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## Transaction Safety in Electronic Banking. Legal Aspects

### I. CONCLUSION OF CONTRACTS ON THE INTERNET

In principle banking contracts can be made via the Internet like in normal business. However, you have to note that regularly a homepage is only an *'invitatio ad offerendum'*.<sup>1</sup> The customer makes the offer; the content provider decides in the absolute discretion whether he accepts the offer. Even automatically generated declarations are manifestations of intent in the sense of the BGB.<sup>2</sup>

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<sup>1</sup> See also OLG Oldenburg, CR (1993), 558; Eckert, DB (1994), 717, 718; Wagner, WM (1995), 1129; Ernst, NJW-CoR (1997), 165; Ph. Koehler, MMR (1998), 289, 290; H. Köhler, NJW (1998), 185, 187; Waldenberger, BB (1996), 2365. A bit different Mehrings, MMR (1998), 30, 32, who assumes a binding offer in some cases.

<sup>2</sup> Köhler, AcP 182 (1982), 126, 132; Mehrings, in: Hoeren/Sieber (Hg.), *Handbuch Multimediarrecht*, 13.1 marginal note 23 with further references. Different opinion in the past Susat/Stolzenburg, MDR (1957), 146; Clemens, NJW (1985), 1998, pp. 2001.

Substantial encroachments on the national legal regulations are to be expected from the Directive on certain legal aspects of electronic commerce. This Directive 2000/31/EG became effective on 8 June 2000.<sup>3</sup> According to the first draft of the EU-Commission, that however should only include the (exceptional) case of a legally binding offer of the service provider, the conclusion of contracts should only be reached by offer, acceptance, confirmation of the acceptance and confirmation of the confirmation (!).<sup>4</sup> This complicated and highly criticised<sup>5</sup> regulation has been dropped now. However, even the new rules about the 'placing of an order' cannot easily be integrated into the traditional doctrines of legal transactions. Art. 11 proceeds from an order by the user and so includes (at least) the typical case that the service provider only explains an 'invitatio ad offerendum'. According to the Directive the receipt of the order has to be confirmed. Are the constitutive features of making a contract meant by that? Will a confirmation also be necessary if the binding offer exceptionally comes from the provider? Will the service provider who receives an offer from the user be obliged to accept it? If yes, which consequences does his silence have? In relation to consumers, that means natural persons who are acting for private purposes, the national regulations must not admit any agreements that break the rule of the confirmation duty. The confirmation duty will not be effective for contracts, which are concluded by the exchange of electronic post or by similar individual communications.

Pursuant to Art. 6 par. 1 of the Directive on Distance Selling the customer has the possibility, as it will be explained later, to cancel the conclusion of the contract within seven working days respectively within three months if there has not been any information about the legal consequences.

<sup>3</sup> Available under:

<[http://europa.eu.int/comm/internal\\_market/en/media/electcomm/index.htm](http://europa.eu.int/comm/internal_market/en/media/electcomm/index.htm)>.

<sup>4</sup> Compare to this concerning German Law Hohenegg/Tausch, BB (1997), 1541; Mehrings, MMR (1998), 30; the same author, BB (1998), 2373; Koehler, MMR (1998), 289.

<sup>5</sup> Compare Tettenborn, K & R (1999), 257, 258; Hoeren, MMR (1999), 192, pp. 198; Spindler, ZUM (1999), 775, pp. 788; Landfermann, ZUM (1999), 795, 800.

## II. AVOIDANCE, AUTHORIZATION AND RECEIPT OF ELECTRONIC DECLARATIONS OF INTENT

### A. Legal Situation According to the BGB

The customer can avoid his offer according to §§ 119, 120 BGB if the provider has wrongly transferred his declaration of intent.<sup>6</sup> If the customer gives wrong information in error in his E-mail he will be able to avoid his declaration according to § 119 par. 1. Alt. 2 BGB.<sup>7</sup> But an avoidance will not be possible with computer-generated declarations that contain mistakes, which stem from previously entered wrong data material.<sup>8</sup> Altogether an avoidance will not be possible if wrong data material is used because it is only a mistake in the inducement which will be unnoticed.<sup>9</sup> Concerning errors in transmission an analogous avoidance is to be taken into consideration according to § 120 BGB.

If a stranger uses the answer-back code of the user an attachment to the electronic orders is to be considered according to the rules about acting under another name.<sup>10</sup> The business partner wants to make a deal with the owner of the name; therefore, the contract only obligates the owner of the name pursuant to § 177 par. 1 BGB

- if there is an authorisation,
- according to the rules of the power of representation by estoppel,
- according to the rules of apparent authority (in dispute).<sup>11</sup>

The rules of apparent authority are also effective if a minor enters into a legal transaction via the Internet with the answer-back code of his legal representative; in this case the legal representative would be obliged by the contract.

Furthermore, the question arises at which point in time a contract via the Internet is concluded. The German law distinguishes between declarations of intent between persons present and persons absent. Concerning the conclusion of a contract between persons present, a declaration of intent reaches somebody in the moment of the perception in an acoustically right way (so-called theory of perception). Concerning a declaration of intent between absent persons the point in time is decisive in which the declaration reaches the sphere of influence of the receiver in a way that he will be able

<sup>6</sup> See Heun, CR (1994), 595, 596; Waldenberger, BB (1996), 2365, 2366.

<sup>7</sup> OLG Hamm, CR (1993), 688; see also BGH, DB (1984), 2399.

<sup>8</sup> AG Frankfurt, CR (1990), 469=NJW-RR (1990), 116; in the result also LG Frankfurt, NJW-RR (1988), 1331; LG Frankfurt, CR (1997), 738.

<sup>9</sup> LG Frankfurt, CR (1997), 738.

<sup>10</sup> See Borsum/Hoffmeister, NJW (1985), 1205.

<sup>11</sup> OLG Oldenburg, CR (1993), 558.

to obtain knowledge of the declaration or in which knowledge can be expected.<sup>12</sup> Concerning online-communicating computers (for example, in the EDI area) it is partially proceeded from declarations between persons present.<sup>13</sup> This may be justifiable for the EDI area. But in the WWW-sector the other opinion is more conclusive according to which the conclusion of the contract follows the way of declarations of absent persons, particularly because § 147 par. 1 BGB requires a declaration directly from one person to another.<sup>14</sup>

For the receipt of declarations of intent via E-mail it is decisive at which point in time the recall of the mail by the receiver is to be expected. Insofar it must be decided between business and private receivers.<sup>15</sup> It can be expected that businessmen always control their electronically incoming mail. E-mails that are recallable during business hours are considered to be received at the same point in time. E-mails that are not sent during business hours are usually taken note of when opening the business. Concerning private persons it is expected that they control their incoming mail at least once a day. Because of missing usual times of recall, mails are considered to be received on the day after the day on which mails can be recalled.

If orders are accepted automatically the passing of the interface of the online-company will be sufficient, so that the protesting right in § 130 par. 1 BGB is practically meaningless.<sup>16</sup>

The opening of E-mail accesses is dangerous because of the connected liability risks. If a lawyer for example makes his E-mail identification public to his clients the impression could arise that legally relevant transactions with the lawyer can be made by E-mail. If the client therefore requests his lawyer by E-mail to file an appeal and the lawyer does not read the E-mail, an action for damages against the lawyer is threatening. With the publication of the E-mail address on sheets of writing paper and visiting cards the willingness to accept orders by E-mail is shown. The provider then has to react immediately during normal business hours. If he does not want that he will have to point that out to his clients. Clear remarks are advisable ('The E-mail address only serves for the transmission of information wishes but not

for giving E-mail orders.'). If the provider wants to accept or settle orders by E-mail he should have a special E-mail address for this and should check the account regularly, in relevant areas several times a day.

The risk of forgery has to be taken by the provider; he must not shift this risk on to the client by the general terms of trade. The provider should even inform the client about the risk of forgery, for example in that way:

'The client demands his orders to be accepted and dealt with by e-mail. The client has explicitly been informed by the provider about the fact that abuses cannot be excluded concerning e-mail transmission. The provider is not able to check e-mail orders to see whether the sender and the content are correct. Apart from that the client asks the provider to accept these electronic orders. The provider is completely discharged from liability that may result from a misuse of the transmission system. The parties agree upon the following preventive measures.'

## B. The Directive on Electronic Commerce

However, special problems are arising through the Directive on Electronic Commerce. Art. 11 par. 2 provides a special regulation concerning the correction of input errors. Typically input errors fall within the risk area of the user. He can avoid his declaration because of such a mistake, but then he has to pay for the damage caused by breach of trust. In this case the Directive determines an additional filter. According to Art. 11 par. 2 the provider has to make available means for the correction of input errors. Pursuant to Art. 10 he also has to inform the user about that. Confirmation fields, which show the client the text of his declaration after he has placed his electronic order to give him the possibility of correction, are already in common use today. Insofar this measure is technically not complicated. However, the provider's duty to establish aid for correction has to be embodied in German law; it must also be determined what consequences the disregard of this duty will have for the provider.

Apart from the term of receipt of the BGB, declarations pursuant to Art. 11 par. 1 of the Directive are considered to be 'received' if they can be recalled by the receiver. It is unimportant if it can be expected that the receiver immediately takes notice.

## III. WRITTEN FORM AND DIGITAL SIGNATURE

The compliance of a special written form is provided by German Civil Law. Digitally signed documents and declarations do not meet the

<sup>12</sup> So-called theory of knowledge or receipt; see MünchKomm/Förschler, (3<sup>rd</sup> ed.), § 130 marginal note 3.

<sup>13</sup> Like this Brinkmann, BB (1981), 1183, 1185; Fritzsche/Malzer, DNotZ (1995), 3, 9; Herget/Reimer, DStR (1996), 1288, 1291; Taupitz/Kritter, JuS (1999), 839, 841.

<sup>14</sup> In the result also like this Graf Fringuelli/Wallhäuser, CR (1999), 93, 98; for the EDI area Bartl, DB (1982), 1097, 1100; Fritzemeyer/Heun, CR (1992), 130; Hellner, Festschrift Werner (1984), 251, 266; Heun, CR (1994), 595, 597; Klier, WRP (1983), 534, pp. 535; Redeker, NJW (1984), 2390, 2391.

<sup>15</sup> Ernst, NJW-CoR (1997), 165, 166; Graf Fringuelli/Wallhäuser, CR (1999), 93, pp. 98; in detail Taupitz/Kritter, JuS (1999), 839, pp. 841.

<sup>16</sup> Like this also Heun, CR (1994), 595, 597.

requirements of the written form according to today's legal situation.<sup>17</sup> Pursuant to § 126 BGB the text must be signed personally by the drawer by signature or by a notary-certified sign if a written form is legally provided. The requirement of the written form is for example provided for consumer loan agreements (§ 4 VerbrKrG; § 492 par. 1 BGB-RE), for contracts on sale of land (§ 313 sent. 1 BGB; § 311b BGB-RE), for written receipts (§ 368 BGB), for suretyship declarations (§ 766 BGB) and for testaments (§ 2231 no. 1, 2231 no. 2, 2247 I BGB).

### A. Pre-History of the Form-Reforms

In the early drafts of the *luKDG (Informations- und Kommunikationsdienstegesetz)* an attempt was made to solve this problem by the initiation of a 'test norm'. However, this experiment has been waived and, thus, the question of the written form has been left open. In May 1999, the Federal Ministry of Justice took care of this concern, also on European initiatives<sup>18</sup>, and presented a draft law concerning the adaptation of the formal legal requirements of Private Law to the modern course of business.<sup>19</sup> On 20 June 2001 the mediation committee passed a resolution recommendation which has been accepted by the 'Bundestag' (Lower House of German Parliament).<sup>20</sup> This law became effective on 1 August 2001.<sup>21</sup>

Besides the notary public recording, the law also provides the 'electronic form' (§ 126 par. 3 BGB) as a substitute for the required written form. The requirements of the electronic form are provided in § 126 a BGB. Here, the nature of the SigG as a reference law becomes apparent because the observance of the electronic form makes a digital signature under the SigG necessary. Two refutable presumption rules from the first draft of 1999 have been eliminated: Firstly, the accountability of a declaration of intention to the owner of the signature key (§ 126 a par. 3 BGB-RE unamended version) and secondly, a special reflection of a presumed apparent authority or authority by estoppel (§ 126 a par. 3 BGB-RE unamended version).<sup>22</sup>

<sup>17</sup> Fundamentally BGHZ 121, 224.

<sup>18</sup> See also the Japanese Omnibus Act for the Use of Information and Communications Technology relating to the Delivery of Papers, Act. No. 126 of 2000, effective on 1 April 2001.

<sup>19</sup> Draft law concerning the adaption of the formal legal requirements of Private Law to the modern course of business from 19 May 1999 – BMJ I B 1 – 3414/2.

<sup>20</sup> Bundesrats Drucksache 497/01. See the draft under <[www.bmj.bund.de/ggv/ggv\\_i.htm/bgbregel1.pdf](http://www.bmj.bund.de/ggv/ggv_i.htm/bgbregel1.pdf)>.

<sup>21</sup> Gesetz zur Anpassung der Formvorschriften im Privatrecht from 13 July 2001, BGBl. 2001 I Nr. 35, p. 1542.

<sup>22</sup> Conclusion, identity, authentication, warning and probative function.

With the 'text form' as a new 'marketable' form an eased form requirement has been provided by § 126 b BGB compared with the formal written form, which makes concessions towards the needs of modern legal relations. According to this, the requirements can also be met by electronic declarations if the text can be read in letters and the person who made the declaration is recognisable. You can then renounce the personal signature. Concerning the telecommunication transmission that is not tied to paper – like the traditional fax – the text form will be complied with if the declaration can be transformed at any time into characters by the receiver (§ 126 b BGB). The receiver can read characters when he can retransform them after the transmission and the transformation into digital or analogous signals. Characters are in a broader sense all graphical signs that are included in the declaration text, especially letters and numbers.

The text form is meant for such cases, which so far required a severe written form in which the requirement of a personal signature would be inappropriate and impeding for the legal relations. Typical applications concern mass proceedings, mostly with repeating declarations without a considerable effect of evidence. Cases that are shown by law are for example § 410 par. 2, 416 par. 2, 541 b par. 2, 552 a and 651g par. 2 BGB.

### B. Directive on E-Commerce, Electronic Signature Directive and Written Form

Even on a European level the theme has been taken up because the so far existing national and international regulations do not offer a satisfying solution for the problems coming up in the electronic course of business. Especially, the valid conclusion of contracts on the Internet should not fail because of form requirements made by the national law.

At the end of 1999 the Electronic Signature Directive<sup>23</sup> became effective. It is its aim to ensure the international legal acceptance of electronic signatures and to create an appropriate and harmonised legal scope.

According to Art. 5 of the Directive electronic signatures should develop the same legal effects as hand-written signatures and should also be admitted as judicial evidence at court.

To meet the requirements in comparison with personal signatures the signature must go back to a certificate qualified by a signature-making unit, Art. 5 par. 1. This is an electronic statement that assigns a signature examination to a person, that can verify the identity of that person and corresponds with the requirements of appendix I of the Directive. The

<sup>23</sup> Directive 1999/93/EG of the European Parliament and the Council from 13 December 1999 on common general requirements for electronic signatures.

appendix contains the requirements that have to be met by these qualified certificates. However, the legal effectiveness of an electronic signature must not be refused according to Art. 5 par. 2 because of the fact that it is made in an electronic form and is not based on a qualified certificate, respectively on a qualified certificate made by an accredited certification service provider.

For the German legislator there will probably be no need for making amendments regarding the BMJ-draft concerning the reform of the formal requirements of the BGB (see above), because the Directive does not determine clear guidelines in Art. 5. Therefore, the shaping is a matter for the member states.

Besides the EU Electronic Signature Directive, the Directive on E-Commerce<sup>24</sup> became effective, too (amendments were merely of a technical nature). In the previous foundations it was said that:

'[T]he member states have to bring about a certain condition and have to check their internal legal regulations systematically whether they would hinder or restrict the application of electronic contracts or make them uninteresting.'

In Art. 9 of the Directive there can be found a detailed regulation concerning the question of the written form. According to Art. 9 par. 1 the conclusion of electronic contracts must be made possible. Especially the fact that a contract has been made electronically should not lead to the invalidity of the contract. With the content of Art. 9 par. 1 the complicated discussion between Germany and the rest of the European Union concerning the question of the legal requirements of digital documents might be settled.<sup>25</sup> According to this every electronic text would meet the requirements of the electronic form, independent from the way it has been made.

Art. 9 par. 2 intervenes in the catalogue of exceptions, which excludes notary contracts, contracts with a duty to register as well as agreements on family law and the law of succession in a correcting way.<sup>26</sup> This provision causes astonishment insofar as the 'spirit of the Internal Market' is reflected in the draft of the Directive, but now thoughts concerning a reform of the

Civil Law are arising. As for the rest, agreements in this field are usually not made on the Internet or through other online-providers.

According to Art. 9 par. 3 of the Directive the respective member states of the Commission should present a complete list of further exceptional cases, as they are provided by par. 2.

Even if the problem of the written form has not been completely solved by the EU-Signature Directive and the Directive on E-Commerce and if permanent improvements are to be made regarding the continuously progressive technical development, they might encourage the national legislators to develop intensive legislative activities with a view of the organisation and concrete wording of formal requirements, if that did not already happen.

However, the formal written form has lost a lot of its protective function. Consumers usually do not read written information. They are also not in every case impressed by the giving of signatures. Moreover, there are several situations in which the consumers must not be protected any longer, particularly since electronic documents can be seen as a functional recompense for the written form, especially if the unadulterated quality of a message can be guaranteed by using the digital signature. The Electronic Signature Directive and the Directive on E-Commerce gave the national legislators carte blanche for the concrete organisation of the formal requirements.

Special form regulations exist in the area of money laundering. Regarding the opening of a bank account the credit institute is obliged to demand the presentation of an identity card or passport to note the name, date of birth, address and the issuing identity authority (§ 1 par. 5 *Geldwäschegesetz*; similar § 154 par. 1 AO). This formal requirement can be fulfilled by the application of the PostIdent-proceedings that have been established by the *Deutsche Post AG*. Doing this legitimisation examination, the credit institute can make use of the *Deutsche Post AG*, who realises the identification of the client through a postman by postal delivery.

#### IV. PROBATIVE VALUE OF DIGITAL DOCUMENTS

Besides the written form the question of the probative value of digitally generated documents arises.

##### A. Free Evaluation of the Evidence

According to the dominant opinion these documents can only be taken into consideration in a lawsuit within the scope of a free evaluation of the

<sup>24</sup> Changed draft law for a Directive of the European Parliament and the Council concerning legal aspects of the electronic commerce within the Internal Market from 17 August 1999 – KOM (1999) 427 endg..

<sup>25</sup> See in general to the signature discussion, Bergmann/Streitz, jur-pc 1996, 37; Kuner, NJW-CoR (1996), 108; Malzer, DnotZ (1998), 96; Mertens, CR (1996), 769; Roßnagel, MMR (1998), 75.

<sup>26</sup> According to the initial draft from 18 November 1998 the list of exceptions should have been able of being changed unilaterally – extended or shortened – by the Commission. In the amended draft from 17 August 1999 and in the passed Directive this regulation has been eliminated.

evidence (§ 286 ZPO) in court.<sup>27</sup> A qualification as a private document in the sense of § 416 ZPO is not possible because there is no permanent embodiment and no sufficient signature and moreover the statement of thought cannot be perceived from itself. Therefore, when making contracts on the Internet the seller cannot believe that the electronically made documents will give the full evidence for the conclusion and the content of the contract. The client can plead without problems that he never concluded that contract— or even not with that content. Transmission protocols do not give prima facie evidence for the receipt of the declaration; they can at most serve as circumstantial evidence.<sup>28</sup>

## B. Evidential Stipulation

This problem even cannot be solved contractually by making an evidential agreement. However, courts would consider a clause according to which the client has to accept the probative value of electronic documents as documentary evidence. But such a clause would not have a binding effect for the evaluation of the evidence at court. The judge could furthermore reject to qualify documents as legal documents. Even the binding of the client to this clause is doubtful.<sup>29</sup>

## C. Amendment of Laws

A solution can only be found by changing the laws. Such a regulation can for example be found in Great Britain. According to the Civil Evidence Act 1995 a computer file will be admitted as judicial evidence if 'it forms part of the records of a business and an officer of the business provides a certificate of its authenticity'. But this rule is in my opinion not to be understood as an expression of an increased probative value. It is more pursuant to the fact that electronic information is not per se excluded from the evaluation of evidence because it is electronically saved. But it has to be distinguished between the question of the general admittance of electronic evidence and the question of the concrete probative value.

An exact definition of the probative value of electronic documents can only be found in Italy. Pursuant to the Act No. 59 from 15 March 1997 electronic documents should have the same probative value as paper-documents. Other European countries are sceptical about this liberal attitude

<sup>27</sup> To this in detail Nöcker, CR (2000), 176, 180 et seq.; Geis, CR (1993) f.; Heun, CR (1995), 2, 3; different opinion only Kilian, DuD (1993), 607, 609.

<sup>28</sup> BGH, NJW (1995), 665.

<sup>29</sup> Hoeren, CR (1995), 513, 516.

of Italy. They wonder why every electronically generated document despite its ability to be manipulated should have such a high probative value.

Basically the regulation of the probative value was provided within the scope of the German '*Informations- und Kommunikationsdienstegesetz* (IuKDG)'. Early drafts of the '*Signaturgesetz*' included in this law-package provided that an electronic document could be accepted as a legal document with probative value if the authenticity of the used electronic signature can be checked with a public key that has been confirmed by a certificate of an admitted certification level of authority, which was valid at the time of signing. However, the legislator lost his courage. Although there are detailed regulations in the IuKDG regarding the digital signature within the scope of the '*Signaturgesetz*' and the belonging '*Signaturverordnung*', the observance of the complicated rules of procedure for digital signatures does not imply their probative value. Any connection between the signature regulation and the ZPO has been later eliminated. This does not exclude that the digital signature has a special probative value within the free judicial evaluation of the evidence (§ 286 ZPO), even if the question of the probative value of digital documents will still be a question for the discretion of the judge.

## D. Directive on Electronic Signatures

However, the European Union here put things right with the Directive on Electronic Signatures passed at the end of 1999.<sup>30</sup> Meanwhile the '*Bundestag*' has also passed a re-enactment of the '*Signaturgesetz*' in February 2001,<sup>31</sup> to implement the instructions of the Directive into national law.

The Directive distinguishes between 'electronic signatures' and 'advanced digital signatures'. According to Art. 5 par. 2 it must not generally be denied that a (simple) electronic signature might be legally effective and admitted as judicial evidence. An 'advanced' digital signature has in addition an increased probative value. This makes it necessary that the signature is exclusively assigned to the signatory, so that it makes the identification of the signatory possible, that the signature is made up by means which are

<sup>30</sup> Directive 1999/93/EG of the European Parliament and the Council from 13 December 1999 on common general requirements for electronic signatures, Abl. L 13 from 19 January 2000, 12. Parallel to this the preparations for the UNCITRAL Model Law on electronic business have to be noticed which also include the development of common rules for electronic signatures <[www.un.or.at/uncitral/index.htm](http://www.un.or.at/uncitral/index.htm)>. Even the OECD works at a survey about formal requirements in the field of electronic signatures.

<sup>31</sup> See MMR 3/2001, p. V with reference to the press release of the BMWi from 15 February 2001.

under the special control of the signatory and that it is connected with the data it refers to in that way that a later alteration of the data can be recognised. 'Advanced' electronic signatures that are based on a qualified certificate<sup>32</sup> should fulfil the legal requirement of a signature (Art. 5 par. 1). With this it might now be certain that at least if the high security requirements of the German *Signaturgesetz* are fulfilled the probative value of the document signed like that must be the same as that of a private document. The same might be effective for signature proceedings in other states if the certification authorities there meet the requirements determined in Appendix II of the Directive. Certification authorities who issue a qualified certificate will be liable to every person who sensibly trusts in the certificate. They are able to restrict the applicability of certificates and the value of transactions for which a certificate is effective. In these cases the certification authority will not be responsible for damages which are the consequence of a utilisation of the certificate that was far beyond the scope of application.

The Directive on Electronic Signatures is the right way. But it still leaves questions open. Especially the relation between the 'advanced digital signature' and the security requirements of certain national signature regulations is unclear. As fast as possible, planning-safety should be established concerning the question which probative value brings which safety-infrastructure for a digital document. But planning-safety can only be established if persons begin with using this signature. The state has to hold up as an example. Also the big companies are called for supplementing the classical distribution by a virtual way of distribution by means of digital signatures and have to make available the respective hardware (chip card and reading device) for policyholders at a reasonable price. Otherwise there is the threat that everybody will be afraid of being the first and the digital signature will therefore never be used effectively.

On 15 February 2001 the '*Bundeskabinett*' passed the draft of an act about the general conditions for electronic signatures and the implementation of the Directive. This draft also passed the '*Bundesrat*' on 9 March 2001. On 22 May 2001 the Act then was published in the '*Bundesgesetzblatt*'.<sup>33</sup>

The new '*Signaturgesetz*' merely regulates the requirements of a 'qualified electronic signature'. The legal effects of the signature should be regulated in the draft of an act about the adjustment of the formal rules of Private Law to the modern business. In the future, running a certification service will be possible after a respective announcement not requiring

permission (§ 4 par. 1 and 3). A voluntary accreditation will be possible for certification service providers who will receive an additional seal of quality by the responsible legal authority (§ 15).<sup>34</sup> Partially it is said that especially the qualified electronic signatures with provider-accreditation are able to guarantee the probative value of electronic transactions secure and long-term because of its high security standard.

A 'qualified certificate' is every electronic written statement that assigns 'signature check keys' to a natural person and confirms the identity of this person (§ 2 No. 6 and 7). The certificate must contain certain minimum data (§ 7) and must correspond to the legal requirements of the SigG. Software-based signature systems are also allowed (§ 2 No. 10 SigG) in contrary to the former SigG. Beyond the wording of the Directive the certification service is liable for all requirements of the SigG and the SigV. There is additionally an extensive schedule of penalties (§ 21 SigG).

## E. Digital Signature: Technical Conversion

To understand the Signature Law you need a short introduction of the technical basics. An encryption of electronic information can be made by two ways: symmetric and asymmetric.

### 1. The Symmetric Encryption

The symmetric encryption enciphers and deciphers by a consistent key. Examples of such an encryption can be found in childhood when children for example invent a secret language: If you say A, you mean B. If you say B, you mean C. Agreements like these must of course follow a more complicated pattern if the exchange of secret information between adults over the Internet is concerned. IBM for example already developed the procedure DES (Data Encryption Standard) in the eighties. Concerning this encryption it is necessary that the secret procedure was previously mentioned between the children. But on the Internet agreements like these are seldom possible. You would have to make such an agreement regularly on the Internet itself, which distinctly reduces the security value of the 'security language'. And too many persons communicate with each other to be able to agree on secret procedures within a small group. On the Internet you can therefore use procedures like these only in closed user groups.

<sup>32</sup> The requirements for a qualified certificate can be found in the appendix of the Directive.

<sup>33</sup> Gesetz über Rahmenbedingungen für elektronische Signaturen und zur Änderung weiterer Vorschriften, Bundesgesetzblatt 21 May 2001, BGBl. 2001 Teil I Nr. 22, 876pp.

<sup>34</sup> See to this the services of Verisign <[www.verisign.com](http://www.verisign.com)> and the Trust Centers of the Telekom T-TeleSec under <[www.telesec.de](http://www.telesec.de)>.

## 2. The Asymmetric Encryption

Concerning the asymmetric encryption (public key cryptography) two different pairs of keys are generated and used. Encryption and decryption keys are not identical; they are like two parts of a puzzle that are different but can be put together by its user. Therefore, the pairs of keys can be used for different purposes. On the one hand it can be guaranteed that the message reaches the receiver without being read by a third person (for example a hacker or criminal prosecution authorities). For this the encryption key of the receiver will be made public; his decryption key is kept secret. The sender decipheres his message with the public key of the receiver and sends the message. The receiver then will be able to decipher the message with his private key and to read it. The message cannot be read by third persons.

On the other hand the authenticity of a message can be saved with the pair of keys. For this the decryption key of the sender will be made public but his decryption will be kept secret. The sender decipheres his message and then sends it to the receiver. He will only be able to decipher the message by means of the public decryption keys and will know that only the sender was able to send the message. Insofar the key pair has the same effect as a digital signature.

In this connection a key generation is important which makes a fast processing of the keys in one direction possible but not in the opposite direction. For this, the so-called RSA-Algorithm is used (named after the developers Rivest, Shamir and Adleman). Very big numbers are built that have to be disassembled into prime numbers. The big number can easily be calculated by means of the prime numbers. But someone who only knows the big number will have so many possibilities to calculate it through the prime numbers that he will not find the correct calculation, even not with the help of electronic data processing.

The application of proceedings like these can easily be demonstrated with the example of E-Trust. E-Trust is a signature model of the 'Deutsche Post Signtrust' on the basis of qualified certificates (see above).<sup>35</sup> In a branch office of the 'Deutsche Post' the client receives a chip card, a chip card reading device and a PIN-number after showing his identity card. Then Signtrust gives him a key pair that will help the user to sign his E-mails. When sending the message E-Trust transfers it into a code of numbers. This so-called 'Hash-value', which is different for every E-mail, will be ciphered once again and will be sent to the receiver together with the original message and the public key. From this basic data the receiver will be able to see who

<sup>35</sup> See <www.signtrust.de>.

sent the message (through the public key) and whether it has been transmitted without any alterations (through the Hash-value).

## V. THE LAW OF THE GENERAL CONDITIONS OF TRADE

The incorporation of the general conditions into a website raises special difficulties. According to § 2 par. 1 AGBG (in future § 305 par. 2 BGB-RE) it must be explicitly referred to the general conditions of trade in the time of the conclusion of the contract and the customer must be given the reasonable possibility to take notice of them. If it is referred to the general conditions in advance in connection with a basic agreement and it has been agreed on the inclusion then the requirements of § 2 AGBG (in future: § 305 par. 2 BGB-RE) are fulfilled.

The inclusion of the general conditions that can be seen by the user only through the electronic recall is problematic. Here it is often argued with the judgements to the Btx-transactions, which say that the reading of longer conditions would be unacceptable because of the longer duration of transmission.<sup>36</sup> There should be the possibility of printing if texts are longer than one screen page.<sup>37</sup> Others refer to the circumstance that the printing is connected with costs, requires abilities of the client concerning printing possibilities and also requires the existence of a printer.<sup>38</sup> Because of the possible alteration, the literature considers effective agreements about general conditions on the Internet to be impossible.<sup>39</sup>

In my opinion these requirements seem to be exaggerated. Especially in the www-area the customer is free to load the general conditions onto his computer or a proxy-server and to read it without any additional transmission costs. Additionally he will be able to print it and with this has the security to be able to take authentically notice of the respective general conditions. In the end the customer uses the Internet for the conclusion of contracts of his own free will and therefore also has to accept the information possibilities of the Internet. A subsequent change of the general

<sup>36</sup> LG Freiburg, CR (1992), 93; similar also LG Aachen, NJW (1991), 2159, 2160; LG Wuppertal, NJW-RR (1991), 1148, 1149; AG Ansbach, 3 C 295/93 quoted from Herget/Reimer, DstR (1996), 1288, 1293. In literature are of the same opinion Ulmer/Brandner/Hensen, AGBG (8<sup>th</sup> ed., 1997), § 2 marginal note 49a and Borges, ZIP (1999), 130, 135; Mehrings, BB (1998), 2373, 2380pp.

<sup>37</sup> Heinrichs, NJW (1999), 1596, 1598; similar also Borges, ZIP (1999), 130, 135.

<sup>38</sup> See to this Mehrings, BB (1998), 2373, 2378; Kamanbrou, CR (2001), 421, pp. 423.

<sup>39</sup> Wolf/Horn/Lindacher, AGBG (4<sup>th</sup> ed., 1999), § 2 marginal note 24; Bultmann/Rahn, NJW (1988), 2432, pp. 2434.



conditions would be liable to prosecution under the aspect of fraud. Therefore, this vague possibility pleads for an effective agreement of the general conditions.<sup>40</sup>

The mere reference to the general conditions on a homepage is not sufficient, for example within the scope of frames on the introducing site. The inclusion of a reference to the general conditions with a link into the online order form is recommended: 'With this I order the following items and have taken notice of the general conditions of trade (here link) and accepted them:...' More distinct would be windows with the general conditions compellingly integrated in the order proceedings, which can be closed only through a button-click of the customer. In this case four windows have to be established that have to be 'clicked' one after the other and then have to be confirmed. These four windows are:

- a window for the description of the supplier and the chosen product (according to the requirements of the 'Fernabsatzgesetz'),
- a window with the general conditions of trade,
- a window with the data protection consent (see § 4 BDSG) and
- a window with the possibility of a correction of the order (requirement of the Directive on E-Commerce; in future regulated in § 312 e par. 2 BGB-RE).

Furthermore, § 312e par. 1 BGB-RE has to be noticed which is the implementation of Art. 10 par. 3 of the E-Commerce Directive.<sup>41</sup> According to this the conditions of the contract including the general conditions of trade have to be made available to the user in a way that he will be able to recall them and to save them so that they can be reproduced. Insofar references to technical storage possibilities are necessary like strg-s and strg-p.<sup>42</sup> The reproduction possibility will be saved in the best way, if the general conditions are made available as an HTML-document for downloading.

In the general conditions of trade the following must be regulated:

- the payment procedure;
- the prices;
- the costs for delivery;

<sup>40</sup> LG Münster, 4 O 424/99 (decision still not res judicata): "also extensive general conditions of trade will be effectively included when concluding a contract on the Internet if the client has the possibility to copy them for free"; similar Palandt/Heinrichs, BGB, 59<sup>th</sup> edition 2000, AGBG, § 2 marginal note 1688; Moritz, CR (2000), 61, 64; v. Bernstorff, RIW (2000), 14, 16; Waldenberger, BB (1996), 2365, 2368pp.

<sup>41</sup> The decision of the BMJ, to do the implementation of the E-Commerce Directive partially within the scope of the "Schuldrechtsmodernisierungsgesetz" will raise difficulties insofar as the amendment of the law of obligations then will also fall under the notification duty of the European Transparency Directive and the notification procedure will take several months. To this discussions within the BMJ are pending.

<sup>42</sup> See Kamanabrou, CR (2001), 421, 424pp.

- the reservation of ownership;
- the caution of revocation, the costs for re-delivery ('Fernabsatzgesetz'),
- no illegal restriction of warranty and liability (§ 11 No. 10, 11 AGBG; in future §§ 307-309 BGB-RE);
- no choice of jurisdictional venue in relation to persons that are not businessmen; and
- the foreign imposer of standard terms and conditions (§§ 12, 24 AGBG) concerning businessmen.

Regarding download products (like software or music) it has to be noticed:

- non-exclusive right of utilisation;
- ownership of copies of the work;
- admissible = license for one working place with a prohibition of a simultaneous utilisation of several CPUs;
- but not a restriction of certain CPUs;
- inadmissibility of a prohibition to resale (§ 17 par. 2, 69 c No. 3 UrhG in connection with § 9 par. 1 AGBG) but transmission of the general conditions concerning non-business users and elimination of older copies;
- hiring rights remain at the provider (§ 27, 69 c No. 3 UrhG);
- no sublicenses by users;
- safety copies (§ 69 d par. 2 UrhG) are imperative concerning software; and
- restriction of error correction and de-assembling is illegal (§ 69 d par. 1, 69 e UrhG) if there is no own support of the provider.

## VI. MEANS OF PAYMENT WITHIN THE ELECTRONIC BUSINESS

On the German Internet the credit card, the direct debiting and the payment on account are the most widespread means of payment.

The advantage of the credit card is that it lends itself as an international means of payment even for international transactions. Its advantage for the seller is that the credit card company makes a payment guarantee so that he does not primarily need to rely on the credit solvency of his client. But the client can easily cancel payments by credit card so that his risk is kept within reasonable limits. Security problems arise when data is transmitted unprotected over the Internet so that it can easily be intercepted and read. Therefore, SET (Secure Electronic Transaction)<sup>43</sup> has been developed, which

<sup>43</sup> <[www.setco.org/](http://www.setco.org/)>.

makes a ciphered form of data transmission possible as well as the identification of the persons who participate in this transaction through digital signatures and certificates. SET is a worldwide standard for payments by credit card on the Internet and serves to protect the credit card data while transmitting it on the Internet. The number of credit card issuers and sellers who offer SET-protected payments, is still increasing.<sup>44</sup> Contrary to other protocols that decipher the transmitted data stream, like for example SSL (Secure Socket Layer), SET is still a platform-tied solution.

In the direct debiting the seller gives electronically the authorisation to collect the invoice amount per direct debit from the current account of the client. A disadvantage of this procedure is that the seller does not have a proof for the direct debiting authorisation because it requires the personal signature of the client. According to the direct debiting agreement between the credit economy and the industry this form of proof is compelling; an electronic document is not sufficient.<sup>45</sup> A further element of uncertainty for the seller is that the client can make a contra-entry of his direct debit within six weeks without any problems. The direct debiting is not suitable for international transactions because in this form it is restricted to home transactions.

Concerning the account delivery it has to be considered that the seller takes the risk of the credit solvency of the client and his willingness to pay, because the delivery of goods goes first in relation to the payment. Without additional possibilities to prove the identity of the client and the authenticity of the order – for example through the application of digital signatures and certificates – this form of payment is not the best possible for most Internet-sellers.

Systems that make the payment on the Internet per chip card (for example money cards<sup>46</sup> or Mondex<sup>47</sup>) or net money (for example E-cash<sup>48</sup>) possible, are continuously in the development but so far have not been used in practice. A relatively new offer that will probably lead to an acceptance of the payment systems, is to offer the E-cash software in connection with a credit card.<sup>49</sup> Also systems are in the development, which make so-called

<sup>44</sup> Compare for example <[www.mastercard.com/shoponline/set/bycountry.html](http://www.mastercard.com/shoponline/set/bycountry.html)>; <[www.eurocard.de/online-shop-ping/nachweis/set\\_nachweis.html](http://www.eurocard.de/online-shop-ping/nachweis/set_nachweis.html)>; <[www.visa.com/nt/ecom/shopping/set\\_merchants.html](http://www.visa.com/nt/ecom/shopping/set_merchants.html)>; <[www.visa.de/ks/karten/partner.html](http://www.visa.de/ks/karten/partner.html)>.

<sup>45</sup> Hoeren/Sieber/Werner, 13.5, marginal note 39.

<sup>46</sup> See <[www.sparkasse.de/ecommerce/](http://www.sparkasse.de/ecommerce/)>, there also information to SET.

<sup>47</sup> <[www.mondex.com/](http://www.mondex.com/)>; Mondex is not available in Germany.

<sup>48</sup> <[www.ecashtechologies.com/](http://www.ecashtechologies.com/)>; <[www.deutsche-bank-24.de/ecash/](http://www.deutsche-bank-24.de/ecash/)>.

<sup>49</sup> <[www.deutsche-bank-24.de/g\\_konto\\_vahoo\\_card.html](http://www.deutsche-bank-24.de/g_konto_vahoo_card.html)>.

micropayments on the Internet possible; the most known examples are Millicent<sup>50</sup> and CyberCoin<sup>51</sup>.

The functional working of these forms of electronic money has been in detail described within literature.<sup>52</sup> Here, the further legal assessment will be restricted to net-money<sup>53</sup> and it will at first be referred to the pioneer-article of Escher.<sup>54</sup> The decisive turning point is the question if the legal nature of net-money is more a claim against the bank or some kind of a vested debenture bond (§ 793, 797 BGB). In the first case net-money would have to be treated parallel to the 'normal' assets in a bank; but then also the circulation ability of the net-money would be endangered because of the strict protection of good faith concerning the assignment of claims.<sup>55</sup> In the second case an assessment orientated to the law of property becomes the focus of attention according to which the net-money is a digital coin but can even be transferred pursuant to § 929 following BGB. However, this assessment goes wrong because net-money does not have the quality of a legal document and insofar the assumption of a vested debenture bond must be wrong.<sup>56</sup> Therefore, Escher proposes an analogous application of the regulations regarding bearer bonds and insofar speaks of 'bearer bond data', 'digitised bearer bonds' or rather 'value data'.<sup>57</sup> This analogous conclusion is at last justified for open systems, which admit a use of E-cash also outside a bank-referred test business. It corresponds to the analogous application of the property regulations regarding software made by the dominant opinion<sup>58</sup>, which is insofar only seen as a special case of digital information. But the situation is different for E-cash systems, which are now within the test business. There, a separate big bank 'gives' E-cash to certain chosen customers and afterwards 'cashes' it from the supplier. Following the legal classification of the money card,<sup>59</sup> the relation between the client and the bank is to be seen as a contract for services in the sense of § 675 BGB. The transmission of the digital 'coin' from the client to the seller implies a separate instruction of the client to the bank pursuant to §§ 665, 675 BGB to debit the E-cash account with a certain amount and to credit the amount to

<sup>50</sup> <[www.millicent.digital.com/](http://www.millicent.digital.com/)>.

<sup>51</sup> <[www.cybercash.com/](http://www.cybercash.com/)>.

<sup>52</sup> See especially Furch/Wrightson, *Cybermoney* (1997); Birkelbach, WM (1996), 2099; Ipekalla, ZBB (1996), 216; Escher, WM (1997), 1163pp.; Hoeren/Sieber/Werner, 13.5 primum; Gramlich, in: *Handbuch zum Internet-Recht*, pp. 103, 105.

<sup>53</sup> To this see the detailed considerations of Kumpel, WM (1997), 1037.

<sup>54</sup> Escher, WM (1997), 1163, especially 1180.

<sup>55</sup> See §§ 407, 409 BGB.

<sup>56</sup> To the missing quality of a legal document see also the comments below.

<sup>57</sup> Escher, WM (1997), 1173, 1181.

<sup>58</sup> See BGH, NJW (1988), 406.

<sup>59</sup> See Escher, WM (1997), 1179.

another account. The seller transmits this instruction as a messenger to the bank who confirms the cashing to the seller after an online-examination of the discounted 'coin-file'. With this declaration the bank makes an abstract financial obligation with the cashing seller. In the relation between the client and the seller E-cash can only be seen as a performance in full discharge of the obligation (§ 364 par. 2 BGB).

Regarding the application of regulations on public supervision of banking to net money it has to be noticed that within the scope of the 6. KWG-reform<sup>60</sup> net-money transactions have been integrated into the catalogue of § 1 KWG and as a consequence only banking houses are allowed to issue digital money (§ 1 No. 12 KWG; being enacted since 1 January 1998). According to the Directive of the European Parliament and the Council on the taking up, carrying out and Supervision of Transactions of E-money institutes, there will also be an issue of electronic money by non-banking houses in the future that will not have such strict requirements if it is restricted only to this field of activity. At the moment only E-cash falls under the term of net-money in the sense of § 1 No. 12 KWG; concerning Millicent the marketability is missing whereas SET is tied to deposit currency accounts. But the former rules concerning net worth and liquidity of the credit institutes can however be transmitted to net-money to secure a sufficient liquidity for the expenditure of net-money. As regards monetary law net-money cannot be seen as a legal instrument of payment in the sense of § 14 par. 1 BBankG and therefore interferes with the note monopoly of the *Deutsche Bundesbank*. The expenditure of net-money is not liable to prosecution pursuant to § 35 BBankG. Due to the planned elimination of the regulations concerning the safety fund, the question if the expenditure of net-money would lead to a reduction of the circulation of notes and coins, which would be dangerous for the safety fund policy, does not play a role any more. The '*Geldwäschegesetz*' that requires in §2 an 'adoption or submission of notes and coins' is not applicable to net-money either directly or analogously.

## VII. CONSUMER PROTECTION ON THE INTERNET

Questions of consumer protection play a special role regarding the utilisation of the Internet; especially the question of the extent to which regulations of the consumer protection law are applicable to electronic orders via E-mail.

<sup>60</sup> Art. 1 of the implementation of EC-Directive on the Harmonization of Banking and Security Supervision from 22 October 1997, BGBl. 1997 I Nr. 71, 2518 from 28 October 1997

### A. Questions of Legal Interference

Even with consumer contracts the applicable substantive law has to be determined first. The finding of the proper law of the contract follows Art. 27-37 EGBGB but with observance of the special consumer protection rules and the German Private International Law.

The UN Sales Convention will not be applicable according to Art. 2 lit. A CISG if the consumer transaction is recognisable for the seller. The recognisability may be missing if an employed person places an order with the E-mail address of his company, but the record should be for his private needs.

A choice of law is also admissible for consumer contracts and has to be considered primarily for the determination of the applicable law. Pursuant to Art. 29 par. 1 EGBGB this choice of law must not lead to the circumstance that the consumer loses the protection that is guaranteed by the imperative regulations of the state in which he has his habitual residence. Even if the application of foreign law is agreed the German consumer will be under the protection of the HWiG, the VerbrKrG and the AGBG (in future regulated in the BGB) when placing electronic orders.

The requirement is that it must be a consumer contract in the sense of Art. 29 par. 1 EGBGB, so that the purpose of the contract cannot be ascribed to the professional or industrial occupation of the client. Furthermore, it is partially – like in Art. 2 lit. A CISG – demanded that the contracting party must be able to recognise the purpose of the contract from the objective circumstances.

The contract must be made for rendering services or the delivery of movable goods. Moreover one of the alternatives listed in Art. 29 par. 1 No. 1-3 EGBGB must be given. Whereas No. 3 obviously cannot be applied to conclusions of contracts on the Internet, No. 2 could be pertinent from its wording. The case that the contracting party of the consumer or his representative has accepted the order of the consumer within his state of residence is regulated there. But the non-physical presence that exists only in the ability to recall a website is basically not sufficient. However, partially an acceptance in the home state in the sense of Art. 29 par. 1 No. 2 EGBGB will be affirmed if there is a clear home-business from the view of an average consumer, respectively if the seller makes use of a home-server.

Anyway No. 1 has to be taken into consideration for conclusions of contracts on the Internet, according to which there has to be an explicit offer or an advertisement within the consumer's state of residence before concluding the contract. The consumer must also have accepted the legal actions required for making contracts in this state. Basically it is demanded that 'advertisements' in the sense of Art. 29 par. 1 No. 1 EGBGB are aimed

at the consumer's state of residence. However, Internet supplies are normally not aimed at a special state but addressed to the whole world. On the other hand the address on the Internet is regarded as individual and it would also be contradictory if the provider did not have to be responsible for the international character of his medium. The risk to be subject to a huge number of legal systems (overspill-risk) must basically be taken by the person who makes use of a transnational medium. Therefore, it must be sufficient for the application of Art. 29 par. 1 No. 1 EGBGB that the Internet advertising at least aims at the consumer's state of residence.

But it is questionable whether the protective purpose of Art. 29 EGBGB can be transferred to Internet transactions. By No. 1 and No. 2 the passive consumer should be protected who stays within his home country and is contacted from abroad. But when making contracts on the Internet the consumer virtually proceeds abroad and insofar he becomes an active consumer. On the other hand the consumer physically stays within the state of residence and only reacts to the given supplies respectively the advertisements on a foreign website. Insofar the protective thought is also applicable to contracts made on the Internet.

If the parties did not make a choice of law the law of that state in which the consumer has his habitual residence is applicable to consumer contracts (Art. 29 par. 2 EGBGB). In this connection there are neither problems nor special features arising concerning contracts concluded on the Internet.

Until now there have been two special points of contact in addition to Art. 29 EGBGB within the area of consumer protection law: in Art. 12 AGBG and in § 8 TzWrG. Another special regulation was provided by Art. 12 II of the 'Fernabsatzrichtlinie'. Art. 29a EGBGB was enacted by the *Fernabsatzgesetz* on 30 June 2000, where all three consumer protective regulations based on the EU directives have been summarised. The former regulations of § 12 AGBG and § 8 TzWrG have been replaced by that.

Art. 29a EGBGB has to be considered *after* § 29 EGBGB, and namely independent from the question whether the scope of Art. 29 EGBGB has been opened. The recourse to Art. 29a EGBGB will only be obstructed if the third state law that has been agreed is applicable according to Art. 29 par. 1 EGBGB because it is more favourably compared with the law of the state of residence.

In contrast to Art. 29 EGBGB, which refers to the applicability of *all* consumer protective regulations, Art. 29a EGBGB only determines the applicability of norms that have been enacted by implementing consumer protection directives. These are listed in Art. 29a par. 4 EGBGB, but this list can be extended by the legislator if needed. Moreover the enumeration is organised 'dynamically': it is referred to the secondary legally relevant acts 'in their currently valid version'.

Like Art. 29 EGBGB, Art. 29a EGBGB only refers to factual situations where there is a *choice of law* in favour of the law of a state other than the home state. Factual situations to which the law of another state is applicable because of an objective point of contact are not included; they cannot be influenced by any of the parties to their favour, and therefore a special protection of the consumer is not necessary.

So Art. 29a EGBGB will be applicable if:

- the contract does not fall under the law of a member state or a contractual state of the EWR by operation of a subjective point of contact (that means choice of law) and
- the contract shows a strong connection 'with the territory of one of these states'.

If these requirements are fulfilled the judge has to apply the 'valid provisions to the implementation of the consumer protection directives' of that EU-state, respectively EWR-state, 'to which the contract shows a strict connection'. So that statute will be applicable to which the contract shows a special relation. The norms that are effective there, are complementary applicable to the norms of the contractual statute determined by choice of law.

Art. 29a par. 2 EGBGB provides guiding examples for a 'strong connection'. More important than Art. 29a par. 2 No. 1 EGBGB is Art. 29a par. 2 No. 2 EGBGB, which attaches a strong connection to the habitual residence of the consumer if he is within a EU or EWR-state. Problems arise if it is referred to the law of a member state where there has not been an implementation of the Directive yet or where a secondary legally relevant act has been implemented within time but not correctly. If Art. 29a par. 1 EGBGB leads to an application of the law of a member state, which does not correspond to the Directive, the German judge has to try to interpret this law in conformity with the Directive. If this is not possible the consumer may file a state action against the tardy member state.<sup>61</sup> According to the EEG law the user of the law must not restrict the determined consequences in Art. 29a par. 1 EGBGB and enforce the German *lex fori* by recourse to Art. 34 EGBGB.

## B. *Verbraucher kreditgesetz* (Consumer Credit Act)

The '*Verbraucher kreditgesetz*' (VerbrKrG) from 17 December 1990<sup>62</sup> is effective for:

<sup>61</sup> Staudinger, RfW (2000), pp. 416, 417.

<sup>62</sup> BGBl. I, 2840.

- credit contracts, for example loans for consumptions, debt deferrals and other financing aids (§ 1 par. 2 VerbrKrG),
- with natural persons, unless the credit is determined for an already carried out commercial or independent profession (consumer within the sense of § 1 par. 1 VerbrKrG),
- if the credit or the cash price is not higher than 400,- DM or if a debt deferral of more than three months is granted (§ 3 No. 1 and 3 VerbrKrG).

In the future, that means after the commencement of the 'Schuldrechtsmodernisierungsgesetz' on 1 January 2002, the 'Verbraucher Kreditgesetz' will be found in the BGB (§ 481 following BGB-RE).

These transactions can only be taken into consideration in two forms on the Internet. On the one hand, it is considerable to make loan agreements via electronic mail. But this is seldom at the moment. The conclusion of instalment contracts is more interesting. Indeed electronic mail-order companies also offer, for example by a virtual mall, instalment credits. If they merely relied on the exchange of E-mails these agreements would be void. These transactions must be in a written form, that means they must be personally signed by both parties according to § 126 par. 1 BGB. The electronic signature does not fulfil these requirements – even not by meeting the above-mentioned requirements for digital signatures (§ 492 par. 1 BGB-RE). Therefore, the attempt to make loan agreements would be doomed to failure when applying the VerbrKrG (§ 494 par. 1 BGB-RE). However it has to be noticed that the non-compliance with the required form will be cured by delivering the goods respectively by taking the credit (§ 6 par. 2 and 3 VerbrKrG; § 494 par. 2 BGB-RE). In these cases the contractually agreed rate of interest will be reduced to the legal rate of interest (§ 6 par. 2 and par. 3 VerbrKrG; § 494 par. 2 BGB-RE).

As for the rest § 4 VerbrKrG will not be applied if:

- the Internet supply deals with the delivery of goods or the production of other results;
- the consumer makes his offer on the basis of a sales catalogue;
- the catalogue contains cash and instalment, amount, number and maturity of the different part payments as well as the annual percentage rate; and
- the consumer could take note of the sales catalogue (§ 8 par. 1 VerbrKrG, 'Versandhandelsprivileg' (direct mail selling privilege)).

It is decisive whether the homepage can be seen as a 'sales catalogue' within the sense of the regulation. An according of equal status of electronic and print media has been denied for the interactive videotex area. For this the existence of a publication would be necessary which must always be

available for the consumer and which cannot be modified by the creditor alone afterwards. With the interactive videotex, modifications like these are technically possible at any time without the knowledge of the consumer, so that the basis of the evidence would be missing.<sup>63</sup> Others consider both forms of publications equivalent.<sup>64</sup> They gear to the fact that the probative value – similar to the general conditions of trade on the Internet – can be produced on the fixed disk by printout or storage.<sup>65</sup> However, the new regulation of § 8 VerbrKrG has to be noticed. Pursuant to this revised text the important thing is that the required provisions in § 4 par. 1 VerbrKrG must be available on a durable medium. The characteristic of a durable medium would only be fulfilled if the data has been received by the consumer through a document or any other form that can be read (§ 361 par. 3 BGB). But this might only be the case with the complete transmission of the data at least per E-mail.

In the future, the direct mail selling privilege will be found in § 502 par. 2 BGB-RE. Pursuant to this, the requirement of the written form will not be effective for instalment transactions within distance selling if the necessary data is not available for the consumer on a durable medium, so that he can take note of the data before making the contract.

The consumer's right of revocation is also important. According to § 7 par. 1 VerbrKrG (§ 495 par. 1 in connection with § 355 BGB-RE) the consumer has the right to revoke his declaration of intent within one week (in future two weeks) by writing (or pursuant to the new law also on another durable medium). The time period is only starting if the consumer has received information about his right of revocation, which he has to sign separately. If correct information is missing the client will have the possibility of revocation within one year (new law: 6 months) after making his declaration (§ 7 par. 2 VerbrKrG; § 355 par. 3 BGB-RE).

Certain regulations of the 'Verbraucher Kreditgesetz' are also effective for recurring obligations to buy besides the credit contracts (§ 2 No. 3; § 505 BGB-RE), for example concerning magazine subscriptions or within the scope of a club membership. They must also be agreed in writing; but the interference of this formal requirement does not lead to nullity. One of the most important norms in this area is the right of revocation (§ 7 VerbrKrG) and the direct mail selling privilege (§ 8 VerbrKrG). Especially the decision

<sup>63</sup> See to the AbzG Brinkmann, BB (1981), 1183, 1188; Micklitz, NJW (1982), 263, 267. To the VerbrKrG MünchKomm/Ulmer (3<sup>rd</sup> ed., 1995), § 8 VerbrKrG marginal note 7.

<sup>64</sup> Soergel/Hönn, (12<sup>th</sup> ed., 1991), § 1a AbzG, marginal note 58; Waldenberger, BB (1996), 2365, p. 2369.

<sup>65</sup> Like this also LG München, decision from 25 May 2000, ZUM (2000), 775.

of the *OLG München* in the matter of 'Bunte' has to be considered.<sup>66</sup> The court concluded from the application of § 8 VerbrKrG to subscription contracts that the provision of the necessary consumer information on a durable medium would be sufficient. But a 'durable medium' would have to be interpreted in that way that the information must be available for the consumer as long as he needs to take note of the given data before placing his offer. It would not be necessary that the information is available after placing the order. Therefore, the consumer must only be able to recall the information from the homepage of the company to make it visible on his screen as long as he needs the information.

### C. Das Fernabsatzgesetz (Distance Selling Act)

Since 1992 the European Commission has been planning a directive on the consumer protection within distance selling. After first drafts<sup>67</sup> a Common Standpoint<sup>68</sup> was determined by the Council on 29 June 1995. Under consideration of 31 suggestions for alterations<sup>69</sup>, which were made by the European Parliament, the Directive was passed on 20 May 1997.<sup>70</sup> For implementing the Directive, the Federal Ministry of Justice published an implementation draft<sup>71</sup> for the so-called 'Fernabsatzgesetz' with a detailed explanation at the beginning. On that basis the 'Fernabsatzgesetz' was enacted on 9 June 2000.<sup>72</sup> The Act became effective on 1 July 2001. Thus far there has been a failure to observe the time limit for the implementation provided by Brussel, which is a failure that can be attributed to the 'Börsenverein des Deutschen Buchhandels'. This association noticed at the last minute that a right of revocation concerning books might cause difficulties for the publishing trade. The late implementation could lead to a liability of the *Bundesrepublik* but that might not play a role within practice because of the small overshooting of the deadline. Meanwhile there have

<sup>66</sup> Decision from 25 January 2001, NJW (2001), 2263 with annotation Lorenz, NJW (2001), 2230 = ZIP (2001), 520 = ZUM (2001), 436 = CR (2001), 401 with annotation Mankowski.

<sup>67</sup> Abl. EG Nr. C 156 from 23 June 1992, 14; Abl. EG Nr. C 308 from 15 November 1993, 18.

<sup>68</sup> Abl. EG Nr. C 288 from 30 October 1995, 1 = EWS (1995), 411.

<sup>69</sup> See to this EuZW (1996), 131.

<sup>70</sup> Directive 97/7/EG of the European Parliament and the Council from 20 May 1997 on Consumer Protection concerning Contracts on Distance Selling, Abl. Nr. L 144/19 from 4 June 1997.

<sup>71</sup> Draft bill from 31 May 1999, available on the Internet under <www.bmj.bund.de/download/fernag.doc>. See also Waldenberger, K & R (1999), 345.

<sup>72</sup> Gesetz über Fernabsatzverträge und andere Fragen des Verbraucherrechts sowie zur Umstellung von Vorschriften auf Euro from 27 June (2000), BGBI. I, 987.

been a lot of articles within literature on the 'Fernabsatzgesetz',<sup>73</sup> a legal system which has not been specifically designed for the Internet but also for telephone transactions or tele-shopping.

A further modification will be made by the 'Schuldrechtsmodernisierungsgesetz'. By this the regulations of the 'Fernabsatzgesetz' will be transferred into the BGB (§ 312 b-d BGB-RE) without making modifications. The respective regulations of the ministerial bill of the *Schuldrechtsmodernisierungsgesetz* are therefore added in brackets.<sup>74</sup>

The applicability of the 'Fernabsatzgesetz' is restricted to the conclusion of contracts under the exclusive utilisation of communication techniques. One of the contractual parties must be a consumer in the sense of § 13 BGB. The other party must act within the scope of a distribution or service system (§ 1 par. 1; § 312 b par. 1 BGB-RE). Included in these communication techniques defined in § 1 par. 2 (§ 312 b par. 2 BGB-RE) are traditional distribution methods like catalogues and mail order businesses as well as modern forms like E-mail sale, distribution on the Internet, tele-shopping and the like.

An application to financial services is excluded (§ 1 par. 3 No. 3; § 312 b par. 3 BGB-RE). However, there is no reason to release bank houses and insurance companies from consumer protection. Something different is effective for online banking and further financial services. Especially in this area of direct banking, consumers make a lot of transactions, which also have an economically high value. It is unclear why the consumer should be unprotected in this area. The Commission noticed that very fast after it committed itself within the scope of an additional agreement to the 'Fernabsatzrichtlinie' to examine the legal situation in general. Therefore, this gap has been rightly closed by the draft directive on consumer protection concerning financial services. Its second draft is already being discussed now (see below). This draft takes up the structural elements of the Directive on Distance Selling. Because of this, the information duties and revocation rights are also effective within the area of the credit and insurance economy. Even if there can be found different nuances in detail – for the financial services sector the provisional farewell from Distance Selling Law has been a lobbyist victory. As for the rest it has to be noticed that the 'Fernabsatzrecht' will of course be applicable if credit institutes pursue online shops.

<sup>73</sup> See Fuchs, ZIP (2000), 1273; Härtling, CR (1999), 157pp.; Härtling/Schirmbacher, MDR (2000), 917; Kamanbro, WM (2000), 1418; Micklitz/Reich, BB (1999), 2093pp.; Roth, JZ (2000), 1013pp.; Schmidt-Räntsch, ZBB (2000), 344; the same author, VuR (2000), 427pp.; Tonner, BB (2000), 1413pp. and others.

<sup>74</sup> See Micklitz, EuZW (2001), 133pp.

## D. Directive on Financial Services

The Directive on Financial Services is not effective for online-banking and the conclusion of insurance contracts on the Internet. This is a consequence from Art. 3 par. 1 and appendix II of the Directive which exclude documents of value and banking services from the scope of application of the Directive. However, a protocol explanation of the Commission has been added to the Directive in which the Commission obligated itself to examine 'how the consumer protection can be integrated into financial service politics and other regulations in this area'. This explanation can be seen as a hint to the fact that the exclusion of banking services from the Directive had already been the object of controversial discussions before the passing of the final text. Indeed it is questionable why a consumer should not get the same protection for these services as for other online-supplies. These doubts are all the more effective as the observance of the regulations would not have been very difficult for the credit institutes.

The European Union has taken the necessary steps out of these doubts. Meanwhile, the Union has planned a separate directive about consumer protection regarding financial services on the Internet; the first suggestion dates from 23 July 1999.<sup>75</sup> Meanwhile, this text has been changed twice, the last time on 12 February 2001.<sup>76</sup> But it is still controversial whether the Directive should cause a full or minimum harmonisation. The applicable law and the jurisdictional venue are still unclear; the European states of the south demand the determination of the principle of referring to the consumer's place of residence. Because of this reason everyone takes into account that the directive will never be passed. But this, however, will lead to relevant gaps of protection within consumer protection at least for the banking area.

### 1. Scope of Application and Information Model

An agreement on distance selling is every contract for which the offering, negotiating and the conclusion is made by communication techniques.<sup>77</sup> If only the offer has been placed on the Internet the afterwards traditionally concluded insurance contract will not fall under the planned directive. An essential element of the directive will be the information model. The consumer should find information about the company and its products on the home page of the insurer (Art. 3). If you take the planned E-Commerce

<sup>75</sup> KOM (1999) 385 endg. Concerning the first version see the draft directive on distance selling of financial services to consumers from 14 October 1998, KOM (1998), 468 endg., Abl. C 385 from 11 December 1998, p. 10.

<sup>76</sup> Dok. 598PC0468.

<sup>77</sup> See reason 12 of the Directive.

Directive additionally you will have a number of more than 50 pieces of information which have to be found as compulsory specifications on the home page of the insurer. It is questionable whether the consumer will really be served with a fullness of pieces of information because an informational inundation can also be counter-productive for the consumer. In addition, some duties to inform seem to be formulated incorrectly, for example if the specification 'duration and effectiveness of the supply and the price' is made (Art. 3 par. 1 lit. E). In the case of an offer without obligation or an 'invitatio ad offerendum' duties like these do not make sense.

### 2. The 'Durable Medium'

The reference to 'durable mediums' also causes problems. Similar to the '*Fernabsatzgesetz*' the Draft Directive on Financial Services requires that the conditions of the contract and other relevant information have to be transmitted to the consumer 'on a durable medium' (Art. 3 a par. 1 and 2). But it is questionable how much durability can be required from a medium. So it is left unclear whether the transmission via E-mail would suffice for example. An availability of information does not seem to be sufficient because the draft expressly requires a transmission to the consumer.

### 3. Right of Revocation

The right of revocation embodied in Art. 4 of the Draft Directive might not be new. The consumer can revoke every financial service transaction made on the Internet. According to the respective national implementation he has a time limit of 14 – 30 days after the conclusion of the contract, respectively the handing over of the necessary information. In the area of the insurance business the length of the time limit might be dependent on the amount of the contribution and the currency of policy. If there are different regulations within the member states the company's place of business should be decisive. If the consumer makes use of his right of revocation the supplier will receive compensation for the financial services he has made up to that moment (Art. 4 par. 1) unless the consumer has not been sufficiently informed about his right of revocation (Art. 4 par. 2). This regulation corresponds to the legal provisions for example in the field of the insurance business. However, the formulation 'right of revocation' is problematic because it gives the (wrong) impression that the dispositive right that has been fit in here would not be a right of notice but a right of revocation in the sense of the provisions of the right regarding revocation of door-to-door and similar dealings.

Besides the Directive on Financial Services, the already existing duties to inform especially within online-jobbing have to be noticed. Section 31 par. 2 of the *Wertpapierhandelsgesetz* provides extensive duties to provide clarification for jobbing. It is problematic how they have to be fulfilled by Internet-Discount-Brokers. Because they only turn to well-informed and experienced investors without consultant services right from the beginning, in my opinion obligations to give information can be fulfilled by standardised consultation before the commencement of business. An individual consultation would contradict the basic thought of discount brokering to which the customer agreed of his own free will.<sup>78</sup> Furthermore attention must be given to the unresolved question to what extent alternative trade systems like securities trade systems are subject to the supervisory authority of stock markets and exchanges; to this, first recommendations have been made by the stock markets panel of experts since may 2001.<sup>79</sup>

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<sup>78</sup> Similar also Balzer, DB (1997), 2311, 2315.

<sup>79</sup> Recommendations by the stock markets panel of experts concerning the regulation of alternative trade systems, Frankfurt 2001, available under <[www.finanzplatz.de](http://www.finanzplatz.de)>. See also the Special Study of the Securities and Exchange Commission on "Electronic Communication Network and After-Hours Trading" from June 2000; <[www.sec.gov/news/studies/ecnafter.htm](http://www.sec.gov/news/studies/ecnafter.htm)>.