CASE CITATION:
Ur19 U 16/02

NAME AND LEVEL OF COURT:
OLG Köln

DATE OF DECISION: **6 September 2002**

OLG Köln Decision dated 06/09/2002 19 U 16/02
Interrogatories upon the conclusion of a contract in the internet auction
JurPC Web-Dok. 364/2002, Section 1 - 15
German Civil Code (BGB) §§ 145 ff.
Guiding principles (the editor)

1. The mere fact of having an e-mail account – just as the mere possession of a credit card – does not entail bearing the risk of fraudulent use.
2. It does not follow that there is prima facie evidence that a bid at an internet auction has actually been submitted by the owner of an e-mail account, because security standards over the internet are not sufficient to conclude from the use of a secret password that the password was used by the person to whom such a password was originally assigned.
3. The vendor in an internet auction is not protected by relying on the fact that the bidder is the same person as the owner of the e-mail account.

Reasons
I
Between 10 and 17 August, 2000, I-T. organized an internet auction for a golden gentleman's wrist-watch. Bids were submitted by e-mails via accounts set up at the internet service provider G. At the time, the defendant had two e-mail accounts at this company: a private account with the user name 'k.' and an official account with the user name 'a.'. To protect both accounts, he had selected the number combination of his date of birth (...) as his (secret) password.

The gentleman's wrist-watch was offered in the auction by a user under the name of 'b.T.'. The starting bid had to be at least 18,000.00 DM. On August 14, 2000 at 18:55 hours, a bid was submitted in the amount of 18,000.00 DM. The EDP system of the auction organizer recorded the auction participant '...' as the bidder. As this turned out to be the only bid, G. informed the claimant on August 24, 2000 that the bid was submitted via an e-mail account which stated as 'contact information' the name, address and private e-mail account of the defendant. When the claimant requested the defendant to effect the payment and take delivery of the wrist-watch, the defendant rejected this, amongst other things, in an e-mail dated August 31, 2000. He argued that the bid had been submitted by an unauthorized third party.

By judgment dated August 07, 2001, to which reference is hereby made, the regional court rejected the complaint, reasoning that it was not proven that the defendant had submitted the bid on August 14, 2000.

The claimant has appealed this decision, and the claimant's primary challenge is that the regional court ruled that he had to bear the burden of proof that the defendant had submitted the bid, arguing that the court should at least have assumed as prima facie evidence against the defendant, which the defendant had not sufficiently refuted. The defendant argued that even if such argument were rejected, the defendant would be liable according to the principles of the prima facie evidence.

The defendant advocates the contested decision by repeating and elaborating his submission at first instance.

With regard to the further details of the status of proceedings, reference is made to the content submitted in the written pleadings exchanged between the parties.

II
The appeal of the claimant is of no avail. The regional court correctly rejected the complaint, giving very detailed reasons addressing all issues. For the avoidance of repetition, the senate refers to the reasons of the contested decision, which it follows to the full extent (likewise in agreement are Wiebe, MMR 2002, 257; Hoeren, CR 2002, 295; in a similar case, the local court Erfurt decided accordingly, MMR 2002, 127).

The objections expressed by the claimant against the decision in the appellate proceedings do not justify a divergent decision.

1. Contrary to the view of the claimant, the defendant does not – only because he has an e-mail account with a specific pseudonym and password – bear the risk of fraudulent use with the consequence of a reversal of the burden of proof based on a distinction of spheres of risk. Merely having an e-mail account does not entail bearing the risk of fraudulent use, just as little as merely possessing a credit card does not entail a liability of the owner in case of a fraudulent use of his (secret) credit card number by an unauthorized third party, for example in a mail ordering process (see in this respect BGH NJW 2002,

2234 with reference to Langenbucher, *"Die Risikozuweisung im bargeldlosen Zahlungsverkehr"*, p. 259).

2. Also, there is no prima facie evidence to the detriment of the defendant. The regional court correctly denied the existence of a typical course of events that would allow prima facie evidence to be adduced. The security standard on the internet – as everyone knows who deals with data transfer – is currently not sufficient in order to conclude from the use of a secret password that such use has been made by the person to which such a password was originally assigned. Furthermore, the difficulties of 'decoding' the password, as illustrated by the claimant, are irrelevant in this context, because a fraudulent use does not necessarily require a previous decoding. Rather, anybody who is familiar with the processes in the internet – which is the case with many juveniles in these days – can 'read' the password without great efforts. One may possibly regard the requirement of 'typical' as sufficiently fulfilled for prima facie evidence if an electronic signature [Editors comment: 'electronic' in this context means digital] has been used, but not just in case of using an unprotected password (see for this Schmidl, CR 2002, 508, who construes a legal presumption of authenticity in these cases where a declaration of will has been furnished with a qualified electronic signature). The fact that the defendant – contrary to the view of the claimant – had sufficiently objected to such prima facie evidence is hence not decisive.
3. A liability of the defendant does not exist in accordance with the legal principles of apparent power of attorney *(Anscheinsvollmacht)*. An apparent power of attorney has to be assumed where (i) the principal is not aware of the action of the assumed proxy, but could have learned of and prevented such actions if applying due diligence and care, and (ii) the other party could justifiably assume that the principal tolerated and approved the proxy's actions; under such conditions, this is a matter of attributing a legal presumption based on a culpable conduct [of the proxy]. In the given case, however, the defendant was unable to foresee that on the evening of August 14, 2000 an unauthorized action would be committed by an unauthorized party. While on August 14, 2000 the defendant did know that his e-mail account was blocked, he did not need to conclude therefrom – even with all due diligence and care – that somebody was concluding contracts over the internet under his name, i.e. using his secret password.

Furthermore, the claimant's reliance on the bidder's identity is not worthy of protection, such worthiness of protection being a precedent condition for such a presumption of a power of attorney, as the regional court has extensively and correctly assessed. Just as a person who receives a fraudulent order by telephone under the name and address of an existing person and just as a person who receives an order via the mail order process by somebody using someone else's credit card number, the vendor at an internet auction is not protected in relying on the fact that the bidder is the same person as the owner of the e-mail account.

III
The appeal will be admitted as this legal matter is of fundamental importance (Section 543 Para. 2 no. 1 of the Civil Procedural Code (ZPO)). In view of the increasing number of contracts concluded over the internet, it can be expected that the question demanding clarification in this legal dispute – the question whether the vendor may enjoy a reversal of the burden of proof or an ease of proof regarding his contractual partner – will arise in an undefined number of cases. This question therefore requires clarification before the highest courts.

IV
The ancillary decisions [regarding costs, etc.] follow from Sections 91, 97, 108, 708 no. 10, 711 of the Civil Procedural Code (ZPO).

The amount in dispute for the appellate proceedings and at the same time the amount of the claim for the claimant is set at € 9,203.25 (=18,000.00 DM).

Post comment

The reader is alerted to three further cases regarding the burden of proof in on-line auctions and direct sales on ebay, which have confirmed the views initially taken by the Higher Regional Court of Cologne in the above case, underlining the point that the current security status on the internet does not sustain prima facie evidence relating to the identity of the person using a certain particular account:

Regional Court of Konstanz of April 19, 2002 (LG Konstanz, 2 O 141/01 A)

Regional Court of Bonn of December 19, 2003 (LG Bonn, 2 O 472/03)

Higher Regional Court of Hamm of November 16, 2006 (OLG Hamm, 28 U 84/06).