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Chapter 7

Click-Wrap International Contracts

Sixto A. Sánchez Lorenzo[1]

SUMMARY: I. INTRODUCTION. II. CLICK-WRAP CONTRACTS AS STANDARD CONTRACTS. II.1. *Written form requirement*. II.2. *True consent: shrink, click, and browse-wrap contracts*. II.3. *Advertising, Matching, and Crowd-working click contracts*. II.4. *Click as an offer*. II.5. *Consideration*. III. WRAP CONTRACTS AS INTERNATIONAL CONTRACTS. III.1. *General rules on jurisdiction and applicable Law*. III.1.1. Identifying international contracts. III.1.2. Identifying consumers and/or traders. III.1.3. Identifying domicile, residence, and establishment. III.1.4. Identifying place of performance in digital contracts. III.2. *Forum selection clauses*. III.2.1. Commercial contracts. III.2.2. Consumer contracts. III.3. *Arbitration clauses*. III.4. *Applicable law clauses*. III.4.1. Commercial contracts. III.4.2. Consumer contracts. IV. CONCLUSIONS: BEST PRACTICES IN INTERNATIONAL WRAP CONTRACTS. V. BIBLIOGRAPHY.

I. INTRODUCTION

Click-wrap (or Click-through) contracts imply the acceptance of contract conditions offered through digital prompts via a simple mouse click. In a wider sense, users' assent in online contracts may be implicit by other gestures, such as opening a window, downloading some software, or even opening a package. The validity and legal effects of these contracts depend on legal rules established for traditional or classic contracts,

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which must be adapted to digital particularities. The legal regime of these contracts also depends on several variables; one of the most relevant is the manner and the moment of expression of a user's assent. However, other circumstances could be significant, such as the fact that the user is a consumer or a professional or the fact that contracts were concluded in cyberspace but executed outside or concluded and executed within cyberspace. Both American and European case laws have recently dealt with this subject, sometimes using rather different approaches. Moreover, the Internet is a potential international market, and, therefore, online contracts also have an international vocation. Conflicts of jurisdiction and conflicts of laws related to these contracts must be solved through private international law solutions conceived for classic contracts.

Formal and substantive requirements for the validity of click-wrap contracts as standard contracts are first analyzed from a bilateral EU/USA comparative point of view to justify the relevance of international solutions (II). Then, this paper focuses on questions related to conflicts of jurisdictions and conflicts of laws in international click-wrap contracts, paying special attention to the enforceability of forum selection clauses, arbitration agreements, and choice-of-law clauses (III). Finally, conclusions are presented as proposals for positive practices in online international trade (IV).

II. CLICK-WRAP CONTRACTS AS STANDARD CONTRACTS

II.1. WRITTEN FORM REQUIREMENT

Insofar as contract conditions may be downloaded and/or printed in writing, formal requirements are duly accomplished by click contracts, even in cases where written form is a peremptory requirement of the applicable law. Functional equivalence between traditional written form and electronic documents is generally accepted in comparative law[2]. Particularly, under most legal systems, choice-of-forum clauses and

2. See a Comparative analysis in Ángeles Lara Aguado 'Formación del contrato electrónico', in Sixto A. Sánchez Lorenzo (ed), *Derecho contractual comparado (una perspectiva europea y transnacional* (3rd edn, Aranzadi/Thomson-Reuters 2016) vol I 867, 885-890. Recital 34 of the EC 2001/31 Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce [2001] OJ L 178 (Directive on electronic commerce) states: "Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such communications adjustment should be systematic and should cover all the necessary stages and

arbitration agreements require written form. However, such clauses are acceptable and enforceable by electronic means. Article 25 § 2 of the "Brussels I" Regulation[3] states that "[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'." Article 7 § 4 (Option I) (4) of the UNICTRAL Model Law on International Commercial Arbitration also establishes that "[t]he requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy"[4].

Form conditions are accomplished even if general conditions have not been recorded or printed by the offeree. This was a crucial point in the *El Majdoub* case before the ECJ[5], related to a commercial contract: The applicant in the main proceedings was a Germany-based car dealer, who purchased an electric car from the website of the defendant, whose registered office was also in Germany. He sued in the German Courts, although the general terms and conditions accessible on the website of the offeror contained an agreement conferring jurisdiction on a court in Belgium. The ECJ followed a literal interpretation, under which Article 23 §2 of the "Brussels I" Regulation (current Article 25 § 2 of the "Brussels I" regulation recast) "that it requires there to be the 'possibility' of providing a durable record of the agreement conferring jurisdiction,

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acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable".

3. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351 ("Brussels I" Regulation).

4. In the same sense, Article 6 of the UNCITRAL Model Law on Electronic Commerce states: "Writing:(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference." (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing. Article 9.2° of the UN Convention on the use of electronic communications in international contracts provides: "Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference."

5. Case C-322/14 *Jaouad El Majdoub/CarsOnTheWeb. Deutschland Gmbh* [2015] ECLI:EU:C-2015:334.

regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he clicks the box indicating that he accepts those conditions"[6]. In the opinion of the ECJ, it is also confirmed by a historical and teleological interpretation, given that according to the Explanatory Memorandum of the Commission on the Proposal of the Regulation, "the aim of that provision is that the need for an agreement 'in writing or evidenced in writing' should not invalidate a choice-of-forum clause concluded in a form that is not written on paper but accessible on screen." In other words, "[i]n order for electronic communication to offer the same guarantees, in particular as regards evidence, it is sufficient that it is 'possible' to save and print the information before the conclusion of the contract."

By contrast, the time reference is important in all cases. Standard conditions must be recordable, downloadable, or printable "before the conclusion of the contract." In other cases, there is not a possible equivalence with a written form and the contract has not been duly performed or at least those conditions are not enforceable. This consequence has been declared by the USA case law for "shrink-wrap" licenses, where contractual terms are only downloadable once the acquired software has been downloaded (contrary to click-through licenses)[7]. This condition is also important in relation with standard conditions merely available by reference, which requires further actions, clicks, or opening new windows by the offeree (browse-wrap contracts). If standard conditions are only available after the contract's conclusion, there is no chance for the offeree to know them, and therefore the contract or some particular clauses are void or voidable. The question arises when referred standard terms are actually recordable, but hardly findable. In this sense, simplicity of web pages becomes crucial. Many authors have pointed out that the availability or publicity of standards terms does not suffice. Thus, an easy, clear, and direct link to the text of standards terms is required, as well as an easy way to print them[8].

6. The Explanatory Report of Professor Pocar on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339 ("Lugano II" Convention) stated that the test of whether the formal requirement in that provision is met *is* "whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way," and that is the case "even if no such durable record has actually been made," meaning that "the record is not required as a condition of the formal validity or existence of the clause."
7. *Specht v Netscape and AOL* [2001] U.S. Dist. LEXIS 9073 (S.D.N.Y.).
8. See Pedro A. de Miguel Asensio, *Derecho privado de Internet*, (5th edn, Thomson Reuters 2015), 910-911; Clive Gringas, *The Laws of the Internet* (Butterworths 1997)

II.2. TRUE CONSENT: SHRINK, CLICK, AND BROWSE-WRAP CONTRACTS

In conclusion, click-wrap contracts are submitted *mutatis mutandis* to the same rules applicable to standard conditions in written form[9]. The click on the block is treated as an acceptation of the standard conditions form or of the main contract, regardless of whether the offeree has or has not actually read the conditions available under the main contract. At first sight, there is an intrinsic logic in such equivalence. In traditional contracts, those concluded by non-electronic means, standard conditions are common; it is also common to not read standard forms and sign them more or less unknowingly. Consequences of such a lack of care vary depending on the abusive or surprising character of any clause and, particularly, of the commercial or consumer nature of the agreement.

Legal analysis should then be focused on the application of traditional principles on standard contracts to click-wrap contracts or clauses[10], but this approach could conceal a "psychological difference" which must be considered[11]. At least for consumers and ordinary people, the mere fact of signing implies a conscious responsibility. A signature is a personal sign that implies commitment, and everyone is aware that a signature cannot be written frivolously. Many centuries of practice deeply stamped such understanding. There is no similar feeling in clicking on computers or smartphone screens[12]. First, there is no personal signature, but a mere electronic identification, apart from cases where electronic signature is admitted or required. Second, navigation in open networks usually

28; Stefan Ernst, 'The Mouseclick als Rechtsproblem – Willenserklärung in Internet' [1997] *NJW-CR* 165-167.

9. As the District Court of Pennsylvania stated in *Feldman v. Google, Inc.* [513 F.Supp. 2d 229, 236 (E.D. Pa. 2007)], "[t]o determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement." See, *e.g., Specht*, 306 F.3d at 28-30; *Forrest v. Verizon Communications, Inc.*, [2002] 805 A.2d 1007, 1010 (D.C.); *Barnett v. Network Solutions, Inc.,* [2001] 38 S.W.3d 200 (Tex. App.); *Caspi v. Microsoft Network,* [1999] L.L.C., 323 N.J.Super. 118, 125-26, 732 A.2d 528 (App. Div.); John M. Norwood, 'A Summary of Statutory and Case Law Associated With Contracting in the Electronic Universe', [2006] 4 DBCLJ 415, 439-49 (discussing clickwrap cases); 1-2 Computer Contracts § 2.07 (2006) (analyzing clickwrap cases).

10. The need for specific rules was early pointed out. See e.g., J. C. Hoye, 'Click: Do We Have a Deal' [2001] *SJTAA* 163.

11. See Nancy Kim, *Wrap Contracts: Foundations and Ramifications* (OUP 2013) 194; Daniel D. Barnhizer, 'Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts' [2014] 44 *SWLR* 215, 216-223.

12. Kim (n 11) 2; Juliet M. Moringiello, 'Signal, Assent and Internet Contracting' [2005] 57 *RLR* 1307, 1316.

requires users to face opened windows with quite different utilities and contents, even merely advertising. The aim to achieve an easy, quick, and dynamic navigation very often induces users to cast aside disturbing windows by the most expeditious way that is "quick-clicking" and accepting any condition to save the navigation burden. Such a well-known trend, provoked by the particularities of the digital sphere, cannot be omitted and should be considered in legal approaches to the question of enforceability of click-wrap contracts.

Therefore, click-wrap contracts do not properly give rise to problems related to mere formal validity. As standard contracts, they risk true consent and substantial validity. Form and substantial consent are then not severable. The offeree cannot modify or suggest any counter offer; he merely consents or rejects the offer and its standard conditions through a simple mouse click or by opening some windows.

The various online contracts and ways to pre-design the user's consent that require regular updating[13]. However, some big categories seem constant: In shrink-wrap contracts, general conditions are available only after the conclusion of the contract. The expression "shrink-wrap agreements" comes from agreements shrink-wrapped in plastic or software packages that state by opening the package, the buyer agrees to the licensing rules enumerated in the agreement[14]. Additional terms are only known by the user once the product has been received or downloaded (e.g., terms of use of a software license). In the EU, such contracts are not enforceable, at least in consumer contracts, as there are peremptory obligations related to pre-contractual information (e.g., Art. 4 of 97/7 EU Directive on distance contracts[15]). The same criterion can be found in US case law. American Courts usually require a true consent founded on a reasonable chance to know general conditions, a non-ambiguous expression of consent on such conditions and a real possibility to reject the agreement. Such requirements are not accomplished in shrink-wrap contracts, even if the user keeps the product beyond the delay for return established by the server[16]. However,

13. See, for instance, Ronald J. Mann & Travis Siebneicher, 'Just One Click: The Reality of Internet Retail Contracting' [2008] 108 *CLR* 984.
14. Kimberlianne Podlas, 'Let the Business Beware: Click-Wrap Agreements in B2C E-commerce' [2001] 8 *JLB* 38, 40.
15. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144 (Distance Contracts Directive).
16. *Register.com, Inc. v Verio Inc.*, [2004] 365 F. 3d 393, 430-431 (2nd Cir.); *Klock v Gateway, Inc.*, [2000] 104 F. Supp. 2d 1332 (D. Kan.); *Step-Saver Data Systems, Inc. v. Wyse Technology*, [1991] 939 F. 2d 91, 104 (3rd Cir.); *Vault Corporation v Quaid Software Ltd*., [1987] 655 F. Supp. 750, 761-763 (ED. La.). See Zachary M. Harrison, 'Just Click Here:

in *ProCD Inc. v. Zeidenberg*[17], a seminal precedent, a shrink-wrap contract is considered enforceable if the user can return the product after a reasonable time (3 to 5 days)[18]. This precedent made that enforceability of shrink-wrap contracts in the USA a question to be solved issue-by-issue and according to circumstances.

When standard conditions or terms of use are available before or at the moment of the contract's conclusion, the place of the button click leads to some distinctions. If it appears below an automatically opened window, including standard conditions, or the application requires opening and/or displaying such conditions, the mouse click is more or less equivalent to acceptation of written standard conditions (click-wrap contracts in the narrow sense). However, if standard conditions are merely available as reference, even in the same web (hyperlinked terms), so that the optional opening and reading depends exclusively on the offeree by way of clicking a separate bottom or visiting a separate banner, link, or webpage (browse-wrap contracts), the click gesture implies acceptance of the main contract where standard conditions or terms of service are referred. This last one was just the case in the ECJ *El Majdoub case* analyzed below.

In commercial contracts, European Law seems to be prone to the validity of browse-wrap contracts, regardless of the size or of the occasional user character of the business party[19]. However, in *Content Services Ltd v. Bundesarbeitskammer*[20], the ECJ stated that information accessible to consumers only via a hyperlink on a website does not meet the requirements of Article 5.1 of the Distance Contracts Directive on the protection of consumers in respect of distance contracts (recorded in Art. 8 Directive 2011/83 on consumer rights[21]) since that information is

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Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts' [1998] 8 *FIPMELJ* 907, 914-929; Michael G. Ryan, 'Offers Users Can't Refuse: Shrink-Wrap License Agreements as Enforceable Adhesion Contracts' [2015] 10 *CL R*2105; Roy J. Girasa, 'Click-Wrap, Shrink-Wrap, and Browse-Wrap Agreements: Judicial Collision with Consumer Expectations' [2002] 10 *NEJLS* 102.

17. [1996] 86 F. 3d 1447, 1449 (7th Cir.). In the same sense, *Hill v Gateway 2000, Inc*., [1997] 105 F. 3d 1147, 1150 (7th Cir.).

18. Lara Aguado (n 2) 903-904; Robert L. Dickens, 'Finding Common Grounds in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases' [2006] *TBEP,* Bepress Legal Series, 1, 21.22. This approach influenced the rules in the Uniform Computer Information Transactions Act (see John Adams, 'Digital Age Standard Form Contracts under Australian Law: Wrap Agreements, Exclusive Jurisdiction and Binding Arbitration Clauses' [2014] 13 *PRLPJ* 503, 513-515).

19. Lara Aguado (n 2) 909-910.

20. Case C-49/11 *Content Services Ltd v. Bundesarbeitskammer* [2012] ECLI:EU:C:2012:419.

21. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304.

neither given by the undertaking nor received by the consumer within the meaning of that provision, given that a website is not a "durable medium" in the sense of the rule. However, such a limitation only deals with information related to the confirmation of the concluded contract. This judgment does not exclude that general information, also available in pre-contractual stage (Article 5.1 Directive on electronic commerce), as far as it may be filed (downloaded) and printed, can be available via hyperlink easily identifiable[22].

USA Courts do not often recognize enforceability of browse-wrap contracts because of the absence of assent[23], and in any case, they show more nuanced consideration of the surprising effect of hyperlinks[24], depending on the professional character of users and their familiarity and habitual or occasional users' character[25]. The mere use of websites does not imply acceptance of its terms of use, so that a positive action by users is required. In *Be In, Inc. v Google Inc.*[26], defendants visited the plaintiff's

22. De Miguel Asensio (n 8) 927.
23. *Specht v Nestcape Communications Corp.,* [2001] 150 F. Supp. 2d, 585 (S.D.N.Y.), [2002] aff d 306 F. 3d 17 (2nd Cir.); *Ticketmaster Corp. v Tickets.com*, [2000] WL 525390 (CD Cal. Mar. 27, 2000), [2001] aff. d 2 Fed Appx. 7441 (9th Cir.); *Tompkins v 23andMe, Inc*., [2014] No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014).
24. The different criteria depending on circumstances are expressly underlined in *A.V. et al IParadigms Ltd. Liability Co.,* [2008] 544 F. Supp. 2d 473 (E.D. Va.)*:* 'There is no evidence to impute knowledge of the terms of the Usage Policy to Plaintiffs. In some instances, courts have imputed knowledge to web site users of the terms of use of those sites based on the users' repeated use of the sites and exposure to their terms of use. See, e.g., *Register.com, Inc*., 356 F.3d at 401; *FruCon Constr. Corp. v. County of Arlington,* [2006] No. 1:06CV1, 2006 WL 273583 (E.D.Va. Jan. 30, 2006). In this case, however, such imputation is improper because there is no evidence indicating that Plaintiffs were exposed to the terms of the Usage Policy. For instance, in *Register.com*, the court imputed knowledge of and assent to the web site's terms of use because the user "was daily submitting numerous queries, each of which resulted in its receiving notice of the terms Register exacted." *Register.com*, 356 F.3d at 401. Similarly, in *Fru-Con Constr. Corp.,* the party denying the existence of a contract had represented to the defendant that it had "reviewed and thoroughly understood] the scope, terms and conditions set forth" in a separate, specifically referenced document. *Fru-Con Constr. Corp.,* [2006] WL 273583 at *2. In this case, Plaintiffs did not have the same type of exposure to the terms of use as did the users in Register.com or Fru-Con Constr. Corp., There is no evidence that the terms of the Usage Policy were presented to Plaintiffs beyond the existence of the Usage Policy link that appeared on each page. Furthermore, as discussed above, the terms of the Usage Policy were not incorporated into the Clickwrap Agreement to which Plaintiffs assented. For these reasons, iParadigms' counterclaim for indemnification fails.
25. For instance, in *Boschetto v Hansing* [2008] 539 F.3d 1011 (9th. Cir.) it becomes crucial the distinction between "regular and systemic eBay users/traders" and "occasional users/traders."
26. *Be In, Inc. v Google Inc.,* [2013] No. 12-CV-03373-LHK, 2013 WL 5568706 (N.D. Cal. Oct. 9, 2013).

website to copy and exploit its contents for their social network. A district court in Northern California held that there was an absence of a consent necessary to conclude an agreement. The existence of a hyperlink was the only argument of the plaintiff, and no evidence was invoked with respect to the size or typeface of the link, the central or obvious location of the link on the webpage, or even the text of the link[27]. In *Nguyen v Barnes & Noble Inc.*,[28] the defendant did invoke the placement of an underlined color-contrasting hyperlink and its close proximity to the buttons, but the Court concluded that the proximity and conspicuousness of the hyperlink was not enough to give rise to constructive notice[29]. However, a district court in the Western District of Virginia supported an opposite view in *AvePoint, Inc. v Power Tools, Inc.*[30]. Terms and conditions did not allow downloading the plaintiff's software for commercial purposes. In this case, the court found additional elements to evidence a true assent by the defendant, particularly the creation of a fictitious profile and email and the fact that the defendant had introduced similar terms and conditions in his own webpage. In short, although browse-wrap contracts are presumed to be non-enforceable, there is always a chance to demonstrate user's actual or constructive knowledge. In the same sense, in *Pollstar v Gidmania Ltd.*[31], the Court considered a hyperlink colored and clear enough to be a sufficient warning.

Following the same principle, consent is presumed in click-wrap contracts by USA Courts[32]. In *Hancock v American Telephone & Telegraph Co.*[33], the court considered consumer click-wrap contracts enforceable insofar as technicians presented customers with a printed copy of the terms and gave customers an opportunity to review them. Customers agreed by clicking on the "I Acknowledge" button on the technician's devices and also clicked on the "I Agree" button to manifest assent to

27. Alison S. Brehm & Cathy D. Lee, 'Click Here to Accept the Terms of Service' [2015] 31 *CL* 4.
28. [2012] No. 8:12-cv-0812-JST (RNBx), 2012 WL 3711081 (C.D. Cal. Aug. 28, 2012).
29. See for a deep analysis of the meaning of "constructive notice" in USA case law: Kim (n 11) 93-105, 130-135.
30. [2013] 981 F. Supp. 2d 496, 510 (W.D. Va.).
31. [2000] 170 F.2d 974 (ED Cal.).
32. *In re RealNetworks, Inc. Privacy Litigation*, [2000] WL 631341, 4 (ND III:); *Caspi v Microsoft Network*, [1999] LLC 732 A. 2d 528 (NJ Super Ct. App. Div.); *Moore v Microsoft* Corporation, [2002] 741 NYS 2d, 91 (N.Y. App. Div.); *Fteja v Facebook, Inc.*, [2012] 841 F. Supp. 2d 829, 837 (S.D.N.Y.) and decisions cited therein; *I.Lan Systems v Netscout Service Level Corp.*, [2002] 183 F. Supp. 2d 328, 338 (D. Mass.): see Rachel S. Conklin, 'Be Careful What You Click for: An Analysis of Online Contracting' [2008] 20 *LCL R* 325, 333.
33. [2012] 701 F.3d 1248, 1251 (10th Cir.).

the Internet terms, which customers had an opportunity to review in a text box. Even in consumer contracts, failure to read the terms and conditions is irrelevant to determine enforceability, as held in *Davis v HSBC Bank Nevada, N.A.*[34] solving a class action against a bank, on the ground of false advertising, fraudulent concealment, and unfair competition in credit card trade. The plaintiff had applied for a credit card, clicking acceptance of terms and conditions available in a scrolling text box, without reading them. As a matter of fact, the use of the credit card implied an unexpected annual fee, clearly established in the scrolling text, as demonstrated by the behavior of the consumer, who discovered that condition when he revisited the website and scrolled trough the terms and conditions. The court reasoned that the annual fee was "within [the plaintiff's] observation."

However, distinction between click and browse-wrap contracts is not always clear. In *Fteja v Facebook, Inc.*[35] the District Court for the Southern District of New York considered the enforceability of a forum selection clause. The terms were only available via hyperlink, but on the other hand, the user had to click "Sign Up" to assent the hyperlinked terms. In the opinion of Alison S. Brehm and Cathy D. Lee, "*Fteja* shows that the more an online agreement resembles a traditional click-wrap agreement, the more willing courts are to find the notice necessary to give rise to constructive assent"[36]. In fact, Facebook informed the user of the consequences of clicking and showed him where to click to understand those consequences. Sometimes, online contracts show a hybrid character. For instance, the dispute in *A.V. et al v IParadigms* Ltd. *Liability Co.*[37], deals with a click-wrap agreement, but a substantial part of the contract was included in a separate browse-wrap contract: the click-wrap agreement contained no indemnification clause and made no reference to the usage policy including such clause. The Usage Policy was a separate and distinct document from Turnitin's Click-wrap Agreement. To view the Usage Policy, the user had to click on the "Usage Policy" link, which appeared on each page of Turnitin's web site, including the login screen. Once the link was clicked, the user could view the entire Usage Policy. The Court considered that "the Usage Policy is not binding on Plaintiffs as an independent contract because Plaintiffs did not assent to the Usage Policy… [T]here is no evidence that Plaintiffs assented to the terms of the Usage Policy. There is no evidence that Plaintiffs viewed or read the Usage Policy and there is

34. [2012] 691 F.3d 1152, 1157 (9th Cir.).
35. *Fteja v. Facebook, Inc.*, [2012] 841 F. Supp. 2d 829, 837 (S.D.N.Y.).
36. See n 27.
37. [2008] 544 F. Supp. 2d 473 (E.D. Va.).

no evidence that Plaintiffs ever clicked on the link or were ever directed by the Turnitin system to view the Usage Policy."

II.3. ADVERTISING, MATCHING, AND CROWD-WORKING CLICK CONTRACTS

According to the current characterization of digital platforms and social networks, relationships between digital and physical worlds are significant in order to deal with the legal treatment of international click contracts[38]. Advertising platforms, where providers only target potential customers, do not usually entail legal particularities, as far as contracts are concluded and performed out of the digital sphere. However, legal disputes may arise in pre-contractual stages. Therefore, tort actions related to *culpa in contrahendo* could lead to some concerns in determining the origin of damages or the law applicable to hypothetical contracts.

By contrast, matching platforms allow contracts to be concluded within the digital world, although such contracts will be performed, at least in part, out of the platform, in the physical world; e.g., acquiring a book or some furniture through a web page. Some relevant fora or connecting factors in private international rules applicable to ordinary contracts, such as the residence of the provider, become more undetermined in those cases. Moreover, certain special rules applicable to consumer contracts depend on geographic criteria referred to marketing orientation that require a more accurate interpretation in case of electronic contracts.

Finally, crowd-working platforms create relationships totally developed, concluded, and performed within the digital sphere (apps, software, social networks, online videogames, etc.). Uncertainty increases until it covers almost all available connecting factors in traditional private international rules: parties' residence or domicile, *locus executionis*, etc.

II.4. CLICK AS AN OFFER

A singular question related to the conclusion of ordinary click contracts, particularly in sales and goods supplying, deals with the application of the traditional distinction between offer and invitation to make an offer[39].

38. See Ilaria Pretelli, 'Improving Social Cohesion through Connecting Factors in the Conflict of Laws of the Platform Economy', in I. Pretelli (ed), *Conflict of Laws in the Maze of Digital Platforms* (Schulthess 2018) 17, 21.22.

39. Andrew D. Murray, 'Entering into Contracts Electronically: The Real W.W.W.', in L. Edwards & C. Waelde (ed), *Law & The Internet: A Framework for Electronic Commerce* (Hart 2000) 17, 21.

Such a distinction can be illustrated by the case of *Nguyen v Barnes & Noble Inc*. The class action on behalf of consumers was based on Touchpad orders that had been cancelled due to unexpected high demand.

In some legal systems, exhibition of goods in shop windows or showcases indicating the price is considered or presumed to be a binding offer (e.g., Article 2:201 Principles of European Contract Law or Article II-4:201 Draft Common Frame of Reference). Common law follows the opposite approach. The presentation of goods in shops and markets is not considered more than an invitation to make an offer[40]. Moreover, Article 14.2 CISG considers these proposals as invitations to offer, since it is not a proposal addressed to one or more specific persons. The display is a way of indicating that the product is available and its price, so that the purchase of the product by the recipient is actually a purchase offer, and not a sale offer.

The OHADAC Principles on International Commercial Contracts have opted for a flexible rule in the third paragraph of Article 2.1.3[41], based on the denial of an offer in these cases, but at the same time, they accept a contextual interpretation. In particular, the OHADAC rules envisage offers in "virtual spaces." This is also the solution envisaged in Article 11 of the UN Convention on the use of electronic communications in international contracts[42]. Given the various considerations in deciding whether these offers are binding, it is recommended that the offeror expressly protects himself/herself against a flood of orders, including a condition or safeguard such as "while stock lasts".

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40. [*Fisher v Bell* (1961), 1 QB 394-399; (1960) 3 All ER 731-733; *Pharmaceutical Society of GB v Boots Cash Chemist (Southern) Ltd* (1952), 2 All ER 456]. However, there were cases in which the display of goods in a self-service store has been considered as an offer [*Lasky v Economy Grocery Stores* (1946), 319 Mass 224, 65 NE 2d 305; *Chapelton v Barry UDC* (1940), 1 All ER 356].

41. "Offer and *Invitatio ad offerendum*: 1. The offer may be directed to one or more specific persons. 2. A proposal directed to the public shall not constitute an offer, unless so provided by the offeror or indicated by the circumstances. 3. Circumstances mentioned in the previous paragraph exist, particularly, in case of exhibition of goods and products at a particular price in physical or virtual spaces. In these cases, the offer is presumed effective until the stock of goods or the possibilities to supply the service are exhausted."

42. "A proposal to conclude a contract made through 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, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance."

II.5. CONSIDERATION

Crowd-working click contracts are often free. In civil law countries, gifts are also enforceable and pure unilateral obligations are binding. However, under common law, enforceability of those contracts depends on the true existence of consideration. A lack of consideration implies a non-enforceable gift[43]. However, following the English and American doctrine on consideration, it seems than profits of providers derived from use and sale of consumer's data, targeting and advertising imply an adequate consideration and, therefore, the enforceability of provider's promises[44].

III. WRAP CONTRACTS AS INTERNATIONAL CONTRACTS

III.1. GENERAL RULES ON JURISDICTION AND APPLICABLE LAW

III.1.1. Identifying international contracts

The application of private international law rules on jurisdiction and conflict of laws requires, as a previous condition, the existence of an international contract. Geographic elements that characterize contracts as international are quite diverse: establishment, domicile, or residence of the parties or of their agents in different states, place of conclusion and performance of the contract, place of situation or delivery of goods, etc. Virtual space sometimes makes the delimitation of such elements more difficult. Internet could be considered as a non-national space, and therefore contracts concluded online could at least be presumed international contracts. In practice, elements of online contracts must be converted into geographic or physical ones: any online contract must be interpreted as concluded or performed in a concrete State, and even digital contents, as intangible properties or credits, must be fictitiously situated in a single territory.

One of the principal cases in EU Law, the *El Majdoub* case, actually gave rise to some doubts about the internationality of the dispute. Both parties were situated in Germany, the webpage belonged to the defendant and the

43. See for more details a comparative analysis in Sixto A. Sánchez Lorenzo, 'Causa and consideration', in Sixto A. Sánchez Lorenzo (ed), *Derecho contractual comparado (una perspectiva europea y transnacional,* vol. I (3rd edn, Aranzadi/Thomson-Reuters 2016) 1042.

44. Giorgio Resta & Vicenzo Zeno-Zencovich, 'Volontà e consenso nella fruizioni dei servizi in rete' [2018] *Revista trimestrialle di diritto e procesura civile,* 411.

car had to be delivered in Germany. However, the defendant contended that German courts did not have jurisdiction in the case, by virtue of an agreement conferring jurisdiction on a court in Leuven (Belgium). In fact, this forum selection clause would not be sufficient to convert a domestic contract into an international one. The decisive international element derived from the agent condition of the German company, inasmuch as the Belgian parent company was the true contracting party and the applicant in the main proceedings could not be unaware of that, as he requested the Belgian parent company to issue an invoice without VAT, which was sent to him mentioning the parent company's contact details, and he paid the price of the motor vehicle at issue into a Belgian bank account.

III.1.2. Identifying consumers and/or traders

Both substantive and private international rules depend on the professional (B2B) or consumer (B2C) character of one party, that is the user in electronic commerce. Electronic commerce implies some confusion of both notions (EaE and EaC), as far as digital offers are usually directed to professionals or consumers indistinctly, particularly in specific fields such as auctions by Internet[45].

The characterization of click-wrap contracts as B2B or B2C contracts is particularly important in EU Law. As held by the ECJ in *Benincasa* case[46], "only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character." If the contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the EU rules for consumers is not justified in such a case. However, this is not altered by the fact that the contract at issue also has a private purpose, and it remains relevant, regardless of the relationship between the private and professional use of the goods or service concerned; even though the private use is predominant, as long as the proportion of the professional usage is not negligible. Accordingly, where a contract has a dual purpose, it is not

45. De Migel Asensio (n 8) 890-892.

46. Case C-269/95 *Franceso Benincasa v. Dentalkrit, srl* [1995] ECLI:EU:C:1997:337, § 17.

necessary that the purpose of the goods or services for professional purposes be predominant for EU rules not to be applicable[47].

Thus, the notion of consumer in EU Law must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and objective of that contract and not to the subjective situation of the person concerned, that is regardless of the knowledge, information or specialization of the user on online services[48], since the same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Thus, in *Maximiliam Schrems v Facebook Ireland Ltd.*[49], the ECJ held that a user of services of a digital social network may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominately professional[50]. On the other hand, neither the expertise which that person may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a "consumer" within the meaning of EU rules, so that the activities of publishing books, lecturing, operating websites, fundraising, and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a "consumer." This status allows consumers to claim before the courts of their habitual residence, but only on their own claims and not on claims assigned by other consumers domiciled in the same Member State, in other Member States, or in non-member countries[51].

III.1.3. Identifying domicile, residence, and establishment

Both in commercial and consumer contracts, the domicile of the defendant plays the role of general forum for jurisdiction. Determination of the consumer's domicile seems less controversial, particularly given that such information is often required in web contract forms. On the contrary, information about the server or provider's domicile may be unclear. Open rules, such as Article 63 of the "Brussels I bis Regulation" provide a wider chance to the customer, as far as the statutory seat is not the only available link. "Real" seat (place of the central administration

47. Case C-464/01 *Gruber* [2005] ECLI:EU:C:2005:32, §§ 40-42.
48. Case C-110/14 *Costea* [2015] ECLI:EU:C:2015:538, § 21.
49. Case C-498/16 *Maximiliam Schrems/Facebook Ireland Limited* [2018] ECLI:EU:C:2018:37.
50. § 38.
51. §§ 39-49.

or principal place of business) allows some other possibilities, but even is such cases, physical domicile cannot be determined from Internet country domains, which is often the only geographical index perceivable by customers. In short, the place of establishment of the server "cannot, by reason of its uncertain location, be foreseeable"[52]. Therefore, it is crucial that server's identity and domicile are clearly available in electronic communications. Article 6 b) of the EC Directive on electronic commerce facilitates such identification requiring that "the natural or legal person on whose behalf the commercial of the Internal market with regard to the information referred communication is made shall be clearly identifiable."

The place of the residence or seat of provider or server is also significant in determining the applicable law to international commercial click contracts, in the absence of choice of law (e.g., Arts. 4 and 19 of the "Rome I" Regulation)[53]. By contrast, the place of consumer's habitual residence is usually considered in some consumer contracts to determine both jurisdiction and applicable law (e.g., Art. 6 "Rome I" Regulation).

III.1.4. Identifying place of performance in digital contracts

The place of contract performance is usually a special forum alternatively available for the claimant in commercial contracts (Article 7.1 "Brussels I" Regulation). This forum does not imply particular concerns when contracts are performed in the physical world, but in case of digital or crowd-working contracts, performance take place in a virtual space wherein a geographic link is hardly determinable. As the ECJ usually reminds, special fora must be characterized by predictability. Therefore, the place of technical means (servers, telecommunication networks, etc.) involved in the service or product provided online must be omitted, insofar as they are not transparent and can be easily moved by undertakings. The establishment of servers and residence of users are very often the only predictable links to determine the place of contract's performance. Among them, the establishment of server seems preferable and more predictable, under some conditions[54]. First, the physical establishment of the server must be easily known by users[55]; if not, apparent establishment

52. Case C-523/10 *Wintersteiger* [2012] ECLI:EU:C-2012:142; Case C-292/19 *Cornelius de Vische* [2012] ECLI:EU:C:2012:142.
53. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.
54. See, e.g., in the field of torts, EJC judgment in *Wintersteiger* (19 April 2012, C-523/10).
55. Thus, Article 5.1 b) of the Directive on electronic commerce requires Member States shall ensure that the service provider shall render easily, directly, and permanently

must prevail. Second, boundaries between service contracts and supply contracts are not well-defined in case of software and digital contents. Current rules and presumptions about the determination of the place of delivery of goods are often inspired by "physical" criteria, such as "effective delivery," "taking of the possession or disposal ability," which are not compatible with online world. Therefore, some authors have proposed special solutions, such as the place of server's establishment at the moment of the contract's conclusion[56].

Some authors have supported the interpretation of special fora toward the user's place of residence, as far it is the presumable place of most downloading and platform accesses and guarantees legal certainty. In fact, the EU Regulation on cross-border portability of online content[57] is anchored in "the subscriber's Member State of residence," "where the subscriber has his or her actual and stable residence" (Art. 2.3). Obviously, the place where an isolated download takes place is absolutely unforeseeable and it promotes forum shopping and fraud in determining the applicable law as well.

Place of the residence or seat of provider or server is also significant in determining the applicable law to international commercial click contracts, in the absence of choice of law (e.g., Arts. 4 and 19 of the "Rome I" Regulation). However, the place of consumer's domicile is usually considered in some consumer contracts (e.g., Art. 6 of the "Rome I" Regulation). In both cases, the place of performance and execution of commercial contracts is also relevant as a connecting factor determining applicable law, particularly in relation with exceptional application of overriding mandatory rules (Art. 9 of the "Rome I" Regulation). As previously noted, such a connecting factor (place of performance) works in advertising and matching click contracts, given that performance takes place in the physical world, but there is difficulty in determining in crowd-working contracts or contracts performed properly online.

Nevertheless, international click-wrap contracts, as standard contracts, usually include forum selection clauses, arbitration agreements, and choice-of-law clauses. This type of clause is commonly unexpected and seriously prejudicial to users and deserves special consideration.

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accessible to the recipients of the service and competent authorities, the geographic address at which the service provider is established.

56. De Miguel Asensio (n 8) 1022-1023.

57. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168.

III.2. FORUM SELECTION CLAUSES

III.2.1. Commercial contracts

Within the European Union, the *El Majdoub* case does not deal with substantial validity of forum selection clauses included in click or browse-wrap contracts. Its interpretation is focused on formal validity. The applicant in the main proceedings argued that the agreement conferring jurisdiction had not been validly incorporated into the sale agreement, as it was not in writing in accordance with the requirements in Article 23 (1) (a) of the "Brussels I" Regulation: a box with the indication "click here to open the conditions of delivery and payment in a new window" had to be clicked on. The ECJ pointed out that the *Content Service* doctrine is not applicable to Article 23(2) of the "Brussels I" Regulation, "since both the wording of Article 5(1) of Directive 97/7, which expressly requires the communication of information to consumers in a durable medium, and the objective of that provision, which is specifically consumer protection, differ from those of Article 23(2)"[58]. In fact, this Article only deals with formal requirements and it was not disputed "that click-wrapping makes printing and saving the text of the general terms and conditions in question possible before the conclusion of the contract. Therefore, the fact that the webpage containing that information does not open automatically on registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction". Consequently, "the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract"[59].

However, the scope of this judgment is limited and does not prejudge the substantial validity of that clause. Article 25 (1) of the "Brussels I" Regulation *recast* establishes the effects of choice-of-forum *clauses* "unless the agreement is null and void as to its substantive validity under the law of that Member State." Therefore, the substantial validity of such agreements is governed by the law of the courts of the Member State chosen by the parties, including its conflict-of-laws rules. As standard clauses, the existence of a free, sufficient, reasonable, and true consent depends on

58. § 38.
59. § 20.

criteria available in each legal order involved about enforceability of click-wrap contracts.

Nevertheless, choice-of-forum clauses, as well as choice-of-law clauses and arbitration agreements, may be submitted to particular solutions differing from general trends exposed above. As a matter of fact, the ancillary character of such clauses leads to their autonomy and severability, so that they must be considered as independent contracts within the main contract. Thus, Article 25 (5) of the "Brussels I" Regulation *recast* states that "[an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." The main consequence of this principle is that nullity of the contract does not imply nullity of the choice-of-forum clause and vice versa. Moreover, substantial conditions related to the user's consent can be different as well as the applicable law thereto. For instance, it is possible that under some legal order, a browse-wrap contract is permitted, while browse-wrap choice-of forum clauses are forbidden. There is no uniform solution to substantial validity of click-wrap choice-of-forum agreements in the EU beyond the formal validity, that is why their enforceability will depend on national rules and judicial precedents.

In the USA, enforceability of forum selection clauses follows the same principles that govern click-wrap and browse-wrap contracts[60].

III.2.2. Consumer contracts

In the EU, protection of consumers against forum selection clauses depends on the "marketing" or "targeting test." Passive consumers are, at first sight, more protected than active consumers and have more chances to impose their own forum (residence of the consumer). Article 17 (1) (c) of the "Brussels I" Regulation recast introduces protective jurisdiction rules in favor of consumers, as far as the contract "has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities." The mere possibility of having access to a web page from the country when the consumer is resident, does not suffice to active the forum protection, that limits the enforceability of forum selection clause to those: i) entered into after the dispute has arisen; ii) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or iii) entered into

60. *Fteja v. Facebook, Inc.*, [2012] 841 F. Supp. 2d 829, 837 (S.D.N.Y.).

by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State. Apart from these hypotheses, forum selection clauses are non-enforceable and the consumer can sue in the courts of his own residence. The crucial question lies in the interpretation of cases where the server directs its activities to the country of the consumer's residence. In this sense, distinction between active and passive web pages seems useful. Active web pages entail that server's intention to operate in such market can be inferred from the content and structure of the same web page (language, currency, means of payments). The European lawmaker has emphasized the lack of relevance of such signs[61]. However, the ECJ judgment in *Pammer* and *Alpenhof*[62] confirms its importance.

First, the ECJ states that "the European Union legislature did not lay down that mere use of a website, which has become a customary means of engaging in trade, whatever the territory targeted, amounts to an activity 'directed to' other Member States which triggers application of the protective rule of jurisdiction"[63]. In each event, it must be determined, "before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers"[64]. Such evidence does not include mention on a website of the trader's email address or geographical address, or of its telephone number without an international code, but the targeting test is positive if there is a mention that it is offering its services or its goods in one or more Member States designated by name. The same

61. Recital 24 of the "Rome I" Regulation recalls that "a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities." The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."
62. Cases C-585/08 & C-144/09 *Meter Pammer/Reederei Karl Schlüter GmbH & Co KG y Hotel Alpenhof GmbH/Oliver Heller* [2010] ECLI:EU:C:2010:740.
63. § 72.
64. § 66.

is true of the disbursement of expenditure on an Internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention[65].

Evidence must be considered as a whole, so that their combination, such as 'the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example ".de," or use of neutral top-level domain names such as ".com" or ".eu"; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers'[66]. In relation with the language or the currency used, the ECJ introduces some nuances on recital 24 of the Rome I Regulation. Its irrelevance is "indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States"[67].

Following the ECJ doctrine, the judgment of the Spanish *Audiencia Provincial de Madrid* n° 111/2015 of 24 March has declined to accept jurisdiction by interpreting the Article 15.1.c) of the 'Brussels I' Regulation in case of legal services related to the sale of a painting and provided to a Portuguese consumer, concluding that the claimant was a legal firm whose web was designed to gain legal services abroad.

Increasing technological resources for Geo-blocking must also be considered. Servers may more and more easily block and limit the access to online interfaces, controlling therefore the targeting or marketing regarding the domicile or site of potential users[68]. The new Geo-blocking Regulation within the European Union[69] tries to avoid the abuse by

65. § 81.
66. § 83.
67. § 84.
68. De Miguel Asensio (n 8), 1031; A. Benjamin Spencer, 'Jurisdiction and the Internet; Returning to Traditional Principles to Analyze Network-Mediated Contracts' [2006] *UILR* 71, 91-93.
69. Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of

traders of Geo-blocking practices able to create artificial internal barriers within the internal market. Conversely, justified Geo-blocking practices are a legitimate mechanism for traders to prevent them from different legal systems on consumer protection, legal environment, industrial property, or taxes. In these cases, Geo-blocking elements permit to implement the targeting or marketing test. However, according to Article 1.6 of the Geo-blocking Regulation, "where a trader, acting in accordance with Articles 3, 4 and 5 of this Regulation, does not block or limit consumers' access to an online interface, does not redirect consumers to a version of an online interface based on their nationality or place of residence that is different from the online interface to which the consumers first sought access, does not apply different general conditions of access when selling goods or providing services in situations laid down in this Regulation, or accepts payment instruments issued in another Member State on a non-discriminatory basis, that trader shall not be, on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile. Nor shall that trader, on those grounds alone, be considered to be directing activities to the Member State of the consumer's habitual residence or domicile, where the trader provides information and assistance to the consumer after the conclusion of a contract that has resulted from the trader's compliance with this Regulation."

In many cases, the Geo-blocking Regulation makes the targeting test more complicated. Adapting their websites to the requirements of the Regulation, traders do not change the geographic orientation of their activities, even if they decide to add other languages or currencies to facilitate an equal access to goods and services, but it is perfectly conceivable that such a procedure of adaptation could invite traders to expand markets in other Member States. There is, then, a serious risk of invoking Article 1.6 of the Geo-blocking Regulation to restrict the scope of "directed activities" notion in favor of traders and to the detriment of consumers. Finally, the Geo-blocking Regulation introduces new elements which require a clarification of the scope of *Pammer* and *Alpenhof* doctrine.

In case of protected contracts according to the targeting test in the European Union, forum selection clauses are only valid if the agreement is entered into after the dispute has arisen or it allows the consumer to bring proceedings in courts other than those indicated in this Section.

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discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 601(Geo-blocking Regulation).

Apart from this case, the only chance is to select the forum of the common domicile of the trader and the consumer at the time of the conclusion of the contract, provided that such an agreement is not contrary to the law of that Member State (Article 19 of the "Brussels I" Regulation).

Failing the targeting test does not imply that forum selection clauses in consumer contracts not covered by the protection given, e.g., by Articles 17 to 19 of the "Brussels I" Regulation, are valid according to the general rule of Article 25. On the contrary, those clauses may be generally considered void, regardless of the targeting test, as far as they are abusive under the *lex* fori or the *lex executionis,* whose rules may be applied as overriding mandatory rules in the sense of Article 9 of the "Rome I" Regulation. That is, for example, the criterion of Spanish judgments of the *Juzgado de lo Mercantil n. 5 of Madrid n. 113/2013 of 30 September 2013* and of the *Juzgado de lo Mercantil n. 1 of Valencia n. 37/2017 of 16 February 2017,* related to forum selection clauses included in contracts for the transport of passengers. As a matter of fact, gross disparity in consumers contracts easily lead to avoid forum selection clauses, particularly where disputes confront consumers and bigger platforms. Thus, in *Société Facebook Inc. V. Monsieur Frédéric, Michel Jean Durand dit Durand-Baissas*, the Paris Court of Appeal[70] invoked due process to avoid Californian courts selection, given that France was the place of the contract's performance (and the consumer residence as well) and of course Facebook has agencies and sufficient resources to face the procedure in France, while French consumers were unable to face the economic costs derived by a procedure in California[71].

Under the US Law, forum selection clauses are usually enforceable against consumers[72] and they are often designed to avoid "class actions" jurisdictions. The same test applicable to any click, browse, or shrink-wrap contract is applied to the validity of forum selection clauses in

70. Judgment 12.02.2016, RG 15/08624.

71. Similar decisions against forum selection clauses imposed by Whatsapp and Facebook can be found in Italy (Autorità Garante della Concorrenza e del Marcato, 11.05.2017, CV 154:92) and Canada (*Douez v Facebook,* Inc. [2017] SRC 751, 2017 SCC 33 [CanLII]).

72. *Carnival Cruise Lines v Shute* [1991] 499 U.S. 585 [1991]. See also *Forest v Verizon Comm. Inc.,* [2002] 805 A.2d 1007 (D.C. Cir.); *DeJohn v The TV Corp.*, [2003] 245 F. Supp. 2d 913 (C.D. Ill.); *Kilgallen v Network Solutions, Inc.,* [2000] 99 F. Supp. 2d 125 (D. Mass.); *America Online, Inc. v Booker,* [2001] 781 So.2d 423 (Fla. Dist. Ct. App.); *Caspi v Microsoft Network,* [1999] 732 A.2d 528 (N.J. Super. Ct. App. Div.); *Groff v America Online, Inc.,* [1998] WL 307001 (R.I. Super. May 27, 1998); *Barnett v Network Solutions, Inc.,* [2001] 38 S.W.3d 200 (Tex. App.). In Canada, the same tendence is followed by the Ontario Courts in *Rudder v Microsoft* [1999] O.J. No. 3778 (Sup. Ct.); see a critical analysis in Mike Beshuizen, 'Just Click Here: A Brief Glance at Absurd Electronic Contracts and the Law Failing to Protect Consumers' [2005] 14 *DJLS* 35.

B2C contracts. Thus, in *Caspi v. The Microsoft Network*[73], the clause was considered valid in a click-wrap agreement as far as the consumers were given ample opportunity to assent to a forum selection clause written in plain and understandable language, whose terms scrollable[74]. By contrast, in *Harris v. comScore, Inc.*[75] the plaintiff argued that the terms of service in a browse-wrap contract were obscure during the installation process "in such a way that the average, non-expert consumer would not notice the hyperlink" to them. The defendant was unable to demonstrate that user could reasonably be expected to find the hyperlink to the agreement or manifest assent to it during the installation process, although it cited several cases in which click-through agreements had been enforced[76].

However, US Courts also have considered the "targeting" test, so that a forum selection clause does not cast aside the *locus lucri,* that is, the place of searched profits in a physical area of interest. This approach reveals the principles of economic analysis of law that underlies the "targeting test." Marketing in a country implies possible profits but also assumption of risks; between those risks undertaken servers must assume the burden of a dispute or procedure. Since Internet is a universal open space, the main difficulty is to interpret with some certainty the targeting intention. As the ECJ, American Courts have also recourse to external signals, such as regular and systemic use of the platform by the trader, warehouse set in the targeted State and employees hired there; availability of toll-free the phone numbers for customers; advertising and marketing materials, etc.[77]

III.3. ARBITRATION CLAUSES

Like international forum selection clauses, arbitration agreements in standard terms are valid as to the form. Although international commercial arbitration implies a pure *B2B* relationship, restrictions to the substantial validity of arbitral agreements concluded through standard conditions

73. *L.L.C.,* [1999] 323 N.J.Super. 118, 125-26, 732 A.2d 528 (App. Div.).
74. Likewise, in *Forrest v Verizon Communications* the District of Columbia Court of Appeals (Canada) decided that there was sufficient notice of a forum selection clause that was written in regular font in the middle of a 13-page agreement. The Court determined that adequate notice had been given simply because at the top of the agreement Verizon had written "PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY" [805 A.2d 1007, (2002) D.C. App. LEXIS 509 (D.C. Super. Ct.)].
75. 825 F. Supp. 2d 924, 926–28 (N.D. Ill. 2011).
76. *See Specht v Netscape Commc'ns Corp.,* [2002] 306 F.3d 17 (2nd Cir.); *DeJohn v The .TV Corp. Int'l,* [2003] 245 F.Supp.2d 913 (N.D. Ill.); *Nazaruk v eBay, Inc.,* [2006] WL 2666429 (D. Utah) (forum-selection clause enforced); *Forrest v Verizon Comm'n Inc.,* [2002] 805 A.2d 1007 (D.C.) (forum-selection clause enforced).
77. *Dedvukaj v Maloney*, [2006] 447 F. Supp. 2d 813 (E.D. Mich), the District Court.

are much more severe and widespread than in the case of forum selection clauses. The reasons for such divergence may probably be found in the implied renunciation of the right to access to the courts derived from any arbitral agreement. As far as the right to public justice is a part of constitutional rights and also of the due process rule, any renunciation should be restrictively interpreted[78].

The Brazilian Arbitration Act provides an excellent illustration in this respect. Article 4.1 recognize the possibility of concluding an arbitral agreement "by reference," as far as the conditions of such an agreement are available for both parties in written form. However, Article 4.2 restricts its enforceability in case of standard or "adhesion" contracts. In this case, the arbitral clause is imposed by one trader on the other, and it is considered enforceable only it the clause is invoked by the adherent party (the user in case of click contracts) of this party has specifically accepted this clause in writing by annexed document or in the contract text brought out in bold letters[79]. Article 26 of the Arbitration Act of El Salvador permits arbitral agreements in standard terms as far as these are known or should have been known to the adherent, who has given acceptance independently and expressly. The same particular restriction is envisaged in Article 6 of the Arbitration Act of Venezuela and by some courts in other countries[80]. Most national systems do not provide express rules on this subject, but the application of general rules on standardized, abusive, or unexpected contract clauses leads to similar conclusions[81]. Substantial validity of arbitral agreements in standardized conditions is frequently analyzed by national case law with important divergences, but national

78. However, this approach is not shared by US Courts. In *Lieschke v RealNetworks, Inc,* [No 99 C 7,274, 99 C 7,380, (2000) WL 198424 (N D III. 11 February 2000)], the agreement provided, among other things, that any unresolved disputes arising under the license agreement would be submitted to arbitration in the State of Washington. Applying a "presumption in favor of arbitrability," the court rejected the plaintiff's contention that the use of the term "disputes arising under" the agreement was not broad enough to encompass their claims, or that the claims were not appropriate for arbitration. Further, the court rejected the contention that the cost of individually arbitrating the claims of all the potential claimants was not consistent with the purpose of the FAA. Thus, the court granted the defendant's motion to stay class action proceedings pending arbitration. See Steven C. Bennett, 'Click-Wrap Arbitration Clauses' [2000] 14 *IRLCT* 397, 400.

79. See judgment of the Court of Rio Grande do Sul of 22 August 2001, cited by J. C. Fernández Rozas, *Tratado de arbitraje comercial en América Latina* (Iustel 2008) 667.

80. E. g. judgment of the Panamian Suprem Court of 28 October 1992.

81. See for instance, in Spain, Article 9.2 of the Arbitration Act; in Belgium, see Maud Piers, Cedric Vanllenhove & Dirk De Meulemeester, '§ 5: International Arbitration in Belgium', in Stephen Balthasar (ed) *International Commercial Arbitration: A Handbook* (München, CH Beck) 223, fn 38.

courts usually require availability and accessibility of standardized terms, although this requirement is more or less strict depending on different legal approaches[82].

The most severe approach is based on the so-called perfect *"relatio,"* according to which the reference to the specific arbitral agreement must be expressed within the non-standardized terms[83]. In case of click-wrap contracts the display of general conditions before the contract's conclusion does not suffice. The *relatio perfecta* would require a special warning before clicking, so that the user was clearly advised that general conditions displayed include an arbitral agreement. In case of browse-wrap contracts the same warning would be necessary to admit hyperlinked terms: the user must be aware that these hyperlinked terms contain an arbitral agreement.

However, most legal systems admit the validity of arbitral agreements in standardized terms available only via an imperfect *relatio*[84], inasmuch as a specific warning related to the arbitral agreement is not necessary. In this case, the validity of the arbitral agreement only depends on general rules on substantial validity of standardized terms, having regard to parties' circumstances, the degree of specialization of traders and usages of international trade[85]. In case of click and browse-wrap contracts there would not be any particularity; the validity of the arbitral agreement will be

82. See a comparative analysis in Vera Van Houtte, 'Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience' [2000] 16/1 *AI* 1-18. In relation with formal requirements in the New York Convention, see Dennis Solomon, '§ 2: International Commercial Arbitration: The New York Convention', in Stephen Balthasar (ed) *International Commercial Arbitration: A Handbook* (München, CH Beck) 81-82.

83. *Cour de Cassation (1 Ch. civ)* 11 de October 1989 *(Bomar Oil), Revue* de l'arbitrage [1990] 134, note Catherine Kessedjian; judgment OG Basel 5 July 1994, *Yearbook of Commercial Arbitration,* vol. XXI (1996) 685; *The "Rena K",* [1978] 1 *Lloyd's Rep.* 545.

84. An interesting analysis of different options of perfect and imperfect *relatio* to standardized terms can be found in the CCI Arbitral Award n° 7211 of 24 September 2013, *Yearbook of Commercial Arbitration,* vol. XXXIX [2014] 263.

85. In Swiss law, incorporation by imperfect reference is submitted to the rule of 'unusual term', which implies the compatibility of the arbitral agreement with predictable or usual practice in international trade: Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (Nomos 2016) 95. In France, the *Bomar Oil* judgment, *Cour de Cassation (1 Ch. civ)* 11 October 1989, admitted the imperfect *relatio,* if there exist between the parties, usual commercial relationships capable to guarantee a perfect knowledge of usual written terms in commercial relationships. However, more recent decisions have attenuated such requirement by recognizing the tacit or implied acceptance of available standard terms: *Cour de Cassation* 20 December 1994, *Bomar Oil II, Revue de l'arbitrage* [1994] 108); *Cour de Cassation* 3 June 1997, *Prodexport, Revue de l'arbitrage* [1998] 537.

considered in the light of the criteria applicable to any other standardized condition within click-wrap or click-browse contracts referred above. Of course, arbitral agreements in shrink-wrap contracts would be absolutely void.

In the USA, enforceability of arbitration agreements follows the same principles that govern forum selection clauses, click-wrap and browse-wrap contracts in general, even in consumer contracts. In *Nguyen* the District Court denied the enforceability of the arbitral agreement included in hyperlinked terms of use, concluding that the proximity and conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, so that website owners must ensure their sites put users on notice of any binding contractual terms in light of the "range of technological savvy of online purchasers." In *Sgouros v TransUnion, Corp.*[86], the arbitration clause was considered unenforceable because on the second page of the sign-up sheet, after filling out credit card information, was a button, "I Accept & Continue to Step 3." The user was not required to click on the scroll box or scroll down to view the service agreement. The scroll box contained a hyperlink that led to the service agreement that the user would need to click to view and the arbitration clause was placed on page eight of a ten-page agreement. In *Specht v Netscape Communications Corp.*[87] the District Court held that it was not clear to plaintiffs that clicking on the Download button would form a contract with Netscape for the SmartDownload software. Without mutuality of assent, the contract for SmartDownload, including the binding arbitration agreement failed. The Court of Appeals for the Second Circuit reviewed the claims and affirmed the district court's decision and reasoning. In *Specht*, all the parties agreed that the click-wrap contract between Netscape and its website users was valid, but the court agreed with the plaintiffs that the browse-wrap contract was not valid: 'Internet user would not have known that he had accepted Netscape's offer to download SmartDownload because he did not realize it was a separate offering from Communicator. Without an understanding that they were facing a separate contract, the court held

86. *Sgouros v TransUnion Corp.,* [2016] 817 F.3d 1029, 1030, 1036 (7th Cir.). See Heather Daiza, 'Wrap Contracts: How They Can Work Better for Businesses and Consumers' [2017] 54 *CAL. W. L. REV.* 201, 220. In Canada, see *Kanitz et al. v Rogers CableInc* [2002] O.J. No. 665, 58 O.R. (3d) 299 (Sup. Ct.) and *Dell Computer Corporation v Union des consommateurs et Dumoulin* [2007] SCC 34 (Lexum), [Online]. http://scc.lexum.umontreal.ca/en/2007/2007scc34/2007scc34.html. See critical remarks thereto by Philippa Lawson & Cintia Rosa De Lima, 'Browse-Wrap - Contracts and Unfair Terms: What the Supreme Court Missed in Dell Computer Corporation v. Union des Consommateurs et Dumoulin' [2007] 37 *Revue générale de droit* 445.

87. *Specht. v Netscape and AOL* [2001] U.S. Dist. LEXIS 9073 (S.D.N.Y.).

that plaintiffs could not give their assent to that contract and therefore, no contract existed'[88].

By contrast, other decisions recognize the validity of arbitration agreements in click-wrap consumer's contracts[89]. In *Thompkins v 23andMe, Inc.*[90] the defendant was a personal genetics company that offered and provided customers hereditary and health information from a genetic sample. Customers first purchased kits online at the website. The kit was shipped with a preaddressed return box and instructions on how to return a saliva sample. When the defendant received DNA tested a certified laboratory, it posted the information to the customer's personal genome profile. The customer received an email notification when DNA results were ready to view. The Terms of Service included an arbitration agreement. These terms were at any time accessible via a hyperlink at the bottom of the homepage under the heading "LEGAL." The user had to scroll through a significant amount of information to view the Terms hyperlink at the bottom of the homepage. Other pages such as "Refund Policy" and "Privacy Policy" also included the Terms hyperlink, but reference to the Terms never appeared in the text, sidebar, or at the top of the webpage prior to the purchase of a kit. The Terms hyperlink appeared at the bottom of many, but not all, of defendant's website pages. The words always appeared in standard font size, in blue or gray font on a white background. The ordering webpage had no requirement that customers view the Terms or click to accept the Terms. In other words, customers could enter their payment information and purchase kits online without seeing the Terms. The only opportunity for a full refund was a 60-minute cancellation window after purchase. After purchase of a DNA kit, to send in a DNA sample to the laboratory and receive genetic information, customers had to create accounts and register their DNA kits online. For this, the account creation page required customers to check a box next to the line, "Yes, I have read and agree to the Terms of Service and Privacy Statement." The Terms and Privacy Statement appeared in blue font and

88. Conklin (n 33) 333-335.

89. See e.g., *Feldman v Google, Inc.* [(2007) 513 F.Supp. 2d 229, 236 (E.D. Pa.)]. Sometimes, these arbitral agreements avoid consumers' class actions: Jason T. Brown & Zijian Guan, 'Click to Accept (You Now Have No Rights)' [2014] 1 *HLELJ* 411. Therefore, collective awareness of consumers by the way of boycott of web pages including arbitration clauses, for instance in the case of General Mills in 2014, has been pointed out by some authors as an effective limitation to such trend: Allison Haynes Stuart, 'Challenge the Law Online: Southwestern Law Review Symposium on Nancy Kim's Wrap Contracts' [2014] 44 *SWLR* 265.

90. No. 5:13-CV-05682-LHK, 2014 WL 2903752, (N.D. Cal. June 25, 2014). See also *Devries v Experian Info. Sols., Inc.*, [2017] No. 16-cv-02953-WHO, 2017 WL 733096, (N.D. Cal. Feb. 24, 2017).

are hyperlinks to the full terms: Similarly, during the registration process, customers had to view a page with the title "To continue, accept our terms of service" written in large font at the top of the page. The registration page provided a hyperlink to the full Terms next to the line: "When you sign up for 23andMe's service you agree to our Terms of Service. Click here to read our full Terms of Service." Customers then had to click on a large blue icon that read "I ACCEPT THE TERMS OF SERVICE," before finishing the registration process and receiving their DNA information. The Court held that the Terms of Service would have been ineffective to bind website visitors or customers who only purchased a DNA kit without creating an account or registering a kit: "The practice of obscuring terms of service until after purchase -and for a potentially indefinite time- is unfair, and that a better practice would be to show or require acknowledgment of such terms at the point of sale." However, the Court concluded that the plaintiffs accepted the Terms when they created accounts or registered their DNA kits and considered the arbitration agreement not substantively unconscionable. Likewise, In *Hubbert v. Dell Corp.* and *Fiser. Dell Computer Corp*[91], the District Court agreed with the plaintiffs that the arbitration clause was not part of the contract, but the Appellate Court stated that the blue link to the Terms and Conditions was conspicuously displayed in many places on the Dell website and throughout the purchase process. Because the link was clearly placed on the site, clicking or choosing not to click on the hyperlink is similar to deciding whether to turn the page of a written contract, so that the plaintiffs were bound by that contract to arbitrate between the parties.

III.4. APPLICABLE LAW CLAUSES

III.4.1. Commercial contracts

Express or tacit choice of law in commercial contracts is a universal rule of private international law. The validity of this agreement included in standardized terms or in click-wrap contracts does not imply any particularity. The validity of the choice of law agreement will follow the same consideration as any other terms included in the click-wrap contract. However, as a separate contract, the validity of the choice of law agreement has a significant relevance. If this clause is valid, the applicable law chosen by the parties will govern the main contract, and this law will be applicable in determining, for instance, the validity of any term of the click, browse or shrink-wrap contract or of the whole contract. If the choice-of-law term

91. 835 N.E.2d at 118.

is null, the law applicable to the contract must be determined according to the private international rules in case of the absence of choice, whose physical points of contact could be hardly determined, particularly in case of crowd-working contracts or contracts performed in the virtual sphere, as explained above.

Consequently, the law applicable to the validity of the choice of law agreement becomes crucial. Most legal systems determine the application of the "putative" of hypothetical contract law, so that the same law chosen in the term will determine the validity of that term itself. This is, e.g., the rule envisaged in Article 10.1 of the "Rome I" Regulation: "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid." Evidently, this rule encourages fraud and abuse by traders, who can impose the choice of the law most favorable worldwide to the validity of click-wrap contracts. Such a law will validate not only the choice of law agreement, but also the whole terms submitted to the same law. Therefore, exceptions to this rule and a more accurate control of true assent of users must be guaranteed by such rules as that included in paragraph 2 of Article 10 of the "Rome I" Regulation: "Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1." Therefore, even in international commercial contracts, the validity of users' consent to terms of service in click contracts must be mainly determined according to the understandings and criteria of the law of the habitual residence of the users, at least when the chosen law does not guarantee minimal fair solutions.

As a matter of fact, even when choice-of-law clauses are valid, overriding mandatory rules from the forum or even from third States (Article 9 of the Rome I Regulation) can limit or avoid their effectiveness. For instance, in commercial contracts, the imbalance derived from the power and size of great platforms easily calls for fair competition protection rules. The French case *Expedia v Ministère de l'économie*[92] provides clear arguments against the "duopole" Booking/Expedia in the field of hotels bookings, concluding the nullity of many clauses imposing difficult conditions for hotel and clear damages for consumers. Professional users established in the European Union are also protected by the rules of the European Regulation 2019/1150 of the European Parliament and of the Council of

92. Cour d'Appel Paris 21 June 2017, RG 18748.

20 June 2019 on promoting fairness and transparency for business users of online intermediation services[93], whose rules contain significant restrictions to general conditions imposed by providers. Article 1.2 clearly establishes that "[t]his Regulation shall apply to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the Union and that, through those online intermediation services or online search engines, offer goods or services to consumers located in the Union, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable." This last statement clearly demonstrates the overriding mandatory scope of the regulation's rules.

III.4.2. Consumer contracts

Choice-of-law clauses in consumer contracts are submitted to a wider control in EU Law. The targeting test is also necessary to guarantee the protection against those clauses according to the Article 6 of the "Rome I" Regulation. Paragraph 2 allows choice-of-law clauses as far as the chosen law does not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the country where the consumer has his habitual residence, which would be applicable in the absence of choice under paragraph 1. This protective rule is only applicable when traders pursue their commercial or professional activities in the country of the consumer's habitual residence, or by any means direct such activities to that country or to several countries including that country, and the contract falls within the scope of such activities. Hence, the targeting test is relevant to determine the protection against choice-of-law clauses as well. In this sense, the same consideration made above in relation with forum selection clauses in consumer's click-wrap contracts may be reproduced. Moreover, the ECJ[94] states that "Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms[95] in consumer contracts must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded

93. Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186.
94. Case C-191/15 "*Verein für Konsumenteninformation v Amazon EU Sàrl*" [2016] ECLI:EU:C-2016:612.
95. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95.

with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of Regulation No 593/2008 he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances."

On the other hand, the Directive 93/13 is not only applicable to consumer contracts protected under Article 6 of the Rome I Regulation. Therefore, choice-of-law clauses included in standard contracts other than those protected by the "targeting test" may be considered abusive and null according to overriding mandatory rules implementing that Directive into the domestic law of a Member State, given the unexpected or abusive character of standardized choice-of-law clauses[96].

IV. CONCLUSIONS: BEST PRACTICES IN INTERNATIONAL WRAP CONTRACTS

In the light of current practice, it would be interesting to formulate a set of good practices to avoid legal difficulties related to the enforcement of international click contracts. Similar proposals have been drafted in relation with substantial aspects by institutions such as the Working Group on Electronic Contracting Practices, within the Electronic Commerce Subcommittee of the Cyberspace Law Committee of the Business Law Section of the American Bar Association (ABA).[97] The following best

96. Thus, judgments of the Juzgado de lo Mercantil n. 5 of Madrid n. 113/2013 of 30 September 2013 or of the Juzgado de lo Mercantil of Valencia n. 37/2017 of 17 February 2017, related to the choice of Irish law in a click contract for the air carriage of passengers concluded by a user residing in Spain.

97. The Principles or rules, really accurate, were: 1. Viewing of Terms Before Assent: The User should not have the option of manifesting assent without having been presented with the terms of the proposed agreement, which should either appear automatically or appear when the User clicks on an icon or hyperlink that is clearly labelled and easily found. Place the means of assent at the end of the agreement terms, requiring the User at least to navigate past the terms before assenting. 2. Assent Before Access to Governed Item: The User should not be able to gain access to or rights on the website, software, information, property, or services governed by the proposed agreement without first assenting to the terms of the agreement. 3. Ease of Viewing Terms: The program operating the click-through agreement should give the User sufficient opportunity to review the proposed agreement terms before proceeding. The User should be able to read the terms at his or her own pace; if the terms occupy more than one computer screen, the User should be able to navigate forwards and backwards within the terms by scrolling or changing

pages. 4. Continued Ability to View Terms: Once the User views the terms, the User should be able to review the terms throughout the assent process. 5. Format and Content: The format and content of the terms must comply with applicable laws as to notice, disclosure language, conspicuousness, and other format requirements. The terms should be clear and readable, in legible font. If the law requires specific assent to a particular type of term, the format of the assent process should comply with that requirement. 6. Consistency with Information Elsewhere: Information provided to the User elsewhere should not contradict the agreement terms or render the agreement ambiguous. 7. Choice Between Assent and Rejection: The User should be given a clear choice between assenting to the terms or rejecting them. That choice should occur at the end of the process when the User's assent is requested. 8. Clear Words of Assent or Rejection: The User's words of assent or rejection should be clear and unambiguous. (a) Examples of clear words of assent include "Yes" (in response to a question about User's assent), "I agree", "I accept", "I consent", or "I assent"- Do not use vague or ambiguous phrases such as "Process my order,…. Continue," "Next page," "Submit", or "Enter." (b) Examples of clear words of rejection include "No" (in response to question about User's assent), "I disagree," "I do not agree," "Not agreed," or "I decline." 9. Clear Method of Assent or Rejection: The User's method of signifying assent or rejection should be clear and unambiguous. Examples include clicking a button or icon containing the words of assent or rejection or typing in the specified words of assent or rejection. 10. Consequences of Assent or Rejection: If the User rejects the proposed agreement terms, that action should have the consequence of preventing the User from getting whatever the click-through agreement is granting the User. The User should not be able to complete the transaction without agreeing to the terms. For example, if the click-through agreement would grant the User use of a website, software, or particular data, the consequence of the User's rejection of the proposed terms should be to bar the User from that use. Likewise, if the click-through agreement would give the User rights to goods or services, the consequence of the User's rejection of the proposed terms should be to eject the User out of the ordering process. On the other hand, if the User assents to the proposed agreement terms, the User should be granted access to whatever is promised in the agreement without having to assent to additional terms (aside from those that the User specifies in the ordering process). 11. Notice of Consequences of Assent or Rejection: Immediately preceding the place where the User signifies assent or rejection, a statement should draw the User's attention to the consequences of assent and rejection. Examples of notice of assent consequences include: "By clicking 'Yes' below, you acknowledge that you have read, understood, and agreed to be bound by the terms above" or "These terms are a legal contract that will bind both of us as soon as you click the following assent button." Examples of notice of rejection consequences include: "If you reject the proposed terms above, you will be denied access to the [Web site, software, product, services] that we are offering to you." 12. Correction Process: The assent process should provide a reasonable method to avoid, or to detect and correct, errors likely to be made by the User in the assent process. A summary of an online order preceding assent is one such means. 13. Accurate Records: Maintain accurate records of the content and format of the electronic agreement process, documenting what steps the User had to take in order to gain access to particular items and what version of the agreement was in effect at the time. If necessary, for proof of performance, link the User's identity to his or her assent by maintaining accurate records of the User's identifying information, the User's electronic assent to the terms, and the version of the terms to which the User assented. Be sure to comply with applicable privacy laws. 14. Retention and Enforceability: To meet any legal requirement for a record of the agreement to be provided, sent, or delivered, the sender must ensure that any electronic record

practices must be considered particularly within the European Union. They are exclusively related to international contracts and must be combined with other substantive best practices such as those proposed by the ABA or other similar institutions:

i) First, before the user's assent on terms of service by a click feasible, an easy identification of the provider, including the domicile or place of business, is necessary.

ii) The user must introduce the basic data related to his residence and a declaration about the private or professional use of the product or service furnished/acquired.

iii) Having regard to the online declarations of the user, standard conditions and terms of use (which may be differentiated) must be displayed in a scrolling text in B2C contracts and in a scrolling text or in a really close and easy hyperlink in B2B contracts.

iv) In case of B2C contracts, if the declared residence of the user is situated in an EU Member State not included among the targeted countries, before the displaying of terms of use, a previous window will automatically open to warn the consumer that a clearly identified clause of terms of use includes a binding forum selection clause and/or a choice-of-law clause.

v) In case of B2C contracts, if the declared residence of the user is situated in a EU Member State included in targeted countries, before the displaying of terms of use, a previous window will automatically open to warn the consumer that a clearly identified clause of terms of use includes a binding forum selection clause and/or a choice-of-law clause, indicating that those clauses do not prevent the user from taking an action before the courts of his habitual residence or to invoke most favorable rules within the law of his habitual residence.

vi) If Terms of Use include an arbitration agreement, even in B2B contracts this circumstance must be automatically warned through a

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is capable of retention by the recipient. In addition, for an electronic record to be enforceable against the recipient, the sender cannot inhibit the recipient's ability to print or store the electronic record. 15. Accuracy and Accessibility After the Assent Process: If applicable law requires retention of a record of information relating to the transaction, ensure that the electronic record accurately reflects the information and, if required, remains accessible to all persons entitled to access by rule of law for the period required by the rule of law in a form capable of accurate reproduction for later reference. See Christina H. Kunz, Maureen. F. Del Duca, Heather Thayer & Jennifer Debrow, 'Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' [2001] 57 *BL* 401.

clear identification of such clause before displaying the scrolling text or determining the place of that clause in the hyperlinked terms, so that the presence of the arbitral agreement can be known by the user, even without reading the terms of use or standard conditions.

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