

Contracting in the Internet: German Contract Law and Internet Auctions

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[1] "One Click, one buy, delivery within 48 hours". Similar offers for goods of all kinds are common to the internet today. And yet, there is a great number of intricate problems involved with doing business in the internet. The uncertainties of doing business online have prompted an abundance on legislation, both on the European as well as the national level. Still, when turning to the courts for a clear doctrine of, say, the conclusion of contracts in the internet, there remains a considerable void. Cases addressing the question whether the fundamental contract rules apply to internet transactions have generally answered in the affirmative. But when the particularities of contractual governance in the internet are involved, the jurisprudence grows thin. In this respect two recent decisions by lower Courts in Germany that deal with the question of internet-auctions, merit closer attention. The *Landgericht* Münster's (Regional Court of the city Münster) ruling from the beginning of last year provoked considerable irritation and thereby illuminated how much the field remained in need of intensive judicial attention. In the same time period, the *Amtsgericht* Sinsheim (Local Court of the city Sinsheim) had simply affirmed conclusion of contract through an online-auction in a similar case. The decision of the Münster Court was recently overruled by the *Oberlandesgericht* Hamm (OLG [Higher Regional Court in the city Hamm]). The appeal of the OLG Hamm decision to the *Bundesgerichtshof* (BGH [Federal Court of Justice]) is still pending. Because of their importance to the rapidly growing internet market place and the largely unresolved questions regarding contract law in that realm, the *Landgericht* Münster and OLG Hamm decisions merit attention, especially in anticipation of the BGH's ruling on the issues they raise.

[2] In the case, first before the *Landgericht* Münster, a private buyer participated in an internet auction hosted by an online auction company called *ricardo.de* AG. *ricardo.de* sells its products through the internet and brokers deals over the internet for other sellers. The firm's auction services allow the seller to set a fixed, starting price. Offers coming in below the fixed, starting price are automatically be excluded. The auction runs for a specific time frame and the final and highest bid at expiration of the fixed period takes the goods. The successful bidder will be notified of the purchase. The auction's rules, thus, foresee that a binding contract results from the offer/bidding process, provided that the set conditions are met (expiration of the fixed time frame and purchase going to the highest bid). There is no discretion on the side of the seller to reconsider his/her offer once these terms are fulfilled. The auction's standard terms stipulate that posting merchandise on the internet site serves as an *invitatio ad offerendum*, i.e. an invitation from the seller to the potential buyer to make an offer. The auction's terms, however, go further and require the seller to accept that, by posting his/her merchandise, he/she *accepts* the highest bid made within in the determined time frame. The seller is informed of these procedural rules through the auction's standard terms, which are posted at and can be reached by internet-site links at the auction's internet site.

[3] In the case before the Münster Court, the buyer entered a bid on a Volkswagen Passat automobile, offered for sale through the auction's internet site by a car dealer. Invitation for bidding was to start at the very low fixed minimum of DM 10. The buyer received an email congratulating him, at the conclusion of the fixed time frame, on his acquisition of the car for a price that was about 50% below the list price. When approaching the seller for delivery, the seller moved to refute the buyer's claim arguing that no contract had been concluded. First, the seller argued that neither an offer nor an acceptance had been declared from its side. Second, the seller argued that if posting the car for sale in the internet auction was to be regarded as an offer, and not merely as an *invitatio ad offerendum*, it would rescind the contract for having been erroneous in this respect.

[4] The *Landgericht* Münster accepted the seller's arguments, holding that the declaration made by the seller in the internet could not be regarded as an offer in the meaning of the controlling provision of the *Bürgerliches Gesetzbuch* (§ 145 BGB [German Federal Civil Code]). For a declaration to be considered an offer under § 145 BGB, it must have such definitive clarity and completeness as regards the *essentialia negotii*, i.e. the essential terms of the potential agreement, that the receiver of the declaration can reach the contract's conclusion by a simple "yes". In other words, the seller's declaration must be sufficiently comprehensive as to the contract matter as to allow the contract's conclusion by simple affirmation from the potential contracting partner. The Münster Court denied the binding character of the seller's declaration regarding the Passat automobile because, the Court concluded, neither the price nor the buyer were identifiable. The Court dismissed the buyer's argument that the specific terms of the *ricardo.de* auction fulfilled these elements of a potential contract. Instead, the Court understood the seller's declaration as being only an invitation towards interested parties to make an offer. The Court's ruling must be seen in the context of German law governing auctions (§ 156 BGB), which stipulates that no contract is concluded until the auctioneer declares that the bidding has been successful and that the bidding process has closed. In the present circumstances, involving an internet auction, the auction waived this provision with those portions of its standards terms that establish that sale of merchandise posted is accepted at a price equaling the highest bid at the time end of the fixed time frame. As a consequence, the Court could not rely on § 156 BGB to provide the seller with the discretion to participate after the final bid has been entered. The seller, when posting an item of merchandise through the auction's

services, accepts the auction's standard terms and is in consequence bound by them.

[5] The Münster Court effectively based its decision on an out-right denial of the existence of a binding offer by the seller. Holding that posting the merchandise on the internet auction was only an *invitatio ad offerendum*, the Court characterized the bidding as a series of offers. The Court then sought to determine whether the seller accepted any of the offers (bids) and concluded that the seller's *ex post facto*, outspoken protest over the transaction constituted a clear sign of the absence of an acceptance of an offer (bid). The Court held that the email received by the buyer from the auction did not have binding force for the seller. With regard to the auction's standard terms, the Court expressed doubt that posting merchandise through the auction constituted an eventual acceptance of a bid. The Court found that the seller had not given agreed to be bound to sell the posted car at the highest received bid. The Court found the auction's standard terms to be an *element* of the auctioning procedures for the seller, buyer (bidder) and auction but concluded that the stipulation, whereupon sales are concluded between the seller and the highest bidder at the close of the fixed time frame, was too abstract to qualify as an expression of the seller's specific intent regarding the sale.

[6] It is especially the Münster Court's dismissive approach to the auction's standard terms that begs further review and commentary. The standard terms clearly stipulate that posting merchandise on the auction's internet site means that the seller agrees to accept the highest bid within the fixed time frame, but the Court concluded that the wording of this stipulation must be interpreted in order to bring out the seller's intention. The Court found the standard terms to be too abstract to accomplish this. The Court also found the standard terms to fall afoul of the practice in the professional context. Illuminating the "usual expectations" among car sellers and buyers, the Court concluded that there was no possibility that the parties in the internet auction could have intended to enter into an agreement that was so substantially lower than the "normal list price". Without explicitly turning to the judiciary's power to exercise control over prices that are grotesquely inadequate and therefore violative of public policy, pursuant to § 138 BGB, the Court simply engaged in a consideration of the relevant business practices in which it found no support for the conclusion that the parties expected to be bound by such a substantially low price.

[7] The Münster Court's ruling was nothing less than a regression of contract law theory, essentially relying as it did on an effort to determine the will of the seller and the shortcomings of the auction's standard terms in accomplishing that objective. The decisive argument against the classic, so-called "will theory" of contract, which reigned in private law discourse until the end of the Nineteenth century, was that to dwell on the will of the parties to a contract would inevitably invite an unacceptable degree of arbitrariness and contingency. "Will theory" was abandoned for the currently controlling paradigm of "objective theory" of contract, which is dependent upon what came to be called the "sociological" approach to contract interpretation. The proponents of the "objective theory" of contract and the accompanying sociological approach to interpretation argued that an appropriate understanding of pre-contractual declarations, and thus an understanding of the contract itself, could only be reached when the circumstances surrounding the contracting procedure were considered. In its "interpretation" of the auction's standard terms in relation to the seller's participation in the auction, the Court actually reversed the turn from "will theory" to "objective theory" of contract law. The Court vaguely alluded to the circumstances of the contracting process while arriving at a conclusion that was more strongly tied to a consideration of the seller's intent and will.

[8] The difficulties with the case were clearly amplified by the fact that the seller is not the same entity as the auctioneer and that there is, therefore, no direct communication between seller and buyer. Rather, contracting between seller and buyer is mediated through the auction, which inevitably complicates the interpretation of both seller's and buyer's (bidder's) declarations. Nevertheless, the seller, while using the auction's services for the promotion of its merchandise, did accept the auction's standard terms which clearly state that the seller agrees to the conclusion of contract with the bidder who receives confirmation from the auction that his/her bid was successful. It is quite problematic that the Court decided to dismiss all of these "objective" circumstances and focus instead on the "will" of the seller regarding the relationship between the seller and the buyer (bidder). The novelty of an internet auction or an internet contract should not be blamed for the Court's inappropriate emphasis on the seller's "will". The problems related to the question of offer and acceptance with which the Court was confronted could be considered independent of the medium of the internet. Instead these problems appear to be taken out of the standard repertoire of contract law and, especially, the field of standardized contracts. Even the latter regime (standardized contracts) may reach too far into a specific sub-set of contract law, considering the generality of the questions the case presented. The Münster Court itself found that the matter had nothing to do with the standard terms of the auction, let alone their binding character for the auctioning procedures.

[9] Nor did the contract's "auction" status make the case any more conceptually difficult, as the Münster Court carefully avoided all reliance upon the legal regime concerning auctions. In doing so, the Court lost an opportunity to illuminate an intriguing debate that originated in the Nineteenth Century, which dealt with the question whether the auctioneer's declaration that the bidding had been successful resulted in the conclusion of a contract or whether, in spite of the conclusion of the auction, the seller retained some discretion to accept or reject the last bid. While the

Court failed to engage this debate, which finds its (partial) resolution in § 156 BGB, it none the less raised a number of related questions. The Court appeared to have been somewhat blind to this context and the dispositions actually made by the parties.

[10] Considering the generally unsatisfactory resolution of the case by the *Landgericht* Münster, it was encouraging that the *Oberlandesgericht* Hamm reversed the lower court's decision. The decision by the OLG Hamm took an altogether different approach to the questions raised by the *Landgericht*. The Court connected its inquiry into the offer-and-acceptance problematics with a close analysis of the auctioning service provided by *ricardo.de* and the governing standard terms. This analysis avoided the lower court's free-flying interpretation of what might and might not have been the seller's intention when posting the car for auction on the internet site. Instead, the Court surveyed the spectrum of possibilities, chances and risks involved with the auction and addressed these eventualities as issues the seller was responsible for confronting. This perspective seems to be far more apt to bring out the conflicting interests and expectations that determined the various participants' choices in the course of the auction.

[11] The Court's evaluation of *ricardo.de*'s standard term, which stipulates that the seller is bound to accept the highest bid at the expiration of the fixed time frame, placed appropriate emphasis on the mechanism the seller had to consider before placing its merchandise on the auction platform. The term itself, the Court found, does not create an inadequate shift of risks to the detriment to the seller, as the seller is free to accept this process or to choose an alternative way of bringing its merchandise to the market. The Court gave special consideration to the specific "nature" of an auction. The Court held that in the context of an auction, the seller has wide discretion to influence the auction's process by setting a starting, minimum price for the car, and by determining the bidding steps as well as the auction's fixed time frame. The Court accepted that the seller, in choosing the auction as a means of promoting or actually selling its product, runs the risk of selling at less than what it might have hoped for. This fact, the Court concluded, cannot be understood as a problem of fair pricing. The Court held that such a view ignores the particular quality of the auction mechanism as a market tool. The Court explained that an auction holds such risks for the seller (sale at a less than desirable price) but presents a number of opportunities for the seller as well. The Court reasoned that an auction's process results in the strong likelihood that a price is achieved that is not a reasonable assessment of what might be fair and adequate price but, rather, reflective of the energy associated with the bidding activity that so often attends auctions. With regard to this bidding process and its possibly special dynamic in the internet, where bidders simultaneously learn about other bids and make new bids through the internet itself, the advantages to the seller might even be greater. Certainly, the seller has the advantage of a much larger possible market at an internet auction than at any previous auction. The Court concluded that, this speculation is the seller's responsibility when put before the alternative of advertising or auctioning. The Court, therefore, saw no reason to interpret the auction's standard terms (in a manner at odds with their plain meaning) as providing the seller with a discretionary emergency break.

[12] The Court, taking this approach rightly rejected any allusions to a "just price" analysis. It did so by illuminating the circumstances that influence the parties' choices at the time they chose the contracting process and by showing that the seller was neither misled nor coerced. With this approach the Court relied on the cornerstones contract law such as private autonomy and responsibility. While there are skeptical voices in the scholarly literature as to the OLG's chances of survival before the *Bundesgerichtshof*, it appears an easy task to affirm the Hamm Court.

For more information:

Directive of the European Commission „e-commerce": http://europa.eu.int/comm/internal_market/en/media/eleccomm/2k-442.htm

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