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Consent in Electronic Contracts

التراضي في العقد الإلكتروني

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Abstract:

This paper addresses the issue of electronic consent, also known as electronic agreement, integral to electronic contracting facilitated through various digital platforms. In this digital realm, contracts are executed using electronic methods, necessitating key elements including electronic consent. This consent, which establishes the mutual agreement of all parties on contract terms electronically, holds the same legal standing as traditional consent. While electronic consent offers significant advantages such as expediting processes and enhancing flexibility, it introduces complex legal challenges related to security, credibility, identity verification, and the protection of personal data. To mitigate these challenges, the implementation of robust regulatory controls is crucial to ensure both justice and security within the digital contracting landscape.

Keywords: Consent; Electronic Contracts.

الملخص:

تهدف هاته الورقة البحثية الى معالجة مسألة التراضي الإلكتروني او ما يصطلح عليه بالتوافق الإلكتروني والذي يتم عبر مختلف الوسائل الرقمية كعنصر من عناصر التعاقد الإلكتروني إذ يتم من خلاله ابرام العقود بالاعتماد على وسائل رقمية هاته العقود التي تتطلب توافر مجموعة من العناصر من بينها الرضى الإلكتروني والذي يتضمن موافقة طرفي العقد وبطريقة إلكترونية على شروط العقد، وللرضى الإلكتروني وزنه القانوني مثله مثل الرضى التقليدي وبالرغم من إيجابيات هذا النوع من الرضى في وقتنا الحالي كعامل مساعد في سرعة الإجراءات ومرونتها الا انه يطرح مجموعة من الإشكالات والتحديات القانونية التي تتعلق بالأمان والمصادقية والتحقق من هوية الأشخاص وكذا مسألة حماية البيانات والمعطيات الشخصية الأمر الذي يتطلب وضع مجموعة من الضوابط التي تنظم هاته المسألة تحقيقا للعدالة والأمان في البيئة الرقمية.

الكلمات المفتاحية : التراضي ، العقد الإلكتروني.

INTRODUCTION:

Similar to traditional contracts, an electronic contract encompasses three fundamental elements: consent, subject matter, and cause, as prescribed by general contract laws. Moreover, a distinct fourth element, form, is requisite for formal contracts. Given that electronic contracts primarily adhere to the overarching principles of contract law, which are too comprehensive for detailed discussion here, this study will concentrate on the nuances specific to electronic contracts concerning the element of consent.

An electronic contract is characterized as "a contractual agreement wherein the offer and acceptance are communicated via an international communications network through electronic data interchange, with the intent to establish binding contractual obligations." Essentially, an electronic contract materializes when an offer, conveyed electronically, whether through auditory, visual, or combined mediums over a communications and information network, is met with corresponding acceptance by another party, thereby intending to fulfill a transaction mutually desired.¹

It is imperative to note that the formation of an electronic contract occurs instantaneously when the intentions of offer and acceptance converge, articulated remotely via contemporary communication technologies that rely entirely or in part on electronic facilitation, either directly or indirectly.²

While offers may emerge from negotiations, they do not culminate the pre-contractual phase; instead, this phase extends until the issuance of an acceptance that precisely aligns with the offer, as mandated by Article 66 of the Algerian Civil Law, which

stipulates: "An acceptance that modifies the offer is considered a new offer."³

According to this legal provision, the initial offer does not conclude the negotiation phase; rather, this phase persists even post the issuance of a non-conforming acceptance, particularly in the context of electronic contracts.

This contrasts with traditional contracts, which may bypass a preliminary phase entirely, moving directly to the contractual agreement.⁴ The preliminary phase in electronic contracts, therefore, is not only fundamental but also indispensable.

Consequently, this leads us to explore: **what are these stages, and how are offer and acceptance managed in electronic contracts?**

To address these questions, the study is structured into two main sections, the first discussing the expression of will, and the second examining the validity of consent within electronic contracts.

First Section: Expression of Will

Contracting via the internet, whether through websites or email, occurs remotely, typically without the contracting parties personally encountering one another, and without validating whether the site promoting the goods is authentic or fictitious.

Many contractors favor receiving offers in the form of an invitation to contract or any message that expresses a willingness to conclude a contract, or phrases that might be interpreted more as an invitation than a definitive offer.

This stage requires the online contractor to undertake meticulous verification before finalizing the contract. An offer directed to specific individuals or a person is considered a legitimate offer unless the intent of the offering party suggests otherwise.⁵

Thus, the expression of will traverses two phases, which we delineate⁶ in the first and second subsections of this section.

First Subsection: The Preparatory Phase of Contract Conclusion

It is prevalent that internet contracting involves multiple steps, including the verification of the identity of the contracting party (the client) and the legitimacy of the website, as well as ascertaining whether the invitation to contract genuinely represents an offer or merely an invitation to initiate negotiations.

Firstly: Verification of Client Identity⁷

Prior to contracting, it is imperative for both parties to verify all pertinent information and data concerning each other to forestall any potential surprises, such as the contract being invalidated due to one party being a minor without the legal age of consent.

Verifying the identity of the client serves the interests of both parties. Contracts presented on the internet are often formatted as templates or drafted in a manner that precludes legally incapacitated or partially incapacitated individuals from entering into agreements, in addition to guarding against deceit or misrepresentation; for instance, a party might claim full legal capacity when, in fact, they are legally incapable or possess diminished capacity, which would invariably compromise the contract's validity post-formation.

Secondly: Website Verification

In this phase, due diligence and precision are paramount; the contracting party must rigorously ascertain whether the website used for contracting is authentic or counterfeit. Should the site prove to be genuine, it is equally crucial to evaluate its credibility and security for conducting transactions.

In today's digital age, the proliferation of fraudulent websites is notable—some are so deceitfully crafted that one might believe they are interacting with a woman when, in reality, it is a man behind the screen. These websites are often designed with malicious intent. In such cases, contracting individuals are advised to utilize verification services, which play a crucial role in identifying deceptive websites designed to exploit unwary users.

These services protect online users by issuing alerts about potentially fraudulent sites. If a site is determined to be fictitious and untrustworthy, the decision to proceed with or withdraw from contracting rests with the client.

Thirdly: Invitation to Contract⁸

Contracting via the web typically involves an offer from a virtual store owner to all individuals interacting on the platform, whether through the website, email, or the commercial site showcasing their goods and services.

However, a critical question arises: Does the display of goods and services on a website constitute an offer, or is it merely an invitation to contract?

This distinction is significant. If the display is deemed an offer, then a contract is established as soon as the intentions of offer and

acceptance align.⁹ In this scenario, the expression of will transforms into an offer when it satisfies two criteria:

- The expression must be precise and specific.
- The expression must be definitive.

Conversely, if the display is interpreted as merely an invitation to contract, the contract does not materialize until an offer is made by the recipient of the invitation, and this offer is subsequently accepted by the initiator.

It is clear that the differentiation between an offer and an invitation to contract hinges¹⁰ on the presence or absence of a definitive intent to enter into a contract, and whether the offer encapsulates the essential elements required for the contract's formation.¹¹

Second Subsection: The Final Phase of Contract Conclusion

According to Article 59 of the Algerian Civil Code: "A contract is concluded as soon as the parties exchange their matching expressions of will, without prejudice to statutory provisions."

This statute explicates that a contract materializes instantly when an offer meets an acceptance, provided both are explicit expressions of the intent to establish a specific contractual agreement.

The offer represents the initial step in the contractual phase of formation, with acceptance constituting the subsequent and final phase, since no contract can be finalized without an acceptance of the offer.

Therefore, the formation of electronic contracts adheres to this fundamental principle, requiring both an offer and acceptance to be present for their establishment. This section will delve into the

dynamics of both the offer and the acceptance in the context of electronic contracting.

Firstly: The Offer

An offer is traditionally defined as: "A definitive expression of intent that concludes a contract upon meeting with acceptance¹²." In the context of European law, specifically under Law No. 97-7 of May 20, 1997, an offer is characterized as: "Any form of remote communication that includes all necessary elements enabling the recipient to directly accept the contract, with the exclusion of advertisements."

Electronic offers present unique challenges concerning language, geographical scope, and the generality of the terms¹³, which are examined in detail in this section.

1. Language of the Offer:

The language used in offers should not act as a barrier in electronic contracting, similar to the directives applied in television sales contracts, as per the European directive dated May 21, 1992.

In Egypt, legal mandates such as Article 2 of the Egyptian Constitution and Article 19 of the Judiciary Authority Law No. 46 of 1972 emphasize, "The language of the courts is Arabic."

Additionally, Article 30 of the Labor Law No. 137 of 1981 stipulates, "The employment contract must be in writing and drafted in Arabic," thereby highlighting the significance of language in contractual agreements.

2. Geographical Scope of the Offer:

An offeror may restrict their offer to a specific geographical region, rendering it

invalid outside this specified area. For instance, an offer made by a French commercial center is applicable solely within France. This stipulation differs fundamentally from another that delineates the geographical scope for the delivery of goods, not for the applicability of the offer itself.

3. Generality of the Offer:

Offers can be broadly or narrowly targeted, directed to the general public, specific individuals, a particular group, or a singular person. It is advisable that the offeror retains the discretion to withdraw the offer at any point, particularly if there is a concern over depleting stock levels of the advertised goods, thus not obligating the trader to the contract upon acceptance by any recipient.¹⁴

Secondly: The Acceptance

Acceptance is characterized as the affirmative response to the offer by the offeror¹⁵, or the expression of intent by the recipient to enter into a contract based on that offer.¹⁶ Acceptance forms the second crucial element of the contract and, for its intended effect of concluding the contract, it must correspond precisely to the offer.

Should the acceptance vary from the offer, it is regarded as a new proposal, unless there is a partial agreement as delineated in Article 69 of the Civil Code, which can result in a binding contract under specified conditions.

In the realm of electronic contracts, acceptance is conducted remotely via the internet, adhering to the traditional rules of contract formation while also incorporating specific stipulations suited to electronic environments. According to Article 11 of the United Nations Model Law on Electronic Commerce dated December 16, 1996, data messages are recognized as valid forms of

expressing acceptance, affirming that contracts retain their legality and enforceability even when concluded through modern communication technologies.

Moreover, as per Article 13, paragraph one of the same law, the intent to accept is attributed to the contractor if they, or an authorized representative, transmitted it via the information network. Under certain conditions, such as when the recipient operates an agreed-upon authentication process, this intent is presumed to belong to the contractor.

Second Section: The Validity of Consent in Electronic Contracts

The question of the validity of consent within the framework of electronic contracts presents complex challenges, particularly when one of the parties involved lacks full legal capacity.

This section delves into the implications of such scenarios on the legality of electronic contracts, focusing on defects in consent such as errors or misrepresentations, and contracting with individuals who do not possess full legal capacity. This analysis is structured into two distinct subsections.

First Subsection: Contracting with Individuals Lacking Full Legal Capacity

Under general legal principles, a contract is valid only if all parties possess the requisite legal capacity to engage in it. This is typically verified in traditional contracts through direct identification and legal representation checks, especially in international dealings.

However, the nature of electronic contracts, executed remotely via advanced communication technologies, complicates

the verification of actual identities and the legal capacities of the contracting parties.

For instance, a minor could conceivably use a parent's credit card to transact with a bona fide merchant, posing as an adult online¹⁷. This raises critical questions regarding accountability, particularly when false information about legal capacity is provided by the client.

To mitigate such issues, some French legal theorists advocate for the application of the 'apparent status' theory, which supports professionals by allowing bona fide merchants to depend on the outward status of a contracting party, given the impracticality of verifying every individual's capacity.

This doctrine has been incorporated into French legislation. On the other hand, English law distinguishes between simple contracts, such as contracts for necessities (e.g., minors purchasing essentials like food or educational materials online), which are not voidable, and more significant contracts involving valuable items like vehicles, which are often voidable in favor of the minor, even at the merchant's expense.

The challenge of verifying a party's capacity over the internet has led some jurisdictions, including the European Union through its Directive on consumer protection in distance contracts (Directive 97-07, Article 04/01), to mandate that professionals gather all necessary data to verify consumer identities.

Furthermore, the United Nations Model Law on Electronic Commerce of 1996 (Article 13) stresses the importance of confirming the identity of parties, particularly in consumer-directed offers.¹⁸

Second Subsection: Defects in Consent

Defects in consent acquire significant prominence in internet contracting, where

technical disparities often place non-expert consumers at a disadvantage, increasing their susceptibility to errors, deception, or coercion.

Firstly, Regarding Mistakes:

these can occur when, for example, a consumer purchases software online under the impression they are obtaining financial exploitation rights, whereas the producer's intent was merely to provide a usage license. Such misunderstandings about the contractual terms can render a contract void.¹⁹

However, the most frequent mistakes in electronic contracting relate to legal misunderstandings exacerbated by the internet's global reach, which complicates adherence to diverse legal frameworks, especially when consumers cannot realistically be expected to comprehend every applicable law, including customary practices unfamiliar to those accustomed to written statutes.²⁰

Secondly, Deceit:

Deceit represents a critical flaw in consent that can invalidate a contract. In the realm of online contracts, deceit might manifest through misleading advertisements or website content that falsely represents the quality or nature of a product, thus influencing a party's decision to contract under these misrepresented premises.

Given the absence of physical inspections and the ease with which online information can be altered, proving deceit in electronic environments is profoundly challenging.

The establishment of specialized websites dedicated to informing, advising, and alerting consumers plays a pivotal role in combating

deceit, ensuring that less experienced parties are adequately protected and able to make informed decisions freely.²¹

Thirdly, Coercion:

Within the digital realm of electronic contracts, which are executed remotely, the concept of physical coercion may seem implausible. However, economic coercion is a realistic and prevalent issue, where a party may find themselves compelled to depend exclusively on the original seller for ongoing maintenance or post-sale services.

This dependency allows producers, professionals, or merchants to leverage their monopolistic or dominant positions to impose unfavorable terms on consumers, effectively exerting control over them due to the necessity of their services.²²

Fourthly, Exploitation:

The reality clearly indicates the widespread use of modern communication networks in contract formation, both by those who are experienced and by ordinary individuals. This situation can lead to exploitation due to their lack of expertise and familiarity with this domain.

To protect these less experienced parties, various global legislations regulating e-commerce have significantly focused on consumer protection.

A prime example of this is the Tunisian legislator, who addressed this issue in Article 50 of the Electronic Transactions Law by imposing criminal penalties on parties that use fraudulent methods during electronic contracting, thus protecting the consumer as the weaker party in the contractual relationship.²³

In conclusion, it is evident that the provisions applicable to defects in consent in traditional contracts also apply to contracts formed over the internet, with the necessary consideration and adaptation to solutions that the internet may offer. This adaptation must align with the technical characteristics of the internet, which must be taken into account by the contracting parties when forming contracts online.²⁴

CONCLUSION:

The formation of an electronic contract is confirmed once the offer and acceptance are aligned, communicated remotely through modern communication technologies. This interaction may occur entirely or partially via electronic means, directly or through representatives.

While the offer may result from prior negotiations, it does not, in itself, conclude the contract or terminate the pre-contractual negotiations. These continue until an acceptance corresponding to the initial offer is declared, at which point the contract is considered fully established.

Despite technological advancements, many developing countries remain on the periphery of these developments, with a few exceptions in the Arab region where laws regulating electronic transactions have been enacted.

Nonetheless, the stance of the Algerian legislator is still somewhat unclear, despite amendments made to the civil law in 2005 that acknowledge electronic documents and signatures as legitimate forms of legal proof. Yet, there remains no explicit provision that recognizes the validity of expressing consent through electronic intermediaries.

These observations underscore the necessity for internet-specific solutions that accommodate its unique technical

characteristics. Such solutions must be recognized and implemented by parties engaging in online contracting. Just as traditional contract law governs consent defects in conventional agreements, it must also be adapted to address the distinct challenges posed by electronic contracts formed over the internet.

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³ The Civil Code issued by order No. 75-58 dated 20 Ramadan 1395 (26 September 1975), includes the Civil Code, Official Gazette No. 78 dated 30-09-1975, amended and supplemented by Law No. 80-07 dated 9 August 1980, Law No. 83-01 dated 29 January 1983, Law No. 84-21 dated 24 December 1984, Law No. 88-14 dated 3 May 1988, Law No. 89-01 dated 7 February 1989, and Law No. 05-10 dated 20 June 2005, and Law No. 07-05 dated 13 May 2007.

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