Consent in clickwrap agreements: Specifications, limitations and proposals concerning the electronic contracting system

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Abstract: This study comprises a theoretical and jurisprudential analysis of civil law and common law on agreements known as clickwraps. Through this, the study determines the rules to be included in a consistent corpus standardising the general guidelines for contracting that must be complied within these types of legal transactions entered into electronically and in which acceptance as an element of consent is given through a 'click', thereby executing the relevant contract. The analysis presented is not limited to the American case law. Moreover, it cites some interpretations of European and Latin American courts to determine uniform rules that provide legal certainty, validity and protection to the contracting parties in this type of agreement. In addition, it identifies limitations provided for by international regulations in force in the e-commerce domain. These limitations are to be included in a separate harmonised instrument specifically designed for electronic contracts.

Keywords: electronic contracting system, clickwrap agreements, consent, model law.

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El perfeccionamiento del consentimiento en los contratos *Click Wraps*: Precisiones, límites y propuestas al sistema de contratación jurídica electrónica

Resumen: El presente trabajo consiste en un estudio teórico y jurisprudencial —con referencia tanto al civil como al *common law*— de los contratos conocidos como *click wraps*, con el objetivo de determinar las reglas a integrarse en un corpus uniforme que homologue las pautas generales de contratación que deben cumplirse en este tipo de actos jurídicos celebrados a través de los medios electrónicos y en los cuales la aceptación como elemento del consentimiento se da a través de un "clic", admitiéndose la perfección del contrato respectivo. El análisis presentado no se limita solo a los precedentes estadounidenses sino que procura invocar algunas interpretaciones de tribunales europeos y latinoamericanos con el propósito de determinar reglas uniformes que brinden seguridad jurídica, validez y protección a los sujetos contratantes en este tipo de modalidad; identificando de previo las limitaciones de la regulación internacional vigente en materia de comercio electrónico y que deben ser superadas en otro instrumento armonizado estrictamente diseñado para los contratos electrónicos.

Palabras clave: sistema de contratación electrónica, contratos *Clickwraps*, consentimiento, ley modelo.

Adostasuna burutzea *Click Wraps* kontratuetan: kontratazio juridiko elektronikoaren sistemaren zehaztapenak, mugak eta proposamenak

Laburpena: Lan hau azterketa teoriko eta jurisprudentzial bat da click wraps gisa ezagutzen diren kontratuei dagokienez —zuzenbide zibilari zein common law delakoari begira—. Bitarteko elektronikoen bidez egindako egintza juridikoetan bete beharreko arauak zehazteko helburuarekin, corpus bateratu batean integratu beharreko kontratazio-jarraibide orokorrak homologatuko ditu. Halakoetan, onarpena, adostasunaren elementu gisa, klik batekin ematen da, hortik aurrra kontratua burutu dela onartuz. Aurkeztutako azterketa ez da AEBetako aurrekarietara bakarrik mugatzen; aitzitik, Europako eta Latinoamerikako auzitegi batzuen interpretazioak ere aipatzen dira, segurtasun juridikoa, baliozkotasuna eta babesa ematen dituzten arau uniformeak ezartzeko, mota honetako kontratuen subjektu kontratatzaileentzat. Horretarako, merkataritza elektronikoaren arloan indarrean dagoen nazioarteko arauketak dituen mugak aldez aurretik identifikatuko dira, eta kontratu elektronikoetarako berariaz diseinatutako beste instrumentu harmonizatu bat eman behar da, muga horiek gaindituz.

Gako-hitzak: kontratazio elektronikoko sistema, *Clickwraps* kontratuak, adostasuna, ereduzko legea.

SUMMARY: Introduction. I. From traditional to electronic contracting. II. Clickwrap Agreements. III. Clickwrap Agreements. (3.1.) Clickwrap agreements in the Latin American context. (3.2.) Clickwrap agreements in the U.S context. (3.3.) Clickwrap agreements in European context. (3.4.) Problems deriving from clickwrap agreements. IV. Final Remarks.

INTRODUCTION

This study entails more than just a theoretical and case law controversy regarding the validity of clickwrap agreements and the perfecting of consent through a 'click' resulting in the acceptance of an offer by the consumer, thereby leading to rights and obligations to both parties because a contract has been executed. We support the theory that the main obstacle to clickwrap agreements is regulatory in nature; a theoretical and case law study of the main legal systems (civil law and common law) may lead to legal clarifications that must be contemplated in consistent regulations (Model Law), harmonising the rules for executing this type of electronic contract.

This study is theoretical and is based on the documentary research method. The method involves a review of the conceptualisations, theories, critical reviews and comparative studies from national and international literature as well as American, Latin American and European case law. The review is coupled with the application of the exegetical method that helps analyze important national and international legal provisions regulating the scope of contract law and the legislative stance pertaining to electronic contracting with respect to clickwrap agreements.

The new space–time structure brought on by globalisation, which peaked with information and communication technologies, has genetically altered the law. This structure has imposed cybernetic processes and has changed the traditional conjecture of theories, principles, modalities, legal phenomena, the way some understand contracts, and legal transactions resulting from the exempting or supplementary will of the parties (autonomy of will).

This study examines the details of clickwrap agreements (adhesion contracts binding a contracting party with the simple act of a user pressing

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an acceptance button). This seems to oppose the traditional position that consent is based on the autonomy of will; thus, there must be an intended understanding between the parties, who are free to create rights and responsibilities, limited only by the principles of possibility and legality. We conclude with final reflections that accept the validity of this type of contract but result in specific proposals on the current electronic contracting system, through a Model Law, considering the territoriality of the Internet phenomenon and based on the specific dynamics of clickwrap agreements.

I. FROM TRADITIONAL TO ELECTRONIC CONTRACTING

Undoubtedly, the complex economic context is a fertile ground for countless legal businesses; the exchange of goods and services is perfected through contracting. In addition to being a legal transaction and a legal regulation individualised according to the Kelsenian[1] contribution, a contract is certainly a means to circulate wealth, the essence of business activity. At the same time, the contract is an important source of obligations. Kant[2] stated that contracts do not belong to the actual world; they cannot be appreciated with the senses as an experimental notion. Rather, contracts are a legal phenomenon in the same sense as marriage can be said to be one: a legal status attributed to a certain state of affairs by virtue of certain rules. The contract is thus a noumenic fact incapable of being understood by experience.

Contracts are agreements between people on a common declaration of will aimed at governing their legal relations. It is a particular applica-

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[1] KELSEN, Hans. *Contracts and Treaties, analysed from the point of view of pure Law theory,* 5th ed., National, 1974.

[2] KANT, Emmanuel. *Metaphysical principles of the doctrine of law*, 2th ed., México, UNAM, 1978, p. 51.

tion of the general idea of declarations of will. Contracts are differentiated as the species of the genus, requiring the gathering of many wills into one, while the manifestation may emanate from a single person[3].

In the U.S., under the Anglo-Saxon legal tradition, contracts have been defined as a promise or set of promises for whose fulfilment the law provides a remedy or whose fulfilment the law recognizes as a duty.[4] In the civil law system, contracts are a source of obligations that create a legal relationship between the subjects or contracting parties and involve giving, doing or refraining from doing something. As a legal transaction, a contract requires a series of elements to be brought into legal life and, if applicable, to be valid. This study specifies the theoretical scope of such elements, the essential ones and the ones regarding validity, as our subsequent reflections focus on perfecting consent in wrap agreements.

The following essential elements are recognised by legal scholars:

1. Consent

Luis Muñoz[5] asserted that consent essentially implies bilateralism or plurilateralism *in iderrt placitum consensus*, a declaration of will that entails two different statements by each of the parties that, if consistent, give rise to consent.

Rojina Villegas[6] defined consent as an agreement or consensus of wills for creating or conveying rights and responsibilities. He added that in a broad sense, the agreement of wills creates, conveys, modifies or removes

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[3] Savigny, Friedrich K. *Current Roman Legal System*, 2th ed., National Supreme Court of Justice, 2004, p. 354.

[4] García, Tonatiuh. "Reflections on the general theory of the contract", *Journal of Private Law*, 2008, num. 21-22, pp.41-67.

[5] Muñoz, Luis. *General Contract Theory*, Cardenas and Distributor, 1973, p. 170.

[6] Rojina Villegas, Rafael. *Mexican Civil Law*, 4th ed., México, Porrúa S.A, 1960, p. 41.

rights and responsibilities because consent implies the declaration of two or more wills and their agreement on a point of legal interest.

This implies that consent is formed by two or more declarations of will reflected in two key moments: first, a promise or offer is made (a party proposes something to the other party regarding a matter of interest), and second, the other contracting party expresses their will by accepting the proposal made, which must be in accordance with the offer.

An offer or promise is a draft contract presented by one of the parties that requires the acceptance of the other party to become a contract. Acceptance is the declaration of will that agrees with all essential or non-essential points of the offer. Thus, according to the theory of manifestation, the contract is formed from the moment acceptance occurs. In this, three possible systems are recognised[7]:

a) The system of knowledge or information[8] requires the contract to be formed, that the proposer has knowledge of the acceptance. The proposer is then informed of the affirmative content of the answer.

b) The system of issuing or sending understands that the contract is formed when acceptance is not only expressed but also directed to the proposer, that is, the recipient of the promise issues a response through specific means.

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[7] *Ibidem*, p. 280 to 282.

[8] This theory has mitigated the negative effects of the so-called theory of issuance; according to which, a contract is perfected from the moment the acceptor issues a declaration of willingness to accept. This theory is criticised because, first, it ignores the receptive nature of contractual declarations; as a consequence, acceptance must be addressed to the proposer, and second, its mere issuance is not sufficient. It is not considered fair that a contracting party — the proposer — be bound by a declaration that they completely ignore. See: Ruperto Pinochet, *La Formación del Consentimiento a través de las Nuevas Tecnologías de la Información, Part III: El Momento de Formación del Consentimiento Electrónico* (Consent Formation through New Information Technologies), Ius et Praxis, 2005, vol. 11, num. 2, pp. 273-302.

c) The system of receipt considers the contract to be formed from the moment it reaches the proposer.

These theories come into play when it is a matter of 'consent deriving from a contract entered into remotely', which has traditionally been referred to in the doctrine as contracts between present and absent parties (remote contracts). In the latter case, the parties do not meet in person when consent is given.

Consent may be express or implied. The civil codes of the Romano-Germanic systems agree that consent is express when manifested through unequivocal signs by means commonly used for contracting: verbally or in writing between the parties present, by electronic means or by any other technology. Consent is implied when it results from facts or acts that cause it to be assumed or allow it to be assumed, provided that the law of each country does not require an express declaration of will. The U.S. law recognizes implied consent in commercial contracts. Article 2-204, paragraph 1 of the Uniform Commercial Code provides that 'a contract for the sale of goods may be entered into in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract'.

2. Purpose

This refers to the consideration undertaken by the parties. It may comprise something that the liable party must give, do or refrain from doing. When the parties perform their obligations, the economic-social purpose of the contract is fulfilled.

The direct objective of the contract is the creation, conveyance, modification or termination of obligations. In other words, it refers to the debtor's conduct. The indirect objective, however, is the thing to be given

or the action to be carried out or not[9]. The objective must exist in nature, be determined or determinable as to the type and must be in commerce. In relation to the obligation, the objective must be possible, that is to say, existing in nature and compatible with the law. There may be no obstacles to performing it, and it must be lawful. This implies that the objective should not be contrary to the laws of public order or good practice[10].

3. Formality

Formality is understood as something that must cover the legal transaction in order for it to come into existence and for it to be in accordance with the law.

Planiol and Ripert[11] affirmed that a contract's formality is in place when the intent of the parties expressed without any established external formal requirements is not sufficient to enter into the contract because the law sets forth specific formal requirements in the absence of which consent has no legal effect.

4. Cause

This is another element disputed by the so-called causality theory, an inheritance of French law, and which is not necessarily recognised in all legislations[12].

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[9] Castrillón y Luna, Víctor. *Civil Contracts*, 6th ed., Porrúa, 2014, p. 26.

[10] Carrasco, Ángel, Encarna, Perera, Lobato, Cordero and Marín López, Manuel de Jesús. *Civil Law Lessons. Law of obligations and contracts in general*, 4th ed., Madrid, Tecnos, 2019, p 50.

[11] Planiol, Marcel & Ripert, Georges. *Civil Law*, 4th ed., Uruguay, Harta, 1996, p. 826.

[12] Mexican legislation, for example, has adopted an anti-causalist position, both in the 19th century Codes and in the current one, for the simple reason that it does not recognize it, neither as an essential element nor as an element necessary for validity, unlike French, Italian and Spanish legislation.

Sánchez Medal[13] distinguished between cause and motive: 'the cause is the immediate and direct, legal and abstract goal pursued by the proposer, while the motive is the remote and indirect, economic and concrete goal'. Luis Muñoz[14] distinguished between the cause of the obligation and the cause of the contract. Furthermore, Luis Muñoz indicated that the former is not the economic and social purpose but the legal basis of the duty to perform. The *resulting cause*, the cause of the obligation, for the creditor, is the title on which the right to performance is based and justified, and for the debtor, is the reason for the obligation undertaken.

We also find the requirements for the contract to be valid. Unlike essential elements, its absence carries absolute nullification and no legal consequences as no legal effects are produced. Legislation recognizes the following elements for validity:

1. *Legal Capacity*

Acosta Romero and Martínez Arrollo[15] distinguished legal capacity, which they believed is the suitability to hold rights and obligations, from factual capacity, which is the ability to act and carry out legal transactions.

The nullification originated by the incapacity to exercise is relative because it recognizes the verification of the transactions carried out directly by a person without capacity who then overcomes such condition or by the intervention of a legal representative legally authorised to carry out the legal transaction.

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[13] Sánchez Medal, Ramón. *Of the Civil Contracts*, 21th ed., México, Porrúa, 2005, p. 71.

[14] Muñoz, *Cit. Work,* p. 191.

[15] Romero, Miguel Acosta & Arroyo, Laura Martínez, *General Theory of the Legal Act and Obligations*, México, Porrúa, 2001, p. 21.

2. *Absence of Defects in Consent*

Defects refer to situations that cause intent to be structured in a defective manner, leading to legal inefficacy; that is, the legal transaction does not generate its effects, and its correct operation is prevented.

Galindo Garfias[16] stated that defects in intent are any elements disrupting its formation, which may deprive the subject of knowledge of the reality. There is a false appreciation of that reality affecting the intelligence (error, fraud), a defect in the freedom to decide (violence) or a defect causing a clear disproportion between the considerations undertaken by the parties (harm). He added that the defect affects internal intent, deviating the subject's direction. If the defect had not existed, the subject would have substantiated his or her own intent, and therefore, it would have been externalised. Thus, the business carried out originated in a defective way, and the law makes the instrument available to the parties.

International regulations, such as the 2016 UNIDROIT Principles of International Commercial Contracts, outline that a contract is invalidated by error, threat, fraud or excessive disproportion (Article 3.1.4). The error comprises a wrongful interpretation of the facts or of the law existing at the time the contract is executed (Art. 3.2.1). Similarly, a party may void a contract if they were induced to enter into it by the other party's fraudulent acts, including words or practices, or where the other party fraudulently failed to disclose circumstances that should have been disclosed under reasonable commercial standards of fair dealings, which is considered to be fraudulent (Art. 3.2.5).

Threats or intimidation occur when there is an unjustified, imminent and serious threat by one party leaving no reasonable alternative to the other contracting party but to enter into the agreement (Art. 3.2.6).

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[16] Galindo Garfias, Ignacio. *Civil Law, First Course*, 11th ed., México, Porrúa, 1991, p. 228.

Interestingly, excessive disproportion (Art. 3.2.7) regulated by the UNIDROIT Principles is consistent with the so-called harm in domestic civil systems. This defect can occur during contract execution when one of the clauses gives an excessive advantage to one of the parties. This implies that one of the parties has taken unjustified advantage of the dependence, economic distress or pressing needs of the other party or of the party's lack of foresight, ignorance, inexperience or lack of negotiating skills. In the U.S. system, this is known as 'unconscionability', which is mainly identified in adhesion contracts, in which there is a certain inequality between the parties based on each of their bargaining power. One of the parties has minimal options to negotiate the content of the clauses as they are imposed (see Article 2-302 of the Uniform Commercial Code).

3. *Licit Purpose, Reason or Aim of the Contract*

Illegality involves a violation of mandatory regulations (which cannot be voidable by the autonomy of the parties' will) related to public order and good practice. Until now, neither legal theory nor national legislation have precisely indicated a formal declaration included in the law with respect to public order; such a possibility is rejected because it is interpreted as an indefinite legal concept that evolves to match reality in accordance with the rules of social coexistence.

Martínez Alfaro[17] stated that public order laws are those whose compliance is imposed even against the will of individuals as opposed to supplementary laws related to will, which may be disregarded. Good practices refer to the average morality of a place and an era, considering that morals vary in time and space.

Similar to the notion of public order, the idea of good morals is not defined by the law; everything indicates that they are based on rules infe-

[17] Martínez, Joaquín. *Theory of Obligations*, 41th ed., México, Porrúa, 1997, p. 123.

rred just from observing social facts. Therefore, as the notion is linked to the idea of morals, it varies according to time and place.

For Muñoz[18], the notion of good morals derives from ethics or morals and not from the equitable use of the relationship life; thus, the concept of good morals and of social morality is relative as human behavior and conduct will not be contrary to good morals to the extent that they can be observed at a given time and place without the disapproval of social morals (social norms).

4. *Formal Requirements*

The law outlines certain formal requirements for the parties to express their consent. The written form (formal contract) and the oral form (consensual contract) are the generally recognised ways to express consent. Contracts must comply with the form provided by law, if any, to be valid. Otherwise, the contract will be affected by relative nullification (although at first it presents a cause for invalidation, it can be validated when the form required by law is complied with).

Formal requirements constitute a specific and determined way of demonstrating consent that carries an intention of legal certainty as it gives precision to the obligations arising from these transactions that support economic and financial operations. Fernández del Castillo[19] affirmed that formal requirements are the sign or set of signs through which the will of the parties toward a legal transaction is stated or demonstrated. Formal requirements are distinguished from formalities that are the set of rules established by the legal system or by the parties that indicate how intent must be demonstrated for the legal transaction to be valid.

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[18] Muñoz. Cit. Work, p. 317.

[19] Pérez, Bernardo. *Civil Contracts*, 10th ed., México, Porrúa, 2004, p. 35.

What happens when the contracting procedure is carried out electronically? Are we dealing with a formal or consensual contract? The principles, recognised as axiological entities directing legal action, functional equivalence and technological neutrality solve the problem posed by the previous questions as follows: if will is expressed electronically or by any current or future technology, it is equivalent to an express way of demonstrating will, which legally binds the parties. If the rule requires a written form, such requirement will be satisfied with a data message available for review at any time.

We now analyse electronic contracting. To do so, it is essential to clarify that when we discuss contracts entered into by electronic means, we are not recognising a new type of contract. It is not a new substantive model of named or unnamed contracts. The ruling transaction entered into through electronic means requires the same essential elements and validity elements outlined for traditional contracts, without which electronic ones could not exist and, therefore, would not be capable of producing legal effects; in that case, it would cause the loss of legal effectiveness without generating the non-existence of the transaction itself.

An electronic contract, considered to be a transaction constituted by the agreement of two or more people's will regarding a legal purpose of common interest, entered into remotely, in real time or through successive transactions and by electronic means with the aim of creating, modifying or terminating a legal situation[20] presents only certain special characteristics. Where appropriate, comprehensive theoretical and case law debates regarding some essential elements and validity will be analysed in light of a specific type of contract, namely wrap agreements.

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[20] Concept proposed by Davara Rodríguez, cited by María Rincón. See María I. Rincón, *La formación y perfección del contrato por internet* (The formation and perfection of the contract by internet), Revista Ch. de D., 2002, p. 111.

This is also confirmed by Davidson[21] in the case of Anglo-Saxon systems: 'contract formality is not altered merely because an electronic medium was used. Simple contracts requiring no formalities are entered into daily. A contract that can be entered into orally can of course be entered into by the use of email and other forms of electronic communication'.

These electronic contracts on the Internet can be carried out by exchanging emails, through websites or by taking actions. For instance, when a software provider offers products through a website and a user downloads a computer program to their information system (known as shrink wraps), a contract is constituted through the acceptance in downloading the program from the website to the user's information system[22].

The Internet, an open and non-proprietary network, has replaced electronic data interchange (EDI), a closed and proprietary network. EDI entails replacing the physical support (paper) of the most used commercial documents that companies exchange through electronic transactions between their respective computers[23]. The advantage of using EDI is that the parties know each other beforehand; the message is safer because the language is encrypted so that unauthorised parties cannot access it, which makes contracting through EDI secure.

Certainly, the cornerstone of regulating e-commerce includes the principles of 'functional equivalence' and 'technological neutrality' included in the instruments sponsored by the United Nations Commission on International Trade Law (UNCITRAL): Model Law on Electronic

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[21] Davidson, Alan. *The Law of Electronic*, 2th ed., Cambridge University Press, 2015, p. 155.

[22] *Ibidem*, p. 112.

[23] Roca, José. *Arbitration in international contracting*, Madrid, ESIC Editorial, 1994, p. 30.

Commerce of 1996[24], Model Law on Electronic Signatures of 2001[25], Model Law on Electronic Transmissible Documents of 2017, Convention on the Use of Electronic Communications in International Contracts of 2005, but which entered into force in 2013 with 13 States as parties to date[26], as well as the document entitled 'Promoting Confidence in Electronic Commerce - Legal Issues on International Use of Electronic Authentication and Signature Methods' of 2007.

Data messages, comprising the information generated, sent, received, filed or communicated by electronic[27], optical or similar means, such as, among others, EDI, email, telegram, telex or telefax[28] are the engine of the development of the use of technologies. The information contained in them is what allows e-commerce.

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[24] Legislation based on or inspired by the Model Law has been enacted in 74 States in a total of 153 jurisdictions, including the United States, which inspired the Uniform Electronic.

Transactions Act (UETA) of 1999. See: https://uncitral.un.org/es/texts/ecommerce/modellaw/electronic_commerce/status, United Nations Commission On International Trade Law, May 1, 2020.

[25] It has influenced the regulations of 33 States. See: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures/status, United Nations Commission On International Trade Law, May 1, 2020.

[26] Information available at: https://uncitral.un.org/es/texts/ecommerce/conventions/electronic_communications/status, consulted on April 25, 2020.

[27] An electronic means is any mechanism, facility, equipment or system that allows the production, storage or transmission of documents, data and information, including any open or restricted communication network such as the Internet, fixed and mobile telephony or others. This concept was taken from Law 18/2011 of July 5, regulating the use of information and communication technologies in the Administration of Justice.

[28] Article 2 of both the UNCITRAL Model Law on Electronic Signatures and the UNCITRAL Model Law on Electronic Commerce; Article 4, paragraph c, of the United Nations Convention on the Use of Electronic Communications in International Contracts of the same international organization.

Based on a review of international legislation[29] regarding the use and validity of data messages, the following rules are concluded:

a) They must be attributable to the person who created them;

b) They must be available for subsequent consultation;

c) The method that generated them must be trustworthy; and

d) They must be kept whole and unaltered from the moment they were generated for the first time in the final version.

Flores Doña[30] mentioned that closed and open contracting should be distinguished because electronic contracting is conducted through a communication network with free or restricted access. Open electronic contracting is conducted through a public communication network or a freely accessible one such as the Internet, where functions are performed through websites. This type of contracting, directly between the contracting parties, is conducted through a computer or electronic device, equipped with a modem and with an Internet access contract. In contrast, closed electronic contracting occurs on private networks, whose access is restricted by private keys (as is the case of EDI).

Thus, the contractual pre-negotiation stage and above all, the execution, of these legal transactions entered into electronically on open networks (the Internet) requires a specific analysis based on the type of contract in question.

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[29] Model Law on Electronic Commerce of the UNCITRAL of 1996, Uniform rules of conduct for interchange of trade data by teletransmission of the International Chamber of Commerce (ICC) from 1988.

[30] Flores, María. *Impact of Electronic Commerce on Contract Law*, Madrid, Edersa, 2002, p. 19.

II. CLICKWRAP AGREEMENTS

Using the Internet to obtain a good or service and encountering a long text of terms and conditions which, in principle, we must accept by 'clicking' on any link or box if we wish to acquire the good or service has become a common and widely known manner to execute contracts online.

The mass contracting that characterises the modern economy is an inherent characteristic of current contracting through electronic means as it would be unthinkable to negotiate and prepare a private contract with each subject with whom Business to Consumer B2C class exchanges take place. According to the theories of the 'Economic Analysis of Law (EDA)', adhesion contracts, whose formula is used for this type of task, allow for savings in transaction costs: 'they are the costs derived from the ex-ante subscription to a contract and the ex-post control and compliance'[31]. Adhesion contracts are those entered into according to a model or format proposed by one of the parties (proposing party), generally the company or businessperson, while the other party (adhering party), the client or consumer, cannot actually modify the clauses previously designed by the other contracting party.

Spanish Law 7/1998 on the General Conditions of Contracts defines pre-determined clauses as those whose incorporation into the contract is imposed by one of the parties, regardless of material authorship, of their external appearance, of their extension and of any other circumstances. They are general conditions of the contract written for being included in various contracts (Art. 1.1. of the aforementioned law).

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[31] Lorenzetti, Ricardo L. "Economic analysis of law: critical evaluation. Towards a theory of individual and collective action in an institutional context", *Agora Law Review*, 2002, years III-IV, num. 3 y 4, pp. 157-177.

These online agreements have the two characteristics indicated in the previous paragraphs: adhesion contracts in which clients bind themselves through a click, find their legal precedent in the so-called 'shrink wrap' agreements, well-known today as 'clickwrap' agreements thanks to American case law. As stated by Gatt[32], shrink-wrap agreements were specifically introduced for the mass-market sale of packaged software.

'A shrinkwrap agreement is an agreement whose terms are expressed inside a box in which the goods are packaged; the term refers to the plastic that covers the box; usually the party who opens the box is told that she or he agrees to the terms by keeping whatever is in the box; similarly, when the purchaser opens a software package, he or she agrees to abide by the terms of the limited license agreement"[33].

In modern e-commerce, this type of license agreement for software packages that were called shrinkwrap agreements have resulted in clickwrap agreements, also called clickthrough agreements or point-and-click agreements.

'The term "clickwrap" is derived from the fact that in the online context, acceptance occurs when the consumer assents to the terms and conditions by typing "I Agree" or, much more commonly, simply mouse-clicking an "I Accept" or similar button or icon ("the Accept icon")'[34]. According to the scope of the previous definition, we can determine that there are usually two types of clickwrap agreements, Many prefer to call

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[32] Miller, Roger & Jents, Gaylord. *Business Law Today: the essentials*, 8th ed., Thomson, 2008, p. 309.

[33] Gatt, Adam. "Electronic commerce- click-wrap agreements. The Enforceability of click-wrap agreements», *Computer Law & Security Report*, 2002, 18, 6, pp. 404, 405. Available: https://www.sciencedirect.com/science/article/abs/pii/S0267364902011056, consulted on April 25, 2020.

[34] *Ibidem*, p. 405.

them wrap contracts, a more generic term given to the previously mentioned classification that includes type and click as well as icon clicking.

In type and click agreements, the user must type 'accept' or similar words in a box that appears on the screen and click on the 'send' button to express consent. Without doing so, it will not be possible to access the site, transfer the software or purchase the product or service in question. These contracts provide greater protection to the parties because they require the express consent of the user to be bound although the user may make a mistake when typing the requested words. In the second type of contract, the user must click on an icon with text such as *OK, I agree, I accept, I agree* or similar words to express consent. If the user does not click, access will be denied as it is understood that consent has not been given[35].

These contracts are directly linked to the Internet and are therefore entered into through webpages or websites. Thus, they do not use electronic signatures, which comprise *electronic data contained in a data message, or logically associated with it, which can be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message* (Art. 2 of the UNCITRAL Model Law on Electronic Signatures). The World Wide Web (WWW) constitutes web servers distributed on the Internet that enable access to information and services, which can be managed through search engines such as Google, Yahoo, Bing, etc., by keywords or by subject. Web documents can be multimedia, multi-resource, hypertext, multi-programming and multi-application. Web documents are accessed through the WWW by indicating in the browser (as client) the corresponding uniform resource locator (URL) files, information, resources and services of the network[36].

[35] Pacini, Carl, Andrews, Christine & Hillison, William. «Contracting in cyberspace», 2002, CPA Journal, vol. 72, num. 3, pp. 65-67.

[36] Barriuso, Carlos. *Data transmission and communication networks in electronic contracting,* 3th ed., Dykinson, 2006, pp. 83-84.

These contracts are carried out through automated data or information systems that are computer terminals or electronic agents programmed to automatically operate without direct human intervention. Thus, this type of system can create and send a message whose content is an offer or an acceptance of the same. This type of contract uses a method that has a human actor on one or both sides of the transaction.

The use of automated data systems is admitted by the Uniform Electronic Transactions Act (UETA) of the U.S., which, in this respect, exceeds the content of the UNCITRAL Model Laws. In section 2 ('definitions'), the said law provides that 'An automated transaction' means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract or fulfilling an obligation required by the transaction.

> Moreover, Section 14 of this law provides that
>
> 'A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know intent cause the electronic agent to complete the transaction or performance'.

We find that the Anglo-Saxon system of the American Law validates contracts where the declaration of will is expressed by clicking on the mouse of the computer. Nevertheless, the complexity is not in unraveling the clear existence and constant use of this type of contract with regard to e-commerce. Instead, the legal issue becomes complex when it comes to determining whether a message created, processed and sent by

an automated data system is sufficient to express the will of the parties to force them to comply with the agreement, especially when it is a matter of clicking a mouse, screen or on a computer.

III. DECLARATION OF WILL IN CLICKWRAP AGREEMENTS

Finalising consent as an essential element in clickwrap agreements is an issue that is always present in heated legal theory and case law debates on electronic contracting. The risk of making mistakes may be greater in the electronic context as people are more likely to inadvertently press the wrong key than to sign a document by mistake. In this type of contract, there is no option to use an electronic signature that can provide the necessary legal security.

If we state that the agreement is formed when consent is finalised, determining the effectiveness of the declaration of will is essential. In the case of clickwrap agreements, the promise or offer is placed in open electronic spaces and acceptance occurs when the client or consumer clicks on the relevant icon, assuming that the person has read the relevant terms and conditions established by the business in an adhesion contract enabled on a certain webpage. The business includes all the clauses it considers appropriate, including those referring to applicable law and jurisdiction. In this particular way of expressing will, a declaration through an electronic signature in the message is not necessary because as Buono and Friedman[37] stated 'express acceptance is enough, through material behaviour, for the relationship to be validly established'.

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[37] National Conference of Commissioners on Uniform State Laws With Prefatory Note And Comments, Annual Conference Meeting In Its One-Hundred-And-Eighth Year In Denver, Colorado July 23 – 30, 1999, available at: http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf, consulted on 25 May, 2020.

The United Nations Convention on the Use of Electronic Communications in International Contracts outlines in Article 8 that a communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. As Estrella Faria[38] stated, 'The Convention does not venture into determining when offers and acceptances of offers become effective for purposes of contract formation'. Moreover, citing the scope of Article 11[39] of the same international instrument, the author asserted that 'the Convention recognises that contracts may be formed as a result of actions by automated message systems (electronic agents), even if no natural person reviews each of the individual actions carried out by the systems or the resulting contract. However, the mere fact that a party offers interactive applications for the placement of orders, whether or not its system is fully automated, does not create a presumption that the party intended to be bound by the orders placed through the system'.

As discussed, the validity of the declaration of will in the context of clickwrap agreements operating under the described dynamics is unified by regulation as electronic contracting, not the international instruments that constitute the cornerstone of the regulation of electronic commerce (both hard and soft law), includes clear provisions in this respect. Furthermore, this type of contract has been mostly analysed in the U.S. case

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[38] Estrella Faria, José Angelo. The United Nations Convention on the Use of Electronic Communications in International Contracts—An Introductory Note, International and Comparative Law Quarterly, 2006, pp. 689–694.

[39] Article 11. 'A proposal to enter into a contract made by means of one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, as well as a proposal making use of interactive applications for placing orders through such systems, shall be deemed to be an invitation to sell, unless it clearly indicates the intention of the party making the proposal to be bound by its offer if accepted.

law; the regulatory and precedential treatment in European and Latin American systems is limited.

3.1. Clickwrap agreements in the Latin American context

As mentioned above, there is little legal precedent in Latin America in this regard. The legal scholars of the region have analysed the U.S. case law. We infer that this is because the legal provisions that were incorporated into the internal systems of Latin countries are inspired by the model laws of the UNCITRAL in the same sense as most of the configuration of the UETA in the U.S.

Although contracting through automatic devices is part of the daily practice of web transactions carried out by users in Latin American countries, we do not find specific legal provisions clearly determining the time to form contracts entered into through such mechanisms, where one (mechanism) acts as the proposer and another as the acceptor and these mechanisms generate the respective declarations of will.

According to Arias de Rincón[40], when a person is interested in a public offer presented on a website and decides to accept it, they can demonstrate will by clicking on the acceptance icon. In this case, demonstrating the declaration of will and the transmission of the acceptance to the recipient occur at the same time. Proof of this is the fact that when the acceptance button is clicked (externalisation), acceptance immediately leaves the user's computer; it is impossible for the acceptor to exercise any type of control over it (modifying it or interrupting transmission), thereby executing the contract under the assumption of sending theory.

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[40] Arias Rincón, María. "Moment of finalising contracts entered into between entrepreneurs on websites", *Journal of the Institute of Legal Sciences of Puebla*, vol. VII, num. 31, jan-jun. 2013, pp. 86-113.

In the Latin American context, the validity of contracts concluded by electronic means is not under discussion either insofar as there is general acceptance of the principle of 'functional equivalence'. However, the need for general terms and conditions to be clearly derived from and fully indicated in the content of the respective website is stressed. For instance, in the case of 'Despegar.com.ar S.A. S/infraction of Law 18.829'[41], Argentine authorities determined that it is appropriate to confirm the fine imposed on a company selling and booking tourist services through the Internet as current regulations (Art. 5 of Resolution Number 256/2000) require cases of exclusive sale by electronic means, with the knowledge of and reliable acceptance by passengers of the general contracting conditions. Therefore, the information provided by the defendant company regarding the existence of a link on its webpage referring to these conditions 'does not satisfy this requirement insofar as it does not guarantee irrefutably that the client knew and effectively accepted them prior to booking the service offered'.

Mexican Circuit Courts have reached similar decisions in Thesis: I.9o.C.37 C (10a.)[42], determining both in contracts for passenger air transportation and in contracts for travel brokerage. It is the obligation of service providers to expressly provide adequate and sufficient information, guidance and advice to the tourist or traveller on all the commitments and benefits that may result from the acceptance of the conditions, with the organisers or wholesale operators usually present in adhesion contracts, by means of accessible and timely explanations, as well as on the times, quality, quantity, modalities and requirements to avoid any in-

[41] *Case File No. 58.438 despegar.com.ar S.A., s/ infracción ley 18.829*, National Supreme Court of Justice of Argentina, Judges Hendler, Repetto and Bonzón, October 22nd, 2008, p. 1-3.

[42] *Thesis: I.9o.C.37 C (10a) Passenger air transportation and travel agency contracts Collegiate Circuit Courts*, Judicial Weekly of the Federation and its Gazette México, Judge, July 2016, 2130.

conveniences to the traveller and to provide them with peace of mind. Therefore, it is not enough for the client or user to express agreement to the conditions of the air transport or travel agency contracts via the Internet when purchasing the ticket or travel agent's ticket. This is because it is up to the service providers to prove that they made the user aware of those conditions and explained their consequences, which is not fulfilled by merely showing the respective contract.

3.2. Clickwrap agreements in the U.S. context

In Section 2, 'Definitions', of the U.S. UETA, when referring to the concept of 'electronic signature', the validity of 'that click' is recognised and is considered equal to an electronic signature. In addition, Section 9 'Attribution and effect of electronic record and electronic signature' is also identifiable as a legal provision validating consent expressed through a click:

> 'This section (section 9) does apply in determining the effect of a "clickthrough" transaction. A "clickthrough" transaction involves a process which if executed with an intent to "sign", intent becomes an electronic signature'[43].

The above legal provision resonated in the decisions of U.S. courts as they determined that clicking on the 'Accept' icon is equivalent to signing a contract and that the consumer is bound by the terms and conditions of that agreement:

> a) In the widely known case Hotmail Corporation v. Van Money Pie Inc[44] in 1998, the court found that the clickwrap agreement

[43] Cited by MORENO, Javier A. "The manifestation of will and its effectiveness in e-commerce", *Journal e- Mercatoria,* 2013, 12, 2, p. 21.

[44] *Hotmail Corporation v. Van Money Pie Inc., et.* Al., No. C-98 JW PVT ENE, C 98-20064 JW. United States District Court, N.D. California. April 16, 1998. available at: https://cyber.harvard.edu/ilaw/Contract/hotmail.html, consulted on 28 May, 2020.

entered into between the defendant and the plaintiff bound the defendants to fully comply with Hotmail's terms of service from the moment they clicked on the 'Agree' icon. The court therefore concluded that the defendant's conduct violated the contract entered into with Hotmail as the terms of service prohibited the use of Hotmail's email to distribute spam.

b) In the case Mortgage Plus Inc. v. DocMagic, Inc.[45], the court determined that the forum selection clause contained in a click software license agreement was enforceable. The court concluded that the software license agreement was a valid contract because the user had to accept its terms before the software could be installed and used. Therefore, the forum selection clause was enforceable, and the court ordered that the lawsuit be transferred to a federal district court in California.

Moreover, in other cases, the U.S. courts have established important guidelines for accepting the validity of this type of contract and thus the materialisation of irrefutable consent. For instance, in the case Ticketmaster Co. et al. v. Tickets Com. Inc[46], the court found that the contract was not deemed to have been entered into 'when only certain general aspects of the contract were accessed on screen without clarifying that by clicking on the 'Accept' button other conditions are also accepted; even less so when only the test 'use means acceptance of the conditions of service' has been displayed on screen without the navigator having had the opportunity to examine them beforehand'. It cannot be said that

[45] *Martin Samson, Mortgage Plus, Inc. v. DocMagic, Inc., et al.* No. 03-2582-GTV-DJW (WHW) (D. Kan., August 23, 2004), Internet library of law and court decisions, avaliable at: http://www.internetlibrary.com/cases/lib_case356.cfm

[46] *Ticketmaster Co. et al v. Tickets Com. Inc., District Court California*, 27/03/2000 Case No. CV 99-7654 HLH, available at: https://casetext.com/case/ticketmaster-corp-v-tickets-com-inc-2, consulted on 30 May, 2020.

simply including the terms and conditions in this way necessarily creates a contract with anyone who uses the website.

Moreover, it follows from a review of Swift v. Zynga Game Network, Inc.[47], Sherman v. AT&T Inc[48] and Vernon v. Qwest Communications International, Inc[49] that courts are more likely to enforce the terms of a 'clickwrap arrangement' when the website user receives adequate notice of the terms, demonstrated by reasonable placement of those terms on the website, and has enough time to object to those terms. In addition, courts enforce clickwrap agreements when the website user checks an 'I agree' or 'I accept' box provided that the terms of such agreement, to which the user is supposed to agree, are reasonably available.

3.3. Clickwrap agreements in the European context

The regional regulations of the European Union and international legislation, Law 34/2002 of 11 July, Information Society Services and Electronic Commerce (LSSICE) of Spain, Directive 2000/31/EC of the European Parliament and the Council on Certain Legal Aspects of Information Society Services, UNCITRAL Model Law have unified criteria establishing that in the case of contracts entered into by electronic means, there is consent from the moment acceptance is expressed regardless of whether the proposer has received such acceptance.

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[47] *Rebecca SWIFT, et al., Plaintiffs, v. Zynga Game Network, Inc.; et al.*, Defendants, No. C–09–5443 2011-08-4, available at: https://casetext.com/case/swift-v-zynga-game-network-2, consulted on 30 May, 2020.

[48] *Sherman v. AT&T Inc. No. 11 C 5857 03-26-2012*, Available at: https://casetext.com/case/sherman-v-att-inc, consulted on May 30, 2020.

[49] *Vernon v. Qwest Communications International, Inc. Civil Action No. 09–cv–01840–RBJ–CBS. 2013-02-27*, available at: https://casetext.com/case/vernon-v-qwest-commcns-intl-inc, consulted on 27 May, 2020.

The judgment of the Court of Justice (Third Chamber) of 21 May 2015 (reference for a preliminary ruling from the Landgericht Krefeld - Germany) - Jaouad El Majdoub v. CarsOnTheWeb. Deutschland GmbH[50] questions whether the 'clickwrapping' technique meets the formal requirements for transmission by electronic means within the meaning of Article 25(2) of the Brussels Regulation I[51].

The CJEU holds that the technique of acceptance by means of a 'click' of the general terms and conditions, which includes a clause establishing jurisdiction, in a sales contract executed electronically, such as that in the main proceedings, constitutes transmission by electronic means, which provides a durable record of that clause, provided that the technique allows for the text of those terms and conditions to be printed and saved before the contract is entered into.

What is decisive for the validity of the clause is that the method used guarantees the buyer not only the possibility of accessing the clause prior to the conclusion of the contract but also the possibility of saving and reproducing such clauses unchanged. The court states that by subordinating the validity of a clause establishing jurisdiction to the existence of an 'agreement' between the parties, the judge hearing the case must first examine whether that clause was, in fact, consented to clearly and precisely by both parties. In the case heard by the court, there was express acceptance of the general conditions by the buyer when checking the corresponding box on the seller's website. Thus, the court decided as follows: 'Article 23(2) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of

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[50] Available at: https://eurlex.europa.eu/legalcontent/ES/TXT/PDF/?uri=OJ:JOC_2015_236_R_0026&from=ES, consulted on 26 May, 2020.

[51] Id. Article 25, subsection 2: 2. Any transmission made by electronic means that provides a durable record of the agreement shall be deemed to be in writing.

judgments in civil and commercial matters must be interpreted as follows: the acceptance technique using a 'click' for the general conditions, including a clause establishing jurisdiction, in a sales contract entered into electronically, as that in the main proceedings, *constitutes a transmission by electronic means, which provides a durable record of that clause, within the meaning of this provision, provided that such technique allows for the text of such conditions to be printed and saved before the contract is executed'.*

In addition, in case C-298/07[52] between Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV and deutsche internet versicherung AG, the authority tried to determine whether a service provider operating exclusively on the Internet must communicate its telephone number to its customers before entering into a contract.

In the case in question, it was concluded that Article 5(1)(c) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) must be interpreted as that *the service provider shall provide service recipients, before entering into a contract with them, with additional information, other than their email address, which will enable them to make contact rapidly and communicate directly and effectively*. This information does not necessarily have to include a telephone number. It may consist of an electronic contact form through which service users may contact the service provider via the Internet and to which the service provider will reply by email, except in situations where a recipient of the service who, after contacting the service provider electronically, is deprived of access

[52] Bundesgerichtshof 22 June, 2007, Petition for a pre-judicial decision, pursuant to section 234 CE, by the Bundesgerichtshof (Germany), by means of resolution from 26 April, 2007, received by the Court on June 2007, available at*: https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:62007CJ0298&from=EN*

to the electronic network and thus requests access to a non-electronic means of communication to reach the service provider.

Thus, we identify similar treatment for the validity of clickwrap agreements in the European context. Nevertheless, it is important to reinstate the requirement of placing relevant website information on the page that allows the user to communicate with the company, if necessary, to clarify the scope of the general contract conditions in case of reasonable doubts that may cause a defect in consent and thus prevent the completion of such contracts.

3.4. Problems deriving from clickwrap agreements

Clickwrap agreements involve a series of problems that require the attention of the Science of the Law. Although we have demonstrated in this study that the validity of these contracts is generally accepted where consent is finalised through a click after complying with the regulations identified by American case law, there are certain aspects that will always generate problems of legal uncertainty. Thus, a unification of international regulations in the form of an electronic lex or computerised lex is necessary. This could be potentially adding efforts to the international legal instrument on electronic contracting in charge of UNCITRAL, which has been cited in several of its working meetings since 2004[53].

Clearly, in adhesion contracts, there is a depersonalisation in the legal transaction, and the business will incorporate general conditions into the contract that on certain occasions, may be unfair to the consumer by generating abusive terms; the tendency toward a contractual imbalance is a latent problem in both traditional and electronic adhesion contracts.

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[53] UNCITRAL has been working on a Draft Convention on Electronic Contracting carried out by its Working Group IV since 2004.

For example, in the case *Specht vs. Netscape Communications Corp*[54], the court did not recognise the agreement because although the icon to transfer the software was at the top of the relevant Internet site, the link to the license agreement was at the bottom with a legend stating as follows: *please review the terms and express your consent to agree.* This phrase was simply an invitation to read the agreement and did not notify users that when transferring the software, they would be bound under the license agreement. In this case, the court emphasises that it is important to keep in mind that the Internet provides companies with many opportunities to exploit consumers who may or may not read the licenses before clicking on a strategically placed button. If a reasonable consumer is not warned of the contractual terms, they cannot accept them. The terms cannot be very subtle; otherwise, it is considered that the consumer may overlook them.

Furthermore, error as a defect of consent is an element for validity that can be compromised in this type of contract. It is common for defendant users to cite error as a defence, claiming that it was not their intention to be bound by the terms proposed by the other party. In Pollstar v. Gigmania[55]; Gigmania held that the claim for breach of contract fails as a matter of law because Pollstar cannot assert the required contractual element of mutual consent. Indeed, upon viewing the website, the court agreed with the defendant that many visitors to the site may be unaware of the license agreement because the notice was displayed in a small grey text on a grey background. It was not underlined as is customary on the Internet and was thus not valid.

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[54] *Specht v. Netscape Communications Corp.*, US District Court for the Southern District of New York., 2001, available at: https://law.justia.com/cases/federal/district-courts/FSupp2/150/585/2468233/, consulted on 28 May, 2020

[55] *Pollstar Plaintiff, V. Gigmania Ltd. Defendant.* No. CIV-F-00-5671 REC SMS, United States District Court, E.D., California, 17 october, 2000, available at: https://www.courtlistener.com/opinion/2402361/pollstar-v-gigmania-ltd/, consulted on 22 May, 2020.

It is worth highlighting that this consent defect affects will, deviating it to something different from what the subject would have wanted without having made an error. Article 3.2.3. of the UNIDROIT Principles, in its latest version, states that an error in the expression or transmission of a statement is attributable to the person making the statement. We thus understand that if the elements of the website where the contract to purchase a good or service is displayed are not clear or properly located, it makes it possible for consumers to make an error (ignorance of the fact), leading them to enter into a contract without knowing that they are legally bound under an agreement from which rights and obligations will arise.

We would be facing a critical error, completely destroying will and preventing the formation and existence of the legal transaction. This would be an obstructive error, an error hindering and preventing the contractual agreement. The author specifies that this error takes place whenever the parties do not reach an understanding about the purpose of the contract and when acceptance does not match the offer as a result of a mistake, which prevents the existence of an agreement between the parties. Thus, this error prevents the formation of consent with respect to a given legal transaction[56].

Finally, the lack of an exclusively international standard covering principles, institutions and regulations is, in our opinion, the main legal problem in the practice of clickwrap agreements. The Internet has surpassed all borders and due to that, it is necessary to standardise the guidelines on electronic contracting through an instrument designed with that sole purpose and one which may overcome the limitations of the UNCITRAL Model Laws on electronic commerce and signatures and the Convention on elec-

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[56] Gaitán Martínez, José Alberto; Mantilla Mantilla, Fabricio Espinosa. *The termination of the contract. New trends in comparative law*, 1th ed, Colombia, Universidad del Rosario Editorial, 2007, p. 44.

tronic communications in international contracts. This would specify the requirements that this type of contract must fulfil regardless of where the business and the consumer are located as the legislation would be uniform.

FINAL REMARKS

Clickwrap agreements will continue to be the object of countless studies and reflections requiring the regulation of electronic contracting, which is not subject to unified regulations, despite the fact that the Internet has removed borders and promoted legal businesses with elements of foreign affairs in which more than one system can converge.

The legal treatment afforded to clickwrap agreements worldwide has been heterogeneous as the theory and case law determining its scope and validity has been shaped mainly by American courts under the common law system. Nevertheless, we have shown in this study that clickwrap agreements are certainly constantly used in the practice of electronic commerce and that they have been afforded legal validity. Consent is given with a simple 'click'.

However, it is essential to comply with a series of rules that, in our opinion, should be proposed in a Model Law on electronic contracting by UNCITRAL, with the intervention of other international organisations with experience in regulating these issues, such as the International Chamber of Commerce. We opted for a soft law instrument, as opposed to a hard law instrument (convention), in view of the success of the Model Law on electronic commerce, which has inspired several national legislations both in the Romano-Germanic and common law systems and which continues to be a reference in commercial treaties such as the recent USMCA. This new Free Trade Agreement between Mexico, the U.S and Canada (USMCA) that will come into force in mid-2020

incorporates a chapter IX entitled 'Digital Commerce' in its Article 19. 5 (1) referring to the legal framework of electronic transactions. It provides that 'each Party shall maintain a legal framework governing electronic transactions that is consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996'.

In the model law we propose, vendors have to face additional costs related to contract law arising from the need to adapt the website on which the contract is provided to the corresponding legal requirements and the provisions of consumer law protection. The aim is to facilitate the expansion of cross-border trade for businesses and cross-border purchases for consumers by reducing transaction costs for both parties, and this can only be achieved by making available a uniform and autonomous body of rules on electronic contract law.

In this sense, we propose that the Model Law should be based on an analysis of regional e-commerce practices from the two most representative legal systems (Civil Law and Common Law) to standardise rules providing legal certainty on this type of contract:

a) Accept reception theory to determine the moment when the contract is entered into, as we consider this theory to be in line with the dynamics of clickwrap agreements. At the same time, it provides a timely and fair response to the issue of risk allocation when using electronic communications. Accepting the proposer's receipt as a way to determine the moment the contract is entered into is the manner accepted by the majority of traditional legal scholars.

b) A pre-prepared contract by a business must be drafted clearly, avoiding any complex terminology.

c) The consumer must be given the opportunity to clearly review the terms and conditions, with all the visual elements helping specify

that if required to 'click', consumers would be bound because they would be accepting a legal transaction. Moreover, the option should be given to completely review the terms and scope before signing (clicking) the contract; that is to say, the hyperlinks or downloads that are on the page and that help the user access the information should not be allowed as a way to express consent since it would be a proposal that is completely or partially unknown at the time.

d) There would be greater legal certainty if next to the 'I accept' option, the consumer could find an unambiguous option stating 'I do not accept'.

e) Following the European trend, customers must have the option to save the respective contract electronically. In other words, the business must ensure that the contract terms are made available in intelligible characters on a durable medium that allows the information in the text to be read and recorded and to be reproduced in a tangible format.

f) Conflict clauses (applicable law and jurisdiction) must be clearly stated in the contract and be an integral part of the document, avoiding hyperlinks to other query windows.

g) The right to withdraw from the contract within a reasonable period of time by the consumer (the day the contract is entered into in the case of the use of digital media) should be regulated. This option to withdraw should also be enabled electronically on the website. If this option is used, the business should send an acknowledgement of receipt of withdrawal via a durable medium (e.g., by email) immediately.

h) As has been the trend in Europe, it is wise and gives greater legal certainty to the transaction if, in addition to an email address, the

business provides additional information for the consumer on its website to quickly contact and communicate directly and effectively in case of questions.

BIBLIOGRAPHY

MORENO, Javier. "The manifestation of will and its effectiveness in e-commerce", *Journal e- Mercatoria,* 2013.

ARIAS RINCÓN, María. "Moment of finalising contracts entered into between entrepreneurs on websites", *Journal of the Institute of Legal Sciences of Puebla*, vol. VII, num. 31, jan-jun. 2013, pp. 86-113.

Bundesgerichtshof 22 June, 2007, Petition for a pre-judicial decision, pursuant to section 234 CE, by the Bundesgerichtshof (Germany), by means of resolution from 26 April, 2007, received by the Court on June 2007, available at*: https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:62007CJ0298&from=EN*

BARRIUSO, Carlos. *Data transmission and communication networks in electronic contracting,* 3th ed., Dykinson, 2006, pp. 83-84.

CARRASCO, Ángel, Encarna, Perera, Lobato, Cordero and Marín López, Manuel de Jesús. *Civil Law Lessons. Law of obligations and contracts in general*, 4th ed., Madrid, Tecnos, 2019.

Case File No. 58.438 despegar.com.ar S.A., s/ infracción ley 18.829, National Supreme Court of Justice of Argentina, Judges Hendler, Repetto and Bonzón, October 22nd, 2008, p. 1-3.

CASTRILLÓN Y LUNA, Víctor. *Civil Contracts*, 6th ed., Porrúa, 2014.

DAVIDSON, Alan. *The Law of Electronic*, 2th ed., Cambridge University Press, 2015.

ESTRELLA FARIA, José Angelo. The United Nations Convention on the Use of Electronic Communications in International Contracts—An Introductory Note, International and Comparative Law Quarterly, 2006, pp. 689–694.

GAITÁN MARTÍNEZ, José Alberto; MANTILLA MANTILLA, Fabricio Espinosa. *The termination of the contract. New trends in comparative law*, 1th ed, Colombia, Universidad del Rosario Editorial, 2007.

GALINDO GARFIAS, Ignacio. *Civil Law, First Course*, 11th ed., México, Porrúa, 1991.

GARCÍA, Tonatiuh. "Reflections on the general theory of the contract", *Journal of Private Law*, 2008, num. 21-22, pp.41-67.

GATT, Adam. "Electronic commerce- click-wrap agreements. The Enforceability of click-wrap agreements», *Computer Law & Security Report*, 2002, 18, 6, pp. 404, 405. Available: https://www.sciencedirect.com/science/article/abs/pii/S0267364902011056, consulted on April 25, 2020.

Hotmail Corporation v. Van Money Pie Inc., et. Al., No. C-98 JW PVT ENE, C 98-20064 JW. United States District Court, N.D. California. April 16, 1998. available at: *https://cyber.harvard.edu/ilaw/Contract/hotmail.html*, consulted on 28 May, 2020.

KANT, Emmanuel. *Metaphysical principles of the doctrine of law*, 2th ed., México, UNAM, 1978.

KELSEN, Hans. *Contracts and Treaties, analysed from the point of view of pure Law theory,* 5th ed., National, 1974.

LORENZETTI, Ricardo L. "Economic analysis of law: critical evaluation. Towards a theory of individual and collective action in an institutional context", *Agora Law Review*, 2002, years III-IV, num. 3 y 4, pp. 157- 177.

FLORES, María. *Impact of Electronic Commerce on Contract Law*, Madrid, Edersa, 2002.

RINCÓN, María. See María I. Rincón, *La formación y perfección del contrato por internet* (The formation and perfection of the contract by internet), Revista Ch. de D., 2002.

Martin Samson, Mortgage Plus, Inc. v. DocMagic, Inc., et al. No. 03-2582-GTV-DJW (WHW) (D. Kan., August 23, 2004), Internet library of law and court decisions, avaliable at: *http://www.internetlibrary.com/cases/lib_case356.cfm*

MARTÍNEZ, Joaquín. *Theory of Obligations*, 41th ed., México, Porrúa, 1997.

MILLER, Roger & JENTS, Gaylord. *Business Law Today: the essentials*, 8th ed., Thomson, 2008.

MUÑOZ, Luis. *General Contract Theory*, Cardenas and Distributor, 1973.

National Conference of Commissioners on Uniform State Laws With Prefatory Note And Comments, Annual Conference Meeting In Its One-Hundred-And-Eighth Year In Denver, Colorado July 23-30, 1999, available at: *http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf*, consulted on 25 May, 2020.

PACINI, Carl, Andrews, Christine & Hillison, William, «Contracting in cyberspace», 2002, CPA Journal, vol. 72, num. 3, pp. 65-67.

PÉREZ, Bernardo. *Civil Contracts*, 10th ed., México, Porrúa, 2004.

PLANIOL, Marcel & RIPERT, Georges. *Civil Law*, 4th ed., Uruguay, Harta, 1996.

Pollstar Plaintiff, V. Gigmania Ltd. Defendant. No. CIV-F-00-5671 REC SMS, United States District Court, E.D., California, 17 october, 2000, available at: *https://www.courtlistener.com/opinion/2402361/pollstar-v-gigmania-ltd/*, consulted on 22 May, 2020.

SÁNCHEZ MEDAL, Ramón. *Of the Civil Contracts*, 21th ed., México, Porrúa, 2005.

Rebecca SWIFT, et al., Plaintiffs, v. Zynga Game Network, Inc.; et al., Defendants, No. C–09–5443 2011-08-4, available at: *https://casetext.com/case/swift-v-zynga-game-network-2*, consulted on 30 May, 2020.

ROCA, José. *Arbitration in international contracting*, Madrid, ESIC Editorial, 1994.

ROJINA VILLEGAS, Rafael. *Mexican Civil Law*, 4th ed., México, Porrúa S.A, 1960.

ROMERO, Miguel Acosta & ARROYO, Laura Martínez. *General Theory of the Legal Act and Obligations*, México, Porrúa, 2001.

PINOCHET, Ruperto. *La Formación del Consentimiento a través de las Nuevas Tecnologías de la Información, Part III: El Momento de Formación del Consentimiento Electrónico* (Consent Formation through New Information Technologies), Ius et Praxis, 2005, vol. 11, num. 2, pp. 273-302.

SAVIGNY, Friedrich K. *Current Roman Legal System*, 2th ed., National Supreme Court of Justice, 2004.

Sherman v. AT&T Inc. No. 11 C 5857 03-26-2012, Available at: *https://casetext.com/case/sherman-v-att-inc*, consulted on May 30, 2020.

Specht v. Netscape Communications Corp., US District Court for the Southern District of New York., 2001, available at: *https://law.justia.com/cases/federal/district-courts/FSupp2/150/585/2468233/*, consulted on 28 May, 2020.

Thesis: I.9o.C.37 C (10a) Passenger air transportation and travel agency contracts Collegiate Circuit Courts, Judicial Weekly of the Federation and its Gazette México, Judge, July 2016, 2130.

Ticketmaster Co. et al v. Tickets Com. Inc., District Court California, 27/03/2000 Case No. CV 99-7654 HLH, available at: *https://casetext.com/case/ticketmaster-corp-v-ticketscom-inc-2,* consulted on 30 May, 2020.

Transactions Act (UETA) of 1999. See: *https://uncitral.un.org/es/texts/ecommerce/modellaw/electronic_commerce/status*, United Nations Commission On International Trade Law, May 1, 2020.

Vernon v. Qwest Communications International, Inc. Civil Action No. 09–cv–01840–RBJ–CBS. 2013-02-27, available at: *https://casetext.com/case/vernon-v-qwest-comm-cns-intl-inc*, consulted on 27 May, 2020.