Contracts

At the heart of e-commerce is the need for parties to be able to form valid and legally binding contracts online. In common, contracts can be concluded on the internet like in normal business life. A need for clarification is given in questions of conclusion of such contracts and formal contract requirements (such as the requirement of a written form).\footnote{\textsuperscript{1}}

Conclusion of e-commerce contracts

For a better understanding of special issues regarding e-commerce contracts it is necessary to recall the German standard civil law of conclusion of contracts.\footnote{\textsuperscript{2}} As mentioned before, there is no difference between contracting in normal business life and contracting on the Internet via e-commerce.

Conclusion upon mouse click, email or computerized explanation

Offer and Conclusion

An electronic formation of a contract requires two compulsory declarations of intent, called “offer and conclusion”. Sole advertisings or advertising like utterances are normally not seen as binding offers.\footnote{\textsuperscript{3}} This is why in general the “offers” on a website can only be seen as advertisements. The potential client makes an offer from his side by clicking on the advertisement or sending an email, stating that he is willing to buy a product or order a service. In cases of automatically running online services, without the involvement of people, a parallel to automatic vending machines is obtruding. This called computerized explanations, which are automatically generated and electronically sent with the help of a computing program, are declarations of intent in a legal way, because the program itself is based on a human decision, which can be seen as a declaration of intent.\footnote{\textsuperscript{4}} In this case, talking about e-commerce, the latest when the vendor asks the client to insert his credit card number (electronic payment) an offer is made. The offer is good while supplies last.

Problems in arrival

For electronic declarations of intent on the world wide web, as well as email communication, the principals for conclusions of declarations of intent amongst absenteees according to article 130 I 1 BGB apply. Therefore, according to article 147 II BGB, the time of arrival in the recipients’ sphere of influence and the time of notice under normal circumstances is important to know. Merely under the circumstances that the electronically used form of communication creates a situation equal to a face to face conversation (e.g. chats)\footnote{\textsuperscript{5}}, the principals for conclusions of declarations of intent amongst attendees apply. In this case a declaration of intent becomes operative at the time the recipient perceives it.\footnote{\textsuperscript{6}}

- Sphere of influence

An online sent conclusion or mailing enters the recipients’ sphere of influence at the time it is forwarded directly to a data processing system or reaches a Mailbox – System operated by a third
party and where the third party keeps it available for the recipient (Email - Account).  

- Mailbox in business operations and time of notice

One of the main questions in case of conclusions of declarations of intent amongst absentees is how often the commercial dealer is obliged to check his electronic mailbox. By installing an electronic mailbox and making the address public the electronic correspondence is opened by the dealer. Henceforth the dealer must be aware of the fact that customers anticipate that their mailing is received and read at once. The constant jurisdiction presumes that the mail arrives by closing time of business at the latest.

- Private mailbox

In contrary to business participants it is assumed that a private person is not checking his privat mailbox every day. Therefore, it applies that an e-mail to a private person is received at the next day.

- Prudent businessmen

For prudent businessmen some specifics must be considered. The main case of application in e-commerce is the letter of confirmation. In these cases, complete silence is seen as confirmation by consuetudinary law. In consequence, orders by email or mouse click are confirmed this way.

## Formal requirements and online contracts

The normal articles of the “BGB” apply most widely in regards of electronic legal dealings. In former times, all legal transactions which required the written form, according to article 126 BGB, were exempted from digital communication, due to the fact that an electronic signature was not available. These days, electronic signatures are available, but in Germany only so called qualified electronic signatures (QES), according to article 2 Nr. 3 Signaturgesetz (SigG), fulfill all legal requirements for the electronic form according to article 126a BGB and can replace the required written form.

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— **Jörn Wohlrabe** 2012/05/09 16:32

1) This article is written on and in reliance to German Civil Law.

2) Hereto German Civil Law Code (Bürgerliches Gesetzbuch – BGB) Articles 1 – 240 BGB.


5) Cf. Amtl. Begründung des FormVAnpG zu § 147 I 2 BGB


8) Similar jurisdiction in Germany for declarations of intent by letter or telefax, cf. inter alia BGH, NJW 2008, 843 (letter); BGH NJW 2004, 1320 (telefax); both with further references.