

The privacy of mutual consent in the electronic contract in the Algerian legislation- Between general rules and special legislation-

خصوصية التراضي في عقد البيع الإلكتروني على ضوء التشريع الجزائري
- بين القواعد العامة والتشريعات الخاصة-

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Abstract :

The contract of sale via the internet is considered the most important contract on which electronic commerce depends, because it provides speed and ease in concluding transactions, where it is concluded without the need for the physical presence of the parties so there is no real contract board, but only virtual, so it falls within the range of contracts concluded, where the acceptance are exchanged via the Internet, it is immediate and contemporary, so studying this contract depends on understanding its concept, and focusing on the privacy of the consensual pillar by defining the concepts related to how the consensual existence and the convergence of acceptance in the contract that arises in the electronic environment, using the descriptive approach.

And up to several results, including those related to the use of the data message to express the will in the electronic contract, the issue of the eligibility of the electronic contractor, the compatibility of the two wills in the electronic sales contract, and even with regard to the provisions of the electronic contract board, it has a kind of privacy.

.Keywords: Electronic sale, contract, mutual consent, special legislation, general rules.

ملخص:

يعد عقد البيع عبر شبكة الأنترنت أهم عقد تعتمد عليه التجارة الإلكترونية، لما يوفره من سرعة وسهولة في إبرام المعاملات، أين يتم إبرامه دون الحاجة إلى التواجد المادي للأطراف، أي عدم وجود مجلس عقد حقيقي بل افتراضي فقط، فهو بذلك يندرج ضمن طائفة العقود المبرمة عن بعد، حيث يتم تبادل الإيجاب والقبول عبر شبكة الأنترنت، فهو فوري ومعاصر، لذلك فإن دراسة هذا العقد يتوقف على إدراك مفهومه، والتركيز على خصوصية ركن التراضي بتحديد المفاهيم المرتبطة بكيفية وجود التراضي وتطابق الإيجاب والقبول في العقد الذي ينشأ في البيئة الإلكترونية، بانتهاج المنهج الوصفي.

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وصولاً إلى عدة نتائج تميز عقد البيع الإلكتروني بخصوصية التراخي في عدة نواحي هي ما تعلق باستعمال رسالة البيانات للتعبير عن الإرادة في العقد الإلكتروني، ومسألة أهلية المتعاقد الإلكتروني، وتوافق الإرادتين في عقد البيع الإلكتروني، وحتى فيما يخص أحكام مجلس العقد الإلكتروني. **كلمات مفتاحية:** البيع الإلكتروني، عقد، خصوصية التراخي، التشريع الخاص، القواعد العامة.

I- Introduction:

According to the general rules of contract theory, for any contract to exist we must get, a consent, available reason, as well as what is required by law in some contracts of a certain form, but the emergence of the Internet has resulted in reducing distances and times and allowing communication with multiple people at the same time, so the electronic contract appeared, which e-commerce adopts as a basis.

The Algerian legislator defined through the text of Article 06, paragraph 01, e-commerce as "the activity whereby an electronic resource proposes or guarantees the provision of remote goods and services to an electronic consumer through electronic communications." As for paragraph 02 of the same article, the electronic contract is defined as "It is the contract in the sense of Law No. 04-02 of June 23, 2004 that defines the rules applicable to commercial practices, and is concluded remotely without the actual and simultaneous presence of its parties by resorting exclusively to the implementation of the electronic communication."

And given that the electronic contract does not go beyond being a contract, it is subject according to the general rules regarding its conclusion, with regard to the privacy of mutual consent in the electronic contract, therefore we present the following problem: what are the provisions of mutual consent in the electronic contract according to the provisions of Law 18-05 related to electronic commerce?

II .1. The concept of an electronic sales contract:

The use of electronic methods in the field of contracting and trade in general has added new dimensions to the concept of remote contracting, and the use of the Internet in particular to conclude the contract has fundamentally changed the relationship that brings together its parties, which necessitates removing the existing ambiguity and regarding the definition of this contract (firstly), and highlighting its most important characteristics that distinguish it from the traditional sales contract (second).

II.1.1. Definition of electronic sales contract:

The electronic sales contract is closely related to electronic commerce, as it is considered the primary tool for this trade, and affected by the comparative law, the Algerian legislator has introduced a law related to electronic commerce (No. 18-05 dated 10/05/2018, JR number 28), defining general rules to trade goods and services electronically, which are carried out by proposing or providing goods and services by an electronic supplier to a remote electronic consumer, and by electronic communications.

Confirm this by the possibility of contracting using electronic means in the Algerian law, and this law only defined the electronic contract in general in article 06 May 02 of Law No. 18-05 above, which: "The contract is in the sense of Law 04-02 of

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June 23 2004, which defines the rules applicable to business practices, and that is concluded remotely, without the actual and simultaneous presence of its parties by resorting exclusively to electronic communication technology. "

Consequently, the electronic contract in accordance with this law is the same contract defined by Law 02-02 defining the rules applicable to commercial practices (dated 06/26/2004, JR No. 41), concluded remotely without the physical presence of persons through exclusive recourse to electronic communication technology, the electronic sales contract differs from the traditional sales contract in the way through which it is concluded, so that it is done through an international network of communications represented in the Internet, in addition to other differences that appear when reviewing the characteristics of the electronic sales contract.

II.1.2. Characteristics of the electronic sales contract:

The electronic sales contract is considered one of the electronic contracts, therefore the characteristics of the latter apply to it as well, and it lies in general that it is a contract concluded without a physical presence of the parties, and the electronic media is used in its conclusion (first), and it is often characterized by commercial and international nature (second) , In addition to its privacy in terms of fulfillment and proof (third).

II.1.2.1 The conclusion of the electronic contract using electronic media without the physical presence of the parties:

One of the most important aspects of privacy is the use of electronic media to conclude an electronic sales contract led by the Internet, as the electronic contract is not different in terms of subject and parties from other traditional contracts, except in terms of the way it is concluded and being done using electronic media, as the Internet has provided rapid communication It is easy for all parties to sell various goods and services (Yamina Houhou, 2016, p. 06).

The electronic sales contract is also distinguished by a basic feature, which is that it is between two contractors that are not joined by a real contract council, as they are included in the contracts concluded remotely, which are between absentees, just as is the contract by regular mail, telephone, fax, or even television (Ahmed Sharaf al-Din, 2013, pp. 5--06)

where remote contracting is done here, but with technological means of communication, in which the affirmative and electronic acceptance is coupled via the internet, which works to gather the will of the contractors in a unified time and place, despite not meeting them financially thanks to the communication and interaction that characterizes these, the network, bringing them together in a slandered governing council (Mohammed Saad Khalifa, 2002, p. 30).

II.1.2.2. Electronic contract is often of a commercial and international nature:

The electronic sales contract is usually distinguished by its commercial nature, so it is called the electronic commerce contract, and the Algerian legislator defined electronic commerce in article 06 _ 01 of Law No. 18-05 related to electronic commerce, as mentioned above, as: "The activity by which an electronic resource

proposes or ensuring the provision of goods and services remotely to an electronic consumer, through electronic communications, jurisprudence also cared to know it, so some people defined it as: “Marketing, selling, buying and exchanging products, services and information through computer networks and the Internet” (Muhammad Nour Burhan and Izz Al-Din Khattab, 2010, p. 09).

The electronic contract is generally distinguished by its international nature, because electronic communication technologies are characterized by being cross-border, as the contract includes people who are located and belong to different countries, and despite that, electronic sales contracts are not always considered international contracts, as the electronic contract may be internally if it was held within the territory of the state and between contractors from the same state, the international nature of the electronic contract raises many issues, such as the question of showing the eligibility of the contractor for the contract, how to verify the personality of the other contractor and know the truth of his financial position, and determine the competent court, as well as the law Applicable to their disputes (Munira Obeizh 2017, p. 109).

II.1.2.3. Distinguishing the electronic contract in terms of fulfillment and proof:

The electronic sales contract is distinguished from the traditional sales contract in terms of fulfillment, as electronic payment methods in the electronic contract replaced regular money, because with the development of technology and increased dealing in the manner of electronic commerce, these methods appeared as an innovative method for making payments in such transactions, including bank cards, Electronic commercial papers and electronic money, which are of two types: digital money and electronic wallet (Khaled Mamdouh Ibrahim, 2006, p. 57).

The paper support embodies the physical existence of the traditional contract, and writing is not a complete guide to proof, unless it is signed by manual signature, as for the electronic contract, it is proven through the electronic document and the electronic signature, so the electronic document crystallizes the rights of the two parties to the contract, it is the reference to determine what the parties agreed their legal obligations, and the electronic signature is what lends authenticity to this document (Ibrahim, p. 57).

II. 2. The privacy of satisfaction in the electronic sales contract:

The sales contract is distinguished by being electronic, that is concluded via the Internet, then it is physically executed on the ground, and since it is a contract between two or more parties, it must have elements that make it true and productive for all its effects, as the existence and validity of the consent is required, in addition to a legitimate cause and place, however, the most important corner in which the privacy of this contract appears is the corner of mutual consent, the latter which is meant to match the two wills, which is the basis and strength of the contract, including the electronic contract, and privacy appears in how it exists in the electronic contract and the matching of the affirmative (first) and acceptance (second).

II.2.1. EGP:

For mutual consent to be achieved in the electronic sales contract, there must be an electronic offer, and the offer must be a complete and firm offer, that is, the offered

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must express in electronic form his firm desire to contract, and it must include the basic elements of the sale to be concluded, on the one hand, and from the other hand, the positive person must be identified through the electronic medium, which may be a commercial website or chat site, or via a message from the email (Zakaria Sarayesh, 2017, p. 28).

The Algerian legislator handled the electronic offer in Law No. 18-05 in chapter three, which they addressed with the requirements related to commercial transactions through electronic communication, expressing in article 10 of it a paragraph with: "Offer" without defining it, as it stipulated that: "Each an electronic commercial transaction preceded by an electronic commercial offer and to be documented according to an electronic contract that the electronic consumer certifies, it is derived from the previous article that the electronic commercial transaction is preceded by a commercial offer, and that it be authenticated by an electronic contract after acceptance by the electronic consumer.

Also specify the commercial presentation method and the data that must be contained in it, in article 11 of the above law, which stipulated that the offer (that is) be seen from the eye, and this is extracted when you affirmed that the offer must be presented in a visual way, as the supplier's responsibility is in some case, if it was done with sound only, the picture is required, whether it is a still or moving image, as its data is required to be read and written in a clear way, and understood not to use vague or scientific phrases far from the absorption of the average consumer, in addition to the requirement that these data be in the national language in implementation of Law 91 - 05 related to compulsory use of language Arabic (dated 01/16/1995, c. T number 03, and the rate of complementary law No. 96-30 dated 21/12/1996, c. T number 81).

It is worth noting that the data contained in article 11 was not provided exclusively, but rather it constitutes the minimum data that must be included in the offer, and from it the electronic resource can add other data, but it is required that it be in accordance with the conditions specified above (Abdel Haq Mani 2018, p. 143).

The law also specifies in article 13 of the aforementioned Law No. 18-05, mandatory data that must be contained in the electronic contract, which can be divided into the following:

A- The data related to the bidder's identification which includes both the tax identification number, physical and electronic addresses, the electronic supplier's phone number, the commercial registry number or the professional card number of the craftsman.

B- Data relating to the description of the product or service in question, which includes both the nature of the characteristics and prices of the good or service, proposed by calculating all fees, if the good or service is available.

C- Data related to deadlines, which include the methods, expenses and deadlines for delivery, a complete description of the various stages of implementing the electronic transaction, conditions and deadlines for justice.

D- Data related to the conditions and effects, which relate to the general conditions for sale, especially the terms related to the protection of personal data, the terms of the

commercial guarantee and the after-sales service, the method of calculating the price when it cannot be determined in advance, how the payment procedures, the terms of the contract termination when necessary, the validity period of the offer when requirement, order confirmation method, (acceptance method), delivery date, price of the product subject to pre-order and how to cancel pre-order when necessary, (method of returning the product), replacement or compensation, cost of using electronic communications when calculated on a basis other than tariffs the applicable (Mani, p. 144).

E-mail is either a private positive addressed to specific people, through the e-mail technology that allows the exchange of contractual offers through data messages, or a positive response addressed to unspecified people through commercial web sites spread across the internet (Lazhar bin Saeed, 2012, p. 74) .

II.2.2. Electronic acceptance:

Acceptance means, in general, the posterior expression of an affirmative and expressing the will of the person to whom it was directed and which results if it coincides with the affirmative contract (Bassam Fanoush Al-Junaïd, 2017, p. 79), and electronic acceptance is not different from the traditional concept of acceptance, except in that it is done through electronic media, It is a remote acceptance, which is identical to the affirmative, that is, the expression of the consent of the recipient to conclude the contract, and according to the conditions specified in advance by the obligor (Ahmed Badr Osama, 2000, p. 204, and Mani, p. 144).

Acceptance must be issued in the electronic sales contract and the affirmation is still valid, due to the limited validity period of its validity, if the affirmative was issued on the line (Offre en ligne), it was necessary to issue the acceptance immediately, and since the modification of the affirmative is considered a new affirmative, the internet can later restrict the client to the model electronic contracts, and the interviewer can only accept or reject, and usually for this purpose, special icons are assigned to be clicked on, or leave space for printing the word (I refuse) or (I agree) in the place designated for that (Yamina Houhou , P. 87).

The Algerian legislator has expressed the electronic acceptance of the choice, and has surrounded it with a set of guarantees, protecting the consumer from directing his choice; this is evident when I stipulate article 12 of Law 18-18, enabling the electronic consumer to verify the order details, especially with regard to what products or services are required , total and unit price, and quantities required for the purpose of enabling him to amend the order, cancel it or correct potential errors. have an opportunity, before confirming acceptance.

The electronic acceptance may be explicit, for example, if a message is send via e-mail, for example, which includes express acceptance of the offer made by the offered, and the acceptance may be tacit in the case of taking any behavior that indicates his acceptance of the offer, since the transfer can be considered as an icon, so acceptance through the electronic media (Muhammad Aqoni, 2017, p. 101).

However, for the Algerian legislator, the acceptance is expressly required, which is taken advantage of article 12 of the aforementioned Law No. 18-05, which states that: "... the choice made by the electronic consumer must be expressly expressed ... acceptance must also take place in a written style, as it is in clear terms that do not call for ambiguity and in an electronic manner, and it is also possible to use various forms

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and drawings indicating the product and everything related to its descriptions, as long as it is done by audio-visual means (Zakia Boulali, Algeria, p. 133 -147).

II. 2.3. Matching the offer and acceptance of the electronic contract:

The conclusion of the contract requires an affirmative acceptance, and since the contracting is by electronic means between absentees in a hypothetical medium, the question of the time in which it is concluded appears a legitimate question, and theories have emerged in this regard in an attempt to define it (first) the Algerian legislator had a position on the subject (second).

II.2.3.1. Theories of determining the moment of acceptance:

Jurisprudence has adopted several theories according to which the contracting time is set between absentees in the ruling on contracting through electronic means of communication, and if those theories agree on the requirement of conjunction with acceptance in the affirmative, but they differed in determining this moment, between the moment of declaring acceptance (first), the moment of its export (secondly), the moment of acceptance (third), or the moment of knowledge of acceptance (fourthly).

II.2.3.1.1. Declaration of acceptance theory:

The time for the contract to take place is determined according to the theory of the acceptance announcement, by the moment of the acceptance declaration by the one to whom the affirmative was addressed, or by the moment the latter makes the decision to accept the affirmative, and pursuant to this theory regarding its recent applications on the electronic contract, it can be said that the moment of the acceptance declaration adopted by this theory, the moment when admissions signs the message that includes acceptance without exporting it, or clicking on the icon designated for acceptance and without exporting this click (Ibrahim, p. 297).

II.2.3.1.2. Acceptance export theory:

The affirmation is associated with acceptance according to the theory of export acceptance, when the latter was final, with a material occurrence being the export of this acceptance, in order to avoid regression in it by the admissions after his exit from his hand, as it is delayed according to this theory the moment when the contract is held until the time that the contract the admissions can export his acceptance, by sending him to the offeror, so that he cannot retrieve it, such as by sending the acceptance by fax or telex or by pressing the computer button to send his acceptance to the offeror (Fawzia Sobhi and Nassira Qamari, 2017, p. 277).

II.2.3.1.3. Acceptance arrival theory:

The contract is concluded according to the theory of acceptance arrival, when acceptance reaches the offeror, and the contract is considered complete at this moment even if the latter does not know about it, where the contract concluded via email is held at the moment the message arrives or enters the email box of the computer of the obligatory and, if the latter did not open his email box, then we considered the received as an acceptance (Muhammad Hassan Qasim, 2005, p. 78 and beyond).

II.2.3.1.4. Acceptance theory:

The theory of is based on acceptance of the conformity or agreement of the two wills, which inevitably requires that each contractor be aware of the will of the other

contractor, so taking this theory postpones the effects of acceptance, which provides additional opportunities for the one to whom the affirmative was directed to withdraw his acceptance, and this theory has difficulty in proving Knowledge of acceptance, especially for contracts that are made by electronic means, and in application of this theory regarding contracts concluded via e-mail or fax, it can be said that the contract is held at the moment when the obligor knows of acceptance, that is, by opening his email box and viewing the admissions 's message, i.e., achieve it by accepting the latter in the affirmative presented to him or in the event that the message reaches the fax machine sent to him and viewed by the offeror in the case of contracting via fax (Ali Filali, 1997, p. 106 and Ibrahim, p. 303).

II.2.3.2. The position of the Algerian legislator regarding the moment that matches the acceptance:

The Algerian legislator united the time and place of the contract between the absent and linked them to the moment of the knowledge of the obligatory acceptance (the Algerian legislator took the theory of acceptance in determining the moment of the contract in article 67 of the Civil Code, which states that: The offeror of acceptance, unless there is an agreement or legal provision stipulating otherwise, and it is presumed that the offeror knew of the acceptance at the place and at the time when the acceptance reached it), and this requires that the obligatory inform the message containing the acceptance, and the e-commerce law did not come with a contrary ruling in this regard, he even confirmed taking it into consideration the confirmation of receipt of acceptance, through the text of article 12 thereof, when it indicated that the request for a product or service passes three compulsory steps, which are providing contractual terms to the electronic consumer and the consumer verifying the details of the order, and confirming the matter that leads to the formation of the contract.

Consequently, the contract to be concluded through the electronic way is not valid unless the acceptance is confirmed by the positive (admissions), after he has been able to review his request and the full price, correct the possible errors, and send the acceptance request to the obligatory who issues the acknowledgment of receipt once perusal of it, and then the electronic contract is concluded.

III- Conclusion:

The electronic sale contract gives rise to an important legal aspect in the Algerian legislation, which is represented in the mutual consent and the specificities it included that made the traditional legal rules governing the contracts seem incapable of knowing in all its aspects. Consent is identical to two wills to produce a specific legal effect, and its existence requires the exchange of both parties to the contract to express their identical will and that it is correct to be issued by a qualified person and to be free from defects, so we tried to apply those rules on mutual consent in electronic contracts, and we noticed the following:

-The data message is often used in the matter of expressing the will in electronic contracts along with e-mail, websites, chatting and viewing, considering that dealers in the cyberspace exchange information through messages, the difficulty that arises here is the extent of the authenticity of these messages, so what is known as the principle of

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equivalence applies is according to Article 323 bis of the Civil Code, and what arises at this point also if the electronic expression of the will is expressed through the trusted electronic agent, is the subject to the general rules of the agency, or not, the answer is in the negation of the privacy of the contract.

-In the issue of the eligibility of the electronic contractor, is that he can be a minor or a non-qualified person and state otherwise in the field of data related to it, and also there is a difference with regard to determining the age of majority so that the problem was solved by using electronic cards and electronic signature and ratification.

-The issue of defects of the electronic contractor will Are the defects of the traditional will in the field of electronic contracts applied to consider the electronic contractor considered a consumer, and therefore approved what is known as nullification resulting from a breach of the obligation to inform or make statements before contracting.

On the issue of compatibility of the two wills in electronic contracts, we find a kind of privacy.

*Concerning the electronic positive, we find that it is characterized by the use of electronic media through the Internet and the difficulty that lies here is the issue of distinguishing between electronic positive and the invitation to contract.

*With regard to electronic acceptance, the methods for expressing it have a kind of privacy, so acceptance is expressed through electronic messages and via the website using the double-click method, the first click is the review click, and the second is the confirmation of the request, then the acknowledgment is sent in which the acceptance is made, and we found that the theory Considering silence as an expression of acceptance that is not applied in this type of contract, and the "consumer" electronic contractor has the right to withdraw despite the contract, and this is contrary to traditional rules.

*Concerning the provisions of the electronic contract board, is the contract between those present or absent considered, then separation of jurisprudence and considered it as a contract between those present in terms of time and absent in terms of location, as for the time of concluding the contract, he took the model law for electronic commerce, the UNCITRAL did not specify the time of concluding the contract, but left freedom to the parties, and in the case of Lack of agreement, specify the time to send and receive the data message, which is contracting time, and it is the theory of exporting confirmation of acceptance.

As for the location of the electronic contract, the unilateral theory that takes the conjunction fails to determine the location of the electronic contract, so the parties remain free to determine the location of the contract.

What can be said in the end is that the Algerian legislator has started its first steps in the field of organizing electronic transactions due to the inability to absorb the traditional rules in various areas of electronic contracts, including the aspect of electronic expression of will.

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