

Internet-Auctions versus Consumer Protection: The Case of the Distance Selling Directive

By Gerald Spindler*

A. Internet Auctions, Consumer Protection and the BGH's *eBay* Decision of 3 November 2004

It has long been disputed whether a consumer under the Distance Selling Directive¹ has the right to revoke a contract concluded as the result of an Internet auction. There is no doubt that contracts concluded by means of electronic trading platforms are to be qualified as distance selling contracts if there is a business-to-consumer-situation.² Hence, at first glance, contracts entered into in the course of an Internet auction should be treated in the same manner so that consumers may exercise their right to revoke the contract. On the other hand, a right to revocation would hamper significantly an Internet auction because this form of trading depends on its character as a game and, thus, on the finality of the resulting contracts. If buyers are enabled to revoke their contracts after the end of an auction there would be no risk for a buyer in making the highest possible bid, thus rendering the auction a farce.

According to German law, in particular sec. 312d para. 4 No 5 of the *Bürgerliches Gesetzbuch* (BGB – German Civil Code), the right to revoke does not apply to auctions. Nevertheless, it has been unclear whether this exemption applies also to electronic or Internet auctions as sec. 312d paragraph 4 No. 5 BGB refers to sec. 156 BGB

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¹ EC Directive 97/7 of 20 May 1997, O.J. 1997 L 144/19, available through: http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/index_en.htm

² Article 2 para (1) of the Directive (97/7/EC) contains the following definition: “(1) ‘distance contract’ means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded;”

which regulates only real (live) auctions. Contracts, however, which are concluded by means of an Internet auction, do not fit into the scheme of sec. 156 BGB because the predominant opinion in Germany, including the jurisprudence of the *Bundesgerichtshof* (BGH – German Federal Court of Justice) qualify the offer of the seller as binding with the contract automatically concluded after the end of the auction without the requirement of any acceptance of the bid declared by the auctioneer.³

Consequently, in November 2004, the BGH ruled that a consumer buying from a business in an auction at the eBay marketplace is granted a right to revocation under secs. 312d and 355 BGB.⁴ The judgment had been long awaited as a landmark in E-Commerce Law since the issue of consumer protection for contracts concluded by means of an Internet auction was highly disputed.⁵ Whereas the decision of the BGH clarifies for practice an important issue, the reasoning of the Court can not be accepted. The Eighth Senate, in an unusual way, totally ignores the practice of lower courts⁶ as well as the ongoing debate in the law reviews.⁷ In the remainder of

³ *Bundesgerichtshof* (German Federal Court of Justice - BGH) in Zivilsachen, Amtliche Sammlung (BGHZ) 149, 129, 133 = *Neue juristische Wochenschrift* (2002), 363; Amtsgericht Itzehoe, Urt. v. 18.5.2004 – 57 C 361/04 *Computer und Recht* 2004, 705, 706; Andreas Wiebe, in: Gerald Spindler/Andreas Wiebe (eds.), *Internet-Auktionen und elektronische Marktplätze*, 2nd. ed. 2005, chapter 4 No 27 ff.; Gerald Spindler, *Vertragsabschluss und Inhaltskontrolle bei Internet-Auktionen*, *Zeitschrift für Wirtschaftsrecht* (ZIP) (2001), 809, 810; BGH, *Juristenzeitung* 2002, 506, 507 commented by Johannes Hager; Amtsgericht Bad Hersfeld, *Multimediarrecht* (2004), 500, 501 commented by Peter Trinks; Stephanie G. Hartung/Alexander Hartmann, „Wer bietet mehr?“ - Rechtssicherheit des Vertragsschlusses bei Internetauktionen, *Multimediarrecht* (2001), 278, 279; Tobias Hollerbach, Die rechtlichen Rahmenbedingungen für Internet-Auktionen, *Der Betrieb* (2000), 2001, 2006.

⁴ BGH Urteil v. 3 November 2004 – VIII ZR 375/03, available at: <http://www.jurpc.de/rechtspr/20040281.htm>.

⁵ Further details concerning legal aspects of Internet auctions cf. Gerald Spindler/Andreas Wiebe (eds.), *Internet-Auktionen und elektronischen Marktplätze*, 2nd. edition 2005.

⁶ A right to revocation was granted by Landgericht Hof, Urt. v. 26.4.2002 – 22 S 10/02 *Multimediarrecht* 2002, 760; Landgericht Konstanz, Urt. v. 28.7.2004 – 11 S 31/04 E, *Computer und Recht* 2004, 862 (Ls.); Amtsgericht Kehl Urt. v. 19.4.2002 – 4 C 716/01 *Neue juristische Wochenschrift – Rechtsprechungs-Report* (2003), 1060; Amtsgericht Itzehoe, Urt. v. 18.5.2004 – 57 C 361/04 rkr. *Computer und Recht* 2004, 705; Amtsgericht Schwäbisch Gmünd, Urt. v. 23.7.2002 – 8 C 130/01; it was refused by Amtsgericht Bad Hersfeld Urt. 22.3.2004 – 10 C 153/04 (70) rkr. *Computer und Recht* 2004, 625 (nur Ls.) = *Multimediarrecht* 2004, 500 commented by Peter Trinks; Amtsgericht Osterholz-Scharmbeck, Urt. v. 23.8.2002 – 3 C 415/02.

⁷ Accepting: Walter Erman/Ingo Saenger, *Bürgerliches Gesetzbuch – Kommentar*, 11. ed. 2004, § 312d Rn. 28; Peter Trinks, *Multimediarrecht* 2004, 500, 501 f.; Kaestner/Tews, *Informations- und Gestaltungspflichten bei Internet-Auktionen - Teil 2, Wettbewerb in Recht und Praxis* (2004), 509, 510; Hanno Teuber/Michael Melber, "Online-Auktionen" - Pflichten der Anbieter durch das Fernabsatzrecht, *Monatsschrift für Deutsches Recht* (2004), 185, 187 f.; wohl auch Otto Palandt/Helmut Heinrichs, *Bürgerliches Gesetzbuch*, 63. Aufl. 2004, § 312d Rn. 13; refusing: Heinz Georg Bamberger/Herbert Roth/Jürgen Schmidt-Räntsch, *BGB*, 2003, § 312d Rn. 33; *MünchKommBGB*/Christiane Wendehorst, 4. Aufl. 2003, §

this case note the judgment of the BGH is analyzed following the logic of the Court's reasoning.

B. The BGH's *eBay* Decision

I. Historical Interpretation

Whereas the wording of sec. 312d para. 4 No 5 BGB seems to be quite clear as it refers directly to sec. 156 BGB,⁸ the so-called historical interpretation, i.e. the statutory interpretation based on the legislative history, leaves ample room for uncertainty: the government draft of the *Fernabsatzgesetz* (distance selling act), which was meant to implement the Distance Selling Directive, excluded the right to revocation in the case of auctions without any restrictions, in particular without any reference to sec. 156 BGB.⁹ The government draft expressed clearly that a mandatory right to revocation would be inadequate for auctions by means of distance selling, especially concerning Internet auctions.¹⁰ While this intent seems to be quite transparent, what has provoked confusion is that the government draft refers to auctions which are concluded by means of a virtual acceptance of the bid.¹¹ It, thus, remains unclear whether the government draft really referred to sec. 156 BGB or to all forms of Internet auctions.

The reference to sec. 156 BGB had been introduced during the parliamentary debates only.¹² Contrary to the reasoning of the BGH this reference was obviously not meant as an exclusive interpretation of "auctions" but as a general reference. Instead, the committee of the parliament laid stress on the typical characteristics of Internet auctions which would be rendered impossible by a right to revoke such

312d Rn. 45; Jochen Hoffmann/Ulrich Höpfner, Verbraucherschutz bei Internetauktion, *Europäisches Wirtschafts- und Steuerrecht* (2003), 107 ff.; Stefan Ernst, *Vertragsgestaltung im Internet*, 2003, Rn. 799; wohl auch Thomas Wilmer, Rechtliche Probleme der Online-Auktionen, *Neue juristische Wochenschrift - Computerreport* (2000), 94, 103 f.; Jan Geert Meents, Ausgewählte Probleme des Fernabsatzgesetzes bei Rechtsgeschäften im Internet, *Computer und Recht* (2000), 610, 614.

⁸ Cf. Amtsgericht Itzehoe, Urt. v. 18.5.2004 - 57 C 361/04, *Computer und Recht* (2004), 705, 706.

⁹ Bundestagsdrucksache 14/2658, S. 33, available at: http://www.rws-verlag.de/volltext/14_2658_1.htm

¹⁰ Bundestagsdrucksache 14/2658, S. 33.

¹¹ Bundestagsdrucksache 14/2658, S. 33.

¹² Bundestagsdrucksache 14/3195, S. 30, available at: http://www.rws-verlag.de/volltext/14_3195_2.htm

contracts.¹³ Moreover, the committee held that a crucial element in auctions is the fact that the seller is bound by his or her declarations during the auction.¹⁴ However, this is true for traditional and for virtual auctions alike. Hence, the reasoning of the Eighth Senate, which refers mainly to a historical interpretation, is not very convincing.

II. Interpretation According to the Distance Selling Directive

On the other hand, the Distance Selling Directive does not provide a special interpretation of the concept "auction."¹⁵ The BGH refers to the fact that Annex I to the Distance Selling Directive, listing the means of communication covered by the Directive, does not mention the Internet; hence, the Court concludes that Internet auctions should not be encompassed by the Directive. This argument is more than dubious. The Annex lists as examples "electronic mail," "Videotext" and "Microcomputers" making it more probable that the Directive aims at the Internet as well.¹⁶ Moreover, the Annex is of an explanatory character and not meant to be exclusive. In addition, if one took the reasoning of the BGH for granted not only

¹³ Bundestagsdrucksache 14/3195, S. 30: „Wie die Bundesregierung ist auch der Ausschuss nicht der Auffassung, dass echte Versteigerungen im Fernabsatz, sei es durch Internet oder aber auch in anderer Form der Fernkommunikation, vollständig dem Fernabsatzgesetz unterworfen werden sollten. Denn insbesondere das Widerrufsrecht würde solche Versteigerungen unmöglich machen. Die Endgültigkeit des Zuschlags ist das Wesensmerkmal einer Versteigerung, das auch bei einer Versteigerung im Fernabsatz erhalten bleiben muss.“

¹⁴ Bundestagsdrucksache 14/3195, S. 30: „Der Ausschuss verkennt zwar nicht, dass diese Ausnahme deutlich weniger weit reicht, als dies meist angenommen wird (scil.: Versteigerungen). Die meisten sog. Internetversteigerungen sind nämlich keine Versteigerungen im Rechtssinne. Eine Versteigerung im Rechtssinne wird definiert in § 156 BGB als ein Vertragsschluss, bei dem das Angebot durch ein Gebot des einen Teils und die Annahme desselben durch den Zuschlag erfolgt. Behält sich der andere Teil die Annahme trotz Zuschlags vor, liegt keine Versteigerung im Rechtssinne vor. Es handelt sich dann vielmehr um einen Kaufvertrag gegen Höchstgebot, der auch nach dem Vorschlag des Regierungsentwurfs im vollen Umfang dem Fernabsatzgesetz unterliegt.“ Bundestagsdrucksache 14/3195, S. 30 f.: „Wie bereits zu § 1 Abs. 3 Nr. 7 Buchstabe c ausgeführt, gibt es solche Versteigerung in der Form der echten Versteigerung, bei der der Vertrag nach Ablauf der Bietfrist unmittelbar mit dem Meistbietenden zustande kommt, und als Kauf gegen Höchstgebot, bei dem der Vertrag nach Ablauf der Bietfrist nicht automatisch mit dem Meistbietenden zustande kommt. Vielmehr können sich Einlieferer und Versteigerer noch überlegen, ob sie den Vertrag zu diesem – unter Umständen unterhalb des Einstandspreises liegenden – Gebot überhaupt annehmen.“

¹⁵ Cf. Jochen Hoffmann/Ulrich Höpfner, Verbraucherschutz bei Internetauktion, *Europäisches Wirtschafts- und Steuerrecht* (2003), 107, 112; see, however, Tobias Lettl, Versteigerung im Internet - BGH, *NJW* 2002, 363, *Juristische Schulung* (2002), 219, 222

¹⁶ See Annex I to the Directive (97/7/EC), O.J. 1997 L 144/19, available through: http://europa.eu.int/comm/consumers/cons_int/safe_shop/dist_sell/index_en.htm

Internet auctions but as well every distance selling contract concluded through the Internet would lie beyond the regulatory scope of the Directive. This would be an obviously ridiculous conclusion.

However, the Directive contains a minimum harmonization only¹⁷ so that the German parliament was free to introduce a right to revocation for Internet auctions in order to provide for an even higher level of consumer protection than prescribed by the Directive.

Nevertheless, the Distance Selling Directive indirectly contributes some insights to our issue: the problems consumers have in assessing the quality of goods and the reputation of the seller before concluding the contract are giving rise to consumer protection concerns in distance selling, including Internet commerce.¹⁸ However, this dilemma is characteristic for all types of distance auctions, be it an Internet auction or a telephone auction. In the face of all of this, the EC provided a general exemption for auctions in the Directive.

III. Teleological Interpretation

Even if we take into account the intention of consumer protection in case of distance selling, the reasoning of the BGH is not very convincing. The Court again refers to the problems consumers have in physically inspecting the goods being sold.¹⁹ However, in consequence, every kind of distance auction should be treated in the same way, be it an auction in the sense of sec. 156 BGB or an Internet auction. It makes no difference for the consumer how the contract is being concluded.²⁰ Significant for the almost formal argument of the BGH is the fact that the Eighth Senate never clarifies which differences relating to consumer protection exist as between an auction as described in sec. 156 BGB and an Internet auction.

¹⁷ Article 14 of the Directive (97/7/EC) reads: „Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection.”

¹⁸ Recital No. 14 Distance Selling Directive, Begr RegE FernAbsG Bundestagsdrucksache 14/2658 S. 15; *MünchKommBGB*/Christiane Wendehorst, 4. Aufl. 2003, vor § 312b Rn. 4; Heinz Georg Bamberger/Herbert Roth/Jürgen Schmidt-Räntsch, *BGB*, 2003, Vor § 312b Rn. 1.

¹⁹ Following the BGH Amtsgericht Itzehoe, Urt. v. 18.5.2004 – 57 C 361/04 *Computer und Recht* (2004), 705, 706; see also Landgericht Memmingen, Urt. v. 23.6.2004 – 1H O 1016/04 *Computer und Recht* (2004), 850, 851.

²⁰ Cf. *MünchKommBGB*/Christiane Wendehorst, 4. Aufl. 2003, § 312d Rn. 46; Amtsgericht Bad Hersfeld, *Multimediarrecht* 2004, 500 commented by Peter Trinks.

The equivalence of Internet auctions and traditional distance auctions covered by sec. 156 BGB should have been crucial to the Court's reasoning regarding the degree of needed consumer protection. Consequently, there is no room for protecting consumers due to the psychological pressures during an auction.²¹ If we took this argument for granted the exemption of real auctions in sec. 312d para. 4 BGB is not comprehensible.²² Even the argument that real auctions (sec. 156 BGB) give bidders a chance to reflect upon their bidding cannot be accepted. The rule that the auctioneer waits until the final acceptance can be declared intends simply to enhance the probability of higher bids. A bidder cannot withdraw his or her bid once he or she has declared a will to purchase at the bid-for price. Hence, there is no time for "reflection," and no argument for consumer protection could be construed from this delay.

Moreover, the decisive argument against a right to revoke contracts concluded by means of an Internet auction is the conflict between speculative trading forms and consumer protection. A cooling-off period for contractors would seriously endanger any trade that has a speculative character.²³ It is not the bilateral situation between seller and buyer, which is characteristic for the typical distant selling business, but a competitive situation between multiple buyers and a seller. A right to revocation may provide incentives to free ride as bidders/buyers can bid without facing the danger of being bound by their bid. The seller would lose all advantages if a bidder could revoke his or her contract freely. The situation of the auction before the final bid can not be reinstated; the seller can not take resort to the next highest bid because the auction has already been terminated.²⁴

The conflict between consumer protection and speculation can not be solved by the doctrine governing contract revocation on the level of individual contracts; instead duties to instruct contractors beforehand are essential for all types of speculation in order to protect them from running too much risk. A good example for this type of regulation and protection of contractors is securities law. In that context, the protec-

²¹ So Bettina Heiderhoff, *Internetauktionen als Umgehungsgeschäfte*, *Multimediarrecht* (2001), 640, 642 ff.; Jan Kaestner/Nicole Tews, *Informations- und Gestaltungspflichten bei Internet-Auktionen - Teil 2, Wettbewerb in Recht und Praxis* (2004), 509, 511.

²² Jochen Hoffmann/Ulrich Höpfner, *Verbraucherschutz bei Internetauktion*, *Europäisches Wirtschafts- und Steuerrecht* (2003), 107, 111.

²³ See Heinz Georg Bamberger/Herbert Roth/Jürgen Schmidt-Räntsch, *BGB*, 2003, § 312d Rn. 33; Alexander Klein, in: Peter Bräutigam/Andreas Leupold (eds.), *Online-Handel*, 2003, B III Rn. 603 ff., 605.

²⁴ Jochen Hoffmann/Ulrich Höpfner, *Verbraucherschutz bei Internetauktion*, *Europäisches Wirtschafts- und Steuerrecht* 2003, 107, 110.

tion of investors is realized by general instructions about risks of speculation and investment and not by a right to revocation.²⁵

Nevertheless, there is a potential dilemma: German administrative law requires permission for real auctions according to sec. 34b *Gewerbeordnung* (regulation on commerce).²⁶ It is, however, commonly understood that the provisions of sec. 34b *Gewerbeordnung* can not be applied to Internet auctions as they require a physical inspection of goods to be sold or a real control of bidders and participants of an auction.²⁷ On the other hand, it is difficult to conceive how the notion "auction" should be interpreted in a different manner concerning sec. 34b *Gewerbeordnung* than is the case in sec. 312d para 4 BGB.²⁸ The principal argument upheld for the inadequacy of sec. 34b *Gewerbeordnung* was always the reference to the non-speculative (!) character of Internet auctions as participants have the chance to free themselves from the psychological pressure exercised by a group of bidders in a room. The contradiction in the different interpretations is obvious. One way out of this dilemma would be to lay stress on the different forms of protection. Whereas sec. 34b *Gewerbeordnung* aims at avoiding typical risks of speculation, the BGB intends to establish the parity between contractors. If information duties are being respected then it is difficult to see any reason why auctions should be regulated by application of sec. 34b *Gewerbeordnung*.

²⁵ References for instruction duties concerning securities in: Eberhard Schwark (ed.), *Kapitalmarktsrechts-Kommentar*, 2004, vor § 37d WpHG Rn. 52; Mülbert, in: Heinz-Dieter Assmann/Uwe H. Schneider (Hrsg.), *Wertpapierhandelsgesetz*, 3. ed. 2003, Vor § 37d Rn. 15.

²⁶ BGBl. I 202 v. 22. 2.1999 as amended by Art. 12 G v. 30. 7.2004 BGBl. I 2014: <http://bundesrecht.juris.de/bundesrecht/gewo/>

²⁷ Kammergericht, Urt. v. 11.5.2001 – 5 U 9586/00, *Multimediarrecht* 2001, 764, 765; Oberlandesgericht Frankfurt Urt. v.1.3.2001 – 6 U 64/00 *Wettbewerb in Recht und Praxis* 2001, 557 = *Multimediarrecht* 2001, 451, 451 f.; Ulrich Schönleiter, Internetauktionen sind keine Versteigerungen i.S.d. § 34b GewO (Bund-Länder-Ausschuss) *Gewbearchiv* (2000) 49; Bärbel Fuchs/Wilfried Demmer, Sitzung des Bund-Länder-Ausschusses "Gewberecht", *Gewbearchiv* (1997), 60, 63; Winfried Bullinger, Internet-Auktionen - Die Versteigerung von Neuwaren im Internet aus wettbewerbsrechtlicher Sicht, *Wettbewerb in Recht und Praxis* 2000, 253, 254 f.; Thomas Wilmer, Rechtliche Probleme der Online-Auktion, *Neue juristische Wochenschrift - Computerreport* (2000), 94, 101 ff., all with further references; dissenting Björn Gaul, Aktuelle Fragen zur Internetversteigerung, *Wertpapiermitteilungen* (2000), 1783, 1786 f.

²⁸ Marc v.Samson-Himmelstjerna/Daniel Rücker, in: Peter Bräutigam/Andreas Leupold, *Online-Handel*, 2003, B V Rn. 73 for sec. 312d Abs. 4 Nr. 5 BGB, Rn. 27, for § 34b GewO; Ulrich Gabriel/Jacqueline Rothe, Schnäppchen im Trend - Rechtsfragen der Veräußerung von Restposten in online-Auktionen, *Verbraucher und Recht* (2004), 212, 213 f.

C. Consequences in Practice for Internet Market Places

The consequences in practice can easily be guessed. First, there are scarce chances to circumvent the decision of the BGH by adapting the mechanisms of concluding a contract by means of an Internet auction. The only way to avoid the right to revocation would be to adopt the mechanism of sec. 156 BGB by installing a live auction via Internet. This is, however, inefficient (as regards time and money) and would reduce drastically the volume of trading as well as the advantages of an automatic auction. Other constructions could try to qualify the platform provider (e.g. eBay) as an agent of the seller who declares acceptance of the bid at the end of an auction.²⁹ However, this construction endangers the platform provider as it could be held liable for risks stemming from the contractual situation.³⁰

Second, incentives to misuse the right to revocation must be reduced. The risk of strategic behavior of bidders could be regulated by contractual duties in the platform contract so that each participant could claim damages. However, this is pure theory as consumers are not obliged to justify their use of the right to revoke a contract; moreover, evident misuse would hardly be realized by sellers as simultaneous bidding is a legitimate means to trade on an electronic platform.

Finally, there is great uncertainty about the criteria for contractors to be qualified as businesses or consumers. Hence, actually it is hardly conceivable for consumers whether their counterpart really belongs to the business community so that the right to revocation would apply – or not. Sec. 14 BGB, defining the term “business”, only requires a continuous and non-gratuitous activity.³¹ Thus, most participants of Internet auctions today could be qualified as business sellers/bidders. The problem in reality is how to realize whether other participants really fulfill these criteria. Crucial for this issue is the burden of proof in a civil proceeding. As the fact that the other party is a business person is favorable to the consumer it is under normal conditions up to the consumer to prove this fact.³² However, this is far from easy to

²⁹ Unclear Andreas Günther, *Widerrufsrecht bei Online-Auktionen*, *IT-Rechtsberater* (2003), 239.

³⁰ Cf. Gerald Spindler, in: Gerald Spindler/Andreas Wiebe (eds.) (supra note 2), chapter 5 No 8 ff. concerning the contractual liability of the platform provider.

³¹ Landgericht Hof, Urt. v. 29.8.2003 – 22 S 1425/03, rkr. *Computer und Recht* 2003, 854; *Münch-KommBGB/Hans W. Micklitz*, 4. Aufl. 2001, § 14 Rn. 12.

³² Landgericht Hof, Urt. v. 29.8.2003 – 22 S 1425/03, rkr. *Computer und Recht* 2003, 854; the burden of proof for an exemption under Sec. 312d para. 4 BGB is with the business, however: BGH, Urt. v. 19.3.2003 – VIII ZR 295/01 *Multimediarrecht* 2003, 463.

do. Hence, courts should limit the burden of proof for consumers,³³ e.g. by accepting that the proof of certain circumstances like the number of transactions of a seller shall suffice. The qualification of being a “power seller” in itself, however, would not be sufficient to shift the burden of proof as this indication depends upon the regulations of platform providers.³⁴

D. Conclusion

The judgment of the BGH cannot be accepted, neither concerning the outcome nor the reasoning. Nevertheless, practice must comply with the situation created by the judgment, apart from new legislative measures which could modify sec. 312d para. 4 BGB. In economic terms it is not useful to hamper Internet auctions, which provide for the first time in economic history a well organized market for used goods without excessive transaction costs.

³³ See Peter Mankowski, *Der Nachweis der Unternehmereigenschaft*, *Verbraucher und Recht* 2004, 79, 81

³⁴ Too restrictive Landgericht Hof *Computer und Recht* 2003, 854; Amtsgericht Detmold *Computer und Recht* 2004, 859