PRELIMINARY REMARKS ON TOPIC AND TITLE

Electronic Banking has become the major topic in banking during the last decade of the past century. The reason is obvious. E-Banking is a part of E-Commerce, which is both one of the most significant products of the I(nformation) T(echnology) and one of its moving factors. Altogether, they are elements of what has become commonly known as ‘Globalisation’. It is therefore a challenging task for any lawyer to speak or write about E-Banking. It is even more fascinating if this is combined with the bank-customer relationship. For the following reasons it may be also dangerous (especially in front of such an audience) to ‘discuss legal aspects of the bank-customer relationship in E-Banking’:

The bank-customer relationship is already a very complex and difficult item. The difficulties multiply if the relationship is combined with the technology of Electronic Banking.¹ Notwithstanding the fact that all over the

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** The text has been extended and amended by footnotes and appendices. With respect to these amendments I have to thank my assistant Advocate Mario Marti for substantial support.

world quite a lot has been written about E-Banking, the whole issue reminds me of medieval cartography. Cartographers did not like to concede that certain areas had not yet been 'discovered'. Therefore, instead of printing 'terra incognita' into the white spots, they put in 'ubi sunt leones'. It is my impression that in E-Banking today we have many spots 'where the lions are'.

It is for that reason that I will approach my topic step by step: First, I will deal with the legal aspects of the bank-customer relationship, then I will discuss some legal aspects of E-Banking and in a third step I will try to give a combined view of the legal aspects of the bank-customer relationship and E-Banking.

I. LEGAL ASPECTS OF THE BANK-CUSTOMER RELATIONSHIP

A. Structure and Variety of Bank Services

What we all thought to be true has been confirmed: Bank services are offered in a broad spectrum that is broadening every day. I do not think it is necessary to reiterate what has been mentioned by several contributors, especially by Mr. Breuer. I would rather draw your attention to the fact that the variety of services has to be taken into account when we discuss the legal concept of the bank-customer relationship. This is one of the reasons why we cannot speak about the bank-customer relationship. There is another reason. One must not only differentiate according to the type of services rendered by the bank, but also take into consideration that corresponding to the different types of services there are different types of customers.

B. The Corresponding Variety of Customers

Looking at the counterpart of the bank, the different types of transactions are reflected by different types of persons contracting with the bank. There is not a uniform type of customer. Rather, there are many different types of customers pursuing different interests with different levels of competence and ability to do business. For the purpose of this paper and for reasons I will return to later I will use only two categories, customers that are clients

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1 Cf. Norbert Horn, Banking in the Electronic Age. Legal issues, in this volume.
Legal Aspects of the Bank-Customer Relationship in Electronic Banking

and customers that are consumers. I call ‘clients’ all those people who deal with banks at arm’s length, who are able to protect and to further their interests. These people may use the consultancy services of banks, they may accept advice but they deal on the same level and as equals with the banks. This is true for the more or less wealthy people that are taken care of by the banks under the title of Private Banking or other comparable terms. On the other end of the spectrum we have the so-called Retail Banking where millions of people do their daily transactions like paying their mortgage interests or the rent for their homes, their insurance premiums and receiving their salaries and from time to time making some small investment. All these people are certainly consumers. They have neither the choice nor the chance to negotiate anything with the bank. They use the services under the terms of the general conditions of the bank whether they may accept these conditions for services rendered or not. The motto is ‘take it or leave it’. For those people consumer protection rules have been developed worldwide, not restricted to the bank-customer relationship but of special import and significance in this legal relationship. And here is the genuine field of E-Banking. Before I return to that in a more specific way I will shortly deal with the legal concept of the bank-customer relationship as a whole.

C. The Legal Framework

1. The Simple Pattern ‘One Transaction – One Contract’?

Looking at the variety of services rendered and the corresponding variety of clients it goes without saying that the legal feature of the bank-customer relationship should reflect these differences. That is true and simple if there is just one transaction or one type of service. If someone cashes a check or changes some money at the counter, these are simple transactions following the pattern ‘one transaction – one contract’. But most people have a more complex relationship to their bank. In all these relations, the bank account is the centre and the basis for most of the services mentioned above. The combination of those services like payments, orders, small or major investments in the capital market or even asset management results in

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3 There are several other groups who do business with the banks, e.g. institutional investors or companies. To them the banks render services as Investment Banking, IPOs etc. Some of these transactions may be done by electronic means (cf. in this volume the articles of Norton Joseph J. and Winship Peter) but one can hardly call those business partners ‘customers’ and in no way is there a ‘Bank-Customer Relationship’ as conceived and explained below in this paper.
several different kinds of contracts or, as many authors say, a 'bundle of contracts'.

2. The Construct of the ‘General Banking Contract’

Looking at this situation, the question has been raised by some authors whether there is a link or a common ground to all these contracts. In Germany, legal scholars have developed the figure of the ‘General Banking Contract’ (‘Allgemeiner Bankvertrag’) as a so-called ‘frame’ or ‘basic contract’ for all sort of bank-customer relationships. On a high academic level there is an ongoing debate whether such a contract exists or cannot exist for dogmatic reasons. Whereas prominent authors deny the necessity and even the possibility of such a construct, I myself have taken the position that this is not a Prince-Hamlet-question ‘to be or not to be’. In my view, it is rather a question of the most pragmatic way of organising the bank-customer relationship (‘Geschäftsverbindung’). Looking at the results, there is namely one point that might be of some importance. Following the concept of the General Banking Contract, the General Contract Conditions are automatically applied in any additional business-contact between the bank and the customer, even before it comes to the conclusion of another additional contract, which is a substantial advantage for the bank. Regarding all other points, there are no real differences between the results of both concepts, for the following reason: Under the prevailing doctrine in Germany, Switzerland and Austria mutual obligations of both parties exist from the first moment of business-contact between them. These obligations include inter alia duties of information, disclosure or as the case may be even

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8 Thus, the limitation of liability or the fiction of capacity as comprised in most General Contract Conditions (see for that the examples and commentaries in Wiegand, supra note 8) apply if the customer, who has already a salary account with the bank, is negotiating a loan.
warning. Therefore, as a result, the legal situation of both the bank and the customer is quite the same as under the General Banking Contract.

D. The Regulatory Environment

Whereas the debate about the General Banking Contract is rather of academic nature and with little impact on bank-practice and, in addition, to a certain extent ‘typically German’, I will now turn to a really important point, an aspect all systems have in common and which is of higher significance for the modern banking law: The multilateral influence of various kinds of legislation and soft law on the bank-customer relationship. Due to this regulatory environment there are extreme restraints on the traditional concept of contractual freedom. These restraints stem from a network of regulations starting with traditional supervisory and prudential regulations, which are nowadays interlinked with provisions of criminal and administrative law. While the traditional prudential regulations were based on the principle of customer and creditor protection, the most influential and heavy restrictions stem now from the internationally accepted common goal to fight organised crime and money laundering. These regulations interfere in all phases of the bank-customer relationship.

The traditional ‘know your customer-rule’ was based on typical bank business experience and aims, adopted by the banks in their own interest, whereas now the ‘know your customer-principle’ mixes up with the banker’s duty to identify the customer and to verify the purpose of the business, to clarify the origin of the money and so on. Based on this system, there is a feedback to the traditional prudential regulations and supervisory rules

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10 Explicitly so Koziol, loc. cit.


12 The banks checked the profile and the business plans of the customer in their own interest – to avoid defaulted credits or ‘foul’ investments.

13 See as examples with further references the articles mentioned in note 11.
because the supervisory authorities, such as the Swiss Federal Banking Commission, now assume that the banks' controlling duties also comprise identification rules as described before. As a consequence, one can say that this is a change of paradigms: Banks take part in an international system of mutual control including their own supervision, the bank-customer relationship as a private law contract is overlapped and partly overruled by public law provisions (in continental terminology), not only restricting the freedom of contract but also - as many observers believe - destroying the confidence between bank and customer, which is considered the most important element of this relation.

In addition to these public law rules, the traditional pattern of contract law has been put aside or amended to a great extent by consumer protection rules. Their importance and the impact on contract law is increasing nearly day by day for two interrelated reasons. One reason has already been touched upon earlier. In my division of customers into clients and consumers, I have mentioned that traditionally wealthy people investing money with banks have to fulfil the conditions to be considered as a client. Development of case law and consumer protection rules as well as many legal authors have together caused a tendency to consider even those people as consumers. This means that they need protection as well in a way to be discussed later on. A second reason for the increasing influence of consumer law is that consumer protection is spreading into more and more fields of law. One of those fields is E-Commerce and E-Banking, to which we will turn now.

II. LEGAL ASPECTS OF ELECTRONIC BANKING

A. E-Banking as a Part of E-Commerce

E-Banking is a special form of E-Commerce. Since E-Commerce has spread all over the world, many institutions have started to draw up regulations or proposals for international rules on E-Commerce. In 1996, UNCITRAL established a model law on E-Commerce and the European Union has set up a framework of regulations, the Directive 97/7/EC on the protection of consumers in respect to distance contracts, the Directive 2000/31/EC on

14 Cf. above p. 165.
certain legal aspects of information society services, in particular Electronic Commerce, in the internal market (Directive on Electronic Commerce) and the proposed Directive on financial services. The Directive on distance contracts is focusing on consumers' protection, as the title already indicates. This directive is applicable to E-Commerce, but not to financial services, which are expressly exempted by Art. 3. Nevertheless, the directive is important for the understanding of the consumer protection concept in distant market transaction. Moreover, the gap will be filled by the – already mentioned – proposal of the commission for the financial services Directive, which includes an amendment of the Directive 97/7/EC and adapts its regulations to the special situation of electronic financial transactions.

The E-Commerce Directive, however, is applicable to financial services right now. Although the main goal of this directive is to further ‘the development of E-Commerce within the information society’, it contains substantial protection rules. They all have one thing in common, and that is true not only for the regulations of the European Union: To protect people concluding distance contracts by the use of modern technology. The directive of the European Union pursues that aim by a two-step-method.

On a first level the Directive on Electronic Commerce constitutes information duties which have to be fulfilled by the provider of services with respect to every customer. Art. 5 ‘General information to be provided’ reads:

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:
   (a) the name of the service provider;
   (b) the geographic address at which the service provider is established;

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20 Excerpt from Art. 5: In addition Art. 6 and 7 set special rules for ‘Commercial communications’. I do not discuss these provisions here, because banks will automatically comply with them.
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated within a direct and effective manner;

(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) as concerns the regulated professions:
- any professional body or similar institution with which the service provider is registered,
- the professional title and the Member State where it has been granted,
- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.'

In a second step an additional duty of information is established by Art. 10:

'Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:
   (a) the different technical steps to follow to conclude the contract;
   (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
   (c) the technical means for identifying and correcting input errors prior to the placing of the order;
   (d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of
conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

The scope of application of this provision is restricted by two exemptions made by the Directive:

Paragraph 4 states that 'Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications'. This exception is of high theoretical and practical importance because it is based on a principal distinction made by the Directive and the implementing legislation. Communications that allow direct, immediate and individual contact between the parties are considered to be and, therefore, treated like declarations between persons present which, obviously, is a circumstance crucial for the conclusion of the contract. Consequently, I will return to that when discussing the formation of contract.

The second exception is made ‘when otherwise agreed by parties who are not consumers’ (Paragraph 1). This exemption is fundamental not only for the E-Commerce Directive but also for the EU legislation and moreover for wide parts of legislation around the world. Most of the rules made in favour of the consumer are imperative and, thus, restrain the autonomy of the contracting parties. Only a segment of population, the group of non-consumers, has (and enjoys) still the freedom of contract as it was conceptualised by the great continental codifications of the 19th and 20th century. By agreement with the service provider, these non-consumers can waive their obligation to inform as provided by Paragraph 1 and 2.

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21 For Switzerland cf. note 20, draft for a new art. 4 paragraph 2 of the Code of Obligations; for Germany the draft of a law concerning the revision of the Civil Code (Regierungsentwurf eines Gesetzes zur Modernisierung des Schuldrechts vom 9.5.2001); for England the Consumer Protection (Distance Selling) Regulations 2000 No. 2334.

22 See below p. 183.


24 It is neither necessary nor possible to discuss this here; for a general critical discussion see Wilhelmsson Thomas, Is There a European Consumer Law - and Should There Be One?, Centro di studi e ricerche di diritto comparato e straniero, Roma 2000.

25 This exemption might be very helpful for bank business done with the category of persons I have called “clients”. However, there is a tendency to extend the protection even to this group of customers. In addition it has to be noted that the exception is only made for
At this stage, I will not discuss this information itself, which is all related to the specific technology used by the parties, but give a little thought to the purpose and the concept behind that.

Both Art. 5 and Art. 10 start with the phrase ‘in addition to other information requirements established by community law’. That means that the information duties in this Directive are an ‘overhead’ to already existing duties based on other directives. And indeed, these duties are specifically designed with respect to the method and means of communications. Nevertheless, the duties constituted by these directives and others are based on a general concept, which is normally called the information model or the principle of transparency.\textsuperscript{26}

I think it is not necessary to discuss this in detail, but I have to repeat the rationale behind the concept. On one hand, the idea is that one of the contracting partners has an advantage of knowledge, which must be compensated by information to give the other side the chance to decide ‘en connaissance de cause’. It is for that reason that all the information duties have to be fulfilled before the potential contract-partner makes his decision (‘prior to the order being placed’). We have to keep that in mind, because I will return to the information duty in the next section.

In addition to these information duties, the E-Commerce Directive of the European Union, but also the respective laws or suggested regulations in other countries, for example the proposal for Switzerland,\textsuperscript{27} include regulations regarding the conclusion of contract. In this regard, all regulations refer to the technique of the digital signature and its application to the formation of contract. This includes two totally different aspects: One is the question of formal requirements of the contract, the other one is the problem of safety of communication.\textsuperscript{28}

To solve the form problem, attempts have been made all over the world to substitute the traditional requirements by adequate electronic means. For a long time, the digital signature was considered the solution, because it can be regarded as equivalent substitute for the traditional hand signing of a contractual document.\textsuperscript{29} Therefore, the EU and many other countries and paragraphs 1 and 2, but not for 3 and the General Contract Conditions; for that see below p. 183.

\textsuperscript{26} Koller-Tumler Marlis. E-Banking und Konsumentenschutz, in: Wiegand, supra note 9, pp. 143-180.

\textsuperscript{27} For Switzerland cf. note 19; for Germany and England cf. note 21.

\textsuperscript{28} Cf. Thomas Hoeren. Transactional Safety in Electronic Banking. Legal Aspects, in this volume.

\textsuperscript{29} This is nothing sensational. The same happened when telegrams and telex were invented. The only important aspect is that technology must give reliable evidence of the identity of the person who used the digital signature or private key.
institutions drafted regulations focusing on the digital signature based on the public/private key technology.\textsuperscript{30} However, the transformation into a practically manageable tool turned out to be more difficult than expected.\textsuperscript{31} Whereas this is a general problem of E-Commerce, the safety aspect, although also a general problem, is of paramount importance - which brings me to the bank-specific aspects of E-Commerce.

B. Specific Problems of E-Banking

What is addressed generally with regard to E-Commerce under the title of safety of communication and data protection is a specific problem of banking law since bank secrecy is one of the most crucial and important problems of bank business. This is more or less true for all countries,\textsuperscript{32} but obviously in a special way for Switzerland.\textsuperscript{33} Therefore, the question arises how the requirements of protection of bank secrecy can be complied with in electronic transactions. Putting aside the technical means which make it possible to protect the customer (although we have learned from Professor Hoeren that nothing is safe), we have to discuss whether banks have to take care of that problem by formulating respective clauses in their contract conditions. I will return to that point in the third section.

On the other hand, banks have the duty - for reasons already discussed - to identify their customers. How that can be done in an electronic way and without endangering the bank secrecy is currently one of the most discussed problems, by banks as well as by supervisory authorities, in many European countries.\textsuperscript{34} I will deal with that in the next section, where I will discuss how the legal aspects, of which I have given a very superficial overview, are interlinked and interrelated or, in other words, their interaction.


\textsuperscript{31} See e.g. Vischer Frank/Albrecht Andreas C., Problematische Seiten der digitalen Signatur, NZZ (22 Mai 2001), p. 18 and Schöbi Felix, Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur: Botschaft liegt vor, in: Jusletter 7 July 2001 (cf. \texttt{<www.weblaw.ch/jusletter/Artikel.jsp?ArticleNr=1186>}).

\textsuperscript{32} Cf. the reports in Cranston, op. cit.


\textsuperscript{34} The Swiss Federal Banking Commission has developed some guidelines, see below p. 180 and also Kunz Michael in Wiegand, supra note 9, p. 23-92; regarding that problem with respect to outsourcing, see Kunz Michael and Warrington Joan in this volume.
III. ACCUMULATION AND INTERACTION OF DUTIES IN THE ELECTRONIC BANK-CUSTOMER RELATIONSHIP

A. The Pre-Contractual Phase

1. Accumulation of Duties of Disclosure and Information

If one puts both the duties in the pre-contractual phase of the bank-customer contract and those of E-Banking together, it results in an accumulation of duties. Based on general contract law, the bank has the duty to inform the customer about the structure and risk of the intended transaction and, moreover, under several jurisdictions it is expressly stated by statutory law or developed by case law that the bank has the duty to elaborate a profile of the customer. Based on that profile, the bank has to assess whether the customer has the financial means and the necessary knowledge for the intended transaction.

In addition to those traditional information and disclosure duties, the banks now have under the E-Commerce regulation the duty to supply the information that has been mentioned earlier. Firstly, the information to be provided under Art. 5 of the E-Commerce rule, which meanwhile has been transformed into national laws in many jurisdictions of the EU or shall be integrated into them, for example into Swiss law by the proposal for an E-Commerce act.

Secondly, and still before the conclusion of the contract, the information required by Art. 10 of the E-Commerce Directive must be added, i.e.:

(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;

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35 See above p. 166.
36 Above p. 173 and in detail below p. 181.
37 The violation of that fundamental principle may cause private-law responsibility and consequential damage claims, but would also be a violation of the standards set by the code of conduct for bankers (as e.g. published by Swiss Bankers' Association, cf. www.swissbanking.org) and therefore result in a violation of prudential supervisory laws and respective sanctions.
38 Above pp. 7-8; cf. also the text of the Directive on Electronic Commerce, Art. 5 and 10.
39 See above note 19.
Legal Aspects of the Bank-Customer Relationship in Electronic Banking

This looks complicated, and it is. Satisfaction of these obligations would be easy if persons talked face-to-face, but it is quite difficult to manage all this by electronic means and to do it in a way that the obligations are really fulfilled. Therefore, it comes not as a surprise that the consequences of not performing these duties are disputed. In Germany for instance, the first Proposal of the draft law concerning the revision of the German Civil Code stated in § 305b Paragraph 5 'Non-performance of one of the duties mentioned above has no influence on the effectiveness of the contract.' This paragraph however has been cancelled in the course of the revision of § 312e Paragraph 3, which reads in the actual Proposal 'Further-reaching duties of information based on other provisions are not concerned'.

In Switzerland, the legislator believes that it is more adequate to put these duties in the framework of unfair competition, which is only at first glance a better solution.

Besides the nature of those duties, their content and the way to comply with the requirements of Art. 5 and 10 is problematic. How can the bank, for example, provide 'the technical means for identifying and correcting input errors prior to placing the order'? And more generally, the crucial point is that the bank must have evidence that all the information has been given and, moreover, that it has been given 'clearly, comprehensibly and unambiguously'; and, in addition to that, for example the jurisprudence of the Swiss Supreme Court is going so far as to claim that the service provider has to check whether the customer really understood the information.

2. Duty to Give Advice or Warnings?

As earlier referred, it is common ground that banks have duties of information, disclosure and advice. It makes no sense to discuss here in detail how this obligation can be fulfilled with respect to the specific situation of E-Commerce and E-Banking. However, I will give just one

40 Preliminary draft of a law concerning the revision of the German Civil Code (Diskussionsentwurf des Schuldrechtmodernisierungsgesetzes des Bundesministeriums der Justiz vom 4. August 2000).
41 Cf. note 21.
42 Cf. note 19, especially the draft for Art. 3 lit. bß and Art. 6a of the Federal law against unfair competition (BG vom 19. Dezember 1986 gegen den unlauteren Wettbewerb, SR 241).
44 BGE 115 I 62; summary and commentary on that decision Wiegand Wolfgang, recht (1990), pp. 134-143.
example reading the formula many major law firms use with respect to E-mail in communication with clients.

'This e-mail message is confidential and may contain legally privileged information. If you are not the intended recipient you should not read, copy, distribute, disclose or otherwise use the information in this e-mail. Please also telephone or fax us immediately and delete the message from your system. E-mail may be susceptible to data corruption, interception and unauthorised amendment, and we do not accept liability for any such corruption, interception or amendment or the consequences thereof.'

What I have quoted from this law firm's e-mail cover sounds like information, but it also includes a warning. This leads to the general question, whether the duties of the banks using electronic means are restricted to simple information or must be extended further to warning and advice. It is plain from case law and legal writing that the borderline between all three duties is small and cannot be drawn exactly. Therefore most authors believe that under certain circumstances banks have the duty to warn the customer if specific risks come into play. This concept has been developed with regard to financial risks, but it is only a special feature of the general duty of loyalty all parties owe each other in the pre-contractual stadium. Therefore, these duties comprise the risks caused by the use of the new technology.

Such a risk, in our case, might be the endangerment of the bank secrecy. Therefore, a bank offering financial services by electronic means has to decide whether already at this early stage the customer's attention should be drawn to the bank secrecy topic or if that may be done in a later phase of the bank-customer relationship in connection with the conclusion of the contract. This, however, will be discussed below in a more detailed manner.

From here it is just a step to the next point. The question arises, whether the banks should give advice to the customer, and this is again asked in a double sense. It is not disputed that banks have a duty to give advice in the pre-contractual relationship, but only to what extent. With E-Banking, there is a second aspect of this duty. The advice should be given for the use of the technology as provided by Art. 5 and 10 of the E-Commerce Directive. The content itself is comparable to a user's manual or instructions that come with products, but the advice must be given before the conclusion of the

45 Horn, supra note 9.
46 See above p. 166.
47 Below p. 183.
48 See text above on pp. 169-171.
Taking a look at homepages and directories for E-Banking, one will already find advice to safe and proper use of electronic means.

3. Customer's Obligations

On the other hand, it goes without saying that the customer, too, has obligations in this pre-contractual phase of the business relations. Besides the well-known duty of loyalty and the duty to provide the bank with the necessary information as to his identity, purposes of the transactions, etc., an additional duty of the customer arises when using modern technologies. He has to comply with the advice and information given by the bank to make proper use of the means. This is of special relevance for the formation of a contract, which I will turn to now.

B. Conclusion of Contract

First, we must be aware of the two different situations to deal with:

The easy one is where the customer already has a bank account or has otherwise done business with the bank. Under these circumstances, it is only a transformation from normal banking to E-Banking. Therefore, everything that has been said about the bank-customer relations, the 'know your customer-principle' and the mutual obligations are not new for this relationship. But everything concerning the special aspects of E-Banking must be taken into consideration at a certain moment which is usually when the customer asks the banker 'Could we do that by E-Banking?' or vice versa when he is asked (as it happens to everyone of us from time to time) 'Why don't you use the much easier way of E-Banking?' Then all the information described above must be given to the customer, and, at present, certainly a warning must be given concerning bank secrecy and data protection.

Most of the banks try to comply with these prerequisites by an agreement on the General Contract Conditions for E-Banking. Before I discuss this in more detail, I would like to take a look at the second and much more complicated situation. It is the problem of opening an account by electronic means without having been a customer to that bank before.

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49 That a seller/producer has to provide the buyer with the respective instruction is part of its contractual obligation but to fulfil after the conclusion of the contract. Cf. the Directive 1999/44/EC of the European Parliament and of the Council of May 25th 1999 on certain aspects of the sale of consumer goods and associated guarantees, especially Art. 2 Paragraph 5.

50 See above pp. 169-171.
In this situation we have to deal with two problems. One has already been touched upon just before, but not addressed. It is the question of how we handle the declaration of will in electronic means.

When I have said that the banks in transforming existing bank relations into E-Banking asked the customer to agree to the special conditions of E-Banking contracts, then this is an amendment of that contract, which has to be done by exchange of declarations of will. Again, this is easier in a pre-existing relation. Of course, it is beyond doubt that declarations of will can be exchanged by electronic means. Disputes have, however, arisen in two areas. One is whether and how the prerequisites of form can be fulfilled by using electronic means, the other one is how the traditional model of exchange of offer and accept works in this field.

It is my understanding that most jurisdictions take the position that advertisement and things alike do not constitute an offer. An exception is made by Swiss Code of Obligation, Art. 7 § 3, which reads: 'The display of goods with an indication of their price is, however, as a rule considered to be an offer.' The proposal for the Swiss law on Electronic Commerce will extend this to services presented in an electronic way. Therefore, already today in anticipation of that situation Swiss Banks on their homepages expressly point out that services presented cannot be considered as a binding offer. It is questionable how and to what extent this will work in practice. Even more questionable is the way of the Directive on Electronic Commerce:

Its Art. 11 deals with 'placing of the order' and provides as follows:

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:
   - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,
   - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

51 See above p.172.
53 See note 19, draft for the new art. 7 paragraph 3 of the Code of Obligations: 'The display of individualised goods and services, namely by electronic means, with an indication of their price is, however, as a rule considered to be an offer.'
54 Cf. Wiegand, supra note 9.
3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications."

This provision is the result of a compromise. The idea is that the conclusion of the contract follows the rules of the respective jurisdiction. Therefore, it is and shall be a question of national contract law to decide what is the offer and the acceptance and at which moment the conclusion of the contract must be fixed. Notwithstanding this, the provision imposes an additional obligation to inform the user of the service immediately about the receipt of his order. The reason is twofold. First, it aims at the consumer’s protection. He shall be, as soon as it reasonably can be done or expected, informed whether the order has been received and accepted; furthermore, as with all EU regulations, the equal treatment of consumers should be granted.

Nevertheless, the doubts and differences are numerous: The effect of that ‘acknowledgement’ depends on the concept of the applicable national law. In German or Austrian law, the ‘acknowledgement’ may have only the function of a confirmation of receipt or a confirmation of the (foregoing) conclusion of the contract (‘Bestätigungsschreiben’). But it may well be that this declaration must be understood as the acceptance of the order and, therefore, marks the conclusion of the contract.

It is for this reason that, again, the sanctions of the violation of this additional duty is in the same way disputed as the consequences of the violation of the specific E-Commerce information duties.

Notwithstanding the unclear function of the ‘acknowledgement’, Art. 11 contains further points that are important for E-Commerce law and obviously for the E-Banking business.

Paragraph 1 and 2 repeat and confirm the limitations of application already made by and discussed in connection with Art. 5:

Non-consumers can waive the application of Art. 11, which, furthermore, is not applied at all if ‘contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications’ (Paragraph 3) are concerned.

56 See above pp. 169-171.
57 See above p. 174.
58 Cf. supra note 21, for Germany especially § 312e paragraph 2 BGB as proposed by the actual Civil Code revision.
The second exemption does not comprise Paragraph 1, second indent. This exception of the exception (which in my view also should have been made for the first exemption) is plain from the content of this indent:

' - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them' (Paragraph 1).

It is obvious that this is not an isolated provision created with regard to the purpose of Art. 11. Instead, it contains a general principle concerning the receipt of a declaration of will when the declaration is transmitted by electronic means. It transforms and - at the same time - confirms the concept codified in Germany (§ 130 of the Civil Code) and adopted by doctrine in Switzerland and Austria.\(^59\) It goes without saying that this indent - as its wording 'offer and acknowledgement' indicates - has to be applied to all 'electronic' declarations of will. This is certainly true for the EU\(^60\) countries, but also accepted in other jurisdictions.

1. Opening of a New Account

Whereas conclusion of contract and compliance with form requirements are problems to be solved in any E-Commerce transaction, there are special and additional problems when a bank account shall be opened. These problems have just been indicated by using the word 'identity', and I need not reiterate what I have said about identification of the customer.\(^61\) In all countries, under the described restraints of public law, it is still difficult, if not impossible, to open an account by electronic means. As far as Switzerland is concerned, the Swiss Federal Bank Commission has edited minimal standards for Internet banks.\(^62\)

2. General Contract Conditions

As the last step of the conclusion of the contracts most banks want to have included in the contractual relation the General Contract Conditions and, in


\(^{60}\) Because of this general impact, the rule has to be considered a provision that is part of and forms contract law, but it needs no further explanation that the EU has no competence for legislation in that field. In other jurisdictions it would be adequate to concept this as a general rule, which the Swiss legislator, for example, explicitly avoided.

\(^{61}\) See above p. 173.

\(^{62}\) For further details see <www.ebk.admin.ch> and Kunz Michael, in: Wiegand, supra note 9, pp. 23-92.
addition to that, the special contract conditions for E-Banking. By doing so, they try to resolve some of the problems described above, as bank secrecy, the proper use of technology and the obligations of the customer to give special care to the PIN code and comparable sensitive items. Therefore, the issue of General Contract Conditions has two aspects. The first is, how they can be integrated into the contract, and the second is, whether at all and if so, to what degree, the used clauses are valid.

As to the first point, the national rules of contract law apply and I do not dare in front of Norbert Horn, one of the ‘Gurus’ of the General Contract Condition law, discuss that in detail. I would rather draw the attention to the fact that, beside those national rules, an additional obligation is established in the EC Directive. This obligation can be complied with before concluding the contract or after it had been concluded, and it is formulated as follows: ‘Contract terms and general condition provided to the recipient must be made available in a way that allows him to store and reproduce them’. And again, the consequences of not complying with this provision are questionable. In my view, the violation of this duty has no effect on the validity of the contract and the included General Contract Terms if the requirements for their incorporation as provided by national law have been fulfilled. For that situation, I consider the application of the rules of unfair competition as an adequate sanction.

C. Performance Phase

1. Traditional and New Duties of the Bank

When rendering the services bank and customer have agreed upon, the bank has traditional duties, especially the due diligence and, as far as German, Swiss and Austrian law is concerned, fiduciary obligations. In addition to these traditional duties, the bank has to comply with duties such as protection of the bank secrecy and the data of the customer, which have already been mentioned in connection with the pre-contractual phase, but nevertheless have to be fulfilled in the performance phase as well. Their extent depends on the law applicable in the respective case. Furthermore, there are duties of information with respect to the technology. The bank has to inform the customer about foreseeable system failures, interruptions by scheduled maintenance services and so on. Corresponding to that, the customer has the obligation to inform the bank immediately if he might have

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63 Art. 10 Paragraph 3 Directive on Electronic Commerce.
lost his code, pin or other sensitive items. Both obligations aim at the avoidance of upcoming risks.

But many of the risks of the modern technology are unforeseeable, some are unavoidable. Therefore one of the main issues of the discussion about E-Banking is how the liability problem can be solved by a just allocation of risks.

2. The Allocation of Risk and the General and Special Contract Conditions

Nearly all financial institutions try to transfer the risk to the customer by a combined use of General Contract Conditions and special E-Net or E-Banking conditions. I will discuss some of the clauses regarding non-performance of the main contractual obligation as well as the duty of information. When I discuss those clauses - selected from major banks forms - it is not my intention to measure whether a specific national law or the jurisprudence of the respective courts would accept those clauses by applying the current standards of control of general terms of contracts and the national contract law. I would rather discuss whether under the perspective of reasonable distribution of risk such clauses are acceptable.

There are two types of clauses: One group is expressly conceived as exclusion of liability, whereas another group of rules could be characterised as regarding the distribution of risk.

(i) Common in General Bank Conditions is the following clause:

'The [Bank] accepts no guarantee whatsoever that the data transmitted by it via the Internet is correct and complete. In particular, information relating to accounts and safekeeping accounts (balances, statements, transactions etc.) as well as information which is generally available, such as stock market and foreign currency rates, is deemed to be provisional and not binding. Data via the Internet does not represent a binding offer unless it is expressly denoted as a binding offer.'

'The bank assumes no responsibility whatsoever for the accuracy and the completeness of data which it transmits. In particular, information regarding accounts (balances, statements, transactions) and generally available information, such as stock market prices and foreign exchange rates, is to be regarded as provisional and non-binding and further the bank accepts no liability whatsoever for losses incurred by the customer or its authorized representatives as a result of transmission errors, technical faults, lost connections, malfunction or illegal tempering with telecommunication systems.'

On the other hand

'the customer and his authorized representatives are obligated to keep the password as well as the authorization codes [...] secret and to prevent their
misuse by unauthorized persons. In particular, after it has been changed, the password must not be written down or stored unprotected on the customer’s computer. The customer bears the consequences of all risk arising from the disclosure of his authorization characteristics or those of his authorized representatives.’

The last clause sounds reasonable and allocates the risk where it lies. The first two clauses are unacceptable for two different reasons.

The first clause contains a manifest violation of the duties of the bank. If a bank offers services including prices or figures of a statement, it is its contractual obligation to provide correct data to the customer. If the bank does not want to be bound by the figures transmitted by the Internet it should not offer Internet banking. It is nothing else than a *venire contra factum proprium* to persuade the customers to use E-Banking and to state at the same time that all declarations given by electronic means are not reliable or binding (but only for the bank)!

The same is true in another way for the second clause. It is not acceptable to agree mutually on the use of Internet technology but to transfer the consequences of any transmission failure to the customer. Even worse is the clause that can be found in some of the conditions excluding the liability of the bank for any failure of their intern IT-system or interruption of availability due to maintenance or other comparable reasons.

In my view there can be no doubt that more reasonable and just distributions of risk will be enforced not only by courts which have already started to do so, but also by the market which will not accept such distribution of risk – an aspect I will return to at the end.

(ii) The second group of clauses is not formulated as an exclusion of liability but advice or warning in the sense described above. Those clauses concern the information the customer should be given due to the duties of disclosure and information as described above. I give three examples:

- ‘Particular importance was attached to security in the development of Internet Banking. A multi-stage security system which utilizes, amongst other things, cryptographic procedures of a very high standard, was developed in order to protect the customer. As a result of the encryption it is fundamentally impossible for any unauthorized person to view confidential customer account data. Nevertheless, it is not possible to guarantee total security both for the [Bank] as well as the customer even with all the state of the art security

precautions. The user acknowledges that his computer in particular represents the weak link in Internet Banking. [...]"

- "The customer acknowledges the following risks in particular:
Insufficient system knowledge and inadequate security precautions can make unauthorized access easier (e.g. insufficient estimate of the space needed for saving data on the hard disk, file transfers, screen display etc.). The customer is responsible for obtaining precise information on the necessary security precautions. No one can rule out the possibility of the customer’s Internet provider creating a traffic characteristic, i.e. this provider has the facility to find out when the customer has been in contact with whom. There is the risk of a third party obtaining access to the customer’s computer unnoticed whilst the customer is using the Internet. When using the Internet there is the risk of computer viruses being spread to the computer. So-called virus scanners can assist the customer in his security precautions. It is important for the customer to only work with software from a reliable source."

- "The customer acknowledges that the data is transported via an open network, the Internet, to which everyone has access. Data is therefore regularly transmitted across national borders without being monitored. This also applies to a data transfer when sender and recipient are located in Switzerland. Although the individual data packages are transmitted in encrypted form, sender and recipient in each case however remain unencrypted. This information can also be read by third parties. It is therefore possible for a third party to draw conclusions about the existence of a bank relationship."

Again: It is not my intention to discuss in detail which would be the reaction of national courts or which particular sentence could not be accepted. Instead I would like to emphasise that these clauses are different from those excluding liability. The banks try to separate the risk spheres by describing the risk and using the formula ‘the customer acknowledges’. In my view most of the information given is correct and helpful. I doubt, however, whether this information is clear enough to meet the standards established by legal scholars and courts (at least in Europe) with regard to the obligation of information, disclosure and especially warning. Thus, for example in Switzerland, additional advice should be given that the customer, by accepting the conditions, renounces protection of the bank secrecy when the data is sent across national border. The same is true with the general description of the risk of using the Internet. Nevertheless, clauses of this kind are arguable and the extents to which they are acceptable depends on a general assessment of the just distribution of risk. Regarding this just
distribution it is necessary and helpful to consider the question in a wider context.

3. A Distant View

The feature we are looking at is no surprise for everyone who is familiar with legal history. It is a well known and often described tendency when the kinds of production change, new technologies come into play and new products enter into the market. Though it would be tempting to discuss this in a detailed manner I restrict myself to a few remarks. The first concerns the legislature for the Austrian Civil Code in the beginning of the 19th century. The question of what degree of negligence would be necessary but also sufficient for liability was a major issue. It was argued that a strict concept of negligence would be an impediment for the development of economy and business and, therefore, could not be acceptable for the new code. A hundred years later a New York judge held:

'We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind and lie at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbour. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same thing upon his land.'

And even going further, the Supreme Court of the State of New York decided 1911:

'It would be quite as logical and effective to argue that this legislation only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them ... The Constitution, ... in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault.'

However, due to the change of the assessment of industrial interests and social protection nobody would share the view of the New York judges. They, nevertheless, show that it is not outrageous, even not unusual, that within a period of change the producer of risk as well as the society, which

believes in the profit, that the new technology of new products will bring to the common wealth, consider it as 'normal' to allocate the risk to the individual suffering the damage. To phrase it in another way: Under those specific circumstances the principle casum sentit dominus or in common law 'the losses lie where they fall' is accepted as a natural rule and not overruled by liability provisions that transfer the risk to the producer of that risk. Having this in mind it is easier to understand the rationale of the General Contract Conditions and their special E-Banking Conditions when banks offer Electronic Banking to their customers. Notwithstanding that background, the banks will not be able to further the electronic technique of banking without reconsidering their attitude with regard to the allocation of risk. This leads to some final remarks.

IV. SUMMARY AND PERSPECTIVE

When E-Banking or generally E-Commerce entered into the market a change of paradigm seemed to have started. Meanwhile hopes have been set back and prognoses were corrected. The reasons for this more realistic view are manifold and cannot be discussed in detail in this context. It is plain that the development in the technology industry and the respective market is one of the reasons, but not the only one. Changing assessment of the future in development of the different branches of the bank industry and the extremely high costs for information technology have forced the banks to reconsider their strategy. Notwithstanding this change of view, E-Banking will play an important role in the bank business. The legal framework is about to be constructed by the legislators, jurisprudence and legal theory. I have tried to show that many of the traditional concepts of contract law can be applied without any problem to this form of banking, amended and supported by the new regulations that have been established all over the world, in Europe by the European Union and the implementing national legislation as well as corresponding proposals in other countries like Switzerland or Eastern Europe. On the other hand, it is necessary to find a balanced distribution of risk, i.e. to avoid that the risk is totally transferred to the customer but also to avoid customer protection that suffocates the whole E-Banking. If this is accomplished, the future of E-Banking has just begun.