

E-Consumer right of cancelling contracts in electronic commerce

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Abstract: This paper focuses on the importance of determining the need to adopt the option of renouncing the electronic contract.

That the consumer in remote contracting has no real possibility before the contract is concluded to see what is contracted or Check its characteristics, so it had to be awarded in this type of contract the right of return.

Considering that consumer protection in the context of remote contracting of which one of the parties is a consumer, Characterized by specificity where this relationship may involve imbalance due to the dominant weakness of the consumer in the interest of the professional, The latter has a stronger position in terms of economic capacity and experience, This has led many laws and legislative texts to adopt special rules to protect the vulnerable party by rebalancing the contract. These rules are the right to renounce or reverse the performance of the contract concluded remotely. Which is one of the fundamental pillars, which requires clarification of its concepts, regulations and legal rules governing it. In addition, the need to adopt this right in Algerian legislation is restricted, especially in view of the fact that the Consumer Protection Act does not contain any provision relating to the right of return.

Key words: Right of cancelling, electronic contract, consumer

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الملخص: تركز هذه الورقة البحثية على أهمية تحديد مدى الحاجة إلى تبني خيار العدول عن العقد الإلكتروني كون أن المستهلك في التعاقد عن بُعد ليس له قبل إبرام العقد إمكانية حقيقية لرؤية ما يتم التعاقد عليه أو التحقق من خصائصه، لذلك كان لزاماً منحه في هذا النوع من العقد حق العدول. وباعتبار أن حماية المستهلك في إطار التعاقد عن بعد الذي يكون أحد أطرافه مستهلكاً، تتميز بخصوصية حيث قد تنطوي هذه العلاقة على إختلال التوازن بسبب حالة الضعف المسيطرة على المستهلك لمصلحة المحترف، إذ أن الأخير يتمتع بمركز أقوى من حيث القدرة الإقتصادية والخبرة، الأمر الذي دفع العديد من القوانين والتصوص التشريعية إلى إقرار قواعد خاصة لحماية الطرف الضعيف من خلال إعادة التوازن للعقد، وهذه القواعد تتمثل في حق العدول أو الرجوع عن تنفيذ العقد المبرم عن بُعد، الذي يعتبر أحد الركائز الأساسية مما يستوجب تبيان مفهومه والضوابط والقواعد القانونية التي تحكمه، بالإضافة إلى تحديد مدى الحاجة إلى تبني هذا الحق في التشريع الجزائري خاصة في ظل خلو قانون حماية المستهلك من أي نص يتعلق بحق العدول .

الكلمات المفتاحية: حق العدول، العقد الإلكتروني، المستهلك.

1-Introduction:

The recent emergence of e-commerce has led to a huge increase of commercial transactions remotely. However, the electronic transactions raise legal issues due to the fact that the consumer cannot detect the quality of the offered products until he/she complete and execute the contract.¹

The retraction of the consumer from the electronic transactions is one of the most important contemporary legal issues raised recently, because sales or services displayed are always characterized by over advertising which affects the consumer's satisfaction to choose the right product, so in order the protect consumer satisfaction, the Algerian legislator worked on a various legislation creating legal guarantees for the exercise of this electronic contracts in e- commerce.

Recent legislation has taken care of consumer protection in electronic contracting as the weak party to the contractual relationship, as the French legislature initially enshrined this right under Law No. 88-12 of the date of the contractual relationship

¹ Lamri Salha, E-Consumer's Right to Refrain from Contracting in E-Commerce Contracts, Journal of Jurisprudence, vol. 13, p. (s), pp. 133-148.

1988/1/6 Although the right to renounce the performance of an electronic contract is in fact an exception to the principle of The binding force of the contract which establishes the valid contracts in force unless the legislator decides or the agreement in the course thereof, giving the weak party the right of restitution based on the general principle on considerations which it deems worthy of departing from this principle by the fact that the consumer is in a factually weak contractual position with the party is not accompanied in accordance with the general theory of the protection of the party's interests.

The majority of contracts signed by the consumer are characterized by a speed that does not enable the consumer to take deliberation before making his final decision in concluding the contract, which prompted many legal legislations to stipulate giving , the consumer has a specific time limit to reconsider the conclusion of the contract again, As many laws have followed in determining this right, what is the extent of the effectiveness of the legal controls (mechanisms) in exercising the right to withdraw or retract from the implementation of the electronic contract?

This problematic includes sub-questions, the most important of which are:

- What is meant by an electronic contract?
- What is the legal nature of the electronic contract and what do we mean by the consumption contract?
- What is the concept of the right to withdraw from the implementation of the electronic contract?
- On what basis is the right of reversal adapted and what is its legal nature?

After getting acquainted with the various aspects of the subject and studying it to enable the reader to understand the subject, as well as standing on the meaning of the right of reversal. This research is divided into two main chapters:

The first chapter is about the definition and framework of the electronic contract, the second chapter contain the legal system for the exercise of the right of withdraw / retract from the electronic contract, which was followed by a conclusion containing a general conclusion for the most important results reached.

2- The definition and framework of the electronic contract

With the advancement of science and the technological development in our modern days, conditions led to the emergence of modern forms and methods of contracting which differs from the traditional ones, one of these modern methods is called "electronic contract" because it relies on electronic means.

2.1- The definition of the electronic contract

E-contract stands for "electronic contract." As the name implies, it is a contract created and shared digitally via email, computer programs, or document management software.²

The electronic contract is one of the main components of electronic commerce, because it represents a legal translation of the will in the contract, the will of the seller or service provider, it is based on trust and requires an appropriate legal mediator, and does not go out in its construction and its composition, types and content are different from the context of traditional contracts, and therefore it is subject to the provisions contained in the contract.

The electronic contract is defined as: "Every contract that responds to commodities or services concluded between a supplier and a consumer within the framework of a system of sale or

² Will Cannon, What Are the Requirements for an E-Contract? Last updated on January 19, 2023, from: <https://signaturely.com/requirements-for-e-contract/>

performance of services at a distance, organized by the supplier who , this contract shall use one or more technologies in remote communications , in other means it is the agreement concluded by electronic means entirely or partially, this refers that any dealings or a contract or agreement concluded or executed in whole or in part by means of electronic communications are considered as electronic contract .

The expanded understanding defines the electronic contract as "the convergence of an offer issued by one party with an offer presented by audio or visual means, or both, on a telecommunications network with an acceptance issued by another party in order to achieve a specific process that both parties wish to perform, which is usually the exchange of values or funds or services.

As for the narrow concept of the electronic contract, it is defined as "an agreement in which offer and acceptance converge concerning funds and services on a network for remote communication, by means of audio and video, the interaction is meant to be between the offer party from a side and the acceptor party from the other side.

And since the electronic contract on the Internet can be characterized in some cases as being at an international level, some have gone to define the international electronic commerce contract as: the contract in which the offers of goods and services converge with the acceptance from people from other countries through the various technological media, including the information network, International Internet with the aim of completing the contract.

European Directive No. 7/97 also defines an electronic contract, namely a teleconference: "Any contract that reacts to goods or

Services between suppliers and consumers under a system of sale or performance of remote services, regulated by the supplier who This contract uses one or more technologies in telecommunications."³

Legislation addressing the explicit and direct definition of an electronic contract also includes the Transactions Act. Article 2 of the Jordanian Electronic Code of 2001 stipulates that: "An agreement concluded by electronic means shall be concluded in full or in full partly."⁴

In addition to the Dubai Transactions and Electronic Commerce Act 2002, use The term electronic transactions to refer to an electronic contract where it is defined in article II thereof "as any transaction a contract or agreement concluded or implemented in whole or in part by means of electronic correspondence".⁵

As a summary, we can say that the electronic contract is a free contract that concludes the obligation between two or more persons both of them using a device connected to a communications network as a means of expressing the sending of offer and acceptance, which is what It is the constituent element of this contract, so this type of contract is distinguished by its electronic way of concluding, which makes it belongs to the category of contracts concluded remotely, so it is of economic value or on material things such as commodities or consumerism

³ Kothar Said Adnan Khalid, Electronic Consumer Protection, New University House, Alexandria, 2012, p.393

⁴ Electronic Transactions Law No. 80 of 2001-Jordan

⁵ Mohammed Ali Ahmed Al-Mahassana, Conflict of Laws Electronic Contracts Towards the Creation of Unified Substantive Rules, Comparative Study, Al-Hamid Publishing and Distribution House, Amman, 2013, p. 23

2.2- The legal nature of the electronic contract

If the electronic sales contract does not differ in its composition or content from the traditional contract, this means that the matter is related to the nature of this contract whether it extent to which it is considered as a contract of a submission nature, or to which it is considered a bargaining contract.

The electronic sale contract is a contract of a compliance nature:

This point goes to consider some electronic contracts as applications of compliance contracts in which the consumer does not have the freedom of management that enables him to negotiate the terms of the contract, and he only has to respond to the objective conditions of the other party, without having the right to discuss it, amend it or object to it, which brings him closer to the contract of compliance, such as a transport contract, gas and electricity.

The majority of electronic contracts concluded via the Internet are usually made by the seller, whom during standard contracts, most conditions related to the contract appears on the seller's website as an electronic form, which includes contract details and is presented to the public with terms and conditions and does not accept discussion or modification. The weakness of the compliant party can be detected as soon as the contract is prepared in advance by one of its parties, who is independent and unique in imposing its terms and conditions, and the other party is limited to merely accepting these conditions as they are without modification, so he does not have the right to discuss them.⁶

⁶ Elias Nasif, International Contracts: An Electronic Contract in Comparative Law, Halabi Rights Publications, Beirut, 2009, p. 45

Thus, there is no negotiation and bargaining between the two parties to the contract, and there is nothing left for the other party except to accept.

The electronic contract is a bargaining contract

The bargaining contract is the contract in which mutual consent is based on actual and legal equality between its parties so that each of them can negotiate and discuss its terms, and these conditions are set freely at the will of both parties.

This approach has gone to the fact that the consumer role is not limited to agreeing to the previously prepared conditions, but rather to him, he is free to contract with any other producer or supplier if he does not like the terms offered on the Internet, and he can move to another site to choose what he wants.

Thus, the electronic contract may be a contract of compliance or bargaining according to the electronic means used in the contract.

If the contract was made by e-mail, chat programs, or by using audio-visual means, here it is a bargaining contract, but if it is done through websites, which often use standard contracts, in which the consumer has no room for discussion, in these terms, and therefore the contractors are not equal to not equivalent in contractual capacity, the contract in this case is a contract of compliance.

Still, There is no clear evidence in the legislation regulating electronic commerce to consider electronic contracts as contracts of compliance although the majority of these legislations include legal provisions for electronic transactions and contracts , It also provides the consumer when he is a weak party to these contracts with more legal protection than the protection it provides regarding general rules for the compliant party except, as for other

atypical contracts, they remain within the framework of bargaining contracts, in which every condition is considered to be a matter violation of the financial balance of the contract by arbitrary terms, and the consumer may demand cancelling it .

2.3- Characteristics of the electronic contract:

The general characteristics of the electronic contract can be resumed as follows:⁷

- It is a consensual contract that is concluded by mere agreement that takes place through the exchange of two identical wills. It is not a formal contract that must follow a special form in its conclusion, and it is not an in-kind contract that does not take place except with the delivery of the thing sold.
- It is a netting contract in which all the contracting parties give consideration for what they received, so the buyer takes the thing sold in return for the price and the seller takes the price for the sale.
- It is a binding contract for both sides that creates opposite legal obligations for both parties.
- The electronic contract is a contract based on one of the named contracts and the common form of it is that it is a sale contract. However: It may be a lease or services contract in addition to, it may be an immediate execution contract in which time is not an element.

It is essential that its implementation shall be according to the time specified by the contracting parties, whether it was the time of concluding the contract or by mutual consent executing it for one or more consecutive terms, therefore, it may be a time

⁷ Salim Saadoui, e-commerce contracts (comparative study) Ed1, Dar al-Khaldouniyah, Algeria, 2008

contract that extends its implementation for successive periods of time.

In addition to the points mentioned above, the electronic contract is characterised by several features that distinguish it from traditional contracts, which are:

- Online sales contract is an electronic contract
- The electronic contract is from the category of contracts concluded remotely
- The electronic contract is a commercial contract
- The electronic contract is often international
- The electronic contract is concluded through a remote communication technique

for a contract to be concluded, three basic conditions must be met, which are the mutual consent, the place, and the reason.⁸

3- Legal aspect for the exercise of the right of withdrawal and its effects:

The right of withdrawal is actually the paradigm of inconsistent EU legislation, for instance, in terms of the period within which it can be exercised, the procedure that must be followed in order to exercise it, or the charges that may be imposed on a consumer who decides to withdraw. These inconsistencies appear as a consequence of the divergent rationale for granting this right in different pieces of legislation.⁹

⁸ Omar Khaled Zereqat, E-Commerce Contracts, First Edition, Hamid Publishing and Distribution House, Oman, 2007, pp 66-67

⁹ Carmen Azcárraga Monzonís ; Raquel Guillén Catalán : The Mandatory Nature of the Right of Withdrawal, University of Valencia, Valencia, Spain, Springer International Publishing Switzerland 2015, Javier Plaza Penadés and Luz M. Martínez Velencoso (eds.) European Perspectives on the Common European

3.1- The concept of the right to withdraw from the implementation of the electronic contract:

Determining the concept of the right to withdraw from the implementation of the electronic contract requires addressing its definition and distinguishing it from systems similar to it, the extent of the legislation's position on it, and determining its basis and legal nature.

Renunciation of the contract is one of the most important legal means in the post-contracting phase, which has many definitions from the linguistic point of view on the one hand and from the jurisprudential and legal point of view on the other hand.

Most opinions from jurisprudence defines withdrawal from contract as "one of the modern legal mechanisms created by the legislator with the aim of providing an effective and necessary protection for the consumer at the stage of executing the contract." after concluding the contract, there is a trade-off or a choice between signing it or withdrawing from it. The right of withdrawal from electronic contract is defined by legislations as "the right of the buyer to withdraw from his contract within seven days of the date on which he received the thing sold without any penalties on his part other than the expenses of the return costs

Through the foregoing, the right of withdrawal can be defined as: "the right of the consumer to return the commodity or refuse it service within a specific period specified by law without the need to provide any justifications, with the commitment of the merchant or provider of the service, according to the circumstances, shall be

refunded for its value, and the consumer shall bear the costs of return only.

The distinction of the right to withdraw from similar systems can be detected by the presence of some characteristics that are unique to it when it is exercised.

The electronic contract, which is represented in its association with contracts concluded remotely, can be seen through the following points:

- Association of the right of withdrawal with contracts concluded remotely.
- The right to withdraw is an exception to the principle of binding force.
- The right to withdraw is linked to public order.
- The right to withdraw is a purely voluntary right.

Due to the legislative shortcomings in the definition and extent of regulating the electronic contract in Algerian law, which did not regulate this new dealing in sales, especially after amending the Civil Code¹⁰, we can return to what the comparative laws came up with which legalized electronic commerce contracts, especially in light of the social changes that are based on publicity and advertising and under the pressure of the temptations and facilities of the seller.

Therefore, the right to refrain from implementing the electronic contract in light of the rapid development of the economy and the new international dealings, It has become an inevitable necessity that requires the Algerian legislator to intervene by adding legal texts specific to the right that the consumer may opt out or draw up an independent law regulating

¹⁰ Ordinance No. 75-58 of 20 Ramadan of 1395 approving 26/9/1985 containing the law Algerian Civil, Official Gazette No. 78 of 1975, amended and completed.

this type of transaction to ensure effective protection Issuing a free will that addresses modern methods.

3.2- Legal controls for exercising the right to withdraw from the implementation of the electronic contract:

The right to withdraw from the implementation of electronic contracts is one of the most appropriate means of consumer protection for the specifics of electronic commerce, as many legislations approved by it seek to regulate it in a precise manner.

The legislator has made a protection from it to the consumer who has decided, by expressing legal texts, a matter related to public order that guarantees balance for both parties signing the contract.

All contracts concluded between merchants and consumers regarding goods and services, which are concluded through electronic contract, are subject to the right to withdraw from the implementation of the contract mentioned above, because it is of great importance in the field of contracting, however, the legislative texts excluded from the scope of the right to renounce many contracts that fall into the concept of remote contracting.

All contracts concluded between merchants and consumers regarding goods and services that are conducted electronically are subject to the right to withdraw from the implementation of the electronic contract, as it is of great importance in the field of remote contracting.

Legislative texts excluded the right to revoke many contracts that fall within the concept of contracting, therefore, there are requirement on contracts in which the right of reversal does not apply:

Contracts in which the right to withdraw does not apply except with the agreement of the parties:

Consumer protection laws has excluded certain cases in electronic commerce contracts that are not permitted revoking the contract after its conclusion, in order to preserve the balance of the contract on the one hand, and in accordance with the principle of not harming the interests of both parties Vendors and merchants on the other hand, which can be resumed in the following points:

- If the price of the commodity or service is subject to market fluctuations, ups and downs, which the supplier cannot control on their prices.
- The supply of services whose execution began in agreement with the consumer before the expiration of the period prescribed for exercising the right to retract during it.
- The supply of products manufactured according to the specifications stipulated by the legislator in the contract or in accordance with his character or speed loss, damage or that cannot be returned to the seller because it is not valid.
- Contracts for the supply of audio and video recordings or computer programs when the seals are removed with the knowledge of the consumer.
- Contracts for the supply of newspapers, magazines and periodicals
- Authorized betting and lottery services contracts.

Contracts excluded from applying the right to withdraw:

Pursuant to the text of Article 121-20/4 of the rationing of consumption, the consumer does not have the right to withdraw in cases the contracts are subject to the supply of common consumer goods that take place at the consumer's place of residence or work through distributors that makes frequent and regular tours, in addition to contracts that are subject to the performance of

housing services, transportation, restaurants and entertainment that must be provided on a specific date or at specific periodic intervals.

3.3- The effects of the right to withdraw from the implementation of the electronic contract:

The consumer's exercise of his right to withdraw from the contract within the stipulated period results in arranging certain effects for each parties from the professional (seller) and consumer side.

The effects of withdraw on the professional side:

The effects of withdraw for the professional are mainly represented in his obligation to refund the price that the consumer paid him for obtaining the commodity, and rescinding the loan contract that the consumer may have concluded to finance the contract that he previously cancelled.

when the right to withdraw is revoked , the professional is obligated to refund the amounts paid by the consumer , in return for obtaining the sold item within a maximum period of thirty days from the date the consumer used this right and if the deadline is exceeded without refunding the price to the consumer, the professional might refund higher amount. in the event of a termination of the loan contract concluded to finance the contract that the consumer has relinquished, and If the payment of the price of the product or service has been funded in whole or in part by credit from the supplier or from a third party on the basis of an agreement concluded between the consumer and the supplier, the consumer's exercise of the right to withdraw leads to the termination of the credit contract, by force of law, without compensation or expenses, except for the possible expenses of opening a credit file.

Thus, we can see that the professional is obliged to refund the price paid by the consumer within a specific period, without the consumer is obligated to compensate, but there is a discrepancy in the period which during the professional must implement his commitment.

The effects of withdraw on the consumer's side:

The laws arranged on the consumer's exercise of the right of withdrawal, which has a number of effects that the consumer will bear after its release from the sale previously concluded, in addition to the effects of the professional seller, and the most important of these effects is commitment.

Returning the commodity to the supplier, in addition to his obligation to pay the expenses of returning the commodity to the supplier or waiving the service that are:

- The obligation to return the commodity to the professional
- The obligation to pay the costs of returning the commodity.

The right of withdraw, together with the right of informing the remote contracting consumer, is the core and content of the legislative protection, and a legal mechanism aimed at regulating remote contracting as guaranteed to the weak party, since this right is represented in Legislative in defining and regulating the electronic contract in Algerian law, despite its recent amendment to the Civil Code.

4-Conclusion:

In light of the of the general rules in civil legislation to provide adequate protection to the consumer when concluding regarding contracts via the Internet, in addition to the disparity in technical and economic capabilities and legal measures the laws and legislations have approved the right to withdraw from the implementation of the contract when it comes to the electronic

contract, with the requirements of the current technological progress that was under study and that was done, several results were reached, the most important of which are:

- The right to withdraw at the stage following the conclusion of the contract is represented in the protection granted to the consumer, the period of reflection after the conclusion of the contract.
- The right of withdrawal with regard to consumption contracts is one of the legal mechanisms included in the private regulation remote contracting to ensure effective consumer protection
- The right of withdrawal is granted to the consumer under the consumption laws in remote contracting within a specified period.
- The essential effect of exercising the right to withdraw from the implementation of the electronic contract is to refund the price to the consumer who is obligated at the same time to return the commodity to the professional.

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