

Case note **Germany**

Case Nos **OLG Köln, 19 U 16/02; LG Konstanz, 2 O 141/01 A; AG Erfurt, 28 C 2354/01**

Name and level of courts **OLG Köln (Regional Appeal Court), LG Konstanz (Regional Court), AG Erfurt (Local Court)**

Dates of verdict **6 September 2002; 19 April 2002; 21 August 2001**

Available in electronic format at <http://www.jurpc.de/rechtspr/20020364.htm>; <http://www.jurpc.de/rechtspr/20020291.htm>; <http://www.jurpc.de/rechtspr/20020071.htm>

Brief facts

Each of the decisions addresses the question of the evidential value of declarations sent by e-mail. The defendants of the each of the three cases were asked to pay for items bought in internet auctions. The winning bids were received from e-mail accounts where the user can write e-mails on the website of the address provider, and each defendant had access to the address by means of a password. The defendants denied they took part in the bidding process.

Decision

All three cases were dismissed. It was not proven that a contract was concluded.

The Reasoning of the Court

The cases were dismissed, because the all the claimants failed to prove that the declarations were sent by the defendants, and consequently that a contract had been concluded. The judges decided further that there was no reason to shift the burden of proof. Both parties accepted the risks of internet communications. A presumption that the e-mails must have been sent by the defendants because their passwords were used to obtain access to the e-mail facilities did not apply, because there are many well known hazards of manipulation by third parties. For example, a password could be revealed by so called Trojan horse viruses. The judges argued that almost anybody could have sent the e-mails using the passwords and accounts of the defendants. Where such an e-mail account is used, the user is not necessarily liable for its use if a third party uses it without authority.

Comment

These cases confirm that an e-mail without a qualified electronic signature has almost no binding effect under German law. A contract concluded by e-mail without a qualified electronic signature is not convincing evidence, especially

where the purported sender denies authorship.

The claimants argued that the password protection could not have been broken, but this argument was not successful, as there were no security standards for passwords and even the provider of the accounts did not expressly guarantee the security of transmitted data in his general terms of business.

Another reason for the failure of such a presumption is that there is a legal presumption in § 292a ZPO (Civil Procedure Code) which requires a qualified electronic signature. Setting this requirement, it can be concluded that the legislator did not intend that a simple e-mail address should be presumed to be that of the owner sending the e-mail.

The evidential burden would only shift to the defendant where the claimant could prove that the defendant's computers had been used. The risk of unauthorised use of a computer at the home of the defendant lies with him, and the defendants would have had to prove that they did not send the e-mail. But the claimants did not try to use the header information to prove it came from the defendant, probably because it was not technically possible to show who used the e-mail accounts. As the court has to decide the case based on the arguments that the parties introduce into the procedure following German Civil Procedure law, the judges did not discuss this point.

Another way of creating liability would have been to claim that a third party using the e-mail address acts like a representative. For this to succeed it would have to be demonstrated that the defendants were aware of and tolerated the possibility that a third party could use their account, or that they set the conditions that somebody else could act for them. The courts denied both these arguments because they could not see that the defendants had created such an appearance.

Even in a case where it is highly unlikely that a third party would be interested in manipulating somebody else's e-mail account, the courts do not

accept the e-mail as sufficient evidence caused by the abstract possibility of manipulation (LG Konstanz 2 O 141/01 A).

Where the evidential value of the e-mail is low, the consequence is that the conclusion of a denied contract cannot be proven, and accordingly the contract cannot be enforced, although it is a fully valid contract, and can be likened to a verbal contract for example. It is obvious that this jurisdiction is an obstacle for electronic commerce. Otherwise there is no reason to shift the risk to the consumer. As the offerors decide not to use safer ways of internet communication, they have to accept the self-created risk.

German case notes reported by Michael Knopp, Researcher at provet, University of Kassel, Germany, German correspondent

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