

## General Terms and Conditions in Online International Contracts: European and Spanish Law

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### Introduction

Internet is not, as it is usually considered, a virtual communications environment or channel, but a transnational communications system which, as a result of common standards and through the usage of telecommunications technologies and networks, enables exchanging and obtaining information through the use of different modalities of communication online. In this context, the expression electronic commerce is used to refer not only to the electronic contracting, but in a broader sense, to any business or transaction carried out using the net as a means or instrument, in addition to the necessary actions to be advertised on the net, that is to say, to be positioned as an online trader.

Online international contracts, specifically, through an Online Store, have a set of particularities from the perspective of its legal regime, which are mainly related with the fact that these are contracts with general terms and conditions. The Client's click represents the acceptance of the said terms and conditions pre-established by the product or service provider, not being totally clear which legal regime to apply to the general terms and conditions, as it involves an international contract on the one side, and on the other side, inasmuch as each legal system has its own specific regulations for the said conditions and for the criteria or rules of incorporation to the contract.

The general terms and conditions of a contract express a rationalisation phenomenon of the contract in economic terms (reduction of costs in the negotiation, speed in the provision of services, etc.) that is present in all sectors of activity. Electronic contracts through an Online Store is carried out under the general terms and conditions, given that the entrepreneur or service provider publishes on the Website any necessary information for the Client (company or consumer) knows the terms under which the specific offer is made.

This way, clicking on the corresponding Website icon ("OK" or "Accept") expresses, in principle, acceptance by the Client. This modality of electronic contract through an Online Store is the one where most problems of irreflexive contracting can arise. On the other hand, while it is true that all of the General Terms and Conditions are set by the company that is selling its products online, this does not mean that their nature is necessarily unfair. This environment entails specific horizontal projection regulations (of application to any type of contract), in virtue of which consumers and clients are warned of the existence of these provisions, allowing them to cancel the contract, if they are abusive as well as pre-set.

Thus, regulations act against abusive conditions used by the party who attempts to use its strongest negotiating position through the imposition of certain conditions to the other party. Both the Directive 93/13/EEC of the Council, of 5 April, and the transposition laws in

each Member State of the European Union, have articulated a procedure by which unfair terms under a contract may be cancelled, as well as a register of those who have been considered as such.

As stated above, general terms and conditions which have not been negotiated by the parties, have their own regulations, and their purpose is to prevent a higher negotiating position of one of the parties, thus resulting abusive or damaging to the interests of the accepting party. Therefore, independently from the legal regime applicable to a specific international contract, which in most of the cases, will be ruled under Regulation 593/2008 of the European Parliament and of the Council, of 17 June 2008, the unfair nature of the pre-set terms must be verified, subject to the established in a specific ruling on general contracting conditions of application in a specific case.

Henceforth, one must question the regulation to be applied to the control of the contract's general terms and conditions, so that it may be, in principle, the same as the one applied to the contract, without detriment of the established in the regulation on general terms and conditions in its own scope of application. This is the solution given, specifically, for the case of Spanish regulations, by the Law 7/1998, of 13 April 1998, on General Terms and Conditions of Business, of application to the provisions of the general terms and conditions that are part of a contract subject to the Spanish legislation. It will also be of application to the contracts that are regulated by a foreign legislation when the adherent (adhering party) has issued its business declaration in the Spanish territory and when Spain is its usual place of residence.

A separate issue from that of the control of the general terms and conditions (adhesion) is that of its incorporation to the online international contract, inasmuch as not all regulations rule the norms of incorporation in the same way. Under the Spanish regulation "in case of telephone or electronic contracting, it is necessary to state (...) acceptance of each and every provision of the contract, without the need for the conventional signature. In this case, the consumer will be sent written justification of the recently made contract immediately, where the terms and conditions will be stated therein." (art. 5, 4º of the mentioned Law 7/1998).

Therefore, the regulation in accordance with which control of the general terms and conditions is made, also regulates its incorporation (or not) to each specific contract. And in any case, doctrine states that the most relevant elements of confluence between the different Legal systems is the *contra proferentem* motto, that is, provisions redacted or imposed by only one of the contracting parties will be interpreted, in case of ambiguity or darkness, in the sense that is most favourable to the party who has not intervened in its drawing.

On the other hand, a different matter is that of the conclusion of an international contract with general terms and conditions, that is to say,

from which moment can it be said that the contract is born? And also, which legal system decides on such birth? If a provision for the choice of law has been included in the general terms and conditions, it is a requirement to ask the chosen legal system when the international contract has been formalised (created), which on the other hand, has been made remotely (online).

Therefore, once the Client's adherence to the general terms and conditions of the contract formalised through an Online Store has taken place, one must verify if they have all been incorporated, pursuant to the actual legal system governing the said terms and conditions. And subsequently, it must be determined if the international online contract has born according to the applicable regulations thereto, and specifically, the criteria set by said legal system

with respect to distance contracts, in addition to the requirements for its formalization.

Finally, if the law to apply has not been chosen in the General Terms and Conditions, its incorporation to the electronic contract will depend on a specific regulation, to be applied depending on the criteria (or geographic indicator) established in the governing regulations of the said terms and conditions, existing in a specific national legal system. Therefore, applicable law of the international online contract may differ to that applied to carry out the said control, inasmuch as it will be determined in accordance with art. 4 of the aforesaid Regulation 593/2008 (test of closest connection with a specific regulation).