent can be validly made online i.e. by electronic transmission of a file in the Internet.<sup>46</sup> The corresponding declarations of intent are obtained by the provider of the platform, who acts as a representative for both sides - auctioneer and bidder - in terms of the receipt, and become valid according to art. 130 para. 1 clause 1 German Civil Code.<sup>47</sup> Thus as a basic principle a contract of sale is concluded between the offeror and the bidder who made the highest bid according to art. 145 German Civil Code.<sup>48</sup> Though no contract of sale is concluded if there was a minimum price quoted that was not achieved.

Doubtful is whether the declaration of intent of the offeror is an anticipated acceptance of the maximum bid, which is made later, or not.<sup>49</sup> Since this does not concern the character as a declaration of intent for legal transactions and therefore is insignificant in terms of the legal consequences<sup>50</sup> this question can be left aside. Furthermore it is questionable if in internet auctions a contract according to art. 156 German Civil Code is concluded, because after the bid the award does not take place.<sup>51</sup> The application of art. 156 that is a special provision for auctions would lead to a choice of the offeror whether he accepts the maximum bid or not.<sup>52</sup> However, since as shown above we are dealing with a “normal” contract in terms of art. 145 German Civil Code, art. 156 German Civil Code remains out of consideration. A particularity as to the conclusion of the contract is the “instant-buy” option. Here it is not a matter of a conclusion of a contract within the framework of an auction. The offeror here makes a binding offer to sell an item to a potential buyer for a fixed price and it comes directly to the conclusion of the contract.<sup>53</sup>

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<sup>43</sup> BGH, CR 2002, p. 213, 214.

<sup>44</sup> Mehrings, p. 469, 472.

<sup>45</sup> Mehrings, p. 469, 472.

<sup>46</sup> BGH, CR 2002, p. 213, 214.

<sup>47</sup> BGH, CR 2002, p. 213, 214.

<sup>48</sup> AG Erfurt, CR 2002, p. 767.

<sup>49</sup> BGH, CR 2002, p. 213, 214.

<sup>50</sup> BGH, CR 2002, p. 213, 214.

<sup>51</sup> BGH, CR 2002, p. 213, 214.

<sup>52</sup> Mehrings, p. 469, 471.

<sup>53</sup> eBay, general terms and conditions, art. 9 no. 4; <http://pages.ebay.de/help/policies/user-agreement.html?ssPageName=f:f:DE>; accessed 13/12/2005.



### **c) Burden of proof as to the conclusion of the contract**

In internet auctions it can be questionable, whether the bidder with the maximum bid has executed the declaration of intent in person or if a third person has done so on behalf of him by using the (maximum) bidder's user account.<sup>54</sup> This would lead to the fact that the bidder and the seller would not have concluded a contract of sale. Thus the seller could not demand payment of the purchase price from the bidder. As a matter of principle each party has to prove that the requirements of the provision that is basis for its claim are met.<sup>55</sup> At an online auction the conclusion of the contract of sale has to be proven by the seller. That means he has to show that the declaration of intent, which led to the conclusion of the contract of sale, has been executed by the bidder who submitted the maximum quote.<sup>56</sup>

As shown above in order to participate in an internet auction one will need (after registration) a username or email address and a password.<sup>57</sup> However, general problems might emerge from that. Basically each person that knows the email address and password of a member is able to bid and participate under the member's name in an online auction. An email address is merely an electronic mailbox and it is or can be known by numerous people.<sup>58</sup> Thus registering by stating one's email address does not say anything about the identity of the user. Furthermore the use of a password is not sufficient to bring forward proofs as to the question whether the entitled user executed the declaration of intent or not.<sup>59</sup> There is no standardised definition of the term "password" and there are not set any rules as to the codification of a password.<sup>60</sup> Further on there are not established any fixed criteria in terms of security that have to be met in order to safeguard the password and keep it secret.<sup>61</sup> So a third person is able to spy out a password for example by means of a "Trojan horse". Trojan horses are hidden data files that - mostly in the form of an email attachment - infiltrate into a computer in order to spy out and forward files and passwords unnoticed.<sup>62</sup> The threat of Trojan horses is not only of theoretical nature but also a real one.<sup>63</sup> Thus it is not possible to rule out the possibility that a third person submits a quote on behalf of a member. If this bid is the maximum bid the member will be the buyer. This course of action does not help the third

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<sup>54</sup> AG Erfurt, CR 2002, p. 767, 768.

<sup>55</sup> LG Bonn, CR 2002, p. 293.

<sup>56</sup> LG Bonn, CR 2002, p. 293.

<sup>57</sup> See B.I.3.a, p. 7-8.

<sup>58</sup> AG Erfurt, CR 2002, p. 767.

<sup>59</sup> Hoffmann, NJW 2002, p. 2602, 2604.

<sup>60</sup> LG Bonn, CR 2002, p. 293, 294.

<sup>61</sup> AG Erfurt, CR 2002, p. 767.

<sup>62</sup> LG Konstanz, CR 2002, p. 609.

<sup>63</sup> LG Konstanz, CR 2002, p. 609.

person but might harm the member.<sup>64</sup> However, such an act of a third person is not attributable to the holder of the account.<sup>65</sup> That means that the seller is not able to claim payment of the purchase price from the bidder, if the bidder alleges that someone has stolen his password. The identity of a contractual partner cannot clearly be ascertained only on the basis of the email address and the corresponding password.<sup>66</sup>

#### **d) The “ricardo.de”- case**

When it is a matter of contract law in internet auctions it is unavoidable to give attention to the ricardo.de decision of the German Federal Court of Justice,<sup>67</sup> since it is the basic judgment as to contract law in terms of online auctions in Germany. On the internet platform of ricardo.de<sup>68</sup> a car dealer offered a Volkswagen model Passat with a catalogue price of 57.000 German marks and a starting price of 10 German marks. The time limit was 5 days from the 22.07.1999, 09.33 pm until the 27.07.1999, 09.33 pm. The car dealer did not quote a minimum price. When the connection took place, the car dealer declared according to ricardo.de’s general terms and conditions that he would sell the car after the expiration of the time limit to the participant who would make the highest bid. The last out of 963 online bidders made the highest bid 8 seconds before the auction had ended. His maximum bid was 26.350 German marks. The parties argued about whether they had concluded a valid contract of sale on the Internet or not. The car dealer refused delivery of the vehicle on the grounds that no contract of sale had been concluded. However, he offered the buyer to purchase the same car for 39.000 German marks. The buyer dismissed this offer. Hereupon the car dealer rescinded his executed declaration of intent on the ground of mistake according to art. 119 German Civil Code. The buyer sued for delivery of a vehicle equipped with the same features as per description on the Internet against payment of 26.350 German marks.

#### **aa) Decision of the regional court of Münster**

The regional court of Münster dismissed the buyer’s action.<sup>69</sup> In the court’s opinion a contract of sale had not been concluded. The court said that the clearing of the website with the offer on the Internet would be nothing more than “invitatio ad offerendum” and so it would be a mere non-binding invitation to make a bid. The car dealer would not have accepted the offer,

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<sup>64</sup> LG Konstanz, CR 2002, p. 609.

<sup>65</sup> AG Erfurt, CR 2002, p. 767, 768.

<sup>66</sup> LG Konstanz, CR 2002, 609.

<sup>67</sup> Decision of the 7<sup>th</sup> November 2001 – VIII ZR 13/01; CR 2002, p. 213 = NJW 2002, p. 363 = JuS 2002, p. 290.

<sup>68</sup> [www.ricardo.de](http://www.ricardo.de) at that time.

<sup>69</sup> LG Münster, JZ 2000, p. 730.

because the price would have been so much less than the catalogue price that it would have been beyond reality.

Furthermore the regional court argued that online auctions are not auctions in terms of provision 34 b German Trade, Commerce and Industry Regulation Act, since bidding is only possible within a certain period and further, higher bids cannot any longer be made from this point in time. Thus it would not be possible to submit a maximum bid. Yet, this would be a main feature of an auction in terms of the German Trade, Commerce and Industry Regulation Act. In addition to that the regional court Münster considered that the technical premises of the auction as for example the nonexistent opportunity to protract the end of the auction and the predetermined manner of the bidding would give such an auction the character of a game of chance in terms of provision 762 German Civil Code. The price of sale would be left to chance. According to the principle of utmost good faith it could not be assumed that the car dealer would agree with the offer and sell the vehicle at a (notable) loss.

The decision of the regional court Münster was considered a miscarriage of justice.<sup>70</sup> The regional court would have acted unilaterally on behalf of the defendant and his interests.<sup>71</sup>

The legal procedure and the regional court's jurisdiction in this case would have been affected and determined by finding a fair selling price.<sup>72</sup> The court presumably wanted to avoid a result that seemed to be unfair.

#### bb) Decision of the Higher Regional Court of Hamm

The judgment of the regional court Münster was set aside by the Higher Regional Court Hamm on the 14<sup>th</sup> December 2000.<sup>73</sup> The Higher Regional Court Hamm assumed the conclusion of a contract of sale and validated contracts between sellers and buyers within the framework of an online auction. According to the Higher Regional Court Hamm the seller can be sued for delivery of the auctioned item versus payment or – if it is impossible for the obligor to perform – the seller can be sued for damages in the amount of the sum that the bidder would have to raise for a comparable item. According to rickard.de's general terms and conditions the seller would commit himself already at the point in time when the auction starts to run and is accessible for potential buyers to accept the highest bid that is made within the period of time of the auction.<sup>74</sup> So the offer was not an "invitatio ad offerendum" but an irrevocably binding offer. The bidder accepts the offer and a valid contract of sale would be

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<sup>70</sup> LG Bonn, CR 2002, p. 293, 295.

<sup>71</sup> Ulrici, NJW 2001, p. 1112, 1113.

<sup>72</sup> Mehrings, BB 2002, p. 469, 470.

<sup>73</sup> OLG Hamm, JZ 2001, p. 764 = NJW 2001, p. 1142.

<sup>74</sup> Ulrici, NJW 2001, p. 1112.

concluded. Further on the Higher Regional Court did not accept the car dealer's rescission on the grounds of mistake. The seller would have acted grossly negligent. The Higher Regional Court was of the opinion the seller could have familiarised himself with the auction's rules and details easily before the auction started to run.

Moreover the Higher Regional Court said the outcome of an auction is not left to chance and thus art. 762 German Civil Code would not apply. The seller could have avoided the possibility to sell at a loss by quoting a minimum price. However, he did forbear from doing so. Besides in this case it would not have been a matter of a gamble, since both participants, the seller and the buyer, would have tried to sell or buy the car at a price that should have been advantageous for each of them. Both parties would have been eager to make a good deal. The result of that would be the existence of a serious moral and economic business purpose and that would preclude the appliance of art. 762 German Civil Code. Because of the fundamental importance of the case the Higher Regional Court Hamm accepted the appeal to the German Federal Court of Justice.

#### cc) Decision of the Federal Court of Justice

The Federal Court of Justice affirmed the judgment of the Higher Regional Court Hamm on the 7<sup>th</sup> November 2001.<sup>75</sup> The judges ruled that declarations of intent can also be validly executed online and that the parties had concluded a valid contract of sale.<sup>76</sup> This contract of sale would be accomplished by the consistent declarations of intent. In contrast to the Higher Regional Court Hamm the Federal Court of Justice deemed the car dealer's declaration of intent not an offer but an anticipated acceptance of the plaintiff's maximum bid. However, this does not lead to different legal consequences. A review of ricardo.de's general terms and conditions did not take place, since the Federal Court of Justice held that these were not able to affect the textual form of the contract of sale between the car dealer and the buyer. Yet, the decisive point would have been the car dealer's individual declaration to accept the highest bid. This declaration would have been executed at the same point in time when the connection of the auction's website had taken place. This declaration would not have complied with the wording of ricardo.de's general terms and conditions, but would match these as regards content. Further comments of the Federal Court of Justice correspond to the decision of the Higher Regional Court Hamm. Hence a rescission on the grounds of mistake in terms of art.

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<sup>75</sup> Decision of the 7<sup>th</sup> November 2001 – VIII ZR 13/01; CR 2002, p. 213 = NJW 2002, p. 363 = JuS 2002, p. 290 = MMR 2002, p. 95.

<sup>76</sup> BGH, CR 2002, p. 213.

119 German Civil Code as well as a gamble in terms of art. 762 German Civil Code had been dismissed by the Federal Court of Justice.<sup>77</sup>

### **III. Consumer Protection**

In this chapter we will take a look at consumer protection in Germany in terms of online auctions. Consumer protection is always an issue when it is about a contract between an entrepreneur in terms of art. 14 German Civil Code and a consumer in terms of art. 13 German Civil Code.

#### **1. Internet auctions and general terms and conditions**

As already explained the operator's general terms and conditions are made available to the participants of an online auction namely the offeror and the bidder. The members have to agree to these general terms and conditions explicitly. The general terms and conditions can be qualified as a previous general agreement of the subsequent conclusion of the contract. The general terms and conditions are incorporated in the contract between the users according to art. 305 German Civil Code. The operator of the auction platform points the general terms and conditions expressly out to the interested parties before the contract is concluded. Thereby the interested parties have the opportunity to take cognizance of the content of these general terms and conditions in a reasonable manner. The users have to agree with the general terms and conditions and show this by clicking on and carrying forward of the registration.<sup>78</sup> The general terms and conditions apply directly to the relationship between the user and the operator of the auction platform.<sup>79</sup> The question is whether the general terms and conditions apply to the relation between seller and buyer.<sup>80</sup> Since an agreement between the seller and the bidder is regularly not existent in terms of general terms and conditions, the general terms and conditions are not presented in terms of provision 305 German Civil Code and therefore a review of subject matter in terms of art. 307- 309 remains undone.<sup>81</sup> Yet, the general terms and conditions constitute the basis for the interpretation of the contract between buyer and seller for each participant of the auction may and has to assume that all other participants will accept the general terms and condition.<sup>82</sup>

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<sup>77</sup> BGH, CR 2002, p. 213, 215-216.

<sup>78</sup> AG Westerstede, CR 2002, p. 377, 378.

<sup>79</sup> Mehrings, p. 469, 470.

<sup>80</sup> Mehrings, p. 469, 470.

<sup>81</sup> Ulrici, NJW 2001, p. 1112.

<sup>82</sup> LG Bonn, CR 2002, p. 293.

The German Federal Court of Justice is of the opinion that the conclusion of the contract has basically an individual character even though the declarations of intent that put the contract together consist of parts that are phrased in advance.<sup>83</sup> The operator's general terms and conditions can nevertheless be consulted as the basis for the interpretation of the contract, if the declarations of the contractual parties are not clear or not comprehensible by itself.<sup>84</sup> However, this point of view is criticised in parts.<sup>85</sup>

## **2. Right of revocation in distance contracts**

When it comes to distance contracts the consumer does not have the chance to check the goods before the contract is concluded. In order to protect consumers art. 312 d para. 1 German Civil Code provides with a right of revocation ( art. 355 German Civil Code ). For auctions in terms of art. 156 German Civil Code the legislator has precluded the right of revocation by art. 312 d para. 4 no. 5 German Civil Code. That was because the right of revocation and the following right of withdrawal ( art. 356 German Civil Code ) with the return of the before purchased item would hamper the utilisation of auctions too much. Distance selling and in particular internet auctions would be almost impossible. The finality of the award is the feature of an auction and has to be maintained also in distance selling. Hence the right of revocation depends on whether or to what extent online auctions are auctions in terms of provision 156 German Civil Code or not. Moreover a right of revocation would only be applied to b2c contracts and thus it would not come into question for the majority of private auctions. In live auctions does not exist this right of revocation, since this type of auction is an auction in terms of art. 156 German Civil Code.<sup>86</sup> At a live auction the operator of the platform leads through the auction and acts as the auctioneer.<sup>87</sup> A moderator awards the bidder who offers the maximum price.<sup>88</sup> If the maximum bid is made by a consumer he will not have the right of revocation and the right of withdrawal. As to the "instant-buy!" option the participant has the right of revocation and the right of withdrawal. When this option is used it is no more an auction in terms of provision 156 German Civil Code but a conclusion of a contract at a fixed price.<sup>89</sup> Therefore the right of revocation is not precluded according to art. 312 d para. 4 no. 5 German Civil Code. If the seller is a businessman and the buyer a consumer it is about a distance contract and provisions

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<sup>83</sup> BGH, CR 2002, p. 213, 215.

<sup>84</sup> BGH, CR 2002, p. 213, 214.

<sup>85</sup> Mehrings, p. 469, 473.

<sup>86</sup> Wenzel, Der Betrieb 2001, p. 2233, 2238.

<sup>87</sup> Compare above, B.I.2.c., p. 6.

<sup>88</sup> Compare above, B.I.2.c., p. 6.

<sup>89</sup> Compare above, B.I.3.b., p. 8.

312 b – 312 d and 312 f apply. This applies also to the user agreement between eBay and the consumer.

Here a distance contract according to art. 312 b German Civil Code about the supply of a service is concluded and in that case the right of revocation applies as well.<sup>90</sup>

### **3. Duties in electronic business transactions**

In art. 312 e German Civil Code and the ordinance on duties to furnish information according to civil law are standardised further duties of businesspersons as to contracts in electronic business transactions. This happened due to the modernisation of the law of obligations. Particularly according to art. 312 e para. 1, sentence 1, number 1 it is the businessperson's duty "to provide the customer with appropriate, effective and accessible technical means allowing the customer to identify and correct input errors, prior to sending his order". According to art. 312 e para. 1, sentence 1, number 2 the businessperson has "in good time before the sending of his order", to "communicate to the customer clearly and comprehensibly the information specified in the Regulation under Article 241 of the Introductory Act to the Civil Code". Provisions 312 e para. 1, sentence 1, number 3 and 312 e para. 1, sentence 1, number 4 stipulate that the businessperson "acknowledges to the customer the receipt of his order without undue delay and by electronic means, and enables the customer to retrieve and save in reproducible form the conditions of the contract including standard business terms incorporated in it upon conclusion of the contract". Thus online auctioneers are obliged to fit out their websites with appropriate facilities and information. The duties of the offeror are concretised in the ordinance on duties to furnish information according to civil law. In particular the businessperson has to inform the consumer about the technical measures that lead to the conclusion of the contract (art. 3, number 1 of the ordinance). During the online auction it has to become clear that the connection of the offering website means a binding offer<sup>91</sup> as well as when exactly the conclusion of the contract takes place. After the conclusion of the contract the consumer has to be informed about a possible storage of the wording of the contract and the chance to take notice of it as well as the language that is available for the conclusion of the contract. The duties of businesspersons in electronic business transactions impact particularly the consumer's right of revocation. According to art. 312 e para. 3 German Civil Code "the revocation period does not begin, in derogation from art. 355 para. 2, sentence 1, until the duties laid down in subsection 1, sentence 1, have been performed".

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<sup>90</sup> Compare provisions 312 b and 312 d para. 1 German Civil Code.

<sup>91</sup> OLG Hamm, JZ 2001, p. 764 = NJW 2001, p. 1142.

#### **4. Consumer credit law/ consumer loan contracts**

Consumer credit law applies when an offeror of goods or services allows a customer a credit in the form of a loan, financial accommodation or instalment supply. This is also conceivable in online auctions. For example leasing contracts and mobile phone contracts are concluded on the Internet and subscriptions are taken out there as well. Of course these products can fall under the hammer in online auctions too.

First of all the consumer shall be protected by provisions as to the form and duties to inform (articles 492 and 502 para. 1 German Civil Code), by provisions concerning the creation of more advantageous contract conditions (articles 494 and 502 para. 3 German Civil Code), and a right of revocation (articles 355 para. 3, 358, 495, 503 para. 1 German Civil Code).

Therefore in the following we will take a look at these provisions.

##### **a) Formalities according to articles 492 and 502 para. 1 German Civil Code**

As a rule it is rather difficult for the offeror of goods and services to comply with the formalities regulated by art. 492 and art. 502 para. 2 German Civil Code. If he does not cope with these provisions, the contract will be null and void according to provisions 494 and 502 para. 3 German Civil Code. Articles 492 para. 1 and 502 para. 1 German Civil Code stipulate that the consumer signs his contractual declaration. According to conventional comprehension the consumer has to sign personally a corporal object.<sup>92</sup> However, as long as the digital signature is not put on a legal par with a personal signature, the requirement for the contract to be in writing cannot be met. So contracts that are concluded in an online auction are automatically void. Even if the digital signature were legally equivalent to personal signature, one would still have to face the problem that according to art. 491 para. 1, sentence 2 German Civil Code “the contract may not be concluded in electronic form” in terms of art. 126 a German Civil Code. Thus it is impossible at the moment to conclude a valid consumer loan contract by way of internet auction in which the loan to be paid out (net loan amount) does exceed Euro 200 (if the net loan amount does not exceed Euro 200, it will be an exception as provided by art. 491 para. 2, number 1). The last chance to conclude such a contract would be the exclusion from the requirement for the contract to be in written form according to provisions 502 para. 2 and 358 German Civil Code.

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<sup>92</sup> Borges, ZIP 1999, p. 130, 133.



### **b) Special provision for distance selling trade (articles 502 para. 2, 358 German Civil Code)**

According to articles 502 para. 2 and 358 German Civil Code the rules stipulated in articles 492 and 502 para. 1 are not always used. These formalities do not apply to instalment payment transactions in distance contracts, if the information listed in art. 492 para. 1, sentence 4 German Civil Code are made available to the consumer in textual form<sup>93</sup> in sufficient time to allow him to take thorough notice of the information before the contract has been concluded (art. 502 para. 2 German Civil Code). That means that the offeror of instalment business in distance selling is able to play on facilities (mail order firm privilege).<sup>94</sup>

In terms of the requirements of art. 502 para. 2 German Civil Code the forwarding per email is sufficient.<sup>95</sup> So is the facility to download the information on the World Wide Web, if the consumer really prints the information or saves it on his hard drive.<sup>96</sup> However, to hold the information in readiness on the Internet only without the download of the user is not sufficient, since it is not ensured that the given information might be altered after the conclusion of the contract. In addition to that the information has to be legible by the user. Therefore it has to be interoperable with common system software and programs as well as being transmitted in a common file format. There may not be made high demands on the consumer's technical skills and technical investment.<sup>97</sup> Yet, this seems to be the case if the information is forwarded in the form of a PDF-file, as then add on programs are necessary.<sup>98</sup> The businessperson is under the obligation of furnishing proof that the requirement to provide information properly has been met.<sup>99</sup> This obligation involves considerable difficulties as to the documentation of this proof. If the businessperson requested a confirmation of the receipt and the print-out by the consumer, it would be possible to avoid these problems.<sup>100</sup>

### **c) Right of revocation according to articles 355 para. 3, 358, 495, 503 para. 1 German Civil Code**

If a consumer loan contract is concluded, the right of revocation according to articles 355 para. 3, 358, 495, 503 para. 1 German Civil Code will be problematic. This right of revocation

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<sup>93</sup> Textual form according to art. 126 b German Civil Code.

<sup>94</sup> Compare Ernst, marginal number 66 ff..

<sup>95</sup> OLG München, CR 2001, p. 401, 403.

<sup>96</sup> LG Kleve, NJW-RR 2003, p. 196.

<sup>97</sup> MüKo/Wendehorst, § 312 c, marginal number 93.

<sup>98</sup> Klein, in: Bräutigam/Leupold, B.III., marginal number 530.

<sup>99</sup> Klein, in: Bräutigam/Leupold, B.III., marginal number 536.

<sup>100</sup> Mankowski, CR 2001, p. 767; Ott, WRP 2003, p. 945, 952; MüKo/ Wendehorst, § 312 c, marginal number 79.

would not be in accordance with the character and nature of an (online) auction.<sup>101</sup> Therefore when a consumer loan contract is sold by online auction one might think about an exception from the right of revocation as it is regulated with respect to distance contracts. However, at the moment the legal position is clear. An exception from the right of revocation in terms of consumer loan contracts is out of sight.

## **5. Summary**

The examination of provisions concerning consumer protection in Germany in terms of online auctions makes clear that all legal problems as to consumer protection have been eliminated not for a long time yet. Especially the fact that consumer loan contracts have to be concluded in written form is still a big problem with regard to the conclusion of contracts on the Internet. However, finally one can say that through the implementation of the directive on distance selling by creating the distance selling act a few years ago<sup>102</sup> and the amendment of other consumer protection rules (for example the consumer credit act that was repealed on 1<sup>st</sup> January 2002 and in parts incorporated into the German Civil Code), consumer protection on the Internet and specifically in online auctions is adequately warranted.

## **IV. Industrial Law**

A person who wants to sell foreign things, properties and whatever rights professionally by auction, needs permission of the competent authority according to provision 34 b para. 1, sentence 1 German Trade, Commerce and Industry Regulation Act. This is because of the danger that during an auction in exciting situations through forcing up the price a too active competition can arise, and the bidders – comparable to situations in betting or gambling – might begin to bid in an imprudent and irrational manner (which consequences he probably will regret).<sup>103</sup> Hence the customer shall be protected against “black sheep” in auction business. The auctioneer shall need a licence in order to tie him to industrial laws’ criteria in terms of reliability.

If online auctions were auctions according to art. 34 b para. 1, sentence 1 Trade, Commerce and Industry Regulation Act, its implementation would require permission by the competent authority.<sup>104</sup> Every single online auction would have to be announced and approved by the chamber of industry and commerce and the competent authorities two weeks in advance.

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<sup>101</sup> Compare above, B.III.3., p. 18.

<sup>102</sup> Reorganisation came into force on the 5<sup>th</sup> June 2000.

<sup>103</sup> Klinger, DVBl. 2002, p. 810, 813 f..

<sup>104</sup> See above, B.IV., this page.

Online auctions would not be allowed at all every Sunday and public holiday. The items that should have come under the hammer would have to be viewed and inspected by the bidders two hours before the online auctions would have begun at the latest. Furthermore sellers would not have been allowed to auction items that are new or available in retail trade. These rules would surely have been the end for the presently existing auction platforms.

It is the same question as it has been in contract law, namely whether an online auction is an auction in terms of the relevant provision or not, and thus whether the provision applies to online auctions or not. In contract law the provision is art. 156 German Civil Code and in industrial law it is art. 34 b para. 1, sentence 1 Trade, Commerce and Industry Regulation Act. To fit the guidelines of art. 34 b it has to be about a time limited event, in which a majority of persons starting from a minimum bid is asked to purchase something by making a maximum bid in mutual competition.<sup>105</sup> In addition the event shall be spatial limited, but when the purpose of the provision to protect against overreaching and precipitance<sup>106</sup> is taken into account, a licence does not seem to be necessary. In parts this requirement is deemed to be met by internet auctions, because the Internet would be a cyberspace.<sup>107</sup> However, the decisive point is rather the existence of a situation of direct competition, which requires knowledge of the other bids.<sup>108</sup> Accordingly such internet auctions, in which the bids of the other users are known, are auctions in terms of art. 34 b, if due to the arrangement of the course of the auction the competitive bids are the cause that a user outbids another and therefore a psychological pressure arises to submit further bids.<sup>109</sup> If that is the case depends on the circumstances of each individual case and the concrete course of the auction. The decisive psychological-situational influence on the bidder was declined by the superior Court of Justice Berlin in a decision on this matter at least in the required intensity.<sup>110</sup> So of course also the superior Court of Justice said that an internet auction is not an auction in terms of art. 34 b Trade, Commerce and Industry Regulation Act.

The superior Court of Justice reasoned that an internet auction differs from a conventional auction in its appearance in such a manner that a qualification as an auction in terms of art. 34 b would not be justified.<sup>111</sup> The legislator did not know yet about internet auctions at that time and created with provision 34 b amongst others a system of rules that does not fit internet

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<sup>105</sup> Klinger, DVBl. 2002, p. 810, 811 f..

<sup>106</sup> KG, CR 2002, p. 47, 48.

<sup>107</sup> LG Hamburg, CR 1999, p. 526.

<sup>108</sup> Klinger, DVBl. 2002, p. 810, 814.

<sup>109</sup> Klinger, DVBl. 2002, p. 810, 817.

<sup>110</sup> KG, CR 2002, p. 47.

<sup>111</sup> KG, CR 2002, p. 47, 48.

auctions.<sup>112</sup> Art. 34 b Trade, Commerce and Industry Regulation Act is a provision that shall protect the participant when it comes to an auction against overreaching and precipitance.<sup>113</sup> Yet, namely in long term auctions, which is the most common type of internet auctions,<sup>114</sup> there is no shortage of time or any force to make a decision, which the bidder would not have made, if he had had more time to think about it. Here the potential buyer has the chance to observe the auction for several days or weeks in order to compare the prices.<sup>115</sup> Furthermore the superior Court of Justice argued that it would be doubtful, if a spatial limit would be existent in online auctions, because computers would be networked world-wide and participation in an online auction would thus be possible from almost all over the world.<sup>116</sup> Even if a spatial limit would be seen in the cyberspace of the Internet, this would not have been comparable with a venue of a traditional auction and hence this would not require the application of art. 34 b, because the psychological-situational influence on the bidder would not be existent or at least not in a relevant intensity.<sup>117</sup> Notwithstanding all the before said, even if an internet auction had not been approved by the competent authority, this would not have any effects on the validity of the contracts concluded during this auction.<sup>118</sup> Moreover consumers are already protected against overreaching and precipitance by the right of revocation, but that is a different story.<sup>119</sup>

## **V. Competition Law**

Within the scope of online auctions and competition law in the first instance two constellations are interesting: firstly the question whether sniper software is anticompetitive and secondly the assessment of reversed auctions in this connection.

### **1. Sniper software and competition law**

It is not very surprising that the software industry developed technical mechanism that is tailored to support the bidder in an internet auction. There are automatically working software products, which are able to bid instead and on behalf of the bidder. The user only has to give a point in time (as a rule it is shortly before the auction ends) and at this point in time the

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<sup>112</sup> KG, CR 2002, p. 47, 48.

<sup>113</sup> Ibid Fn. 106.

<sup>114</sup> See above, B.I.2.a., p. 5.

<sup>115</sup> KG, CR 2002, p. 47, 48.

<sup>116</sup> KG, CR 2002, p. 47, 48.

<sup>117</sup> KG, CR 2002, p. 47, 48.

<sup>118</sup> BGH, CR 2002, p. 213.

<sup>119</sup> See above, B.III.2., p. 18 f. and B.III.4.c., p. 21 f..

software will submit the highest quote for the bidder and will guarantee the bidder the award.<sup>120</sup> Sniper software is normally “clever” enough to keep its maximum bid just a little bid below the so far highest bid. Therefore the profit margin of the online auctions is on the decrease and for this reason the auctioneers’ proportion of the charge fee as well. Hence in parts auctioneers tried to forbid the utilisation of sniper software during their auctions by stipulating this in their general terms and conditions.

The legal judgment of sniper software is still not consistent. The tendency seems to be rather tolerant. In terms of the relation among the bidders as well as concerning the relation between auctioneer and seller the use of sniper software is considered legally unobjectionable.<sup>121</sup>

General terms and conditions to the contrary are deemed an unreasonable disadvantage in terms of art. 307 German Civil Code.<sup>122</sup>

Since the application of sniper software is only possible, if the user gives away his password, the Regional Court of Hamburg has ruled that the use is anticompetitive, if according to the auction’s general terms and conditions the password has to be kept a secret.<sup>123</sup> Also the selling of goods would be hampered by sniper software, because the bids would not increase as much as without sniper software and moreover bidders who would not use sniper software would not stand any chance against bidders that would apply sniper software.<sup>124</sup> This would be unfair competition.

In contrast to that decision the Regional Court Berlin was of the opinion that unfair competition would not be existent.<sup>125</sup>

Sniper software would only be used by a few bidders. The danger of unfairness would only be abstract. The bids that are made with the support of sniper software would still have to be (and is automatically) higher than the so far highest bid. This would be in the interest of the seller. Furthermore it would not be clear that the use of sniper software has a negative influence on the amount of sales revenues in internet auctions. Finally auctioneers would be allowed to prohibit the use of sniper software contractually.

The Regional Court Berlin seems to have the more plausible arguments, but like always one will have to watch further development (for example it might be a problem, if sniper software were used by more and more users) and of course the particularities of each individual case.

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<sup>120</sup> Leible/ Sosnitza, CR 2003, p. 344, 344 f..

<sup>121</sup> Leible/ Sosnitza, CR 2003, p. 344, 345 ff..

<sup>122</sup> Leible/ Sosnitza, CR 2003, p. 344, 349.

<sup>123</sup> LG Hamburg, MMR 2002, p. 755.

<sup>124</sup> LG Hamburg, MMR 2002, p. 755, 756.

<sup>125</sup> LG Berlin, CR 2003, p. 857.

## **2. Reversed auctions and competition law**

The reversed auction has already been presented above.<sup>126</sup> Its usual procedure is that firstly a high price is quoted, which falls step-by-step while the auction is proceeding.<sup>127</sup> The first person who submits a quote gets the award to the object's price at that moment.<sup>128</sup> With regard to this type of auction there was raised concern in terms of competition law because of the alleged abuse of lust for gambling, and because the bidders are induced to buy inconsiderately.<sup>129</sup>

The German Federal Court of Justice had to decide a case in which it was about a used car that became cheaper weekly by 300 German marks.<sup>130</sup> Reversed auctions always involve a special form of advertisement, because the auctioneer dangles a benefit, namely a price reduction, to the bidders, if they buy his goods. The buyer is distracted from quality and price of the goods in terms of his decision whether he should buy the item or not, because his attention is directed to the more or less alleged benefit. Hence this type of advertisement holds the risk that the buyer is distracted from the deciding businesslike factors in terms of competition in performance.

The court decided that the mere use of elements of this form of advertisement and the possibly therewith connected aleatoric inducement to buy is not anticompetitive. In fact further additional and particular circumstances would be necessary in order to justify this accusation. An advertisement would only be anticompetitive, if the use of aleatoric inducements caused, that the free choice, whether the bidder wants to buy the item or not, is influenced so strongly, that the decision to buy does not depend anymore on businesslike criteria but on the pursuit of the announced chance of winning.<sup>131</sup>

It is beyond controversy, that reversed auctions involve aleatoric attractions. The question is, if the inducement to wait and make a bigger profit alone can direct an average consumer to refrain from checking if the item is worth the money and to be induced by the gamble to buy the offered commodity. This will not be the case, if the offered price does not tempt to be compared to other prices to a greater extent than a fixed price. That is for example when the commodity is a seldom bought and high priced product (like a used car), and if the time to think the buying over is very long.<sup>132</sup> According to the Federal Court of Justice it would according to experience be normal, that a person who intends to invest a lot of money -

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<sup>126</sup> See above, B.I.2.b., p.5.

<sup>127</sup> See above, B.I.2.b., p.5.

<sup>128</sup> See above, B.I.2.b., p.5.

<sup>129</sup> OLG Hamburg, CR 2002, p. 753.

<sup>130</sup> BGH, CR 2003, p. 517 = MMR 2003, p. 465.

<sup>131</sup> Already before constant and prevailing case law, for example BGH, GRUR 2000, p. 820, 821.

<sup>132</sup> OLG Hamburg, CR 2002, p. 753.

different from a person who intends to spend a rather low price - buys the desired item only after due consideration and after having performed a price comparison.<sup>133</sup> Now one could say that concerning cheap items an aleatoric inducement does exist. The Federal Court of Justice failed to address this question.

As to the time for consideration (which is identical to the period of time between two price reductions) the Federal Court of Justice did not say how long this time has to be. Of course that depends on each individual case and its circumstances, but rough guidelines could be a help with regard to further cases. This applies in my opinion all the more as this clock pulse between two price reductions should be the major and most important criteria in order to decide, if the reversed auction is anticompetitive. You have to allow people to buy expensive commodities. If they decide to buy such an expensive product, they are free to do so, but they will not need more protection, if they have enough time for due consideration. In the first instance it should only be decisive, if the buyer has enough time to check the offer, its cost/performance ratio as well as the quality and price of competing offers. Then it does not matter how high the price of the item is. The auction then should not violate provisions of the Law against Unfair Competition and hence be legally allowed.

A chance to eliminate unfair competition in reversed auctions on the Internet with respect to the available time for the buyer to think about his bid would be to award the buyer instead of the item itself an option in order to decide whether he wants to buy the item after the auction has ended or not.<sup>134</sup> That would mean that the auction would not end with the conclusion of the contract but with such an option. Then the buyer would be able to inspect the purchased item and change his mind unhurriedly after the acceptance of his bid. Thus, even if the price fell rapidly, the reversed (online) auction would not be anticompetitive. If this is in the interest of the auctioneer is another question, but at least he could be sure not to violate provisions of the German Law against Unfair Competition.

However, if the buyer is a consumer, he has the right of revocation in any event. That means that after the conclusion of the contract he is able to contemplate without ruffle or excitement, whether he wants to keep the by auction purchased item and pay for it the agreed price or not.

In connection with reversed (online) auctions and competition law there are two more types of cases that appear in front of the courts. Auctions that use the slogan “from 1 Euro” and the

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<sup>133</sup> BGH, CR 2003, p. 517.

<sup>134</sup> BGH, GRUR 2004, p. 249, 250 = WRP 2004, p. 345.

utilisation of the term “auction” could be misleading in terms of art. 5 German Law against Unfair Competition and hence be a violation of this provision, because reversed auctions are formally considered not to be an auction<sup>135</sup> and the slogan “from 1 Euro” could pretend a relief in price, since this price is only possible in theory but not practically. Yet, to pretend a relief in price is always misleading in terms of art. 5 German Law against Unfair Competition.<sup>136</sup>

The utilisation of the term auction will not be misleading, if it is adequately clear, that the reversed auction is not a traditional one. For this purpose it is sufficient to use the term “reversed auction” or a similar one.<sup>137</sup>

The use of the slogan “from 1 Euro” is anticompetitive, as it arouses untrue ideas of the price.

## **VII. Liability of auctioneers**

The liability of online auctioneers is especially regulated by the German Teleservice Act. This Act works as a filter for general provisions in all fields of law concerning responsibility. The intention of the legislator was that “before a service provider is liable on the basis of general provisions, it has to be examined, if the service provider’s responsibility is not precluded by articles 9 to 11 Teleservice Act.”<sup>138</sup> Online auctioneers are categorised as providers in terms of art. 3 number 1 of the Act. Thus articles 9 to 11 are a liability privilege for online auctioneers. The Act determines different consequences, if a provider is liable. There are three different kinds of providers, content providers (make contents available to the users on the Internet), access providers (enable users to gain access to the Internet) and host providers (place web space, where web site files are stored, at the users’ disposal). Online auctioneers are normally considered host providers, but like always in law the particularities in individual cases are decisive.

According to art. 8 German Teleservice Act online auctioneers are responsible for their own contents to the full extent. Online auctioneers will be liable for external contents, if they adopt these contents as their own ones. This is not the case only because the online auctioneer makes a platform available for external offers. That shows already the general terms and conditions as a rule, since they normally include a note that says that the contract is concluded

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<sup>135</sup> Compare above, B.I.2.b., p. 6.

<sup>136</sup> BGH, GRUR 1975, p. 262, 263.

<sup>137</sup> Spindler/ Wiebe, p. 49.

<sup>138</sup> BT-Drs. 14/6098, concerning section 3, preliminary note as to §§ 8 to 11, p. 22/23.



by the users only. An adoption of the contents as own ones is rather, when online auctioneers have knowledge with regard to these contents, and if it is reasonable and technically practicable for them to prevent the use of these contents. In the majority of cases it is not a technical problem for online auctioneers to remove external contents. Hence it depends on the online auctioneer's knowledge of external contents. In art. 8 para. 2, sentence 1 German Teleservice Act is now clarified that service providers have no obligation to monitor all external offers, which are on sale on their website. This would be unreasonable because of the very large number of new offers every day. Thus online auctioneers have to be aware of the infringement in order to be liable. The mere chance to take cognizance of it is not sufficient. On the other hand only to mark the offers as external ones would also not be a sufficient arrangement in order to avoid to be held responsible for an infringing offer, because it would depend on how the offers are represented on the website and how a third person would understand this representation.

It is undisputed that an offeror of products in online auctions is responsible for the legality of his offer for example for copyright and trademark infringements, even if it is about a private selling.<sup>139</sup> However, it is contentious, whether the information in the offers of a third person is attributable to the operator of an online auctioneer as own contents or not.<sup>140</sup> The company Rolex filed for injunctive relief and filed a claim for damages against internet auctioneers like eBay and Ricardo, because of the sales and distribution of trademark infringing replicas of Rolex watches. The auctioneers deemed themselves host providers, which only have to take action, after they have been informed by the holder of the trademark rights (in this case by Rolex). The Regional Court of Cologne ruled in favour of the plaintiff. The Regional Court considered the offers the auctioneer's own contents, since at least the offer's headlines are presented as own contents. Own contents would also exist, if from the user's point of view provider and external content seem to be an entity. As a result Ricardo was enjoined – as a content provider – to refrain from distributing Rolex replicas on grounds of trademark infringement.<sup>141</sup>

This judgment was repealed by the Higher Regional Court of Cologne.<sup>142</sup>

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<sup>139</sup> LG Berlin, CR 2002, p. 371.

<sup>140</sup> LG Köln, CR 2001, p. 417.

<sup>141</sup> LG Köln, CR 2001, p. 417; similar LG Hamburg, CR 2002, p. 919.

<sup>142</sup> OLG Köln, CR 2002, p. 50.

However, the German Federal Court of Justice has henceforth clarified, that the operator of a platform for auctions on the Internet can be enjoined to omit to distribute forged branded goods if these are offered by potential sellers on this internet platform.<sup>143</sup> The Federal Court of Justice emphasised, that the regulations of the German Teleservice Act, which stipulate a liability privilege for services where the operator allows third persons the storage of external contents, concern a claim for damages but not a claim for injunctive relief. For this reason a liability of the defendant as a person who interferes with the plaintiff's rights would come into consideration. This claim would assume an action in business volume and a reasonable chance for the operator to prevent an infringement of a trademark by third persons by way of exercising control. It could not be expected of the defendant, that he scrutinises every offer that is placed on the Internet directly by a potential seller concerning an infringement of third person's industrial property rights. However, if the defendant would get knowledge of an infringement of a trademark, he would not only have to block the concrete offer immediately as stipulated in art. 11 number 2 Teleservice Act, but also he would have to look ahead in order to prevent that it would not come to further equivalent trademark infringements.<sup>144</sup> Yet, a claim for damages against the operator of the online auction platform was dismissed by the Federal Court of Justice.<sup>145</sup> When it comes to a claim for damages the demands to escape liability are higher than when facing an action for an injunction. In this case according to art. 11 number 1 Teleservice Act the service provider must not know about facts or circumstances that make an infringement obvious. However, in the Rolex case even that did not help the plaintiff.

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<sup>143</sup> BGH, GRUR 2004, p. 860.

<sup>144</sup> BGH, GRUR 2004, p. 860; LG Hamburg, MMR 2005, p. 326.

<sup>145</sup> BGH, GRUR 2004, p. 860.

## **C. Legal Situation in the United States of America**

Firstly this paper will deal with contract issues concerning online auctions in the United States of America. The following chapter will be about the Digital Millennium Copyright Act. Finally the paper will look into fraud in internet auctions.

### **I. Contract Law**

First we will take a look at the general rules of contract law in the United States of America.

#### **1. General rules**

Like in German Law offer and acceptance are the basis of the conclusion of the contract.<sup>146</sup>  
The contract is deemed concluded when the offeror receives an effective acceptance.<sup>147</sup>

##### **a) Effectiveness**

The rules in terms of the effectiveness of a declaration of intention are comparable with the ones in German Law. The person that makes the declaration of intention has to be competent to enter into legal transactions. In addition to that the declaration of intention has to comply with the form required by law. Formal requirements are contained in the UCITA (Uniform Computer Information Transactions Act)<sup>148</sup> Sec. 201 and the UCC (Uniform Commercial Code)<sup>149</sup> § 2-201. Also relevant is the UETA (Uniform Electronic Transactions Act).<sup>150</sup> The most important formal requirements are “writing” and “record”.<sup>151</sup> “Writing” requires that contracts of sale for the price of US \$ 500 or more are in written form.<sup>152</sup> Within the scope of electronic commerce “records” are necessary. This requirement will be met, if storage on a medium is conducted. In order not to constrain business connections too much with such formalities, this formal requirement applies only to contracts for the price of US \$ 5000 and more.<sup>153</sup>

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<sup>146</sup> Calamari/ Perillo, p. 23 ff..

<sup>147</sup> Wildemann, CRi 2001, p. 109, 110.

<sup>148</sup> For the full text see: <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>; accessed 07/01/2006.

<sup>149</sup> For the full text see: <http://www.law.cornell.edu/ucc/ucc.table.html>; accessed 07/01/2006.

<sup>150</sup> Text available on: <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>; accessed 07/01/2006.

<sup>151</sup> Compare the wording of Sec. 201 UCITA and § 2-201 UCC.

<sup>152</sup> § 2-201 para. 1, sentence 1 UCC.

<sup>153</sup> Sec. 201 (a) 1 UCITA.

### **b) Receipt**

A declaration of intention has reached a person and hence becomes effective when it reaches the sphere of control of the addressee. Thus in electronic transactions the declaration of intent reaches the addressee at the moment, in which the email becomes stored on his processor. When it comes to online orders the contractual parties are considered attendees and so the declaration of intent, which is made on the Internet (for example by clicking on a button) as received instantly.

### **c) Incorporation of standard business terms**

In order to incorporate general terms and conditions into the contract it is sufficient in United States Law that they are pointed out and that the possibility of gaining knowledge of them is given.<sup>154</sup>

It is questionable, whether a contract is validly concluded, if the standard business terms are incorporated only within the scope of the acceptance.<sup>155</sup> In Common Law according to the “mirror image rule” the acceptance is the mirror image of the offer. If the standard business terms were declared only with the acceptance, the acceptance would differ from the offer. Thus a contract would not be validly concluded. Notwithstanding these rules the Uniform Commercial Code regulates that the contract can be concluded, even if the general terms and conditions are declared only with the acceptance, if the acceptance is not “expressly made conditional on assent to the additional or different terms.”<sup>156</sup>

## **2. Specific rules in terms of online auctions**

As to the conclusion of the contract apply the just mentioned rules as well as the supplementary provision art. 2-328 Uniform Commercial Code.

The above mentioned doubts in respect of the incorporation of general terms and conditions into contracts will normally not be a matter in (online) auction law. Usually in terms of standard business terms attention is invited to the users when they are registered by online auctioneers. So the standard business terms become a part of the leasing contract of every user. As a result it is ensured – also when it comes to a procurement of offers via the platform of the online auctioneer - that the contract between offeror and successful bidder is governed besides general provisions by the general terms and conditions of the online auctioneer.

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<sup>154</sup> Calamari/ Perillo, p. 378.

<sup>155</sup> Effross, San Diego Law Review 1997, p. 1263, 1348.

<sup>156</sup> § 2-207 para. 1 UCC.

## **II. DMCA**

In this chapter it shall be examined, if and to what extent online auctioneers are liable, when on their online auction platform commodities, which are protected by copyright, are sold. It also has to be determined to what extent online auctioneers are obliged to monitor their auctions.

It does take place that copyrighted items of every description are auctioned. First of all it has to be defined, which laws apply to a possible liability of online auctioneers in this context.

The law, which deals exclusively with copyrights, is the United States Copyright Act (USCA).

### **1. History**

In the past providers were taken to court in numerous cases. They were accused of caching data on their servers and supporting and quickening user's storage, even if they only provided access to the Internet like for example universities.<sup>157</sup> Thus online providers copy and publish copyrighted material at least indirectly. However, these are actions that actually only the owner of the copyright is allowed to undertake.<sup>158</sup> According to United States Copyright Law a person who abets a copyright infringement incurs a penalty. To provide access to the Internet can constitute such an abetment. Hence also online auctioneers bear the risk to commit indirectly a copyright infringement. According to former law online auctioneers would commit a copyright infringement, if they sold copyrighted products and so the owner of the copyright could claim for damages against them.

In order to reduce this legal insecurity for service provider and thus for online auctioneers as well the most important limitation of liability within the framework of the DMCA (Digital Millennium Copyright Act)<sup>159</sup> was adopted. It was the Online Copyright Infringement Liability Limitation Act (OCILLA),<sup>160</sup> which is a part of the Digital Millennium Copyright Act.<sup>161</sup> The purpose of the DMCA was to implement the guidelines concerning copyright of the World Intellectual Property Organisation (WIPO).<sup>162</sup> In addition to that it was intended to create protection for service providers in terms of copyright infringements by a limitation of liability. This limitation of liability is stated in the OCILLA. It is also known as DMCA 512

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<sup>157</sup> Gilsdorf, 66 University of Cincinnati Law Review, p. 619, 635.

<sup>158</sup> Siegel, 4 Virginia Journal of Law & Technology 7, marginal number 44.

<sup>159</sup> Signed into law 28 Oct 1998 as Public Law 105-304. Full text available on:

[http://www.eff.org/IP/DMCA/hr2281\\_dmca\\_law\\_19981020\\_pl105-304.html](http://www.eff.org/IP/DMCA/hr2281_dmca_law_19981020_pl105-304.html), accessed 08/01/2006.

<sup>160</sup> Sec. 512 DMCA, available on: <http://thomas.loc.gov/cgi-in/query/F?c105:1:./temp/~c105dSSyu6:e57590;>, accessed 08/01/2006, or on the website given in Fn. 159.

<sup>161</sup> Sec. 202, sec. 512 of the DMCA.

<sup>162</sup> U.S. Copyright Office, Summary, p. 1, <http://www.copyright.gov/legislation/dmca.pdf>, accessed 08/01/2006.

or the DMCA takedown provisions, as it is put down in section 512 of the DMCA, and provides that an online or internet service provider promptly has to take down content, if someone alleges it infringes his copyrights. Thus the OCILLA provides a safe harbour to online service providers against copyright infringement claims, if copyrighted material is made available on the service provider's websites.

## **2. Safe Harbours**

The restrictions as to the online provider's liability (also called safe harbours) can be divided into four types. Each of them ties in with a different offer, service or action of the online service provider. If an offer or service of a service provider can be assigned to one of the hereafter mentioned safe harbours, the online service provider will not be liable for infringements of copyrighted material.

### **a) Sec. 512 (a) Transitory Digital Network Communications**

In order to qualify for the first safe harbour provided by sec. 512 (a) DMCA an online service provider has to be according to sec. 512 (k)(1)(A) DMCA "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." That means sec. 512 (a) DMCA limits the liability for service providers that only allow a transport of data. Those are access providers, which do not control contents that are accessed by the users themselves. Online auctioneers normally do not provide access to the Internet. Hence in terms of online auctions this safe harbour is out of the question.

### **b) Sec. 512 (b) System Caching**

This provision applies to copies of information inside the service provider's cache. A cache is a temporary memory of the provider's server, which makes the desired information accessible more frequently. Its function is to enhance the speed with which the user can gain information and to relieve the service provider. Online auctioneers do not need caching for external contents, since only their own contents are accessible via their websites. Thus this safe harbour does not apply to online auctions.

### **c) Sec. 512 (d) Information Location Tools**

This safe harbour is tailored to search engines, Internet directories and hyperlinks. Through it the liability of service providers for external contents, to which reference is made, shall be restricted.<sup>163</sup> Thus this safe harbour does also not apply to online auctions.

### **d) Sec. 512 (c) Information residing on Systems or Networks at Direction of Users**

Here a limitation of liability is enabled for such contents, which are stored on the online provider's servers on users' demands. In order to qualify for this safe harbour, online auctioneers would have to be service providers in terms of section 512 (c) DMCA. Here the term "service provider" is broader in comparison with that one in section (a). In section (c) a service provider is defined as "a provider of online services or network access, or the operator of facilities therefor". Thus online auctioneers had to be an access provider or an offerer of online services.

Online auctioneers like eBay only act as agents. They provide with a platform where sellers can place their offers and auction them to potential buyers. Online auctioneers could perhaps be access or service providers. They usually do not enable access to the Internet or other networks. So they are not access providers. In order to qualify for the safe harbour stipulated in sec. 512 (c) DMCA online auctions would have to be "online services".

The question is whether this term has to be interpreted in a broad or narrow sense. If it were a broad sense, every website – including of course online auctioneers - that offers any kind of service would provide online services in terms of sec. 512 (c) DMCA.

However, one could understand the term in a narrow sense. A reason for this approach is the motivation of the DMCA that the limitation of liability only applies to Internet service providers.<sup>164</sup> Another argument is that in section 512 (c)(2) DMCA a difference is made between the provider's service and its website. This distinction would not have to be drawn, if it had not had a certain meaning. It can be assumed that the legislator has not stipulated a needless formulation, but rather wanted to separate these two terms. So this difference in terms of the wording of sec. 512 (c) DMCA does support the assumption that the term "online services" can be interpreted in a rather narrow sense. But even if this term were interpreted in a narrow sense, online auctioneers would meet this requirement of sec. 512 (c) DMCA. That is because even if sec. 512 (c) DMCA required that the online providers have to provide

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<sup>163</sup> Friedman/Buono, 6 Richmond Journal of Law & Technology 18, marginal number 4. Available also on: <http://law.richmond.edu/jolt/v6i4/article1.html>; accessed 09/01/2006.

<sup>164</sup> U.S. Copyright Office, Summary, p. 1 and 8, <http://www.copyright.gov/legislation/dmca.pdf>, accessed 08/01/2006.

services like for example email, chat-rooms, forums etc., one would still have to note that online auctioneers provide with such a service, since they offer a platform for the users where those are able to deal with their bids while the online auctioneers have no influence on this bargaining.

Hence online auctioneers are basically qualified for the safe harbour of sec. 512 (c) DMCA.

### **e) Legal consequences**

Anybody who is protected by one of the just above mentioned safe harbours gains “a complete bar on monetary damages for direct, contributory, and vicarious infringement, and restricts the availability of injunctive relief in various ways.”<sup>165</sup>

#### **aa) Direct infringement**

Hereunder are included actions that constitute direct copyright infringements. That is the case, when copyrights - to that only the holder of the rights is entitled to – are violated by for example copying, sale and publication of the protected work.<sup>166</sup> For this type of infringement intention is not required,<sup>167</sup> but the intention is taken into consideration when the amount of the compensation is determined.<sup>168</sup>

#### **bb) Contributory infringement**

Contributory infringement means the incitement or aiding and abetting as to the copyright infringement. Here another person has to be knowingly encouraged or supported to commit a copyright infringement.<sup>169</sup>

#### **cc) Vicarious infringement**

If a provider is able to control the accessibility of its contents and gains a direct financial benefit, it will be liable for the copyright infringing acts of its members.<sup>170</sup> That is called

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<sup>165</sup> Friedman/Buono, 6 Richmond Journal of Law & Technology 18, marginal number 2. Available also on: <http://law.richmond.edu/jolt/v6i4/article1.html>; accessed 09/01/2006.

<sup>166</sup> Compare U.S. Copyright Law, Title 17, § 106, available on: [http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000106----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106----000-.html); accessed 09/01/2006.

<sup>167</sup> Playboy Enterprises Inc. v. George Frena, 839 F. Supp. 1552, 1559, available on: [http://www.loundy.com/CASES/Playboy\\_v\\_Frena.html](http://www.loundy.com/CASES/Playboy_v_Frena.html), accessed 09/01/2006.

<sup>168</sup> Compare U.S. Copyright Law, Title 17, § 504 (c)(2), available on: [http://www.law.cornell.edu/uscode/html/uscode17/usc\\_sec\\_17\\_00000504----000-.html](http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000504----000-.html), accessed 09/01/2006; Compare also Playboy Enterprises Inc. v. Webworld Inc., Case No. 3-96-CV-3222-DES, point III.B. (statutory damages, p. 11), [http://www.loundy.com/CASES/PEI\\_v\\_Webbworld.html](http://www.loundy.com/CASES/PEI_v_Webbworld.html), accessed 09/01/2006.

<sup>169</sup> Tsilas, 8 CommLaw Conspectus, p. 85, 95.



vicarious infringement. A problem forms the definition of the direct financial benefit. One could apply a high standard and require that the financial benefit emanates directly from the copyright infringement like for example a percentage of sales revenue. Then a monthly fixed charge for fixed-disk storage of a provider would not be sufficient to justify a liability. If one applied a lower standard, a monthly charge would be sufficient for a liability, since the sales volume of the company would be enhanced by the actions of the copyright infringers. In order to ensure appropriate copyright protection, the second approach of course would be preferable. Indeed a limitation of liability with regard to Internet service providers makes sense, since without this privilege service providers would face almost insurmountable obstacles in terms of their business operations. For such a large amount of users like on the Internet it is almost impossible to control and supervise all contents. Yet, people want a brisk state of trade with preferably only a few restrictions. The increasing economic importance of the Internet shall not be delayed, because people want to make money. However, on the other hand service providers will not be liable, if they are qualified for one of the four safe harbours. In my opinion this factor compensates for the appliance of a lower standard in terms of the direct financial benefit.

### **3. Application of the DMCA to online auctioneers**

In order to be protected by the DMCA service providers have to take several steps.

#### **a) Determination of DMCA-agent**

Firstly, a DMCA-agent has to be appointed. He shall receive complaints of copyright owners and make sure that the users, which have put the material on the web, are notified.

#### **b) Notification to copyright office**

Secondly, the name of the DMCA-agent has to be notified to the copyright office and be mentioned on the company's website.<sup>171</sup>

#### **c) Provision of information for customers**

Finally it is the company's duty to create certain general terms and conditions and rules, which clarify that the membership of every person, who violates these rules repeatedly, can be

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<sup>170</sup> Compare Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F. 2d 304; Lutzker/Lutzker/Settlemyer, 2nd paragraph, <http://www.arl.org/info/frn/copy/osp.html>, accessed 12/01/2006.

<sup>171</sup> See for example: <http://pages.ebay.com/help/community/registered-agent.html>, accessed 12/01/2006.

terminated.<sup>172</sup> Furthermore the company is obliged to provide network users with information about copyright laws.<sup>173</sup> For example eBay informs users about items that may not be auctioned.<sup>174</sup>

#### **4. Requirements of a limitation of liability**

In order to gain a limitation of liability further requirements have to be met. These requirements are given in section 512 (c)(1)(A)-(C) DMCA.

##### **a) Lack of knowledge**

Online auctioneers must not have knowledge of the relevant copyright infringements and the relevant offers of by copyright protected commodities.<sup>175</sup> Only those online providers shall be privileged that do not cause damnification on purpose. The lack of knowledge is compulsory in order to be protected by the DMCA. The DMCA does not provide that service providers have a general duty to supervise their websites in order to detect copyright infringements. The service provider's knowledge consists of a subjective and an objective part. The subjective component concerns the question if the service provider was aware of the facts and circumstances that led to the copyright infringement. The objective part is fulfilled if an objective, reasonable third person would have noticed the copyright infringement.

##### **b) No financial benefit**

If the service provider is able to supervise the interfering action, it must not gain a direct financial benefit from it.<sup>176</sup>

##### **c) Removal of contents on request**

The last requirement that has to be met by a provider is to block the access to the by copyright protected work or to remove it from its website, if a notice is made to it. This is the so-called "notice and take down procedure".

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<sup>172</sup> Lutzker/Lutzker/Settlemyer, 3rd paragraph, <http://www.arl.org/info/frn/copy/osp.html>, accessed 12/01/2006.

<sup>173</sup> Lutzker/Lutzker/Settlemyer, 3rd paragraph, <http://www.arl.org/info/frn/copy/osp.html>, accessed 12/01/2006.

<sup>174</sup> See for example: <http://pages.ebay.com/help/sell/questions/prohibited-items.html>, accessed 12/01/2006.

<sup>175</sup> Tsilas, 8 CommLaw Conspectus, p. 85, 90.

<sup>176</sup> Sec. 512 (c)(1)(B) DMCA.

## **5. Duty of online auctioneers to monitor auctions**

As seen above online auctioneers and service providers must not have knowledge about the copyright infringing actions. However, the risk of copyright infringements is so high that the question arises whether online auctioneers are despite a missing regulation in the DMCA obliged to monitor their auctions in order to guarantee a more effective protection of the holders of a copyright or not.

### **a) Pro**

For a duty of online auctioneers to monitor their auctions is that online auctioneers are basically able to check each auction before it starts. Online auctioneers are in control concerning their own auctions and are technically properly equipped. Who else could as easily survey the auctions? If one looked for responsibility, the first address after the infringer himself would be the auctioneer.

Also it does not seem to be justified that the holders of a copyright should have the duty to survey the auctions and bear the costs of it.<sup>177</sup>

### **b) Contra**

Against a general duty of online auctioneers to survey their auctions speaks mainly the fact that although it is possible in theory to monitor all of their auctions it is practically almost impossible to survey every single auction because of the enormous amount of new items and offers every day.

In addition to that online auctioneers would perhaps waive protection under the DMCA, if they monitored their auctions. As shown above online auctioneers must not know about copyright infringements in order to be protected by the DMCA and its safe harbours. If they surveyed their auctions, they would have a theoretical chance to have knowledge about a copyright infringement. Thus it could be that online auctioneers are not protected by the relevant provisions of the DMCA in individual cases.

### **c) Comment**

One could argue that the protection and interests of the holders of a copyright outweigh the concerns of online auctioneers and online service providers. Especially the shifting of the duty to monitor and the linked financial burden seem to be unfair. However, if online auctioneers

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<sup>177</sup> Compare Friedman/Buono, 6 Richmond Journal of Law & Technology 18, marginal number 29. Available also on: <http://law.richmond.edu/jolt/v6i4/article1.html>; accessed 15/01/2006.

had the duty to survey their auctions, they would be liable as publishers for the information on their websites. Of course the risk to be sued would be enhanced. Furthermore the attractiveness of online auctions would be reduced, because auctions would have to be checked before they could be listed and released. That would not be advantageous for business. Also the protection by the DMCA would indeed be considerably reduced if not nullified.

Hence it seems to be better to deny a duty of online auctioneers to monitor their auctions.

## **6. Summary**

Recapitulating it can be said that online auctioneers are completely protected by the DMCA. Until further notice the DMCA seems to be well appropriated to regulate the liability of online auctioneers and online service providers.

## **III. Patent Law**

As far as it concerns the protection of the auction's procedure itself, besides copyright only protection by patent law comes into question. A protection by competition law in terms of art. 4 number 9 of the Law against Unfair Competition would only apply to the auction's offers and not for its procedure.<sup>178</sup> Therewith one has to deal with one of the most contentious fields of patent law, namely to what extent business practises and software can be protected by patent law. Patent systems are in flux globally.

In terms of the patent law of the United States of America a fundamental change took place because of the decision *State Street versus Signature*.<sup>179</sup> In this judgment the US Court of Appeals came to the result, that computer related business practices are basically patentable. Factual criteria in terms of the patentability would be only, whether the invention has technical character and not for which application the computer program is dedicated. Based on this decision in the USA a series of patents were registered in connection with online auctions and similar e-commerce procedures, which resulted in infringements of patent rights. To mention is for example the proceeding of "Priceline.com" against Microsoft because of an alleged infringement of a patent. The patent protects computer-aided procedures of a reversed auction, in which customers submit a quote - as to for example plane tickets - which they are willing to pay at most and towards that the airlines make their bids. The proceeding ended

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<sup>178</sup> Compare Leible/ Sosnitza, p. 282, marginal number 655 and p. 300, marginal number 693.

<sup>179</sup> *State Street Bank & Trust Co. vs. Signature Financial Group, Inc.*, 149 F. 3 d 1368 (Fed. Cir. 1998).

with a composition. In another proceeding Amazon blamed bookseller Barnes & Noble for infringing one of Amazon's patents, which protects the possibility to purchase products via the Internet by means of one single mouse click. This proceeding ceased with a settlement as well. The firm Netcentives seems to have patented an invention for connecting online shopping and frequent flier programs. Customers that buy on the Internet at affiliated traders are credited frequent flier miles. A company named CyberGold was allegedly granted a patent for a payment system, which will allow customers benefits, if they accept online advertising. Last height was the judgment of a US- district court in the matter MercExchange versus eBay and "Half.com". The court decided that eBay had infringed several patents of a Thomas G. Woolston by using the protected technology for fixed price sales. Ebay's appeal helped only to reduce the amount eBay had to pay to MercExchange for damages from US \$ 35 million to US \$ 30 million.<sup>180</sup>

## **IV. Online Auction Fraud**

One of the biggest problems in terms of online auctions is online auction fraud. As online auctions are extremely popular it is in fact one of the biggest problems on the Internet. Apparently the anonymity of the World Wide Web and the active trade in online auctions with its huge amount of business transactions are very suitable circumstances in order to enable fraud. Online auction fraud harms the reputation of online auctions. Although the entire damage is not exactly determinable, consumers might lose confidence in online auctions.

### **1. Statistics**

Consumers lost over US \$ 3.2 million to Internet fraud in 1999 in incident reports to the National Consumers League's Internet Fraud Watch.<sup>181</sup> As expected, online auction sales remained the number one Internet fraud for 1999 increasing from 68 % of the frauds reported to the Internet Fraud Watch in 1998 to an overwhelming 87 % in 1999.<sup>182</sup> Scams perpetrated on online auctions remained the top Internet fraud for 2001, though down 8 % from 1998.<sup>183</sup>

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<sup>180</sup> See, <http://www.internetnews.com/ec-news/article.php/2246941>, accessed 04/12/2005.

<sup>181</sup> National Consumers League, News release 16 February 2000, <http://www.fraud.org/internet/99final.htm>, accessed 25/01/2006.

<sup>182</sup> See previous footnote.

<sup>183</sup> National Consumers League, 2001 Internet Fraud Statistics, <http://www.fraud.org/internet/2001stats.htm>, accessed 25/01/2006.

The amount of money consumers lost to Internet fraud increased. Losses overall were US \$ 6.152.070, up from US \$ 3.387.530 in 2000 and US \$ 3.262.834 in 1999.<sup>184</sup>

In 2005 the overall loss was US \$13.863.003 and therefore significantly higher than the US \$ 5.787.170 reported in 2004.<sup>185</sup> Online auction fraud was only 42 % of the frauds reported to the Internet Fraud Watch, but in 2003 eBay removed the link from its Web site to “fraud.org” and as a result, the number of auction complaints reported to the National Consumers League’s fraud centre dropped considerably to 1/6 of its previous level.<sup>186</sup> Based on statistics prior to eBay’s action, the National Consumers League estimates that there would have been 30.720 auction complaints in 2005 representing 71 % of complaints overall.<sup>187</sup>

## **2. Fraudulent actions**

When it comes to fraud you can separate two periods of time, namely the bidding phase and the period after the contract of sale has been concluded.<sup>188</sup>

### **a) During the auction**

During the bidding phase mainly two fraudulent actions are possible.

#### **aa) Bid-Shilling**

The seller or a friend of him can participate in the bidding in order to enhance the price for his product. In 2000 eBay cancelled the sale of a painting to a Dutch software executive for US \$ 135.805 contending that the seller, Kenneth A. Walton, had violated eBay’s rules in artificially increasing the sale price.<sup>189</sup> The minimum price was only 25 cents. This Bid-Shilling is of course forbidden in the general terms and condition of most online auction houses.

#### **bb) Bid-Shielding**

Here the buyer has a partner who helps him to create a price that is too high. Bit by bit other potential buyers stop making their bids. Shortly before the end of the auction the partner

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<sup>184</sup> See previous footnote.

<sup>185</sup> National Consumers League, Internet Scams Fraud Trends January-December 2005, [http://www.fraud.org/2005\\_Internet\\_Fraud\\_Report.pdf](http://www.fraud.org/2005_Internet_Fraud_Report.pdf), accessed 25/01/2006.

<sup>186</sup> See previous footnote.

<sup>187</sup> See previous footnote.

<sup>188</sup> Snyder, 52 Federal Communications Law Journal 2000, p. 453, 457.

<sup>189</sup> Hansell/Dobrzynski, NY Times, 11 May 2000.

withdraws his offer and the buyer is able to obtain the item for a low price. Of course this method is also forbidden by general terms and conditions.

### **b) After the auction**

After the auction different fraudulent actions take place.

#### **aa) Non-delivery**

This is the most common form of online auction fraud. The difficult thing is to get the money back, if you pay by cheque or cash. One well-known case in this context is Federal Trade Commission versus Craig Lee Hare.<sup>190</sup> Hare auctioned computer and computer equipment and accepted the money but failed to deliver the sold goods.<sup>191</sup> Hare was ordered to pay US \$ 22.000 for damages and sentenced to 3 years on probation. Furthermore he was ordered to use the Internet never again for selling goods.<sup>192</sup>

#### **bb) Bad delivery**

In this case the seller does deliver the goods, but the commodities are of such an inferior quality that they are almost worthless. Craig Lee Hare was accused of this fraudulent action as well.

#### **cc) No payment**

Here the buyer obtains the goods but does not make payment.

Besides these above mentioned fraudulent actions there occur also several others like for example market manipulation or identity fraud.<sup>193</sup>

## **3. Measures**

The question is how one can fight these forms of online auction fraud. In terms of this matter different organisations have different approaches.

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<sup>190</sup> FTC v. Hare, Civil No. 98-8194 (D. Fla. 1998); compare also Federal Trade Commission, Going, going, gone..., p. 7; <http://www.ftc.gov/bcp/reports/int-auction.pdf>, accessed 23/01/2006.

<sup>191</sup> See Federal Trade Commission, Going, going, gone..., p. 7; <http://www.ftc.gov/bcp/reports/int-auction.pdf>, accessed 23/01/2006.

<sup>192</sup> FTC v. Hare, Civil No. 98-8194 (D. Fla. 1998).

<sup>193</sup> Compare the compilation of the Department of Justice on <http://www.internetfraud.usdoj.gov>, accessed 23/01/2006.

### a) Federal Trade Commission

The Federal Trade Commission publishes papers and guidelines in order to inform consumers about risks resulting from online fraud and in order to support operators of online auctions.<sup>194</sup>

The Federal Trade Commission is also able to submit complaints to the users and has even the opportunity to order an injunction against the fraudulent user. Furthermore the Federal Trade Commission is able to file an action (for an injunction) at a federal court in order to stop the fraud and to get compensation for fraud victims.

### b) Websites

Online auction houses develop different ways to fight online auction fraud.

One approach is to design programs to help users. Main feature is usually a feedback forum where users comment and assess their transactions with other users. In doing so it should be created a directory of trustworthy commercial partners. Of course this only works, if transactions, which really have taken place, are assessed, because otherwise with the help of friends it would be possible to be awarded good assessments.

Another possibility that is used is that insurances are offered, which cover fraud.

Also on online auction websites is often made reference to escrow services. This is recommendable, if it is about a big deal where a lot of money is involved. Here the money and the auctioned items can be deposited in order to be subject of third party verification. Unfortunately only a very few people use this opportunity. Usually they prefer to save the money for this service.

Finally it is common that users will be issued a caution, if they violate the rules of the online auction house once. The second violation then normally results in an exclusion from the system. However, this is of course only a subsequent sanction that shall deter from committing online auction fraud.

### c) Consumer protection organisations

As one of the leading consumer protection organisation in this context, Internet Fraud Watch cooperates with auction houses like eBay and Yahoo in order to enhance security in online auctions. Also Internet Fraud Watch that belongs to the National Consumers League publishes documents in order to inform and help users to be aware of Internet fraud risks and to know

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<sup>194</sup> Federal Trade Commission, Going, going, gone..., Law Enforcement Efforts to combat Internet Auction Fraud, February 2000; Available on: <http://www.ftc.gov/bcp/reports/int-auction.pdf>, accessed 23/01/2006; See also the Department of Justice: Internet Fraud; <http://www.internetfraud.usdoj.gov>, accessed 23/01/2006.



how to deal with these risks.<sup>195</sup> This shall help to prevent Internet fraud in general and also in particular online auction fraud.

#### **4. Summary**

The measures of the different organisations and online auction houses that shall avoid or reduce online auction fraud point basically the right way. However, online auction fraud is still a very big problem and so far there has not been developed a really satisfying solution. It is anyway impossible to solve the problem in its entirety. Online auction fraud will always be an issue. The conditions on the Internet are ideal for fraud and cheaters are innovative and adapt themselves to new consumer protection strategies. The best weapons to fight online auction fraud seem to be information of the users and practicable arrangements. If users are aware of potential kinds of fraud and know about the proper measures against it, the risk of being a fraud victim will be considerably reduced. Online auctioneers should be able to intervene in auctions to an early point in time, but they should not be liable for mistakes.

### **D. International Civil Procedural Law**

To online services territorial borders of national legal systems do not apply. From any spot of the world any server can make a homepage available on call to anyone. The location of the server has no effect on the accessibility of online services. Thus it is possible that virtual places emerge in the Internet where legal tolerance exists. Caribbean islands become the origin of junk mails or the emporium of pharmaceutical products. For provider of online services from any country have to think about the question whether they have to take into account only their own national law or different provisions of other countries' national laws especially in terms of the accessibility of online services as well. The difficulties and problems become very clear in a decision of the Tribunal de Grande Instance de Paris. The Tribunal de Grande Instance de Paris ruled that Yahoo in the United States of America is obliged to create technical precautions in order to make it impossible for French users to access websites propagating right wing extremist content.<sup>196</sup> One United States District Court of California refused to follow this French judgment. The French decision cannot be upheld,

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<sup>195</sup> <http://www.fraud.org/internet/inttip/inttip.htm>, accessed 26/01/2006.

<sup>196</sup> Tribunal de Grande Instance de Paris, judgment rendered on the 20th of November 2000, K & R 2001, p. 63.

because the freedom of opinion would be protected by the First Amendment of the constitution of the United States of America.<sup>197</sup>

International Civil Procedural Law determines whether contentious facts of a case refer to the country where the dispute has arisen or not. Hence it defines in which cases a national court is responsible. Basically each state decides by itself when its national courts are responsible for international disputes. However, if there are multilateral or bilateral agreements on international competency of courts these will outweigh the national regulations concerning international jurisdiction. International Civil Procedural Law regulates also the recognition and enforcement of foreign judgments. Differing from International Private Law it is directly only concerned with procedural questions. The International Private Law shall define the applicable law for facts that bear relation to a foreign country. It tries to apply the one legal system out of several with the closest spatial connection in respect of the facts of the case. So International Private Law is about the question which national law can be best applied in individual cases. However, it is possible that International Civil Procedural Law has an impact on the court's decision as well. This is because the applicable law depends on by International Civil Procedural Law determined international jurisdiction. If there is a majority of possible legal venues the plaintiff can by means of a clever choice of the court determine the applicable law and the provisions material to the court's decision.

The determination of international jurisdiction is problematic in cases in which the parties are located in different countries. The jurisdictions that come into question are the court where the server is located and all courts of places from where the server is accessible. The offline-rules as to jurisdiction often do not provide satisfying solutions for online disputes. The risk of getting the "wrong" jurisdiction is almost not calculable. This is the more because each nation has different approaches to jurisdiction rules and an international harmonisation is not due in the near future. Indeed within the European Union the European Council Directive on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (EuGVO)<sup>198</sup> creates a harmonised legal framework, but global rules in terms of jurisdiction in civil and commercial matters are nearly out of sight.

## **I. Jurisdiction on infringement of intangible goods**

We have to distinguish between national and international facts.

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<sup>197</sup> US District Court for the Northern District of California, decision of the 7th November 2001 (Yahoo vs. LICRA), MMR 2002, p. 26.

<sup>198</sup> The EU-Directive (came into force 1st of March 2002) succeeded the EC-Directive (EuGVÜ).

## 1. Intra-German cases

For intra-German cases the rules of the German Civil Procedural Law do apply. According to art. 12 of the German Code of Civil Procedure one has to file a suit at the residence of the defendant. In tort law matters – for example when copyrights, trademarks or personal rights are infringed – the plaintiff has the option to take action at the site of tort as well. That is the site where the result occurred as well as where the unlawful act took place, namely the location of the server.<sup>199</sup>

However, opinions differ on the determination of the place where the offending result occurred. Some courts apply each place from where a homepage is accessible. Therefore the plaintiff has the right to choose any court within Germany. Experienced lawyers are able to take advantage of this circumstance and pick the “proper” court by evaluating the specific characteristics of each court in terms of its jurisdiction and tendencies.

Other courts want to restrict the jurisdiction by make it due to the fact whether the homepage is accessible at the place where the court is located.<sup>200</sup>

Procedural particularities apply to copyrights and Competition Law. According to art. 104 German Copyright Act only ordinary courts are responsible for copyright disputes. Many federal states took the option of art. 105 German Copyright Act. This provision authorizes federal states to establish only one certain local or regional court to have jurisdiction in terms of copyright disputes within the federal state.

As to Competition Law jurisdictions are regulated in art. 24 of the German Unfair Competition Act. The court has jurisdiction in whose district the defendant’s permanent establishment is based (art. 24 para. 1 German Unfair Competition Act) or the unlawful act was committed (art. 24 para. 2 German Unfair Competition Act). These rules are rather similar to those of the German Civil Procedural Law. But with regard to the site of crime in Competition Law legal practice acts on the assumption that the virtual effects of the advertising that is subject matter of the dispute in the circuit are relevant.<sup>201</sup> For example there shall be no competitive relation between two smaller offices in Heilbronn and Berlin that could be able to establish the legal venue of the scene of offence.<sup>202</sup>

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<sup>199</sup> Some voices consider the residence of the wrongdoer as the deciding factor: Koch, CR 1999, p. 121, 124; Mankowski, *RabelsZ* 1999, 257, 262; Pichler in Hoeren/Sieber, Art. 31, p. 121.

<sup>200</sup> LG Düsseldorf, judgment of the 4th of April 1997, WM 1997, p. 1444.

<sup>201</sup> LG Potsdam, judgment of the 4th July 2001, MMR 2001, p. 833.

<sup>202</sup> OLG Brandenburg, judgment of the 27th March 2002, MMR 2002, p. 463.

## **2. International Jurisdiction**

The rules of the German Code of Civil Procedure are also used analogously for the clarification of international jurisdiction. Especially the scene of the crime- principle embedded in art. 32 German Code of Civil Procedure is applied analogously. However, the application of the German Code of Civil Procedure comes only into question in those cases in which international jurisdiction has to be defined with respect to a defendant whose residence is not within the European Union. If the defendant's residence is within the area of Switzerland the Lugano Agreement of the 16<sup>th</sup> September 1988 will be appropriate. The Lugano Agreement is rather similar to the EuGVÜ.

If the defendant is an EU- resident EuGVÜ and EuGVO are relevant to the issue of jurisdiction. The EuGVÜ was replaced by the EuGVO on the 1<sup>st</sup> of March 2002. EuGVÜ and EuGVO assume that it's possible to file a suit at the defendant's residence (art. 2) or at the site of crime. According to art. 5 no. 3 the place "where the harmful event occurred or may occur" is material to the site of crime. This depends on the scene of the action and scene of the occurrence. So the plaintiff has the choice as far as that goes. However, the scene of the occurrence is – in the same way as in the case of art. 32 German Code of Civil Procedure – determined by the courts according to the fact if a homepage at a certain location is accessible not only by chance.<sup>203</sup> With regard to a claim for damages one will have to note that after the Shevill-judgment of the European Court of Justice<sup>204</sup> the whole damage can solely be claimed at the scene of the action. At all scenes of the occurrences it is only possible to claim for that part of the damage that occurred in the particular state.

When we talk about intangible goods possible sites of crime in terms of art. 5 no. 3 EuGVO that entitle to jurisdiction are only such sites at which at least one part of the action - to that the legitimate bearer of the right was exclusively entitled to – has been committed. Since unlike the law of property incorporeal rights are not tangible at any certain place there is no difference between the scene of the action and the scene of the occurrence. The deciding factor is where the inference in those to the bearer assigned rights takes place.

The appealed court decides if an act that justifies having jurisdiction was committed at home in compliance with the law, which applies according to the rules of International Private Law of the relevant state. That is always the law of the country on which territory protection is

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<sup>203</sup> Schack, MMR 2000, p. 135, 138.

<sup>204</sup> EuGH, Rs. C-68/93, Slg. 1995, I 417.

wanted (*lex loci protectionis*). This is a worldwide acknowledged principle of Private International Law. It follows from the territorial principle according to that incorporeal rights are valid only on the territory of the nation, which grants protection. Moreover only there an infringement is possible. That means for example that a copyright which is protected by the German Copyright Act can only be infringed by an action within the Federal Republic of Germany. Besides this principle is codified in art. 5 para. 2 RBÜ. So if somebody appeals to a German court, because his by copyright protected work is accessible via the Internet, this court will determine its jurisdiction in terms of art. 5 no. 3 EuGVO by answering the question whether this accessibility means an infringement according to the German Copyright Act or not. If an act that justifies having jurisdiction was committed at home is thus defined by the material incorporeal rights law of that country, on which territory protection as to incorporeal rights is claimed, and so domestic law decides on this question. That means for the utilization of material in the Internet that is protected by incorporeal rights that the material law of the country that grants protection for these rights decides if the accessibility within this country's territory alone is sufficient to give reasons for an infringement and the duty of the wrongdoer to recognize the court of this country.

In the European Union art. 3 of the copyright guideline<sup>205</sup> deals with “making available rights” in that way that the recall of protected material via the Internet is an action that requires permission.

Within the scope of trademark rights and patent rights and other commercially protected rights the question also is if the accessibility of a by domestic trademark law protected domain or – in particular with regard to the United States of America – the online utilization of a at home patented, implemented business model in each case alone is enough to give reasons for an infringing action and so for having jurisdiction at the scene of the crime.

For the use of an in Germany by trademark law protected expression as a domain under the top level “.com” by a company from the United States the Court of Appeal in Berlin<sup>206</sup> considered the accessibility within the Federal Republic of Germany sufficient for justifying to have jurisdiction in terms of the action that the German legitimate holder of the right filed. The court based its decision on having jurisdiction on art. 32 German Code of Civil Procedure, which is equal in content with art. 5 no. 3 EuGVO. The accessibility at home was deemed by the court being enough to take a domestic scene of the crime for granted. Though, there are voices in relevant literature that demand a further domestic reference to give reasons

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<sup>205</sup> European Parliament and European Council Guideline 2001/29/EG.

<sup>206</sup> KG Berlin, judgment of the 25/03/1997 – 5 U 659/ 97, CR 1997, p. 685.

for a domestic site of crime.<sup>207</sup> Mere technical accessibility at home shall not be enough to justify a site of crime at home.<sup>208</sup> These voices mostly demand a behaviour, which is somehow aimed at the relevant country.

For companies that use protected material of incorporeal rights for their Internet appearance the jurisdiction according to art. 5 no. 3 EuGVO, which is based on the site of crime, means worrying results: these companies risk facing claims for damages and actions for an injunction at every place within the European Union where accessibility of their website or homepage is possible.<sup>209</sup> It is only necessary that a third person asserts rights concerning this material. With this concept is a varying legal domicile connected and it is difficult to handle. For example German courts are responsible for a large number of Internet disputes without being able to refuse jurisdiction like Anglo-American courts.<sup>210</sup> The problem of the German rules relating to International Procedural Law is that it is almost impossible to hand over international jurisdiction. However, there are tendencies to interpret rules concerning international jurisdiction in a more restricted sense. For a long time it was possible to bring so-called Torpedo Claims to Brussels Courts of Appeal. Such an action for declaratory judgment by the supposed infringer directed at the ascertainment that there did not happen any infringement, would have led to jurisdiction of the Brussels courts and would have led to the fact that no other legal domicile within Europe would have jurisdiction according to the principle of law “lis pendens”. The Brussels Appellate Court ruled out this opportunity in its decision rendered on the 20<sup>th</sup> February 2001. The court emphasized that art. 5 no. 3 EuGVÜ is not for actions for negative declaratory judgment.

## **II. Jurisdiction on contracts**

Unlike tort law in contract law a choice of the applicable law is conceivable. Art. 38, para. 1 German Code of Civil Procedure allows agreeing upon a legal domicile, if the parties of the contract are businessmen or legal entities under public law. Furthermore according to art. 38, para. 2 German Code of Civil Procedure the same does apply if one of the parties does not have an inland general legal domicile. If one of the parties is a consumer an agreement on a legal domicile is not allowed.

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<sup>207</sup> See for example: Koch, CR 1999, p. 121.

<sup>208</sup> Koch, CR 1999, p. 121.

<sup>209</sup> In terms of the claim for damages it is only possible to claim the part of the damage that arose in the particular country; compare above E. I. 2., p. 14.

<sup>210</sup> Compare the decision of the High Court of Justice, 29/10/2004, Richardson v. Schwarzenegger EWHC 2422 (QB), Cri 2005, p. 21.

The rules above apply analogous to the question of international jurisdiction. Art. 17, para. 1 EuGVÜ allows an agreement upon the legal domicile, if it is concluded in written form or verbally with written confirmation or according to a habit developed by the parties. Unlike according to the German Code of Civil Procedure such contracts are valid if one of the parties is a consumer. Consumers are protected by the requirement of written form. Otherwise it has to be a protection comparable to the traditional written form. Moreover one has to note that to long-distance business with consumers special rules apply<sup>211</sup>, which cannot be modified in advance.<sup>212</sup> These rules in terms of the legal domicile are tightened up in the new European Union Directive. According to the new Directive it is sufficient to have the legal domicile at the residence of the consumer if the seller “directs...activities to that member state” (art. 15, para. 1, lit. c).

On international level in particular the United States of America criticized the tendency of the European Union to protect consumer especially during the negotiations concerning the Den Haag Convention for International Jurisdiction and Recognition in Civil Matters. The courts of that state have jurisdiction in which the consumer’s place of residence is located. However, the subject matter of the action has to have a connection with a contract that the party which is not a consumer has concluded within this state or aimed at this state. Companies that operate within the scope of E-Commerce need special protection. Therefore an activity is not considered geared towards a state if the non-consumer proves that he met proper arrangements in order to avoid the conclusion of contracts with consumer which have their place of residence within this state.

### **III. Enforcement**

The problems eventually culminate in the range of enforcement. Even if it happens that an action is successfully brought against a foreign defendant and a decision in favour of the claimant is rendered, this does not really help if the judgment cannot be enforced. Within the European Union this is not that big issue. EuGVÜ and EuGVO ensure enforcement of judgments within all member states.<sup>213</sup> Outside the European Union enforcement is only guaranteed on the authority of bilateral agreements on enforcement. Normally these do not exist. Thus it is possible that one person chooses a foreign oasis of enforcement as the

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<sup>211</sup> Art. 13, para. 1, no. 3 EuGVÜ.

<sup>212</sup> Art. 15 EuGVÜ.

<sup>213</sup> It does happen that in some member states (for example in Italy or Belgium) enforcement is protracted; however, enforcement is guaranteed.

location of his server and then supplies the entire world with illegal pirate copies. This is one of the biggest problems of law that makes it so desirable in certain issues – and in particular in online business - to have a worldwide legal system.

#### **IV. Online Dispute Settlement**

A recommended solution as to these obstacles is the establishment of online dispute services. These are some kind of boards of arbitration that shall settle disputes between the parties online. Well-known is the settlement of disputes according to the Uniform Dispute Resolution Policy<sup>214</sup> of the ICANN (Internet Corporation for Assigned Names and Numbers), though it differs from other boards of arbitration in the possibility to link the decision of the Domain Name Panel with the assignment of the domain. Other institutions cannot make a binding decision. They are only able to publish their decisions and to take away any seals of quality. Because of the missing sanctions there is a lack of clarity and acceptance in terms of online dispute settlement. Also the compatibility of online boards of arbitration with the Legal Aid Act is contentious.<sup>215</sup>

#### **E. Comparative View and Final Statement**

As shown above there are several problems concerning online auctions in Germany and also in the United States of America even though it is the birthplace of online auctions. The problems are different ones in the two countries, but it is obvious that there are urgent needs for appropriate regulation in terms of the still young media Internet.

When we compare the legal situations of the two countries it is firstly noticeable that the right of revocation in Germany seems to be paramount and a strong protection of the consumer. This is a result of the fact that Germany's laws have to comply with the guidelines of the European Union in terms of consumer protection.

In terms of copyright the differences between the regulations and its purposes is considerable. While in Europe the work itself as well as the relation between the work and its creator is

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<sup>214</sup> UDRP.

<sup>215</sup> Grunewald, BB 2001, p. 1111 ff..



protected,<sup>216</sup> in the United States of America the commercial side of the copyright is more in the focus. Sec. 107 of the US Copyright Act is a general clause as to the fair use of copyrights. The wording “fair use” itself implies that the exchange of ideas shall be made easier and not complicated and that of course promotes commerce. Because of the wide terms of the provision there has to be a judge who has to interpret it and decide at his own discretion about each individual case. Of course in Germany also a judge applies the law, but because of the general wording of sec. 107 US Copyright Act in the United States of America the judge has much more competence in terms of his interpretation of the provision and thus the parties have to rely on a single judge.

In comparison to that in Germany the provisions of the Copyright Act contain narrow blanket clauses with almost no elbowroom for the judge to influence his decision. The decision is almost already made by the legislator. Therefore there is more legal certainty for the parties than in the United States of America. The problem is that one cannot deny that the legislator is almost always more or less influenced by lobbyists who are interested in a certain jurisdiction, which is profitable for them. Therefore it could be better to rely on a judge. In addition to that there is always a time lag between the law and the present situation on the Internet, since changing the law takes a long time compared to the Internet’s rapid development. Thus it takes time to react properly on changes. The consequences are laws that are not satisfying for a certain period of time.

Basically one can say that both approaches as to copyrights have their benefits and disadvantages.

Differences exist also with respect to the written form and digital signature. Because of different legal opinions and interpretations in Germany and the United States of America concerning the written form, the problems concerning this issue are handled differently. Unlike in Germany in the United States of America signed writing and digital signature are on equal terms. This is possible, since in United States Law it depends primarily on the intentions of the contractual partners. Therefore a symbol as a signature is sufficient as long as it becomes clear that the signatory wants to authenticate his document. That is a significant difference compared to German Law where legal formalities have certain functions like for example warn-, proof-, advice- or control functions. Furthermore in the United States the written form requirement shall not be a disturbing element with regard to the common law. This would be an obstacle for the increasing economic importance of the Internet. Thus the

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<sup>216</sup> Compare §§ 11 and 14 of the German Copyright Act.

requirements in terms of signature procedures are on a low level standard. Operator of these procedures can be besides state authorities also private companies. A higher standard is not necessary anyway as the equivalence of written form and digital signature is based on common law and not on requirements of signature procedures.

The purpose and function of the written form is more important in Germany. The demands that are made on digital signature procedures are accordingly higher. That shall guarantee a better control. However, on the other hand it has to be accepted that these procedures mean an obstacle in electronic business transactions. The consequence is that Germany as an economic site could be put at a disadvantage.

Because of the fact that on the Internet different legal systems collide, it will be all the more important that governments and legislators make an effort in order to create a practicable and uniform basis with regard to the written form and the definition of the digital signature.

Further issues in electronic business transactions can almost always be solved by the present law in Germany and by the common law in the United States of America. If the case law in the United States is not able to keep up with the rapid development, statute law will apply<sup>217</sup> and play its part in guaranteeing harmonisation of the law in federal states as well as legal certainty for users.

As we can see it is possible to draw a parallel to the differences with respect to copyrights. The more open U.S. American system can easier deal with the speedy development of the Internet, because there is more legal elbowroom. Also it is again attached more importance to the commercial side. And once again in the United States one has to rely to a greater extent on a judge's discretion.

As we have seen there are still a lot of problems concerning business transactions in online auctions. It will be very important to handle the area of conflict between an active (international) trade and the protection of consumers properly and to find a reasonable compromise. Too many restrictions will hinder an active trade. Not enough protection and the trust of consumers will be reduced and that would entail the same result. However, this issue should not necessarily be considered a compromise, as good consumer protection will result in an active trade, since consumers' suspicion is the main reason for people to refrain from concluding contracts via the Internet. If good protection is provided, there will be thriving business. So this seems to be the deciding factor when it comes to online auctions.

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<sup>217</sup> Of course above all the U.S. Digital Signature Acts.

But there is still another very important point. New technical developments in terms of the information and communication area on the Internet with its international character cannot entirely be legally controlled only by national legal systems. National legal systems only are not capable of guaranteeing sufficient legal protection and sufficient legal certainty. When contracts are concluded on the Internet between parties who are located or live in different countries that are not a part of a legal entity (like for example the European Union), national legal systems have only very limited power. Thus there is an urgent need for a speedy internationalisation of fundamental areas of law and for worldwide legal protection.

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