

The study of rules and process of electronic contracts

Amirhamed Majidnia ^{*}, Mohammadjavad Jafary ^{**}

^{*}Department of International Law, Kermanshah Branch, Islamic Azad University, Kermanshah, Iran.

^{**}Department of Law, college of private law , Assistant Professor, Kermanshah Branch, Islamic Azad University, Kermanshah, Iran.
Email : mohammadjavadjafari.phd.1384@gmail.com

ABSTRACT- An electronic contract is not a special kind of contracts but electronic description only expresses how formation of it; the form of these contracts is as electronic .The formation of contracts usually doesn't require special formalities and as soon as intents of individuals about creation of a legal nature is announced and is agreed, a contract is concluded among them. The way of announcing intent is not important, but any means that implies intents of person, can create legal effects. And in electronic contracts, intents of individuals meet through electronic means and create legal effects. This research tries to study rules and process of electronic contracts as analytical- descriptive and by use of library method. © 2014 Bull. Georg. Natl.Acad. Sci.

Key words: Contract , Legal nature , E-Commerce Law.

Disuse of E-commerce means loss of momentary opportunities in global trade, weakening competitive situation and isolating in context of international trade, the growth of this trade has accompanied with posing multiple legal problems in context of contracts law rules, transnational jurisdictions, selection of governing law and claim proof evidence that finding a response for it in legal systems is an undeniable necessity. E.-commerce means conclusion of contract for transfer of goods, services, money and commercial documents through advanced electronic means. The importance of this phenomenon is because of its role in change of global market which affects large parts like trade, communication, education, health and even government. Therefore, different countries and regional and international organizations try to enact and predict law in this regard. Legal system of our country is not an exception and can use experiences of other nations and patterns of international institutes. Validity of electronic contracts that by extension of new technologies specially Internet which have accepted and used in trade is not undeniable, even if laws don't assert it .So, the presence of law to preserve general order and to create a framework for transactional and legal relations of individuals is necessary. Therefore, by the emergence of new way of E-commerce, legal systems have provided a bed for it. And also, for formation of electronic contracts, laws and regulations have enacted. With respect to above explanations, this research tries to answer this main question that do electronic contracts follow the rules and what is process of concluding them?

1. Concept of electronic contract

The conclusion of contract in virtual space generally is similar to its conclusion in real world and from perspective of this, there is no principal difference between these two spaces and jurists generally refrain from presenting a separate definition for electronic contracts. For formation of contract whether electronic and etc .The existence of fundamental conditions of transaction correctness that has mentioned in article 190 of civil law and after, is necessary, because electronic contracts follow general rules of contracts. By developing use of new means of information technology in E-commerce, validity and correctness of all electronic contacts is assumed and there is no difference between contracts formed by real persons, representatives of legal persons and contracts formed by computer (automatic contracts) or internal and international contracts. For explaining domain of contract concept in electronic space, at first concept of several legal natures must be studied.

1. Contract¹ has multiple definitions; in legal context, contract has two meanings; on the one hand, it means legal nature that is created by interaction of intents of two or several persons in terms of validity and on the other hand, it is interaction of intents of two or several persons in creation of legal nature².
2. Obligation; obligation means to commit, to debt and to obligate. Literally and in law, obligation means act or omission. Obligor and a person who obligation is beneficial for him/her, is called obligee and a person who obligates is called obligor³.
3. Ayqa: Ayqa is legal nature that is created by will of a party. Ayqaat have different kinds in terms of legal effects. Some Ayqaat create ownership like reclamation of lands (articles 143 and 147 of civil law). Some cause loss of ownership like disclaimer (article 178 of civil law). Some cause that debtor doesn't obligate like acquaintance (article 289 of civil law) and finally some cause to obligate person like sale annulment considering kinds of legal natures, it seems that in electronic space, the concept of contract includes three above-mentioned natures; and there is this difference that is formed in electronic contracts and electronic communications. So, the concept of electronic contract is very more extensive than traditional concept. In article 2 of Jordan electronic transactions law, electronic contract has been defined as follows: An agreement that generally or partially is concluded through electronic means⁴. Also, Tunis electronic law has defined electronic contracts as contracts which are concluded through electronic mediators⁵. So, electronic contract can be defined as product of process of forming a legal nature through electronic mediators. After formation and creation of a legal nature in electronic space. Its effects are not different from the nature which is formed in non-electronic space. Accordingly, there is no change in existence, nature and effects of legal natures, because of they create in electronic space and bed of communication and information networks; however, title of electronic contract is used for process of formation of all them.

2. Conditions of concluding electronic contracts:

In electronic contracts like non-electronic contracts, intent and content, qualification, an item under transaction and legality for correctness of transaction are necessary and there is no principal discourse about it; what seems to study, how expression of will (offer and acceptance) and form of concluding contract.

- a) Expression of will:
- b) Although E-commerce is not only done through global extensive network (Internet), but Internet is the most common means of concluding electronic contracts⁶.
- c) In Internet, these contracts are concluded by message data interchange through electronic letter, Internet Interfaces, and chat services.
- d) Generally, stage of concluding an electronic contract are similar to traditional contract⁷.
- e) 1.2. before conclusion of contract:
- f) In this stage, consumer enters a base (website) that goods have presented in which and evaluates properties of goods and conditions of seller.
- g) Conclusion of contract:
- h) By selection of goods list, buyer put them in buy basket and selects way that has been determined in base for payment of price. Accordingly, there must be a difference between electronic contracts and a contract which its offer and acceptance has done by electronic means. In latter, all stages of concluding contract from advertisement

¹ Some jurists believe that the word contract is used for contracts which have special names and their effects and conditions have determined separately like sale contract but contracts includes contracts without name and generality of contracts is posed accordingly. But, title of second part of second book of first volume of civil law and all cases about contract and general rules of contracts, is opposite to this interpretation... but regardless of doubt in correctness of this possibility. We will see that in present law, it must equal contract and based on this possibility, there is no difference between these two concepts;

Katuaian, Dr Naser; civil law; general rules of contracts, first volume; third edition; Tehran 1374; number 46; p. 11.

² Shahidi Dr. Mehdi; formation of contracts and obligations; majd publications; Tehran 1380; number 9-13, pp. 36-40.

³ Ibid, p. 42.

⁴ Article 2 of electronic transactions law; Biroot 2005.

⁵ Ibid, pp. 22-26.

⁶ Farrel Henry; constructing the international foundations of E-commerce; the EU-US; safe Harbor arrangement

⁷ Sax.M.M; Buying and selling goods over the Internet 2000 p.9; available. At: [www.saxlaw.com/publication/backup20% of 20% seminar % 2001 %2014 5b1% 5d. htm](http://www.saxlaw.com/publication/backup20%20of%2020%20seminar%202014%205b1%205d.htm)

to primary and final negotiations and even in many cases. Deliver of an item under transaction as electronic are done by Internet.

- i) Payment of price:
- j) The buyer selects icon related to way of payment and pays the price.
- k) Sending goods:

This stage may be accompanied with sending warranty paper of services after sale and To buyer. If payment is done as electronic (for example, an item at price of 30 dollars is purchased from an internet base and is received as electronic⁸), this is called direct electronic commerce transaction. Conversely, in indirect electronic commerce transaction. Deliver of item or receive of price is often done as traditional, however, receive of price as electronic and by use of electronic systems of payment is possible⁹. The cause of un-electronic deliver of an item under transaction may be impossibility of electronic deliver of item: for example, transaction of several computers set or agricultural machinaries, ship and ... or security problems like distrust to other party, penetration of hackers to computer programs and disorder or are posed.

The following examples is an important instance of a difficulty that may be created in electronic commercial relations. In 2004, company (a) sent a letter to company (b) that expresses: the cargo which you had wanted is ready to deliver. The claim of company (a): electronic offer, is deliver of 3 million gallons of frozen orange juice to company (b) that according to above claim, the time of delivering it is 2004; according to what is claimed, above offer as done is 2001 and company (b) has signed its contract as digital. In response to this claim, confirmation office of signatures of company (b) announces that without knowledge of claimed offer, this company has changed way of signature that has used in 2001 and has substituted other digital method company (b) doesn't have any reason for defense of its rights against claimed offer.

The trade that is done without physical relation of parties, creates such difficulties; claim of offer and acceptance, digital signature of an electronic document by unauthorized person under heavy obligation, ... By passing time, and development of media systems and specially computer systems, these difficulties and claims are decreased, too. Electronic offer and acceptance is valid and as paragraph 1 of article 11 of Ansiteral law, 1996 says about E-commerce; during formation of contract, if there is no opposite agreement, offer or acceptance can be done as electronic; when electronic method is used for contract formation, validity and enforceability of contract can not be denied on the sole ground that an electronic method has used for its formation. And contents of this paragraph is done for electronic offer and acceptance too and certainly as paragraph 2 of same article asserts, if there is opposite agreement, it is not executed at all¹⁰.

2.2. Conclusion formation:

For conclusion of some contracts, in addition to all necessary elements for contract, special formalities are needed. For example, according to some jurists about transfer of registered properties, formal document is needed. (articles 47 and 48 of registration code) and mere offer and acceptance is not sufficient. Therefore, contract is formed legally when above formalities are done, however, there are opposite opinions about correctness of contract¹¹. In English law, according to article 52 and paragraph 2 of article 54 property act (1925), rent of real property must be done by formal document. The existence of document for validity of contract is other restriction for electronic contracts and because of absence of electronic formal document at present time including because of possibility of easy forge of this transfer, must be done through registers of documents. Which must be filed formally and by register according to article 47 of registration of documents and lands code. There are multiple opinions about electronic documents. Some introduce saved documents in computer as documents in writing and others don't believe it at all. For example, one of English jurists says filling electronic formal document is possible, if all conditions of paper formal document like signature and presence of witnesses by officer and according to right law are met but with respect to this reality that electronic formal document is not study,

⁸ Download

⁹ Baker & Mckenzie; Done E-commerce in Europe; 2001, edition p. 183.

¹⁰ Alsan Mostafa; formation of electronic commerce; research- scientific magazine; commercial research; number 36; autumn 1384; pp. 147-150.

¹¹ Shahidi. Dr. Mehdi; legal papers; Tehran 1375; p. 55.

existence of at least a paper backup is necessary. Regardless of above materials, all legal acts can be concluded as electronic, unless law has mentioned an exception explicitly or nature of legal act is so that is not concluded as electronic.

3. The ways of concluding electronic contracts

Today, by use of world network of Internet, we can send or receive many data and messages; so that, persons, firms and economic companies can introduce. Present and buy their goods or services through creation of an Internet base easily.

The facilities of this network are so that in majority cases, all stages of a contract from stage of pre- contract negotiations and conclusion of contract to stage of execution of contract and deliver of item and payment of price may be done in this medium. For example, if an item under contract is computer software, stages of contract formation, payment of price or even stage of item deliver can be done completely in this virtual space. But in some cases, there is no possibility of execution of all or part of different stages of a contract by electronic agent. For example if material and physical goods are under contract, naturally part of contract stages like stage if item deliver can not be done in this way. In addition to internet, other means of electronic communication are used for contract formation, too. The number of these means is so high that all them cannot be mentioned. But, conclusion of electronic contracts can be done through one of the following ways:

1. Conclusion of contract through telegram, telex, telecopy and fax.
2. Conclusion of contract through data base.
3. Conclusion of contract through e-mail.
4. Conclusion of contract through data electronic interchange that in 4 separate chapters, any of them is explained respectively.

1.3. Conclusion of contract through telegram, telex, telecopy of fax

The most elementary way of contract conclusion through electronic communication means is use of telegram, telex, telecopy of fax. telegram set is a set that by it, the writing materials are sent through printing machine. In fact, telegram is writing materials to deliver to audience that is sent by telegraph. The uniform commercial code (UCC) in article 1-204 (4-1) defines telegram as any message that is sent by any mechanical method or any method similar to it. Usually a party who wants to send a telegraph, delivers his/her messages to telegram company in writing or by telephone, the officer of telegram company changes message to text and sends it for related party through communication networks of telegram company, this telegram is delivered to party as paper. In telex, oral or writing message is typed in a fax set and is received through other fax set by communication networks. Parties of fax set can communication through above set and recognize identity of each other. A telecopy or fax is usually sent through entering a paper document in fax set of sender and scan of document and change it to digital messages. These digital messages are transferred through telephone set to fax set of receiver. The fax set of audience copies exactly similar to main document and this copy contains all details of sender document including header of sender document and also exactly copy of signature in main document. These copies can be sent from remote directly through a main computer and without entering paper in sender set. Audience of computer faxes can print the received document. The telecopy messages that are provided and sent through computer directly, may contain digital. This signature along with other parts of messages is sent. In ordering and non-computer faxes, the sender sends message through entering a paper that materials of message has written on it in fax set and receiver set provides an exact copy from this document and prints it. But in fax through computer, any paper is not used for sending and receiving and any may the received prints message and the sent version remains in sender computer. Without there is an objective document. Therefore, the above-mentioned electronic communication means can be used to express will and to form contract and sometime even legislator has mentioned these means as confident means to exchange data and messages.

For example, MLEC law in article 2(a)¹² by definition that has presented for data message, introduces sent messages through telegram, telex or fax as data message and has established that: whenever law announces necessity of a writing, sent data message through telegram or telex and fax will be sufficient. Also, in paragraph c of article 2 of international

¹² Article 2(a): data message means information generated, sent, received or stored by electronic, optical or similar means including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

commercial arbitration law of our country (1376), it has been mentioned that applicant of arbitration can send his/her request through custom letter, a picture message, telex, telegram and statement and ... for other party that indicates identification of above- mentioned electronic means by legislator. In terms of comparative law in US courts, the messages which are created through telegram and telex, are valid if they have the following conditions:

1. The message identifies parties of transaction clearly.
2. It announces condition of parties agreement.
3. Clearly, it indicates that parties want to obligate according to agreed conditions.

Also, one of courts of US 9th jurisdiction has expressed that use of symbol, codes or letters in a telex message have condition of need to signature according to us forging law, of course provided that this symbol, codes and letters specify easily identity of contract parties and are identifiable for parties¹³. Also, this court about other case, and unsigned document that was sent through fax and contained this expression; this company guarantees payment of price under transaction, said; this guarantees is valid, while only property of above document was to write the name of obligator on top of paper.

2.3. Conclusion of contract through website:

Database (website) is a space in computer that files if web of an organization or institute are kept in which and has a single address. In this space producers and suppliers of goods and services and also buyers and applicants can conclude contract easily. Usually, in this database, general conditions of presentation of goods and services, price, way of deliver or payment of price that is done principally by credit cards and also properties of product and probably a picture of goods, are seen.

Also, in these sites, there are forms that have special contents that applicant can conclude contract by completion of these forms and finally by selection of icon "I agree" or "I accept". Concerning nature and legal value of this contracts, this data bases can be compared with vitrine of shops or shelves in stores and this question is asked that is what is presented by these data bases, general offer? So that with acceptance by other party, a contract is concluded or contents of these databases are called invitation to transaction¹⁴? In fact for answer this question, we can't obtain general rule. This depends on intent of data base creator that this intent can be inferred through the study of statements and asserted condition and other evidence. If intent of data base creator is that with acceptance by other party, he/she obligates to his/her offer, otherwise offer is called invitation to transaction. So, magistrate must discover intent of partly firstly, otherwise, to discover of his/her intent, magistrate must use sort criteria of course, in majority cases, internet base has shop window that allows customers to buy goods and services and owner of base can accept or reject their offer.

The advertisement concluded must be so that it is specified, customer accepted offer or offer presented in base. Practically, there is no guarantee for the latter and if there is disagreement, only conditions show that information and advertisement presented in base is offer of buy or sale of goods or services or is just invitation to transaction . certainly, majority of sale bases specify explicitly that expression of owners will is offer or invitation to transaction or there is explicit evidence for identification of it.

3.3. Conclusion of contract through electronic mail (e-mail):

electronic mail service or e-mail is one of the first internet services and is similar to traditional mail; but there is this difference that transfer of letters in it is not physically, but letters in his service only can be computer files that are transferred by electronic systems. Therefore, sending message through electronic mail of receiver in any place of the world is between several second and several minutes. After writing of receiver address and text of electronic letter, send icon is selected. By selection of above icon, after a while, a writing that indicates your message was sent is seen on monitor screen. In this time, sender doesn't control the message. electronic letter after sending transfers to internet services provider (ISP) and the receiver can receiver the letter from ISP by refer to his/her electronic mail address. The process of observation of letter text by the receiver is several seconds to several minutes. If content of this electronic letters is offer or acceptance of a contract, contract is formed. The sender and receiver may use internet network concurrently and in the other words are online that in this case we can say that there is relatively concurrent communication between parties and sending and receiving message is similar to presence session. But if the receiver doesn't connect to internet during sending

¹³ Stuchy kent D; law journal press; New York; 2002.

¹⁴ Jens Werner; online lousiness transaction and the applicability or traditional English contract law rules; International journal of communication law and policy, Issue 6 winter 2000-2001; p. 5.

letter and in the other words is offline, the communication is not concurrently and e-mail is used like traditional mail and so time of send and receive of message according to date of send and receive is determined.

4.3. Conclusion of contract through electronic data interchange (EDI)

The traders and firms that have continuous transactional relations with each other, usually before doing transaction through E-commerce, in order to protect security of messages, arrive at an agreement which according to it, how identification and attribution of messages received by parties, frame and form of messages writing the way of price payment of transactions and other terms agreed by parties are determined. After agreement, the parties do their transactions including after, payment of price,... by internet. Therefore, electronic data interchange is based on a pre-determined agreement. The messages that are exchanged through EDI, may be created by parties of contract or are sent and received by software and smart programs. Today, by use of artificial intelligence technology (AI), the software and computer smart programs are supplied that act as commercial manager and for example can be used for storing¹⁵. Persons who use these software can program conditions related to offer or acceptance, the list of related goods, maximum and minimum of goods price, number and amount of goods needed, ... as instructions in memory of computer. Suppose that chain stores (a) which have several branches in Tehran city, ordinary buys health products from production companies (b) and there are continuous transactional relations between them. The smart computer of chain stores (a) by observing that inventory of shampoo in storehouse is minimum, immediately it sends offer of 100 packet of shampoo to computers of company (b) and considering during 2 last months. Sale of one mark has been more than other mark, it orders more number of toothpaste of that mark after acceptance of offer by computers of company (b). the price is paid through transfer of credit card code or through transference to pre-determined bank account. If smart computers of company (b) receive offers that correspond with that has programmed in terms of price, number of orders, type of goods ... accept above offers. So, traders by use of smart software and programs can control their transaction in all items. The above offer and acceptance that have exchanged between two computers is not result of decisions which are formed in the memory of computer independently, but it is resulted from instructions that have programmed by user of that software in memory of computer¹⁶. Inter- Bank information interchange network is other instance of electronic data interchange that has many applications in bank system.

Conclusion

Many steps have taken to remove legal obstacles of electronic contracts through equaling value of electronic profiles with paler documents. Anyway, half of these steps must be taken by parties of E-commerce. Parties must know that new rules and effective use of formal means have predicted to validity and enforceability of electronic contracts. By these actions, they can sure that they different benefits will be supported.

REFERENCES

1. Alsan mostafa; formation of electronic contracts; research- scientific magazine; commercial research; number 36; autumn 1384.
2. Bana niasari Mashaallah; formation of contract in cyber space; legal research magazine; fifth year; number 9; spring – summer 1385.
3. Katoozian. Dr. Naser; civil law; general rules of contracts, first volume; third edition; Tehran 1374; number 46.
4. Shahidi Dr. Mehdi; formation of contracts and obligations Majd publications; Tehran 1380; number 9-13.
5. Shahidi Dr. Mehdi; legal papers; Tehran 1375.
6. Rahbar Navid; formation of electronic contracts; M. A thesis private law; guidance by Dr. Mir Ghasem jafarzade; law college of shahid beheshti university; 1383-84.
7. Mohammed Abidat; Birout 2005.

¹⁵ Emily. M. weitzenbook; electronic agent and the formation of contract international journal of law and information technology. Vol 9, no 3 2001 pp. 218-220.

¹⁶ Bana Niasari. Mashaallah; formation of contract in spring- summer 1385; pp. 50-52.