

UNCITRAL Model Law on place of contract formation in Electronic Commerce

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ABSTRACT- In cases in which the contract is signed in a parliament and the bidder and respondent conclude a contract in a place, there would not be a problem in determining the time and place of the contract. In electronic contract, which is formulated without the simultaneous presence of the parties, it is likely to confront with some problems. Civil Law has not mentioned the date and place of the contract in any matter, but some lawyers, by virtue of article 191 of the Civil Code, has accepted sending theory as a crucial evidence. These issues are complex in electronic contracts and to determine them, it is necessary to benefit from known principals of traditional law and also assumptions in electronic commercial legislation. Electronic Commerce Law of Iran following the UNCITRAL Model Laws and without taking privacy policy, has described both the time of sending and receiving the messages. Thus it paves the way to enforce the rules of civil rights in this field. In this study, the method of determining the location of each contract (applying quad opinion regarding the certain time to accept) has been investigated and the best way to determine the location of electronic contract formation has been suggested. For this purpose, a comparative study in law in Iran, UNCITRAL Model Law on Electronic Commerce (1996) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) have been mentioned. ©2014 Bull. Georg. Natl. Acad. Sci.

Key words: UNCITRAL (1984), Electronic Communications Convention (2005), Distant contract

Every human concludes contracts with other persons in his life intentionally or unintentionally. Sometimes, the parties sign the contract in presence of each other and in the same place. For example, a seller and a buyer of an automobile conclude a contract by attending in an automobiles contract agent. In many cases, contracts are formed through letters, telephone, fax, and etc. Such contracts can be called distant contracts or contracts between absent persons. Today, because of advances in communications and electronics, the world has become a village. Contracts are concluded between persons who are not in a same place and do not know each other. Many contracts are concluded via electronic mail (Email). Internet sales are common now days. Individuals send their offers through e-mail or Internet to other person and those people receive the offers in the same way. Thus, a contract is concluded between them. An important issue that arises in all these cases is where the place of contract signing is. It has been said that in signing the contracts between present persons, the problem of determining the location is not proposed. Since the offer and acceptance are issued in a same place and time and parties are notified. In these contracts, the parties conclude the contract in the same location, and there is not much gap between offer and acceptance, but in distant contracts, identifying the time and place of the contract is more important. Development of computer and communication tools has increased the number of distant contracts. Perhaps, it can be said that the number of distant contracts is more than contracts between present persons today. Using the electronic media and fascinating phenomenon of IT and EDI, has imposed some uncertainty and difficulty on the status and position of many contracts of sales and services. It also has raised many legal issues, which economists, businessmen and lawyers can not be indifferent toward them. Because in contracts, which are concluded by electronic intermediaries, parties are

not in the same place and those contracts are made in distance, it is likely that the offer and acceptance, which are exchanged between parties, do not have time symmetry and continuity. The question which arises here is: which of these places (the announcement date, sending and receiving time, and notice date), is the place of contract? What is the reason? Is it possible to apply traditional rules of contract formation, does the contract location depend on its formation time? Is the concept of place meaningful in cyberspace? United Nations Commission on International Trade Law (UNCITRAL) proposed a legislation in 1996 which was called "The UNCITRAL Model Law on Electronic Commerce", its main purpose was to uniform the approved laws by various countries in the field of electronic commerce. In Iran, in order to formalize the new facilities of communication in business, a new law entitled "Electronic Commerce Act" had been approved in which formed contracts through electronic medium have been recognized official. This law is a translation of UNCITRAL Model Law and the legal base of electronic commerce in Iran; it also has made public relations on the Internet legal. UNCITRAL Model Law and Electronic Commerce Law in Iran have not considered the place of transaction and its legal effect. They have delegated it to the general rules; instead, they have put into consideration the place of sending and receiving the data messages.

In this study, considering the 1980 Vienna Convention concerning the International Sale of Goods on the one hand, and UNCITRAL Model Law on Electronic Commerce (1996); United Nations Convention on the Use of Electronic Communications in International Contracts (2005) and the Law of Electronic Commerce in Iran (2003) on the other hand, we attempt to explore how distant contracts are formed by two parties? Where is the place of contract? By finding answers for these questions, businessmen, who acting through electronic commerce, will become aware of the legal effects of On Line activities.

METHOD

In case of traditional contracts in which parties form a contract in the presence of each other, offer and acceptance are excited in a very short space of time. In these cases, because parties agree and notify each other on a same place and time of contract, it is not a difficult task to determine the time and place of the contract formation. But in distant contracts, there is an interval between offer and acceptance, so it is a little difficult to set the time and place of the contract. Any thing has not been mentioned about the time and place of the contracts in Model Law, Electronic Communication Conventions, and National Legislation in the sphere of electronic commerce. Failure to address this issue in the Model Law and the Electronic Communications Convention is clear; it is because different legal systems may apply different rules, so it is likely that Model Law and Conventions are not able to make necessary legal unity. Hence, they have only paid attention to place and time of traditional concepts of sending and receiving in the form of data message successfully. This silence means applying the general rules to determine the time and place of electronic contracts. At first, we must determine the applicable rules, and then by using the electronic commerce legislation, the places for the rules' fulfillment. The traditional legal rules and electronic commerce regulations should help to determine the principal rules and the rules' fulfillment places. Four different theories have been expressed in this regard. Some persons have known "declaration theory" adequate for the contract formations, and some other adopt "postal rule/mailbox rule theory". In addition to these, some other believe that the time of "reception" by bidder is the time of acceptance, and consequently the time of contract formation. Others have gone further than this and believe the "information theory". They believe that acceptance is applicable when bidder is aware of acceptance provisions. Since the Vienna Convention on Contracts for the International Sale of Goods (1980) is the first experience of UNCITRAL, as well as the most important international reference, and since this convention and Iran law have chosen the same way on the time of contract formation and certain acceptance, we review the positions of these two systems about the time of contract formation, then according to the new premises at economic commerce legislation, the element of time will be discussed. By considering the time specified, we will

examine how to determine the location of electronic contracts. In International Convention of Goods, among the four theories (declaration theory, postal rule/mailbox rule, reception/receipt rule, and formation theory) reception theory, as a general rule about the time of contract formation between absent persons, has been accepted. Paragraph 2 of Article 18 of the Convention provides: "... 2. The acceptance would be run at the time of satisfaction. It would not perform if satisfaction announcement has not been reached to the bidder within the time specified, or within a normal duration, if no date is determined. To recognize the normal duration, the contract conditions including the speed of used communicative tools should be considered. Article 23 states: contract is formed at the moment in which acceptance has been performed according the convention rules. Paragraph 2 of Article 18 accepts the reception theory for applying the necessary caution and care from the letter sender. The sender of acceptance letter has a better opportunity to detect if his selected tool for sending the acceptance has accompanied with a delay or not. In other words, respondent should respect all the necessary cautions for not losing or delaying the acceptance. It is fairer if the respondent accepts all the responsibilities of sending the acceptance. [1, vol 1, p 235] Article 24 of the Convention defines the concept of receipt. This Article provides: For this part of the Convention, offer, acceptance announcement, or any tool of stating intention will reach to addressee if they have been said verbally, they also can be delivered to addressee himself, or even to his business or postal address. The acceptance of receipt theory is better and more practical to prove the time of acceptance. Thus, the convention chose the receipt theory. It is not necessary to draw the attention of the respondent to the content of letter. Just, the letter should be placed in mailbox or other places designed for delivery [1]. In Iran laws, including Civil Code, anything has been mentioned about the time of contract formation, and just lawyers have stated their opinions in this regard. Each of them has chosen a unified theory. Some of the Iranian professors believe that at the time of contract formation between absent persons, two issues of nature of acceptance and necessity or un-necessity of expressing acceptance are different from each other. Time and certainty of acceptance are issues on which principle of positive does not govern. The court by considering all circumstances should detect the time in which addressee has expressed his certain intention. Sometimes, addressee expresses his certain intention by writing acceptance letter, and sometimes by writing and signing it and by giving the letter to post office; in this way, he keeps a reasonable plan and expresses his certain intention [2]. They believe that acceptance will attain by mailing the letter. Some Iranian lawyers support the postal rule/mailbox rule and believe that this theory matches with legal principals of country. In Civil Law, what is introduced as the factor of contract formation is the composited intention and instrument for expressing, but the other elements such as received acceptance to bidder or bidder awareness of acceptance are not necessary. In case of distant contract, the composited intention of bidder and acceptance are submitted to post office. Contract formation requires available composited intention and its expressing instrument. This intention will be achieved when acceptance letter delivers to the post office [3]. Another author of civil law believe that the first and second theories are close together, because both theories intend to conclude the contract at the time of acceptance, but according to the first theory, writing the acceptance letter is necessary to fulfill it, but for bidder. According to the second theory, acceptance will be fulfilled, if acceptance letter has been sent. These two theories are close together and referred as "issuing system". According to article 191 of the Civil Code, contracts will be performed by the intention of composition if they are accompanied with something that signifies their intention. Therefore, inner intention suffices to form the contract, but this inner intention should be expressed. What signifies the intention of the composition may be word, gesture or act. Writing is one of the things that signify the intention of the composition. In distant contracts, as soon as the addressee writes his acceptance on paper, he has stated his inner intention. So at this moment, the intention of composition is accompanied with something that indicates the claim, so what was required by law, it was fulfilled. Therefore, the contract is formed with acceptance letters. It seems that due to the above reasons, "declaration theory" is consistent with the Iranian legal system. Thus, the acceptance fulfillment must be absolute and there must be a proof on it. If there is another reason implying that acceptance has been fulfilled before sending, it can be considered as criterion. As mentioned before, according to "sending theory", the contract will be formed as soon as sending the acceptance. Article 15 of the Model Law and article 26 of Electronic Commerce Law

express the time of sending in signed contracts through electronic networks. Paragraph 1 of article 15 of Electronic Commerce Law provides: "except for the agreement between the bidder and addressee, sending the data message will be occurred when the data message enters into information system outside the control of the bidder or the person who has sent the data message from him [5.MLEC.Article15].

The place of receiving the message

Like what was said earlier about the location of data message, in order to determine the place of data message receiving, Model Law on Electronic Commerce has chosen the criteria of business place. In order to search logic relationship between respondent and the place of data message receiving, and also ease of set for bidder, the Model Law has chosen the criterion of business place and provides: "the place of data message receiving is where the business of respondent is located there." As mentioned in the discussion of the post place, the parties' agreement is prior to the legal regulation. Otherwise, if the respondent has more than one place of business, then the principal place of working is where the closest relationship with original transaction has. If there is not any transaction, the principal place of business would be the criterion. In the absence of a place of business, habitual residence is considered as the place of data message receiving. Iran's Electronic Commerce law in article 29 states: "The bidder's place of business is the location of sending the message and the respondent's work place is the location of receiving the message, unless otherwise agreed upon". This means you can determine optional business place, or unlike the convention, it is possible to determine the other location rather than the business place as the place of receiving the message. The excepting at the end of this article should be reflected and reviewed. Determining the places of sending and receiving the data message governs on assigning the place of contract formation, assigning the places of sending and receiving the data message by the parties' tools, which determine the place of business or commercial domicile, is optional. This issue will be investigated in the next debate. Convention of Electronic Communication, similar to the Model Law, provides: "... it is assumed that the Electronic Communication is received at a place, where it is respondent's business location". (7) About this regulation, it should be noted that at first, the business place is determined according to article 6 of the Convention which was described at the previous section. Secondly, the physical business location of respondent has been considered as the place of data message receiving, not the real place of receiving the message, this is while in determining the time of receiving the message; the real time of its entrance into respondent's information system has been considered as a criterion. That is, in case of the place, the same hypothesis in traditional contracts has been adopted, but in case of the time, the cyberspace (when the information is logged) has been considered as criterion. In both cases, this legal assumption may seem reasonable, because it is easier to determine the business places of parties rather than the actual location of data message sending and receiving _ which depends on the location of parties' information and communication systems [10]. The result is that the legal system in question, to determine the place of sending and receiving the electronic communications has a single criterion and it is the business place of sender or receiver. Although according to the rules of traditional law, the place of contract formation depends on its time, but this rule can not be applied in the electronic world. As it was said, the parties' information system is an effective criterion in determining the time of contract formation, but not in determining its place, which has been considered in all controversial rules. This criterion has removed the complexity of determining the place of electronic contract formation. Because in all regulations, the places of sending and receiving the message have been considered as the business places, it is important to determine the parties' business places which resulted in determining the place of contract formation. Nowadays, due to the difficulties in determining the parties' position in online rules, a significant legal uncertainty has been created. This risk is always existed, and the global reach to electronic commerce in every part of the world has made the problem twice and because of the effects of parties' positions on issues such as jurisdiction and law enforcement, this risk has had important legal results. Thus, unlike the Vienna Convention on the International Sale of Goods in 1980, which has not proposed any rule for determining the place of business and place of contract formation, the 2005 Geneva

Convention on Electronic Commerce and Electronic Commerce Law of Iran, has provided some rules to facilitate the working place by parties, whether individuals or businesses set. Different assumptions about the conditions will be examined below.

The rules of determining the business location

Model Law and the Convention on the International Sale of Goods have not established any rule to determine the place of business. Apparently, the differences in internal rules of countries in determining a criterion for merchants' residence have caused that these rules refuse to determine a rule for business place of merchants. But the Electronic Communications Convention (Geneva, 2005) at the paragraph "C" of Article 4 defines the business place and provides: "Place of business is to establish a place where a person establishes a permanent company for economic activities and it does not include the place of temporary supply of goods or services out of the certain place. However, according to this definition, we can not recognize the domicile of a legal person, because a person, either real or legal, may possess several permanent establishments in various countries in which his economic activities are pursued. This definition is applicable to Articles 1 and 6 of the Convention (7). Therefore, the convention cites the real address rather than the imaginary and virtual address. It is assumed that the persons' business center is the place declared by them, unless other person asserts its incorrectness (article 6). Also doing the former transactions in one place or disclosing the information by one of the parties may be evidence on the business center. Therefore, the convention relies on the information of location provided by each of the parties and it is regardless toward the place of technical equipments or the place where you can access an information system. This prediction is very significant because it reflects the global consensus about the topic of "establishment of business center for merchants in the Internet environment" [14]. Suppose the seller introduces a place as his working place where there is not substantially any business location. It is also common in the business world that merchants locate their warehouses in different places to send the needed and wanted goods to buyers from the nearest warehouse. If merchants introduce none of these, its contrary will be proved. Electronic Commerce Law in Iran like the UNCITRAL Model Law has not provided a definition for the business place, but at the end of paragraph "A", article 29, which is related to the number of business places, provides: "b) if the bidder has more than one place of business or employment, the closest place to the transaction would be the principal place of business, otherwise the principle place of company will be the business place. The principle place of company is the same criterion which has been determined as the legal residence of persons in article 22 Q. A. D. M and 590 of the Commercial Code and article 1 of registration law of companies. Of course, the problem with the concept of "principle" is proposed here too, it is that "if domicile is an operation center or a legal administration place". The problem in this regulation, paragraph B of article 29, is the lack of determining the position of real merchants. While in this regulation the business place has been determined for all assumptions, but it has not been considered for real trader. According to article 590 of the Commercial Code: "The residence of a legal person is where the legal person's office is located there", while the latter part of article 1002 of the Civil Code provides: "... the residence of legal persons will be their operation centers". It is important how to judge this contradiction between article 590 of the Commercial Code and article 1002 of the Civil Code. In other words, which of the sites mentioned in this article should be considered as the domicile of a legal person? The principal center of legal person (article 590 Q. t) or operation center (article 1002 Q. M) or these two terms do not have the same meaning? Some people believe: since the Civil Law was enacted after the Commerce Law and they are different regarding the domicile of a legal person, we have to accept that Civil Law abrogates the Commercial law, they also state: In today's law, the domicile of legal persons is their operation centers [15]. But most of Iranian lawyers believe that the general law does not abrogate the special law, unless its abrogation has been expressed clearly.

- 1) Commercial Law is a special one and article 1002 of the Civil Law has not stipulated that the mentioned rules in Commerce Law about the legal persons are obsolete in terms of residence.

- 2) 2. Article 1 of Companies Registration Law (passed in 1931) also has decreed: "Any company, which is made in Iran and its principal center is located there, it is assumed as an Iranian firm." Under this article, in order to determine the Iranian or foreign citizenship, the principal center is a criterion not the operation center. When we consider the fact that the nationality of companies is relevant to their domicile (article 591 Q. M.), it is elicited from Companies Registration law that legislator has known the principal center and domicile as the same things.
- 3) In accordance with article 1002 of the Civil Code, the business center of real persons should be their important center of business. As for legal persons, the same criterion in the Commerce law has been approved.

Parties' authority in determining the business location

Geneva Convention in paragraph "1" of Article 6 has established a rule for the place of business, the article states: "It is assumed that a person's place of business is where he has set it, unless the other party proves that the presenter of address does not have any business place there". Convention merely has made an assumption that each of the parties can determine their own business places, but this assumption can be rejected by the other party, namely the presumption is not absolute and the parties can not create fictitious business location for themselves, and if one party proves that the other contract's party has not any relationship with the introduced commercial location, this assumption is rejected. This regulation is related to contracts made by electronic tools, it is not current in non-electronic contracts. In International Convention, such a rule has not been set, and only in article 10 of the convention regarding the multiplicity of business places, it has been stated that the closest relationship with each transaction should be discovered. Article 10 provides: "In terms of the convention: A) If a party has more than one place of business, considering the conditions before and during the contract, the place would be the business place where has the closest relationship with transaction..." But in electronic contracts in accordance with paragraph "1" of article 6 of the Convention, if the seller has multiple business locations in cyberspace, he can introduce just one of the existing commercial places as his own commercial place in all the transactions not a place where has the closest relationship in every transaction. In the law of electronic commerce in Iran, there is not such a regulation of convention, but in paragraph A of article 29, it has emphasized that parties can determine the business location with an agreement between them. Article 1010 of the Civil Code has allowed that in a contract, with an agreement or unilaterally, one of the parties determines another place rather than his own true home as his residence. But what seems different in this law is that the impact of determining the residence is limited to performance of its obligations or delivery the same papers. In this regard, the article 78 of Civil Procedure Code states: each of the parties or their lawyers can choose a place to deliver the summon papers and its appendages in the city of court and declare to the court's office, in this case all the papers related to dispute are delivered at the specified location.

Multiplicity of business place

If one of the parties has multiple places of business, Geneva Convention (Electronic Communication, 2005), considering the situations before and after the contract, considers the place, where it has the closest relationship with the transaction, as the commercial location. Paragraph "2" of article 6 of the Convention provides: "If one party has not determined the location of his business or he appoints more than one place of business, in terms of the convention, the place, where it has the closest connection with the contract, is known as the business place, but the situations and circumstances before and after the contract should be taken into consideration (7). Prior to the enactment of the Law of Electronic Commerce in Iran in 2003, there were not any rules concerning the cases in which merchants or commercial companies had more than one place of business. However, the article 36 of former procedure law approved in 1939, article 22 of the new procedure law, as well as the article 1 of registration law of companies, know the principal center as the domicile of companies for cases, in which a company has several

branches, There is one exception on this principle: residence of legal persons is considered as commercial company or its principal center, this exception is related to lawsuit against the company. As a general principle, any complain should be proposed in the court of defendant residence, however the articles 370 and 38 of the Civil Procedure Law provides an exception that some lawsuits against the legal persons could be proposed in another place rather than the domicile of legal person and if there are multiple branches, lawsuits raised from the commitments of each branch and persons from outside should be presented in courthouse in which the party's branch is located [16]. But our Electronic Commerce Law with an adoption of paragraph 4 (a) of article 15 of the Model Law, initially, introduces the closest place to original transaction as the business place of trader or trading companies, otherwise it has considered the original place of company as its commercial location. Paragraph "b" of article 29 states: If the bidder has more than one place of business or employment, the closest place to transaction will be the business place; otherwise the principal place of company will be the commercial location.

CONCLUSION

One of the main goals of using the electronic commerce is to make speed and ease in commercial business. Another goal is to integrate the rules of international trade, which has provided the necessary arrangements and also it facilitates the international relations of merchants by suggesting the proposed uniform rules. The UNCITRAL Model Law on Electronic Commerce and consequently, the relevant laws in various countries have tried to not be different the legal rules governing on electronic commerce with traditional rules of business in different countries and also with uniformed rules of international trade, so the using of the cyberspace in international trade will has the lest legal problems and conflicts. In case of the place of contract formation, UNCITRAL Model Law and the Law on Electronic Commerce in Iran have stated the problem well and clearly. These rules states that in distant contracts, the place of sending and receiving the data message depends on the parties' business place or legal residence. Given the nature of electronic contracts, they do not consider the parties' location of information system as a criterion. So in formed contracts through electronic media, the place of contract formation is in fact the commercial place or legal residence.

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