3.1. Jurisdiction: the 1968 Brussels Convention and the Council Regulation 44/2001.

The **Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters** provides a directly applicable legal instrument that replace the 1968 Brussels Convention[84]. In Europe, the primary source of jurisdiction law was the Brussels Convention which established that consumers may bring lawsuits where a company is located, where a contract is performed, or, in some situations, in their own country of domicile. Under the 1968 Convention, businesses could sue consumers only in the individual's home country. Council Regulation 44/2001, which took effect in March 2002, modified the older convention and expanded the range of situations in which consumers can bring lawsuits in their home country. Notably, EU consumers can bring suit in their home country whenever the seller, by any means, directs its activities to that country and a contract is formed within the scope of those activities (**"country of destination principle"**)[85]. It is worth noting that the European Union is actively considering an extension of Council Regulation 44/2001 beyond the EU's borders to European Free Trade Association states (i.e. Switzerland, Liechtenstein, Norway and Iceland) and Poland[86].

However, the following provisions are substantially similar to those established by the Brussels Convention:

- Article 2 establishes the **General rule**: Persons shall be sued in the courts of the Member State where they are domiciled[87] (i.e. defendant's domicile).
- Articles 5 and 6 provide the plaintiff with an additional **Special jurisdiction** for:
  a) **Contracts**: Place of performance. It will be implied from the place where the goods are to be delivered or the services are to be provided[88].
  b) **Torts**: Place where harmful event occurred[89].

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[84] **The Brussels Convention will continue to apply to the relationships between Denmark or the excluded territories and all other Member States.**

[85] Substantial uncertainty exists as to what a website must do to avoid "directing" its activities to EU consumers, and thus triggering jurisdiction in the consumer's home forum.

[86] See the European Commission press release, "Civil judicial cooperation: Commission proposes speeding up work with a view to adopting the Lugano Convention", IP/02/513 (rel. Apr, 8, 2002).

[87] See Article 2 of Council Regulation 44/2001, **Jurisdiction** (Section 1 – General provisions).

[88] See Council Regulation 44/2001, **Special jurisdiction**, Article 5.1.

[89] Ibid, Article 5.3.

c) Disputes arising out of the **operation of a branch, agency or other establishment:** Courts for the place in which it is established[90].

d) Disputes involving a **plurality of defendants:** Place where any one of them is domiciled[91]; it is important to note that claims must be highly connected.

e) **Third party proceedings:** Place where they are being held[92].

f) **Counter-claims** based on the same contract or facts on which the original claim was based: Place where the original claim is pending[93].

g) Actions combined with those **involving real estate:** Court where the property is situated[94].

Articles 15, 16 and 17 regulate **consumer contracts** and have been the subject of most changes[95]. A great number of voices from the business and legal communities have described the provisions as a disproportionate measure which would impose an unnecessary burden on **electronic commerce**.

3.2. Avoid expansive jurisdictional claims

Governments should take care to avoid creating unpredictable grounds for asserting jurisdiction over e-commerce activities. Some examples of expansive jurisdictional claims, which threaten to create an inflexible rule of reference to the jurisdiction or laws of the consumer's residence, regardless of choice or effective alternatives, are:

- Article 4(1) of the EU Data Protection Directive has been interpreted as requiring foreign web site operators who automatically collect information over their web sites, but who are not established for business in Europe, to comply routinely with the data privacy rules of each EU country and appoint legal representatives in those countries[96].
- The recent conversion of the 1968 Brussels Convention into Council Regulation 44/2001 in effect subjects any dispute relating to an on-line contract with a consumer to the jurisdiction of the courts of the consumer's place of domicile.

[90] Ibid, Article 5.5.
[91] Ibid, Article 6.1.
[92] Ibid, Article 6.2.
[93] Ibid, Article 6.3.
[94] Ibid, Article 6.4.
[95] See the Brussels Convention's Article 13 on consumer contracts.
[96] This is likely to prove unworkable and unenforceable, and it is inconsistent with jurisdictional doctrines in national law and in private international law.

- Certain proposals to amend the 1980 Rome Convention (i.e. the Rome I) would apply the laws of the consumer's residence to an on-line transaction with a consumer[97].
- The Hague Conference on Private International Law's draft Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters currently adopts the country of destination approach to jurisdiction, with very limited exceptions, over sellers who conclude contracts with consumers, thereby subjecting companies to the jurisdiction of the courts of all countries from which its websites may be accessed.

The International Chamber of Commerce encourages the relevant governments and administrations to reconsider the policies of the existing or proposed rules set forth in the preceding examples consistent with its recommendations. These recommendations (which are treated in the next paragraphs) stress the importance, when dealing with jurisdictional issues, to distinguish between B2B and B2C transactions. (Dealing with the later type of transactions the ICC points out the differences and consequences of applying the 'country of origin' and 'country of destination' principles).

3.3. The need for legal certainty and the distinction between B2B and B2C (Jurisdictional issues)

Business is mainly concerned about uncertainty and aggressive assertion of jurisdiction and applicable law in business-to-consumer (B2C) e-commerce, with emphasis on the distinction between the principles of *country of origin* and *country of destination* (see paragraph 3.4. and 3.5.). It is worth underlying that harmony and predictability of jurisdictional questions in cyberspace are of crucial importance to the flowering of e-commerce.

Companies that engage in international e-commerce transactions must recognize the international consequences of their actions and carefully navigate the emerging legal frameworks governing international electronic commerce. On the one hand for companies engaging in business-to-business (B2B) transactions, careful contracting between the parties can reduce, but not eliminate, many legal obstacles, on the other

[97] See the Policy statement issued by the International Chamber of Commerce (ICC) titled: "Jurisdiction and applicable law in electronic commerce", prepared by the Electronic Commerce Project (ECP)'s Ad hoc Task Force on Jurisdiction and Applicable Law in Electronic Commerce, in particular "Recommendations" - available at: www.iccwbo.org

hand for business-to-consumer (B2C) transactions, businesses must potentially comply with an array of laws dealing not only with e-commerce but also privacy, consumer protection, and other areas.

The distinction between B2B and B2C is of particular importance. In the case of business-to-business transactions across borders, established conventions and solutions which help guide such transactions exist. For example, the sequence of contractual documents is generally standardized. Moreover, contracting parties are usually more refined and often incorporate choice of law and choice of forum clauses in their agreements[98]. Such customs and practices are not the rule and therefore are not familiar to transborder contracting between businesses and consumers, and many of the business practices and traditional ADR (i.e. Alternative Dispute Resolution) techniques are simply too costly (especially in terms of legal hire, correspondence, logistic, and the use of expert third parties) to be utilized by most consumers. It should be noted that with business-to-consumer e-commerce 'jurisdiction anywhere' is a real possibility. Notably for many on-line activities, it is extremely difficult or even impossible to comply with the laws of every potentially relevant jurisdiction.

As soon as a website is posted it is instantly available worldwide to anyone with a computer or another form of network connection (e.g. wireless devices, such as third generation mobile phones), companies that sell to consumers need a detailed knowledge of the advertising, consumer protection, privacy and contracting laws in any jurisdiction where they intend to do business[99]. For companies engaging in e-commerce one of the most significant concerns is determining exactly when such laws apply.

It is important to note that the question of determining jurisdiction in cyberspace remains unresolved notwithstanding the existing rules, leaving unclear the ability of a party to sue an on-line entity in the court of its choice. "***Jurisdiction*** *is a crucial matter when Internet transactions are involved, because individuals and businesses who*

[98] There are also well established arbitration and mediation options to avoid litigation in the courts of one party's country.

[99] *It is virtually impossible to prevent 'advertising' in jurisdiction where such advertising would not be permitted, and although in most cases states and countries have not imposed sanctions for advertising where it was not clearly targeted to their jurisdiction, a business that accepts orders and deals with customers from that jurisdiction could find itself subject to the whole range of applicable laws and regulations there.* See: "Jurisdiction and applicable law in electronic commerce", prepared by the Electronic Commerce Project (ECP)'s Ad hoc Task Force on Jurisdiction and Applicable Law in Electronic Commerce (International Chamber of Commerce), available at: www.iccwbo.org

operate websites face the danger of potentially being sued in any jurisdiction from which their sites or on-line services are accessed"[100].

In the B2B context, companies can void some of these difficulties, as mentioned above, through choice of law and choice of forum provisions, which should be included in on-line contracts, licences, and agreements as well as in a website's terms of service.

It is worth remembering that in B2C transactions, choice of law and forum selection clauses imposed by a business on a consumer may not be enforceable[101].

Noteworthy the International Chamber of Commerce believes that it is business' responsibility to provide rules of best practice that will enable contracting parties to make the right choices as to applicable law and competent forum in the domain of legal B2B and B2C transactions[102].

3.4. Country of origin principle (included considerations by the ICC)

Article 3.1 of the E-Commerce Directive[103] requires that each Member State ensures that the Information Society services provided by a service provider established on its territory comply with the national provisions of such States which fall within the scope of the "co-ordinated field". This article establishes the principle of control by country of origin.

However, it reaffirms the applicability of the existing rules of Private International Law. (Thus, we will apply the Brussels Regulation and its rules).

It should be noted that the control by country of origin is based on the concept of "establishment". A Member State will be competent when a service provider is established in it. Article 2 (c) of the E-Commerce Directive defines an "established

[100] In this sense see T. Brightbill and A. Worlton, *New markets, new risks: Barriers to global electronic commerce*, E-Commerce Law Report, May 2000.

[101] Companies trying to avoid jurisdictions that may not honour their restrictions on forum and governing law should consider posting clear and conspicuous disclaimers on their websites, screening for indicators that a consumer resides within undesired jurisdictions, and removing from their sites languages and currencies from such jurisdictions.

[102] In this context "transactions" must be understood to encompass transactions conducted between or among legal persons. Regardless of size and other factors, legal persons – as opposed to natural persons – should be subject to the same rules in the same circumstances. This is of particular importance in on-line transactions, where the parties may not know each other and cannot practicably make distinctions as to applicable law based on the size and character of the legal entity with which they are dealing.

[103] Directive 2000/31/EC of the European Parliament and Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

service provider" as a body *who effectively pursues an economic activity using a fixed establishment for an indefinite period* [104].

The Court of Justice has recognised the possibility that the same service provider is established in several Member States. In such case, the Member State in which the service provider has the centre of its operations will be deemed competent.

The Court also remarked how the presence and use of technical means (such as the location of the web server) will not constitute an "establishment"[105].

As stated in the derogations set forth in the Annex to the Directive, the following will be excluded from the scope of the country of origin principle:

(i) copyright, neighbouring rights, industrial property rights;
(ii) emission of electronic money;
(iii) freedom of the parties to choose the law applicable to the contract;
(iv) contractual obligations concerning consumer contracts;
(v) formal validity of contracts creating or transferring rights in real estate;
(vi) permissibility of unsolicited commercial communications by electronic mail;
(vii) certain provisions of insurance legislation;
(viii) companies set up for the collective investment in transferable shares.

Application of the "country of origin" principle seems to be the most workable solution. However, the International Chamber of Commerce recognizes that there is a subset of consumer transactions in heavily regulated industries where, due to compelling public reasons, regulations have been developed to provide that specific redress and information be made available to the consumer in his/her country of residence. "As a commitment to consumer protection and empowerment is shared by business and governments, application of the "country of origin" principle should not be read to undermine such regulations. Nevertheless, the ICC encourages governments to reassess such regulations so as to identify their utility in a global marketplace.

The ICC and the international business community wish to assure consumers and government representatives that where choice, self regulation and country of origin are espoused as the preferable or only workable solution, it is with the conviction that

[104] See article 2 (c) of the E-Commerce Directive.
[105] The following won't constitute establishment: (i) **hosting** of websites; (ii) **access** to a website in a Member State; (iii) the **offer** of personalized services in a Member State. This remains consistent with the community legislation in force applicable to other areas.

mechanisms proposed must be trustworthy, user-friendly and able to provide effective redress to the consumer[106]" [107].

3.5. Country of destination principle

Some governments have adopted application of the "country of destination" principle, which states that the applicable law and court with jurisdiction are those where the consumer resides in the event of a B2C cross-border dispute. Application of this principle may severely limit greater consumer choice and more favourable prices.
The ICC stressed that the complexity of applying the "country of destination" principle is exacerbated when it is applied where consumers use '*infomediaries*' or other interposing technologies to purchase goods or services that are digitally transmitted, and pay with digital cash or any other payment mechanism that does not identify the purchaser. In this situation, a business would never know the law and forum to which it subjects itself as the '*infomediary*' prevents a company from knowing the identity and location of an individual consumer[108].

3.5.a. Jurisdiction, choice of law and recognition and enforcement of judgment from the point of view of the consumer

Consumers contracting on the Internet need confidence that they can seek redress in their own courts, use the consumer law rules they are familiar with and enforce their judgment, should problems arise. Council Regulation 44/2001[109] (which provides a definition of the place of performance) contains a revised test for application of the consumer protection rules. These now apply when '*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, and the contract falls within the scope of such activities*'[110].

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[106] Effective consumer protection can not be achieved by applying traditional consumer protection concepts. Interactive technology, and in particular the Internet, provides a unique opportunity for creating solutions that are effective and that preserve the flexibility that underpin many of the emerging e-business models. The ICC and the business community are committed to engage in an open dialogue with consumers and governments on how these goals can be attained.
[107] In this sense see: Policy Statement by ICC titled *Jurisdiction and applicable law in electronic commerce*, available at: www.iccwbo.org/
[108] Under these circumstances, companies are most likely to forego cross-border on-line sales entirely, thereby significantly reducing the Internet's benefit to consumers.
[109] *Regulation on Jurisdiction and the Recognition and Enforcement of Judgment in civil and commercial matters*, in OJ L12/ 2001.
[110] See article 15.1.(c) of Brussels Regulation 44/2001.

The enforcement procedure, which was already relatively straightforward under the Brussels Convention, has been made even more streamlined by the Regulation.

Notably choice of law rules in contract within Europe are governed by the Rome Convention and the basic rules, contained in it, are more trader-friendly than the rules on jurisdiction. "In principle the parties have freedom of choice over the applicable law and so the trader could include a relevant term in his contract. If such a choice is absent in contractual matters the issue is governed by the law of the country in which the principal place of business of the party who is to provide the characteristic performance of the contract is situated (i.e. the trader's state)"[111].

Relevance of the Rome Convention

Once the applicable Jurisdiction to a given contract has been clarified, the judge will apply the forum's conflict of laws rules to ascertain the applicable law. At European level, conflict of laws rules have been harmonised in regard to contractual matters, through the implementation of the EEC **Convention of June 19, 1980 on the law applicable to contractual obligations.** The Convention applies to contractual obligations in any situation[112] involving a choice between the laws of different countries. However, it will exclude:

1) certain commercial contracts that are already subject to other harmonised conflict of law rules (e.g. arbitration and insurance),
2) non-commercial agreements,
3) certain matters which do not involve contract choice of law (procedure).

Notably article 5 of the Rome Convention deals with consumer contracts that arise in three well defined sets of circumstances. In these cases the mandatory rules of the country of habitual residence of the consumer cannot be contracted out of, and apply in the absence of a choice of law by the parties. This article may be relevant to certain electronic commerce contracts. The attention should be on the provision that one of the circumstances involves a specific invitation which was made to the consumer in his

[111] In this sense see: *Private International Law – electronic commerce - country of destination principle*, Directorate-General for Research, Division for Social and Legal Affairs (Legal Affairs Series), March 2001, available at: http://www4.europarl.eu.int/estudies/internet/workingpapers/juri/pdf/105a_xx.pdf (accessed: June 20, 2002).

[112] See Article 1.1 of the **1980 Rome Convention on the law applicable to contractual obligations** (consolidated version).

country and he accepted it there[113]. The main issue here is whether a website constitutes a specific invitation made to the consumer in the latter's habitual residence[114].

Although the parties have the possibility to choose the law which is to govern their contract, the discretion of the parties to elect the applicable law is not entirely unlimited. In fact, the Rome Convention provides that the parties cannot contract out the mandatory provisions of the law of a particular country if all the other elements at the time of the choice are connected with that country. It should be noted that most countries do not have many "mandatory provisions". They are, however, quite common in the field of consumer law. For this reason, it is particularly important to ensure that the clause in which the governing law is stated is specifically incorporated into a contract entered into electronically.

3.5.b. Jurisdiction, choice of law and recognition and enforcement of judgment from the point of view of the supplier

Article 5(1) of Council Regulation 44/2001 specifies that in relation to contract the place of performance in the case of the sale of goods will be the place in a Member State where the goods were delivered or should have been delivered, and in the case of the provision of services the place in a Member State where the services were provided or should have been provided. This clarification is helpful, even if it still exposes the supplier to being sued in the customer's "home court".

The major improvement for electronic commerce traders appears in Article 23, which deals with 'prorogation of jurisdiction. The key concepts of the old Article 17 of the Brussels Convention have been retained, but quite importantly paragraph 2 now specifies that '*[any] communication by electronic means which provides a durable record of the agreement shall be equivalent to writing'*. This is a major breakthrough for electronic commerce and it enables the trader to rely for example on e-mails and "click wrap" contracts. However, it should be noted that the overriding effect of the special

[113] See article 5.2. of the Rome Convention, 1st case.

[114] A fully interactive website through which the consumer can conclude a contract with the supplier no doubt comes within the scope of this concept if the consumer takes all the necessary steps in his habitual residence sitting in front of his computer. The presence of a fully passive website is also possible, which does not qualify as there is no specific invitation and it is left to the consumer to make contract with the supplier by means that are not provided by the website (non-interactivity). From a trader's point of view this approach is not desirable, in fact it creates uncertainty and makes it likely that different consumer laws will apply to different contracts concluded by the same supplier.

regime for consumer contracts has been retained. The improvement is therefore limited to the non-consumer contracts area[115].

Again the main instrument in relation to choice of law is the Rome Convention on the Law Applicable to Contractual Obligations. Parties, as already mentioned, are free to choose the applicable law - this principle is contained in article 3. This article does not raise many particular problems for contracts in relation to electronic commerce. The only major problem that arises specifically in relation to article 3 is the question of whether or not an on-line contract confirmed by e-mail or a click wrap contract or any similar arrangement, and specifically the choice of law clause in it, can be seen as a valid agreement by the parties on the applicable law in the absence of a traditional written and signed document. It is worth remembering that in the absence of a choice article 4 will lead to the determination by the court and the application of the law with which the contract is most closely connected. Notably the Rome Convention provides that in case the parties do not agree upon the governing law, it shall be the law with which the contract is most closely connected. It further establishes a "rebuttable" presumption that the law shall be the law of the "characteristic performance". This is the law of the place where the party who has to effect the characteristic performance has his seat of business. For example, in a contract of sale, characteristic performance is effected by the seller who has to deliver the goods, and therefore the law of the seller's country applies. It is interesting to stress the following: the application of this rule to contracts made on the Internet may on occasions unfortunately apply a law which has little connection with the reality of the contract, particularly where, for example, the seller may have set up business in a tax haven and the goods never physically pass through that haven. In such a case, the law of the tax haven would nevertheless apply.

Recognition and enforcement of judgments is an issue of vital importance of any electronic commerce trader. Once a judgment has been obtained it should be recognised and executed anywhere in the world as smoothly and quickly as possible. Though the current instruments in this area (i.e. Council Regulation 44/2001, and the work of the Hague Conference on Private International Law) work well, developments in the direction of an even less cumbersome and almost automatic system are desirable.

[115] The provisions on consumer contracts have been widened in scope and the negative impact of these provisions for electronic commerce traders has therefore increased further.

3.6. Difficulties posed by jurisdictional and choice of law issues

The European Commission is considering a regulation[116] ("Rome II") that would go beyond jurisdiction to choice of law issues. The proposed regulation, known as "Rome II", could dictate that the laws in the consumer's country should govern certain B2C cross-border advertising and solicitation over the Internet, even if no B2C contract is formed. This "country of destination" principle conflicts with the "country of origin" approach, which is favoured by e-commerce providers because it limits and clarifies potential liability. Rome II would subject e-commerce merchants to liability under the laws of any location where their websites could be accessed. This measure would no doubt stifle e-commerce ventures. In response to this concern, in June 2001 the European Commission indicated that it would consult with industry and consumer groups, and might consider elimination of the "country of destination" approach. However, the European Commission has recently showed renewed interest in revising Rome II to expand consumer protection on-line. Businesses need to be aware of multilateral efforts to resolve jurisdictional and choice of law issues. The most significant is the Hague Conference on Private International Law. In April 2002, Conference negotiators met to hammer out a treaty providing for the foreign enforcement of judicial decision. It is important to note that negotiators were derailed in past sessions in part by the efforts of European nations to impose a jurisdictional "country of destination" rule on B2C on-line contracts[117].

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[116] **The European Commission has launched a consultation proposal for Rome II (a Council regulation), which sets the goal of harmonising laws that will apply in cross-border, non-contractual disputes in a situation where there is a choice between the laws of different countries. This will result in all Member States applying the same law to cross-border disputes on non-contractual obligations and in turn meaning that judicial decisions throughout the EU will be accepted by all States. Due to the disparities of this law among Member States an individual suing another may choose a court on the basis that the law in that jurisdiction will be more favourable to them. Rome II will deal with the law that applies in relation to, for instance, defamation and unfair competition. With regard to defamation it is the law of the country where the victim resides, which shall apply. Such harmonisation will complete the Private International Law rules in the EU in relation to commercial obligations as the law regarding contractual obligations has already been harmonised in the 1980 Rome Convention.**
The 'Draft proposal' for a Council Regulation regarding applicable law for non-contractual obligation is available at: http://www.europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm

[117] World-wide adoption of a "country of destination" rule could expose on-line traders to judgments from courts in every jurisdiction where they form B2C contracts, a risk that could severely curb international e-commerce.

3.7. The need for legal certainty of on-line contracts: EU Electronic Commerce Directive (contractual aspects)

The Electronic Commerce Directive is of fundamental importance when dealing with electronic transactions in Europe. The most relevant articles concerning contractual aspects of e-commerce are undoubtedly articles 9, 10, and 11. In particular Member States are urged by article 9 to eliminate barriers to the conclusion of electronic contracts, in a way that legal certainty for on-line transactions can be considerably boosted.

Following these dispositions, closely connected to the Electronic Signatures Directive[118], the Member State shall have to:

- eliminate those dispositions that forbid or severely limit the use of electronic means,
- not prevent the use of certain electronic systems,
- not limit the effects of the electronic contract in a way that would favour the use of paper contracts,
- adjust their existing formal requirements of those contracts that cannot yet be carried out electronically.

It is important to note that there are some exceptions. The requirements stated above, in fact, will not apply to all or certain contracts falling within the following categories:

- contracts that create or transfer rights in real estate, except for rental rights,
- contracts requiring by law the involvement of courts, public authorities or professions exercising public authority (notaries),
- contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;
- contracts governed by family law or by the law of succession.

Article 10 of the E-Commerce Directive clearly states the information to be provided in connection with formation of electronic contracts. The service provider shall inform about the technical steps to follow to conclude a contract, how to correct input errors, codes of conduct, contract terms and general conditions.

[118] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

Concerning **the different technical steps to follow to conclude the contract**, it is rather common in B2C websites to find a sort of "barometer" with an expression of the percentage of the transaction being undertaken towards its conclusion or otherwise a graphical display of the total number of steps it will take to, for instance, purchase a plane ticket[119], highlighting the covered ones.

Another important piece of information to be provided is whether or not the concluded contract will be filed by the service provider and whether it will be accessible. This could be connected to a company's obligations towards ensuring a proper data protection policy. Indeed, guaranteeing full access to the database storing the placed orders can prove rather cumbersome. However, it is important to stress that if a method is established in order to comply with obligations set forth by the Data Protection Directives[120], it might also prove useful in providing access to this sort of information[121].

Prior to the placing of the order, it is also necessary to provide the technical means for identifying and correcting input errors. This would comprise a message explaining the procedure a recipient would have to follow in order to make use of the technical means enabling the identification and correction of errors. (The availability of such technical means is imposed by article 11.2). Furthermore, article 10 sets **the languages offered for the conclusion of the contract**. Multilingual applications are commonplace. However, it is understood that such choice will be provided at the beginning of the transaction or first display of the website. Changing languages at, for instance, payment processing time, might prove somewhat harder.

The service provider will have to indicate any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically (it usually consists of a link to the privacy policy undertaken).

It is worth noting that the contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them. Notably this requirement implies the need to offer a 'printer friendly' version and a 'save' choice.

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[119] A very good example is the British Airways' website: www.britishairways.com The consumer is guided step by step, and he always knows at what stage of the purchase the transaction is.

[120] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regards to the processing of personal data and on the free movement of such data, (OJ 1995 L 281/31); and Directive 2002/58/EC of 12 July 2002 (OJ 2002 L 201/37).

[121] Such a method could consist of allowing a customer to log on to the personal information about himself, including detailed information about the orders previously placed.

3.8. Formation of the contract

First of all it is necessary to stress that the mere fact that the communication of an offer or acceptance is electronic should not impede the formation of a contract. Being able to form contracts through websites is crucial to consumer-oriented electronic commerce, as underlined at the beginning of this work. A website may contain a vendor's on-line catalogue of goods and services, including pricing and availability , as well as a means for taking orders and payment. Orders can be fulfilled electronically, arrangements for later physical delivery can be made[122]. Transactions concluded through websites often use standardised forms and "clickable" icons to indicate assent to a bargain[123], raising issue of contract enforceability.

3.8.1. Relevance of "pre-contractual" liability in e-commerce

Many civil law countries (Italy included) have a relatively developed doctrine of "pre-contractual liability", which imposes a legal obligation on both parties to negotiate in good faith. If one party withdraws from the negotiations, they may be liable to the other for their lost business time and expenses, including their legal advisers' expenses. This doctrine does not exist in common law jurisdictions, such as England[124]. Notably under English law, either party may generally withdraw without liability from negotiations at any stage before the contract is signed.

Trading internationally on the Internet highlights the different approaches taken on this point across the globe. For example an English businessperson, unaware of this doctrine overseas, could easily caught out if they engage in a series of e-mails and than decide not to go ahead. Equally a continental European could be surprised to find they have no recourse against an English counterpart if discussions subject to English law fall apart.

What is important to note is that the existence of "pre-contractual" liability in e-commerce depends on choice of law, and on method of concluding contracts. If the law to govern the contract provide for the existence of "pre-contractual" liability, in case it occurs the doctrine will be applied. This particular liability is only possible and might

[122] Websites which are used to process customer orders for subsequent delivery play a role similar to that of paper-based catalogues used in mail order sales. For this reason, many of the same business and legal considerations apply.

[123] Statements on web sites are invitation to treat and not offers and the seller will not be bound by orders placed by customers until they are accepted.

[124] English common law merely protects parties from fraudulent and negligent misrepresentations in relation to a proposed transaction.

occur if the contract is to be formed exchanging e-mails. It is no possible for "click-wrap" contracts. To some extent, pre-contractual liability can be prevented from accruing by applying a common law, such as English, to all negotiations. However, it should be noted that this method is not entirely watertight, since the private international laws of the civil law country may apply the domestic law irrespective of the chosen English law.

Advertising and marketing: It is worth noting that there is currently no international unanimity as to which law governs advertising and marketing on the Internet. In some countries it is believed that the law of the country where the advertising originates will apply; in others it would appear that the country where the advertising and marketing is accessed by users apply. The safest, but more expensive, course to follow when setting up a website is to ensure the advertising used complies with the rules applying in the relevant jurisdictions[125].

3.8.2. The E-Commerce directive and the formation of the contract

Having set up a web site and placed advertising material[126] on it, the next step is hopefully to receive orders for goods (or services). It is worth stressing that one of the advantages for traders (i.e. sellers), and disadvantages for consumers, is it is easy to enter into a legally binding contract. Few formalities are required under the laws of most EU Member States. There are exceptions[127] but most everyday contracts will be enforceable provided there has been an offer, acceptance and an intention to create legal relations. Some countries' laws require *consideration*[128] to pass between the parties. It follows that contracts can be validly made either by e-mail or the World Wide Web. However, contracts concluded directly over the web are becoming more commonplace.

[125] The International Chamber of Commerce issued revised guidelines on advertising and marketing on the Internet on April 1998. These guidelines are not binding and are always subordinate to existing national law. However, the ICC Guidelines and Codes are frequently used, particularly in the Member States of the EU, as providing the core of domestic codes, or as offering guidance on the interpretation of the laws dealing with unfair trade practices.

[126] There is currently no international unanimity as to which law governs advertising and marketing on the Internet. In some countries, it is believed that the law of the country where the advertising originates will apply; in others, it would appear that the country where the advertising and marketing is accessed by users apply. The safest, but expensive course to follow when setting up a web site is to ensure the advertising used complies with the rules applying in the relevant jurisdictions.

[127] For example, sales of land and agency contracts, if requested by one of the parties, must be in writing.

[128] Promise by one party to a contract that constitutes the price for buying a promise from the other party to the contract. A consideration is essential if a contract, other than a deed, is to be valid. It usually consists of a promise to do or not to do something or to pay a sum of money.