

Rules For Identifying the Applicable Law in The Electronic Contracts Field

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Abstract:

As a result of the technological revolution that emerged in the mid-twentieth century and the resulting enormous production and distribution capabilities, Consumer protection has become a significant issue that requires the attention of legislators in most countries worldwide. The emergence of electronic commerce, accompanied by its evolution to occur via the Internet, has significantly affected the legal framework of traditional contracts, leading to the emergence of what is referred to as cross-border electronic shopping. This necessitated measures to reach electronic contracting, where one of the key players is frequently the customer. As a result, identifying the relevant legislation became necessary to safeguard customers in the online marketplace. The law selected by the parties (fundamental regulations) controls electronic commercial transactions; however, there are issues beyond the parties' will, represented in precautionary regulations closely associated with the contract, for example, when the parties do not specify the law that governs the field, either directly or indirectly.

keywords: Electronic Commerce; Applicable Law; Electronic Transactions; Electronic Contract; Principle of Freedom of Contract; Conflict of Laws Rules.

Introduction:

The Internet has grown significantly in our digital age, leading to the widespread occurrence of electronic commerce, which offers numerous advantages. Consumers can now acquire what they desire with a single click, without the need to move or use traditional currency. Businesspeople can avoid the hassle of travel and promote all their goods, products, and services over the Internet.

Electronic commerce is often described as an electronic marketplace where consumers, suppliers, sellers, and intermediaries meet, showcasing all services and goods in digital or virtual form, with payments made via electronic money.¹

The increasing importance of electronic contracts at international, regional, and national levels reflects their significance in economic life. In order to improve electronic contracts on a national scale, the Algerian

lawmaker drafted Law No. 18/05 related to electronic commerce² and governed its provisions through Law No. 15/04 concerning electronic signatures and authentication. This regulation arose due to numerous legal challenges facing electronic contracts regarding electronic signatures and the organizations that authenticate them.

This trade has become a practical reality on a national and international scale because of the exponential growth in electronic commerce transactions, which has resulted in a significant increase in completed electronic contracts. As a result, offers and acceptance between contracting parties now take place virtually in a matter of seconds. Given that this contract is the backbone of electronic commerce, electronic transactions inherently have an international character because of the Internet's global reach, which aids in the growth of this industry. Nonetheless, this feature presents legal questions, chief among them being which law will be applicable to this contract in the event that the parties disagree, particularly if one of them is a foreign entity. This situation necessitates adhering to traditional conflict of laws approaches, represented in personal and substantive connecting factors. Additionally, parties may resort to resolving their disputes by relying on the modern approach represented in substantive electronic law.³

Electronic commerce contracts have emerged in an environment that does not recognize borders, geographical locations, or even the status of the parties. However, with their global spread, numerous issues arose those legal systems, including jurisprudence and judiciary, struggled to keep pace with. This presents a challenge in determining the relevant legislation for agreements made online because these agreements do not focus on a particular state's region; it is, by its nature, a contract between absent parties lacking a single contracting assembly in terms of place. Because of this circumstance, the relevant statute must be found.⁴

Therefore, the significance of this research is in figuring out how the parties to the contract could choose the appropriate law, either explicitly or implicitly, using what is known as the law of will. Without the parties' acceptance, the judge must consider substantive linking criteria to decide which one applies to the contract if this conclusion cannot be reached.⁵ Digital overlaps and challenges in identifying the law that applies to contracts made online led us to discuss this subject in order to make clear which law applies to digital contracts and which law is best suited for settling disputes resulting from electronic transactions. The following issue can be brought up as a result: How well do parties apply the standards that establish the relevant legislation in the context of electronic contracts?

To answer this question, we adopted an analytical approach to determine the applicable law for electronic contracts by analyzing the

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information selected from various references in an effort to find solutions to the research problem and achieve the desired objective. This entails addressing the key terms of the parties' intent and its lack, as outlined by Algerian lawmakers in the Law on Electronic Commerce ⁶ and the Algerian Civil Code. The study is divided into two main topics: the first examines the law of will as a basis for determining whether law applies to electronic contracts, and the second discusses the precautionary standards for identifying the relevant law.

I. Fundamental Standards for Identifying the Applicable Law in Electronic Contracts (Personal Connection)

Legal systems use two different methods to decide which law applies to international contracts between parties. It makes a distinction between two situations. In the first, the parties have agreed, either explicitly or implicitly, on the applicable legislation that will regulate their relationship. In the second instance, the parties to the contract are unable to agree on which law will be applied in the event of a dispute. ⁷ As a result, our study in this part will concentrate on the following: As a fundamental prerequisite for the process of assigning the relevant legislation, the freedom of contract concept will be discussed in the first subsection. But in the second part, we will talk about how to choose the law of will.

1. The Principle of Freedom of Contract as a Fundamental Criterion for Assigning the Applicable Law

A contract is an agreement between two parties to create, end, or modify a legal relationship; the will serves as the basis for legal action. It is acknowledged that it does not contravene public order or ethical standards. The terms and conditions of the agreement, including the laws regulating their commercial relationship, are completely up to the contracting parties.

In this section, we will discuss the meaning of the law of will in contracts involving e-commerce; the second section will discuss its application.

1.1. The Law of Will's Significance in Contracts for Electronic Commerce

The general rule in traditional contracts is not altered in an e-commerce contract; it is an agreement that establishes obligations between its two parties, governed by the law they choose and commit to. If they disagree, they are bound by the conditions and provisions contained therein. Generally, this contract should have a governing law; when there are no foreign elements in the contractual relationship, domestic law is applicable; nevertheless, when the contract is international, the law established by the connecting rules is applicable. There are many and varied connecting factors, but the most important is the law of will. ⁸

It is not one of the contractual parties' exclusive will, but rather their collective will. When negotiations about contracts begin, the function of unilateral will ends. At this stage, known as the negotiation stage, the wills of

the two parties join together to form a single will that produces the desired results for both parties. When their wills converge to decide the applicable law, the unilateral will is terminated. This is what the Algerian legislator adopted in Article 18 of the aforementioned Civil Code.

1.2. The Emergence of the Law of Will Principle

Contracts, regarding their main elements and conditions, are subject to the law chosen by the contracting parties either explicitly or implicitly," said Professor Doumoulin, who is recognized as the founder of the law of will principle. The country in which they were draughted controls them. Despite a lot of criticism, this approach is still used all across the world.⁹

Italian scholar Mancini 1851 announced his theory known as the "Personal Law Theory," which stipulates that laws follow people wherever they go, and thus, the law of the state to which they belong by nationality applies to them, whether inside or outside its territory, with a number of cases where nationality law is not applicable, such as when it comes to issues pertaining to the applicable contract law about their subject matter, where the law of will is applied in accordance with the freedom of contract concept.¹⁰

1.3. The Legal and Jurisprudential Positions Regarding the Relevant Law for Electronic Commercial Contracts

Regarding jurisprudence's stance: the notion of freedom of will has provoked major legal dispute regarding the limits of the parties' freedom under the contract.¹¹ The determination of the parties' stated will has been divided by jurisprudence into two theories: the objective theory and the subjective theory.

Given that some countries lack specific laws for electronic transactions to which such actions can be subjected, we can conclude that adopting the subjective theory is more accurate and comprehensive when it comes to electronic commercial contracts. This is because the parties to the contract cannot be familiar with the laws of most countries or their own countries.¹²

2. How to Identify the Law of Will

The free will of the parties to the contract can select the applicable law; this can be done explicitly (First Section) or implicitly (Second Section). Alternatively, there may be silence on the choice of the contract's law (Third Section).

2.1. Explicit Choice of the Electronic Contract Law

It is normal to have an explicit agreement between the parties at the time of contract conclusion when selecting the applicable law. This is achieved by a clause or condition inserted in the body of the contract. It can also be achieved through an independent agreement between them on this choice, and this hypothesis arises when the parties delay deciding this matter until after concluding the contract or until a dispute arises between them.¹³ Since explicit

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agreement between the contracting parties regarding the applicable law for their contract is not only possible but also needed in contracts concluded via the Internet, this agreement is typically incorporated in one of the contract terms.¹⁴

According to certain legal experts, the receiving screen should be used to make this specification. When an express agreement is made, the law of the contract is chosen at the time of drafting.¹⁵

2.2. Implicit Choice of the Electronic Contract Law

A true but unspoken decision that the judge takes in light of the case's circumstances is known as the implicit choice.¹⁶

If the parties cannot agree on the applicable laws for the contract, their will does not necessarily cease to work. Instead, the will may be present in the contract's nuances, although in a subtle way; this is referred to as an implicit agreement. In this case, the content of the contract is dealt with, searching its provisions for this will, where the applicable law is inferred from these provisions, which often have a tendency to prefer one nation's laws over another.¹⁷

2.3. Silence of the Will Regarding the Choice of the Contract Law

When the parties' express desire to choose a law for the agreement is absent and their hidden intentions cannot be uncovered, the judge's role is actually to carefully attempt to determine the contract.¹⁸

Thus, the judge is obliged to search and investigate after localizing the contract in the legal rules that are fully compatible with the contract. There may be rules that fit partially and conflict with others. The judge must find what fully suits the dispute and ensure there is a connection between the applicable law to the contract.¹⁹

Regarding electronic contracts made online, the location of acceptance is regarded as the contract's completion location.²⁰

3. Challenges in Implementing the Freedom of Contract Principle in Contracts for E-Commerce

In this requirement, we shall discuss the challenges in applying explicit choice in addition to the challenges in applying implicit choice.

3.1. Challenges in Applying Explicit Choice

In the context of electronic commerce, choosing the precise law that will apply to a contract presents a number of difficulties. These difficulties are as follows: first, it is hard to verify that the parties intend to engage into a contract; second, it is hard to identify the parties; and third, there are no rules about the chosen law that deal with contracts involving electronic commerce.

a. Challenges in Confirming the Will to Contract's Existence

The problem occurs when the will is represented through media and electronic equipment, which means that a computer that has been configured will deliver incorrect messages in ways that the person it is operating for

cannot expect. This problem also occurs when the will is expressed by someone who lacks the legal authority to speak on behalf of the original contracting party (agency) or if the electronic message's content is changed or manipulated, particularly given that communication networks are vulnerable to hacking and outside interference.²¹

In conventional contracting, the parties validate each other's identities; but, in contracts made online, the parties can, for example, confirm each other's will by sending electronic messages with offers and acceptances. However, the problem arises when that will be expressed without direct human intervention via electronic devices and media that lack the authentic will, i.e., when a programmed computer broadcasts erroneous messages in ways unpredictable by the person operating the computer on their behalf. This raises legal questions regarding the legal consequences of errors in electronic contracting and whether the computer bears responsibility or the individual operating the computer on its behalf, as well as whether such messages were sent without the will of the relationship owner, instead, by a third party who altered and interfered in the electronic messages' content.²²

b. Challenges in Identifying the Parties

When a minor makes an electronic payment to someone else or using their parents' bank card, for example, this can happen over the Internet without either party having the ability to enter into a contract.²³

Techniques used to ensure the contracting parties' eligibility include firewalls to aggregate programming mechanisms to avoid network breaches, location tracking to protect against fake businesses and people, as well as electronic documents that reveal the sender and recipient's identities.

The parties might not be aware of who the other party they want to enter into a contract with is, nor their legal capacity, nor the country to which they belong, especially if the email addresses indicate (.com) or (.org) in the last segment.²⁴ Furthermore, it is against the law for merchants to hold client addresses in their databases in order to verify the identities of the other parties, since it is difficult to monitor the contractors' email addresses.

c. Challenges in Confirming and Demonstrating the Contract's Seriousness

This obstacle arises for contractors when electronic devices experience technical problems, affecting the contracting process by causing the loss of evidence and data stored within them or by reaching the expiration date designated for storage, rendering it destroyed or unreadable. Moreover, changing the text of the document reduces the possibility that it will be accepted²⁵. A right is considered worthless if the opponent denies it and the owner cannot prove it. The right may exist legally, but the failure to provide proof of its existence prevents its owner from obtaining legal protection,

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making it practically equivalent to non-existence. Furthermore, electronic devices may encounter technical issues that lead to the loss of evidence and data stored within them, or they may reach the expiration date designated for storage, rendering them destroyed or unreadable.²⁶

d. Absence of Regulation for E-Transactions under the Selected Law

It is crucial that the parties agree to apply a particular country's law to any issues resulting from e-commerce contracts. This is because, in order to obtain the desired legal security, contracting parties always use electronic media to ascertain the applicable law before entering into any contractual relationship. This is especially true if one or both parties to the contract are from a country whose laws do not recognize electronic documents, which means that the electronic commercial contract is not recognized. In certain situations, contracting parties can be shocked to learn that electronic papers are not recognized by the legislation that was agreed upon to regulate the contract.

A number of organizations have responded to this by recommending that legal protection for electronic commercial relationships be made mandatory. As a result, parties to contracts frequently try to incorporate a particular clause that identifies the law that will apply to the agreement. One example of such a contract is the one with Apple Store, which stipulates that California law governs all sales agreements in which Apple Store is a party.²⁷

3.2. Challenges in Applying Implicit Choice

The challenge in applying implicit choice is figuring out which law applies to contracts involving electronic commerce by relying on signs or proof of the parties' implicit will. For instance, since English has emerged as the primary language of communication in electronic transactions, the language used to create the contract cannot be relied upon to ascertain the will. Furthermore, reliance cannot be placed on the currency used for payment, as the payment for the service is often made electronically via money transfers or payment cards, allowing individuals to pay in any currency at any time. Thus, it is difficult to assert that the law governing the original contract applies to other electronic contracts linked to it, as the issue of linkage rarely occurs on the network. Relying on the contracting parties' shared nationality or common domicile law is similarly difficult, as these criteria ultimately lead to localizing or concentrating the relationship spatially, while localizing the contract according to these traditional criteria in the electronic world is not an easy task.²⁸

The absence of agreement between the parties, which occurs when they cannot agree on a specific law to apply to their contract, means that the law of the will is not adequately applied to contracts involving electronic commerce.

II. Preventive Standards for Identifying the Relevant Law in Electronic Contracts (Substantive Connection)

When the contract's parties specifically or indirectly decide that a particular law would apply to their contractual relationships, this law or the electronic legal act applies from all aspects, whether in terms of the conditions of validity, reciprocal duties, or the results, so long as this agreement complies with all applicable legal requirements, particularly those of the clauses governing capacity, proof, form, jurisdiction, and real estate transactions. Additionally, the parties' agreement is not recognized when it involves fraud against the law or violates public order and morals.

The electronic contract must be localized in a particular location to establish the applicable law. There are now two competing trends in this localization: one is flexible, and the other is rigid.²⁹

In this case, the judge determines which law is more relevant to the contractual agreement, either by assigning that relationship to rigid connecting factors (Subsection One) or by assigning it to flexible connecting factors (Subsection Two).

1. Rigid Connecting Factors

The Algerian legislator stated in Article 18(2) of the Algerian Civil Code that if this is not feasible, the law of the common domicile or nationality will take effect.

Despite acknowledging that these linking variables are common connecting factors in international trade contracts, the legislator did not address the rule governing the site of contract execution or explain the difficulties in applying these laws to electronic contracts.³⁰

According to this criterion, rigidity is based on the fact that the centre of gravity in all contracts is fixed and does not alter as the contract does. It is limited to the contractors' shared nationality or residence, the location of the contract's conclusion, or the location of completion.³¹

Notably, it is challenging to apply the following strict connecting aspects to contracts for internet electronic commerce:

1.1.Factors Related to the Contractors

If there is no consent between the parties, the law of common nationality and the law of common domicile are feasible connecting criteria to assist determine the applicable law to the e-contract.

a. The Law of Common Domicile

"Common domicile" refers to the place where an individual resides or serves as a gathering place for their interests. In private law, it refers to the relationship between an individual and the territory of a state.

The common domicile of the two parties is considered a linking factor to the contract. If they have a common residence, the law of that residence

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applies to their relationship. Nevertheless, it is challenging to apply this linking factor to contracts involving electronic commerce since online transactions rely on email addresses rather than physical locations, and these addresses do not clearly indicate the location.³²

b. The Law of Common Nationality

In a variety of countries, personal status concerns are governed by the legislation of a person's nationality. It is easier to determine a person's nationality compared to their domicile, which presents several difficulties regarding its determination, unlike common nationality.³³

Referring to the provisions of Article 02 of Law 18/05 related to electronic commerce, we observe that neither the shared nationality nor the shared place of residence of individuals were acknowledged as linking criteria by the Algerian legislator. The Algerian legislator limited the relevant legislation pertaining to electronic contracts to Algerian law alone, excluding cautious linking factors as separate criteria that the judge can use, and not depending on the law of will.

1.2. Factors Related to the Contract

a. The Law of the Location of Contract Completion

The location of contract completion presents several challenges, like other linking factors, when applied to electronic transactions conducted fully through electronic media, such as computer programs that are directly handled on the Internet.

Two possible situations can be identified, the offline contract execution scenario, which usually takes place at the site of the order or service delivery. The parties to an international contract, however, seldom agree to discharge their obligations in separate places, which hinders legal concord since different legal systems have differing opinions about where the contract should be carried out.³⁴

b. The Law of the Place of Contract Conclusion

Because it is the first location where their wills will be actualized, the contracting parties are aware of the unity of the applicable law to their contract. The contractual relationship is assigned to the place of contract conclusion due to the genuine connection between this criterion's law and the contract.

An electronic contract can be made without creating a connection between the contract and the location of the conclusion, for example, when someone uses a computer that does not belong to him, a computer that is available in a café, or a laptop that belongs to a travelling party who is moving from one nation to another.³⁵

2. Flexible Connecting Factors

The purpose behind this linking factor is to determine the relevant legislation regulating the contract based on its key commitment and to vary

contract transactions. Regardless of the number of obligations in a single contract, one of them captures the essence of the contract and sets it apart. Therefore, it must be trusted to ascertain which law applies to the entire transaction.³⁶

In addition to being simple to understand beforehand, this linking factor is distinguished by its adaptability and appropriateness for various kinds of contracts.

2.1.The Significance of the Contract's Distinguishing Completion

Because it might be difficult to apply strict linking criteria to electronic contracts, the judiciary and jurisprudence have adopted a flexible connecting factor based on the contract's distinguishing completion criterion as a substitute objective standard for determining which law applies to the contract.³⁷

Even if a single contract has several responsibilities, it is the one that sets the contract apart and captures its core; as such, it must be relied upon to identify the relevant law for the entirety of the transaction. If a contract comprises many responsibilities, one of the obligations is what distinguishes the agreement and forms its essence; hence, it must be relied upon to determine which law applies to the entire transaction.³⁸

2.2.The Use of the Distinguishing Completion Theory in Contracts for Electronic Commerce

Dr. Saleh Al-Manslawi thinks that applying the concept of distinguishing between contract execution, international agreements, and judicial rulings to contracts in electronic commerce is not without criticism for a number of reasons, even though most private international laws have adopted it in many countries across the world.³⁹

In the area of international electronic commerce contracts, the theory of differentiating completion has evolved a viable solution to the conflict of laws since it can be used to determine who is responsible for completing the important or principal obligation in the contract. If the theory of distinguishing contract completion is applicable to non-electronic international trade contracts, it can also be applied to electronic commerce contracts, particularly when it is difficult to localize the contract in a specific location when it is completed and executed online.⁴⁰

It is evident from examining Law 05-18's Article 2 on electronic commerce that the legislator chose strict connecting criteria while excluding the flexible connecting factor.⁴¹

Conclusion

The legislation or regulations that apply to the electronic contract are those that the parties have specifically or tacitly selected. The problem of determining the applicable law for electronic commerce contracts lies in that

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they often occur between parties of different nationalities and places of residence, related to a location whose management is unknown. Additionally, since it is unclear which law will apply, the legality of such a clause is called into question, even if it was accepted by the parties to the electronic contract. This is because the user may not have read the contract and most likely did not negotiate it, and the contract may be considered an adhesion contract.

The principle of freedom of will is considered as one of the most significant traditional connecting factors used in disputes over electronic commerce contracts regarding the choice of the applicable law, which is established in all legislation and governs electronic commercial transactions. This enables the parties to agree, either directly or implicitly, on their disagreements in the majority of cross-border, or international, electronic commerce contracts that are signed over the Internet.

In conclusion, we have reached several recommendations, the most important of which are:

- It would be preferable for the legislator to address electronic contracts more precisely, as they have become prevalent in our daily lives.
- Establish specific rules governing the applicable law for electronic contracts.
- Enhance trust and security in electronic commerce transactions and protect them.
- Work on preparing legal professionals capable of activating electronic commerce and keeping pace with the developments it experiences.
- The Algerian legislator should strengthen the legislative framework and establish specific legislation pertaining to contracts in e-commerce.
- The legislator has to mandate the parties in e-commerce contracts to provide all personal data that identifies their identities.

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