Active and Passive *Websites* in International Trade Law

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Abstract

The Internet is not only the provision of a new medium of communication or dissemination of information but also the emergence of a new electronic market. The basic characteristics of this market is that business operations are not performed by traditional means but by electronically, and by virtue of the transnational nature of the Internet, it becomes an international environment: distances and geopolitical boundaries are no obstacle to conduct business within the Network. Through the Internet contracts can be improved by electronically as the parties may issue statements of will through the exchange of electronic messages or by filling out an order form depending on whether the site is active or passive.

Keywords: Website, online store, e-procurement, contract formation, international trade, dynamic sites (active) and static sites (liabilities)

1. Introduction

The opening of the Internet to commercial use and especially the development of the Web World Wide has been the key element that has made it possible for electronic commerce to come to the final consumer, provoking a growth in the transactions across the network. This new virtual area, rather than a physical location, supposes a new area of operation of the mercantile activity, in which are generated a place of meeting offer and acceptances of negotiable non-existent wills previously. The aspect that grants "added value" to the commercialization of goods and services, takes root in that the fulfillment of the obligations that stem from the contract can be carried out by electronic means. In this respect we can encounter different websites, depending on if only they offer information so that the user cannot influence the content, or if on the contrary the user can influence the content of the site that will change depending on every user and on the aims of this one.

2. Websites's Classification: Active and Passive Websites. Questions to Having in Account on Having Created a Website

A website is a collection of related and common web pages to an Internet domain or sub-domain in the Web World Wide. A web page is a document accessible HTML/XHTML generally by means of the HTTP protocol of Internet. Some web sites need a subscription to accede to some or all its contents. Examples of sites with subscription include many portals for games, forums, services of e-mail based on web, sites that provide information of stock market and economic real time information, etc. A web site is a great documentary organized space that the majority of the times is typically dedicated to some particular topic or specific intention. Any web site can contain hyperlinks to any other web site, so the distinction between individual sites, as perceived by the user, can be sometimes complicated. We must not confuse web site with web page; the latter is only a HTML file, a HTML unit, which forms a part of some web site.

On having deposited a web address, one is always referring to a web site, which has a HTML initial page, which is generally the first page generated and seen by the user upon entering the address. The search in the Internet is realized associating the DNS deposited with the IP address of the servant who contains the web site in which there is the HTML looked page. Different types exist of websites depending of: The first major audience, we have such websites as:- Public: It is a normal Website; a page directed the general public, without restrictions of access at first. - Extranet: They are Sites limited by the type of users who can access them, for example the suppliers of a certain company, or the clients. - Intranet: They are sites which access is restricted to a company or organization, normally they work inside private networks, though this it is not always so.

Of dynamism, they can differ:- Dynamics (active Wesites): The user can influence the content of the site that will change depending on every user and of the aims of this one. Normally, the pages are generated when the user requests them, personalizing the information that offers him. - Statics (passive Websites): The users cannot modify or add anything to the site, the designers alone may make alterations or changes exclusively.In the third place, a distinction can be done between: -Opened structure: All the documents have this address and the users can access any point of the Website. - Closed structure: It limits the access to a few points of entry (even to only one). An example would be a site which requires a previous account or login to enter, the user always required to enter that account orlogin before being able to access to the rest of the page. - Semiclosed structure: Half way between both, it forces the users to access through a few specific points, for example only the principal page and the pages of entry to the most important sections. Finally the potential purposes of websites: - Commercial: The site is created to promote the business of a company.

Its purpose is economic. Its users may include clients, investors, employees and even the competition and the mass media. We can divide them in turn into Corporate (They Report on the company) and Promotional (they promote products).- Informative: Its principal purpose is to distribute information. The users of this type of site depend on the type of information that they distribute: - Leisure: Even though normally they are sites with an economic purpose, these are a special case. These sites are not easy to make, nor to maintain, and often will follow their own rules; since sometimes it is more important to surprise the user with innovations that to support the consistency and the structure of the site. - Navigation: The purpose of these sites is help the user find what they are looking for. Inside this group there are the so-called portals, which try to include practically everything inside their own site. -Artistic: These sites are a vehicle for the artistic expression of the creator or creators. This type of site will often eschew all convention and reflects only the follow the direction of the artist creating the site.- Personnels: Similar to above, these are personal expressions of the site's creator or creators. Its aims and potional audience can be varied. Inside this category there can be everything from collections of photos of the family to scientific treatises of the highest caliber.

In this work we will focus on the classification that is realized according to the dynamism. As mentioned there exist to types of websites, those which only give information, banners, etc, (wesites passive), and those websites which have been called virtual malls or market place (websites activate). In the first type of site, the company in question will give information about its products, brands and prices, while in the case of the second type of website exists a virtual shop via the Internet/Intranet/Extranet, where it is possible to online orders etc. Furthermore access will often be restricted to client, with information about the safety system available. The active websites are those in which besides information about the entity and the products, it allows the development of commercial on-line activity (that meaning, that it treats itself about an operative web to do the transaction) it is necessary an external service specialized in doing it. In such cases, it is necessary that certain experts (technical personnel or IT) design the site in order that, close to the information about what the company is concerned with, it is also possible to contract, to pay, to request information, etc. Normally the first pages appear without movement and without functionality beyond the links. These pages are constructed by the HTML language, and are very simple to create, although they offer few advantages both to the developers and to the visitors, since they can only present flat texts accompanied by images and at most contained multimedia since they can be videos or sounds.

On the other hand, dynamic or active websites include special effects or functionalities and therefore it is necessary to use other programming languages, apart from the simple HTML. Thus the dynamic pages are more complex and versatile. On the one hand principal characteristics of the passive websites are: Absence of movement and functionalities, absolute opaqueness to the desires or searches of the visitor to the page and they are realized in language XHTML or HTML. To change the character of the site it is necessary to access the server which the site was originally lodged in. The user does not have any possibility of selecting, ordering or modifying the contents or the design of the page to his taste and the updating process is slow, tedious and essentially manual. They cannot use such functions as databases, forums, virtual shop, etc. On the other hand, an active website has the following characteristics: huge potential for design and further development, the visitor can alter the design, contents or presentation of the page to his or her taste, at his disposal are a number of diverse languages and programming tools. The updating process is extremely simple, without need to enter the server. It allows for a great number of functions such as databases, forums, dynamic content, virtual shop, etc. Static web sites consist of pages that do not change from the moment they are created.

The documents are saved in the server and if there twenty pages saved and changes are not made via the server, then there will remain twenty pages, outside the control of the user to alter. In comparison, the dynamic web site creates the pages as the users need them. Let's consider, for example, a virtual shop, where the user decides to see the characteristics of a certain product, nobody has created this page, believe itself in the moment, on the basis of the consultation of the user. Let us consider, for example, a virtual shop where the user wishes to view the characteristics of particular product; nobody has actually created this page. It creates itself on the basis of needs of the user. The system takes the information of the databases from the servers, and creates the ad hoc page. When creating a website the first consideration is what you want to be able use the site to do, this factor will influence the future SEO and web positioning of that site. Let's suppose that, in effect, it is a question of online shopping. If it was necessary to create a page for the product, the serious immense web, it would consume a great quantity of resident space in the server. In addition, it would be of little practical worth, because to edit the information it would require entering each static page.

On the contrary, the dynamic sites, in general, rely on an interface that it allows the information to load in a much more accessible form, and, fundamentally without need to edit the source code of any page. As for the positioning in seekers, in the beginning it was more difficult to achieve a good ranking with dynamic pages. Nevertheless, this already has changed, so they are constructed on codes opened for the community, by what all the time improvements are done and they add functionalities. For this reason gradually the dynamic sites are replacing static ones, and because of this the problem of the SEO it is relativized, when all compete almost on the same basis. As with the static sites, the dynamic sites admit CSS, or Cascade Style Sheet, for what it is possible to achieve sites of great visual performance without consuming great quantity of resources of space or of time of load. In addition, there exists a great variety of solutions based on the technology of dynamic extremely efficient pages to sell products (Zen Cart, Oscommerce, CubeCart), to handle contents (WordPress, Drupal), or to manage the most identical site to the needs.

3. Utilization of the Active Websites and Electronic Contracting in the Frame of the Private International Law

Since it has been exposed, in the active websites the users can interact, and one of the more important characteristics of this type of web site is that the same ones it can acquire goods and services across contracts made on-line. Inside electronic contracting different modalities can be distinguished: First bearing in mind the form of execution of the operation can differ between direct and indirect electronic contracting. The first one is that one allows the virtual delivery of intangible assets or the provision of services that they are not necessarily in the physical presence of his lender. This delivery or presentation can be, in turn, immediate or deferred. Examples: acquisition of licenses of use of IT or right programs on songs and videos or the contracting service of hosting, management of payments, and virtual services. On the other side the indirect electronic contracting is one that needs the physical delivery of material goods or the presentation presencial. The execution is necessarily deferred, (JAVIER MASTER, J/ALMEIDA, C. 2003). To give some examples, the purchase of ink cartridges or the contracting for juridical services etc. In the latter example depending on how the declaration of will is carried out by the contracting parties we will be using an pure or mixed electronic contract. In the first the declarations of will demonstrate entirely across such electronic means as the e-mail or the interactive pages.

In turn they can differ: the contracts reagents that demand of the parts the use of additional tools of communication to be able to carry out the contracting. They are the most common in micropayments systems, contracts for personalized services and sale for catalogue. Examples: Contracting across e-mail, Subscription to services by means of sending SMS and the interactive contracts that are those in which the place in which one finds the offer allows for yes to have the effect of contracting. This way we would have the contracts "click": The formalization of the contract demands of the acceptor an express manifestation of will, which it grants touching the button that is indicated to such an effect and that habitually contains the word "I" "agree". Example: Acceptance of the terms and conditions of social networking sites by clicking "yes". On the other hand within the electronic interactive contracts we can find the so called "browse" contracts: The contract is formalized by the mere access of the web page or site, without need for express acceptance. Examples: tacit Acceptance of the conditions of use of a web page or of his legal notice. Inside this second distinction of electronic contracts according to the form in which there is carried out the declaration of will of the parts, one encounters the mixed electronic contract, which in that there are combined electronic systems of manifestation of will by traditional others. Example: It comes out of form of request of order for his sending for fax or postal mail.

In the third term depending on the subjects that are a part of the electronic contract there can be established other two distinctions of electronic contracts, the electronic contract for the consumption and the mercantile one, the first one is that one in which a consumer or user takes part at least. Example: purchase of tickets of flight across a web page. On the other hand the electronic mercantile contract, it is in that all the contracting parties are businessmen or professionals. Example: Dealing of wood for the manufacture of chairs.Finally there can be a classification of electronic contracts made depending on the form of payment that the parts have established. From this we can distinguish between contracts whereby payment is made electronically and contract using traditional payment methods. The most common examples are the following ones: Payment with card of credit, bank transfer and PayPal. Nevertheless there has been an increase in relevance of private monetary types on the internet as used by certain website engaging in electronic commerce, such as auctions and MMORPGS; in Second Life's web page the payments are realized in There adjoins Dollars (L\$), in some pages it is bought with tokens and in WOW with golden coins By comparison in contracts using traditional payment, the selected means of payment is ready money or check, submitted by means of post or courier post.

The use of electronic methods for the commercial sale of goods and services has required a review and adjustment of the existing regulatory framework of juridical insecurity. This is because the nature of electronic market often eludes the previous frameworks. The general regulation on contracting has been modified by a community instrument, which guarantees a high degree of harmonization in the classifications of the Members States. It is a question of the Board Directiva 2000/31, sobre comercio electrónico, incorporada al derecho español por la Ley de Servicios de la Sociedad de la Información, (LSSI). This instrument becomes applicable to electronic commerce from the moment any of the above mentioned electronic activity qualifies as a service of the information company.

4. Electronic Contracting Across the Active Websites. Formation of the Contract According to the Board 2000/31/Ce of the European Parliament and of the Advice Gives 8 June 2000

In this area of the realized contracts across websites to activate the contract, it will be necessary to determine when the contract is understood perfectly and therefore when an electronic contract exists as such. The principal question that appears is as for the test of the contract, so much in the relative thing to the intervention of the parts as for the presentation of his assent. On the other side, the moment of the birth of the contract, that is to say, about his conclusion, allows it to know from what moment the contract exists, as well as to determine which is the law applicable to the capacity of the contracting parties, which is the applicable norm in the supposition of legislative modifications happened during the formation of the contract (there is an in force law in the moment of the preliminary treatments and stops being in force to the time of the birth of the contract), to determine the period of prescription, the limit of the retroactivity in case of contracts submitted to condition, the transfer of the risks of the thing I object of the contract, the prices of the market or the rescission of the contracts done in fraud of the creditors, etc. Some of these aspects turn out to be relevant inside the area of the electronic contracting, for example, that of the determination of the risks, and others seem to be probably impossible, as the legislative modifications in two moments of the contract, since the Electronic Contracting is characterized by the speed in the execution.

Also it has special relevancy, the place of development of the contract, which will allow it to determine which courts have competence in cases where there arises some conflict related to an electronic contract and which is the applicable law to the contractual relationship. I will address these questions, the analysis will point at the moment of development of the contract, that is to say, when the manifestations of will of the contracting parties coincide. These manifestations of will are translated in what is known as offer and acceptance, (CHAFFEY, D. 2003). In Spanish jurisdictional classification, the contract is controlled in the beginning by the principle of party autonomy, which is modified by the technological advances they are the forms of manifestation of the offer and of the acceptance. The problems arise over the degree of security offered by the above mentioned resources and the juridical acceptance of those when considering a contractual breach. Thus in our country the voluntary aspect to conclude a contract, and that the assent is expressed freely and without coercion, is in an email or attached to a document in the Web, then this contract will exist, always and does not need special formalities to be distinguished by law. In this way, a contract is binding when one party makes an offer and other accepts it. The principle problem we encounter in electronic contracts is at what point do we consider a contract accepted?

In the cases where acceptance is given by means of an email or by means of an attached document there will no be problem in determining whether a juridical contractual relationship exists, but what happens in cases where it is not possible to use such methods? By this we are referring to active website, whereby it is only necessary to touch a certain icon or accept a few certain particular conditions that already been given by the page. There is another disadvantage in the determination of the existence of a contract or not, and that to bear in mind the fact that the Internet is a global system. Nevertheless since later it will be analyzed when one speaks about the comparative Law, in case of the American and English law, a contract is closed when the parts show will and mutual intention of remaining fastened for a set of terms. In this area of the Electronic Contracts when one is in presence of an offer and the offer is accepted via a click or other mechanism, a priori, in this moment it would have been concluded, although it would be necessary to analyze the type of contract and the applicable law. Therefore in this case, the possibility of revoking the offer turns it into a void. If it is a question of the sending of an offer, the repeal of that same offer would be to send the repeal prior to it becoming known to the addressee and is accepted, which invariable is impossible given the speed with which the messages travel across the network.

With relation to yes the acceptance in the Internet it must be implicit or explicit, in general, the person who the offer is made to cannot be assumed to have accepted an offer through silence, so if one party receives an e-mail informing did he or she did not answer to the offer within certain period, an answer cannot be forced. It can be implicit when already there exists a regular business flow between the parties, which take an ordinary use of Internet as a way of communication and which have established a commercial permanent relation, based on a principal contract created before, that it was agreed upon before regarding this virtual way of realizing agreements.

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