

Requirements of the Formation of Electronic Contracts in Iranian Law in In Light of International Documents

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Abstract

The emergence of new information and communication technologies such as computer and mobile phone as well as social networks and their growth and development in recent two decades has provided the possibility of reducing paper methods and even eliminating it in commercial transactions. The contract that their conclusion before emerging these technologies required days, but months, and occasionally required traveling to other countries and exchanging paper reasons, now it can be done in several minutes and even seconds without paper involvement. However, besides the undeniable benefits of using electronic communications, these tools have created new challenges in terms of the way of confirmation of essential conditions for the conclusion of electronic contracts, such as capacity, consent, the subject of deal and its legitimacy and also in terms of time and place of formation of electronic contracts. Regarding the challenges associated with required essential conditions for the conclusion of electronic contracts, the Electronic Commerce Code of Iran has not specified a certain rule and apparently assigned it to the doctrine and judicial procedure. But in terms of time and place of formation of these contracts, the legislator has specified rules on e-commerce of 1996 by inspiring regulations of United Nations Commission on International Trade Law (UNCITRAL), that sometimes have objections in terms of incorrect translation or misinterpretation from these regulations.

Keywords: *Electronic contracts, Offer and acceptance, Capacity, Consent, Trade direction, UNCITRAL Model Law on Electronic Commerce, United Nations Convention 2005 on the Use of Electronic Communications for Concluding International Contracts, Time and Place of Formation of Contract*

Introduction

As the French lawyer, Xavier Linant de Bellefonds, has stated that e-commerce, which is surrounded by a number of rules related to the legal status of its agents, advertising, consumer rights, and so on, is mainly done through the conclusion of contract. The contract between the supplier and the customer can be concluded in various legal forms: contract of leasing objects (supplier of various addresses and information), leasing services (advertising of goods, referral and all forms of providing service, etc.) and, finally, contract of sale when ownership of an immaterial and material objects is transmitted.¹ There is no definition of e-commerce or electronic contracts in Iranian E-Commerce law. Article 14 of the French Law of Trust in the Digital Economy of 2004 has defined electronic contracts as: "*The economic activity that the person proposes or guarantees supply of goods or services remotely and electronically*". In the legal context, there will be not being real e-commerce unless the subject of transaction (sale of goods or services) is carried out on the network (on-line). It can be said that any factor that appears on the networks as a supplier of goods or services is e-commerce.²

The Iranian E-Commerce Law is inspired by the regulations of UNCITRAL³, in particular in what related to time and place of sending and receiving of data message, and its content may also be offer and acceptance. While, on the one hand, sometimes due to mistake in the translation or misinterpretation from these regulations, the rules not have sufficient precise. When contracts related to such commerce are concluded by distance and without the physical presence of the parties, the study of requirements of the formation of electronic contracts is necessary. In this regard, on the one hand, the confirmation of essential conditions for the validity of transactions, such as the consent of parties, capacity and legitimacy for the transaction is necessary (first part), and on the other hand, the determination of time and place of formation of electronic contracts in the Iranian law has great importance (Second part).

First Part – Confirmation of essential conditions for the conclusion of electronic contracts. The unprecedented growth of the use of Internet and increasing e-markets led the

¹Xavier Linant de Bellefonds (1998) Electronic Commerce Law (with Analysis of Iranian E-Commerce Law), Translation and Research by Sattar Zarkalam, Shahr-e Danesh Publication, Fourth Edition, 2017, p. 73.

²Alain Hollande & Xavier Linat de Bellefonds (2008), *Pratique du droit de l'informatique et de l'internet*, éd. Delmas, 6ème éd. pp.221-222.

³In this article, when it is speaking about UNCITRAL Model Law, the purpose is UNCITRAL Model law of the United Nations Commission on International Trade in Electronic Commerce 1996.

tendency of consumers to e-commerce more than ever. At the same time, the confirmation of the essential conditions for the conclusion of electronic contracts is necessary. However, what is so important in these types of contracts is how to confirmation of these conditions. Given that electronic contracts are concluded in the absence of parties, confirmation of capacity and consent in particular by the supplier of goods is inevitable. Regarding two other conditions, i.e. the legality of the object of contract and its legitimate cause, it is necessary to pay attention to the features associated with the electronic form of contract.

(A) Capacity confirmation. As contracts that are concluded on paper forms and traditionally with presence of the parties of contract, the existence of capacity in electronic contracts must also be confirmed. Basically, in these contracts, two types of non-capacity need to be investigated: foolish and minority. Because the new generation typically deals with the Internet and e-markets, the issue of non-capacity is raised about minor. All countries recognize the non-capacity caused by minor, although they do not agree on its age and the applicable sanction in this area.

A question raised in this field is whether a child who concludes an electronic contract using his parent's credit card number can order a product?⁴In response, it should be said, if non-capacity is accepted by both parties, there will be not be a contract, and the seller must, as soon as informed, regain the goods sold and return the money. However, a supplier who neglects in control of information related to his customer's age, while claiming his non-capacity, he will be faced with the risk of fault in contracting contract.⁵

In the absence of age-related information, because the control of customer's capacity is impossible for seller, the "mandate apparent" theory ⁶should be applied. Based on this theory, it is assumed that the parents of the child are the parties of contract and considered the debtor of the price (goods or services). Hence, parents should reduce the potential risks by applying some software controls that limit the child's accessibility under their supervision to his favorite business sites.⁷

⁴ Xavier Linant de Bellefonds, Op.cit. pp. 74 -75.

⁵ Culpe in contrahendo

⁶ Here, the mean is apparent mandate, which is one example of the theory of appearance.

⁷Ibid, pp. 74-75.

B) Parties consent confirmation. Consent is the result of the wills that are on the same path. On the Internet, these consecutive wills are transmitted in the form of data message. Thus, the data message indicating the acceptance of customer following the message of a supplier theoretically with the electronic signing causes contract.

1- Necessity for the data message including offer and acceptance. However, in Iranian civil law, the consent principle of contracts or non-formalities governs, but the necessity of electronic contracts is the existence of data messages containing offer and acceptance. In other words, although in a traditional and non-electronic environment, offer and acceptance can be exchanged verbally or even practically that indicates consent and intention, but when the contract is concluded using electronic communications, the exchange of data messages is inevitable indicating the will of parties. According to Iranian E-commerce Law, offer maker is interpreted as the originator, which is the main source of the data message, the data message is generated or sent by him, but not includes a person acting as intermediary in the data message. In contrast, the offer maker audience has been interpreted as an audience who is a person according to Iranian E-commerce Law that the originator intends to receive the data message but does not include a person acting as an intermediary.⁸

According to Article 2 (a) of the Iranian E-Commerce Law, "data message" means *"Any symbol of event, information or concept that is generated, sent, received, stored or processed by electronic, optical or new technology. In accordance with Article 6 of the same law, "If writing is required in terms of law, the data message is written in judgment."* This provision is adopted by paragraph (1) of Article 6 of the law of UNCITRAL Code, which provides: *"(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference"*.

Article 6 referred to above which accepted a few exceptions that established a functional equivalence between the writing and data message. In accordance with Article 6, the following legal acts are not accepted in the data message form that are: the immovable property ownership documents, the sale of pharmaceutical materials to final consumers, the declaration, warning

⁸Deputy of Judicial Education and Research, Rules of Iranian E-commerce Law (2010), Jangal Publishing, First Edition, p. 126.

or similar phrases issued a specific order for use of goods or prohibits the use of certain methods as action or omission.

Expression of will in electronic contracts with some electronic behaviors gets meaning that is realized by completing forms on a computer screen and with two (or several) clicks after reading the contract proposal. However, consent has the same nature in these types of contracts with contracts concluded on paper or verbally, i.e. some behaviors turn the project of purchase into a legal act and leads to intercept of wills.⁹ The number of clicks that lead to the fulfillment of the element of satisfaction or ultimate intercept of the wills, depending on the information exchanged between the parties, in particular, legal requirements for consumer contracts will be different and can increase up to seven clicks or more.¹⁰ The question raised here is whether a cyber- consumer can wrongly claim as a defect of consent despite the clicks required to conclude a contract? According to the famous French lawyer in the field of contract law, the answer is negative, because in this assumption, both the validity of the contract, but the existence of it is doubtful, and the proof is with a person who denies the existence of the element of consent, i.e. with cyber supplier and not in responsibility of consumer.¹¹ Some authors have raised several other conditions for the validity of electronic contracts.

The first condition is the possibility of recording electronic exchanges for future reference and use. This condition has been interpreted as "accessibility", which has been considered by Iranian legislator in paragraph H, article 2 and paragraph A, Article 8 of Iranian E-Commerce Law. The second condition is that the customer clearly knows that his action (such as clicking) leads to the conclusion of a binding contract, and otherwise the customer's action cannot be considered as acceptance. It is also necessary to give enough opportunity to customer to enable to review the terms of the contract and to know its content.¹²

⁹ Philippe Le Tourneau, *Contrats informatiques et électroniques* (2006), éd. Dalloz, 4^{ème} éd. 283.

¹⁰ Xavier Linant de Bellefonds, *Op.cit.*, p. 77.

¹¹ RAYNOUARD (A.)(2000), "La formation du contrat électronique", *in* Travaux de l'Association Henri Capitant, *Le contrat électronique*, Journées nationales, Tome V, Toulouse, Coll. Droit privé, éd. Panthéon Assas, 2002, p. 15 et s.

¹² Abdolhossein Shiravi, *International Trade Law* (2015), Samt publishing, Eighth Edition. P. 424.

2. The data message including signature: In accordance with Article 7 of the Iranian E-Commerce Law, "*If the law requires the existence of a signature, electronic signature is appropriate*". This article has been adapted from Article 7 of UNCITRAL Model Law, with the difference that the recent article of functional equivalence of electronic signatures with traditional signature has been subject to conditions.¹³ The Iranian legislator, without defining the signature, on the one hand, consider it necessary to validate the ordinary document in Article 1293 of the Iranian Civil Code, and on the other hand, in accordance with Article 1301 of the same law, "*the signature on the writing or the document is opposable against the one who signs it*". In fact, from the two articles, several main functions of signature are deduced. On the one hand, the signature makes it possible for the signer to be identified (the function of identification); on the other hand, it provides the required confidence because person has interfered in signature" (Function as a evidence), and eventually links between the signer and the content of document (assignment function).¹⁴

In electronic signature, the Iranian E-commerce Law has recognized two levels of signatures: a simple or uncertain electronic signature that only enables the signer to be identified (Article 2) and the reliable electronic signature that, in addition to identify the signer, guarantees the uniqueness, the exclusive control of signer to it, and the integrity of the data message (paragraphs K Article 2 and Article 10). In terms of the value of affirmation, a simple or uncertain signature is accepted as a normal document that its originality can be questioned through denial, doubt or forgery, and the reliable electronic signature that it is considered as a valuable document and only can claim forgery to it. (Article 15 of the Iranian E-Commerce Law).

(C) Characteristics of the subject of electronic contracts. The subject of electronic contracts, such as contracts concluded in the paper environment or verbally, must be lawful and financial value. As some lawyers have pointed out, "the legality of goods varies considerably from the

¹³ (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement. (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

¹⁴ For other functions of sign see: United Nations Commission on International Trade Law (UNCITRAL) (2013), Trust in e-commerce, legal issues related to the use of certification ways and electronic signatures, translation of Sattar Zerkalam, Shahre-Danesh publications, second edition. P. 34.

laws of various countries. Even if some of these commodities, such as narcotics, are prohibited by the public, others may oppose or agree with public order and morality including cryptographic devices, drugs, racist documents, and so forth."¹⁵ In addition, the sale of data that there is according to the law of exclusive rights to them and protected through intellectual property rights, trade secrets, professional secrets, and privacy are illegal.

D) Illegitimate cause in electronic contracts

Paragraph 4 of Article 190 of the Iran Civil Code considers the legitimacy of the cause of contract as another essential condition of contract conclusion. The legitimacy of cause is not defined in Iranian civil law, but it is in fact the reason of transaction is the main purpose of the trader from concluding the contract. The Iranian legislator has invalidated the contract with illegitimate cause on the assumption that the direction is mentioned in the contract. Some lawyers have considered the term "illegitimate" as contradictory to the rules of law, whether the rules are based on Islamic law or jurisprudence, or good morals, or other matters relating to public order. However, it can be said that the legislator has intervened in order to preserve the interests of society and the requirements of public order. Of course, from jurisprudential point of view, an important reason that can be found to invalidate a trade with illicit motivate is the prohibition of cooperation on enmity, and in cases where such a title is true, and on the assumption of accepting the implication of refusing to cooperate with the enmity on the corruption of transaction, the sentence is on voiding contract with the direction of illegality.¹⁶ There is no difference between the traditional and electronic environment about prohibition of illegitimate cause, and in order to announce electronic contract for this reason, it is required that the illegitimate cause in data message including contract to be noticed.

Second part – Determination of the time and place of conclusion of electronic contracts

The Iranian E-Commerce Law, adopted in 2003, did not specify the time and place of formation of electronic contracts in contrast to UNCITRAL regulations. In fact, contrary to the signature, the electronic records and writing that Iranian E-commerce Law, in accordance with

¹⁵Xavier Linant de Bellefonds, Op.cit., p 75.

¹⁶ Seyed Mohammadhadi Ghabuli Derafshan and Seyed Mohammadmehdi Ghabuli Derafshan (2012), Necessity or non-necessity of the essential conditions of accuracy of contracts for the terms of the contract, Journal of Civil Rights Knowledge (Payame Noor University), Volume 1, Issue 1, Summer and Fall 2012, 27- 36

the rules of UNCITRAL has placed it equivalent to the signature and paper records, has not transmitted the UNCITRAL model law to Iranian law in the field of offer and acceptance of Article 11 and, in other words, not created functional equivalent between electronic offer and acceptance and traditional offer and acceptance. According to paragraph 1 of Article 11 of UNCITRAL model law: *"In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose"* However, the Iranian E-commerce Law has devoted the fourth chapter from its first chapter to "the time and place of sending and receiving "data message ". In accordance with paragraph A, Article 2 of the law, data message *"means any symbol of an event, information or concept to be produced, sent, received, stored, or processed with electronic, optical or new technologies of information."* According to this definition, since in Iranian law, contract is formed by intercept of wills or offer and acceptance, if the content of data message is offer or acceptance, the provisions of Articles 26 to 30 of the Iranian E-commerce Law can be used for determining the time and place of electronic contracts.

(A) The time of conclusion of electronic contracts

Determination of time of electronic contracts is important, such as any other contract in a variety of direction, including the impossibility of referring from offer and acceptance, the time of transfer of ownership, the time of beginning of prescription and delays and the conflict of laws....¹⁷

In distance contracts, including in electronic contracts that are concluded without the physical presence of the parties of transaction, the determination of the time of intercept of wills or, in other words, the time of the exchange of offer and the acceptance may be faced with problems such as the silence of communication device of the other party, its non-working, non-activated of communication system, so that it between the offer and acceptance to be a distance. In this case, it has long been questioned when the contract is formed? According to the answers given to this question, various theories of acceptance, submission of acceptance, receiving acceptance

¹⁷ To see the description of these directions: Gholam Nabi Feizi Chekab, under the title of the moment of contracting through electronic intermediaries, the previous and a series of articles of the conference, Examining the legal aspects of information technology, the Legal Deputy and Judicial Development of Judiciary, June 2004, pages 411 to 436, especially pages 420 to 423.

and aware of acceptance have been formed, among which two theories of submission and receipt has more followers.¹⁸ In some countries, such as Belgium, theory of time of receiving acceptance, explicitly contracts of electronic sale has been accepted as a law.¹⁹ There is no single view in this field in Iranian law, but one of the professors of law by pressing the article 191 of Iranian Civil Law²⁰, considered that the theory of submission of acceptance has been chosen and by analyzing various theories, he has concluded that: "Accepting is considered declared when the letter containing it has been given to post. The proof of contrary to this principle requires to evidence²¹ ".

The Iranian E-commerce Law has described both the time of sending and time of delivery of data message in accordance with the regulations of UNCITRAL model law and without specifying a definite position, thus allowing the two theories of declaring acceptance (submitting acceptance) and receiving acceptance. More precise investigation of these regulations seems to be necessary.

1- The time of sending the data message

Article 26 of the Iranian E-Commerce Law is set as follow by modeling the paragraph 1 of Article 15 of UNCITRAL model law: "*(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator* "

In the interpretation of this article, it is stated that: "This information system may belong to an intermediary, for example, a certificate of signature or belong to the addressee. The information system may also belong to a third person that the addressee previously assigns him to send response. For example, in the context of his offer, he has announced to the addressees to send the response to a person (E. Mail) "²². Article 26 above indicates that the criterion of the time of sending a data message, which may include the offer or acceptance is to be entered the

¹⁸ For the detailed consideration of these views: Naser Katouzian, Civil Rights, General Rules of Contracts, Volume I (Concept of Contracts and Validity of Contract of Consent), Fourth Edition, 1997, Pages 350 to 359

¹⁹ Guillaume RUE, La vente en ligne et consommateur, in Protection du consommateur, Pratiques commerciales et T.I.C., Jacques LAFFINEUR, éd., CUP., Vol. 109, p. 95

²⁰ "*Contract is concluded for the purpose of creating, provided that indicates intention*".

²¹ Naser Katouzian, Op.cit., p. 263, No. 191

²² Ghulam Nabi Feyzi Chekab, Op.cit. p. 429.

information system and out of the control of originator. According to Article 2 of Iranian E-commerce Law, originator is the main source of "data message" that "data message" is generated and sent by it, and not includes a person who acts as intermediary in the data message. Therefore, if the originator sends the data message containing the offer or acceptance, but not enters the information system out of control for any reason, the send will not be fulfilled, and if enters the system late, the time of entering will be considered the sending time.²³ However, the United Nations Convention on the use of electronic communications in international contracts 2005, which the Government of the Islamic Republic of Iran has temporarily signed, according the approval dated 2007, while describing the submission and receiving of e-communications apparently has determined a different criterion for submitting. According to paragraph 1 of Article 10 of this Convention: "*The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.*"

In an interpretation written by some writers on this article, it is said that: "The Treaty for specifying time of sending first deals with the principle and then the exception to it. The principle is that the electronic communication is deemed to be sent when it is out of control of the originator or the person who communicates, but in some cases due to defect of device or any other factor, this connection may not be excluded from the originator control. In this case, the time of sending the communication is time of receiving communication specified in paragraph 2 of Article 10. Therefore, in cases where it is not clear that the communication has been removed from the control of originator, it must be established that the communication has been received"²⁴.

An interpretation that the Secretariat of the United Nations Commission has written for International Trade Law (UNCITRAL) in paragraph 1, article 10 of convention is partly different with recent interpretation: "*In practice, the result should be the same as under article 15, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce, since the most easily accessible evidence to prove that a communication has left an information system under the*

²³ Ibid, pp. 429 & 430.

²⁴ Ali Rezaee, Electronic commerce law, Mizan Publishing. First edition, summer 2008, Page 211.

*control of the originator is the indication, in the relevant transmission protocol, of the time when the communication was delivered to the destination information system or to intermediary transmission systems"*²⁵.

In the interpretation of second part of Article 10, paragraph 1 of Convention, this section indicates that electronic communication has not been removed from the information system depending on originator. The assumption that is not in Article 15 of UNCITRAL Model Law occurs when, for example, the parties of data sends messages with the same information system or single network, so that the electronic message data never actually enters into the system belonging to the other side. In such a case, the sending time and the time of receiving electronic data message will be the same²⁶.

2. Time of receiving data message

In accordance with Article 27 of Iranian E-commerce Law: *"The time of receiving data message will be in accordance with the following conditions: a. if the contact information system is set up to receive the data message, the receipt will be done when: 1. the data message data is assigned to the certain information system. 2. If data message is entered into the contact information system other than a system specifically determined for this purpose, the message is recovered. B. If the contact not determined an information system for receiving, receiving will be done when the data message enters the information system of contact."*

This article, which is derived from paragraph 2 of Article 15 of UNCITRAL model law, has predicted two different assumptions to determine the time of receiving data message:

A. The addressee has set a specific information system to receive message data. In this case, there are two modes. First, the originator may send the message to the determined information system. In this case, reaching data message occurs when the data message is entered into the same information system, although the contact is not aware of it. Second, the originator may send the data message to another contact information system, except a system that is

²⁵ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998. United Nation Publication, New York, 1999, p.45.

²⁶ United Nations Convention on the Use of Electronic Communications in International Contracts (2005), United Nations publication, New York, 2007, p.60.

exclusively determined for this purpose. In this case, from the moment that the addressee recovers data message, it is considered received, not the moment entered this system.

B) The addressee not specified a particular information system to receive data message. In this case, as soon as the data message is entered into each of the information systems of addressee, it is considered received. It can be said that the data message is entered into the information system of addressee that the addressee can investigate and study it²⁷. Article 10, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 provides about time of communication (data message): *"The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address"*²⁸.

It is referred in the explanatory note of the Secretariat of United Nations Commission on International Commerce Law and UNCITRAL, in comparison between paragraph 2 of Article 10 cited above and Article 15 of UNCITRAL model law (which Article 27 of Iranian E-commerce Law has followed it) that: *"Paragraph 2 of article 10 is conceived as a set of presumptions, rather than a firm rule on receipt of electronic communications. Paragraph 2 aims at achieving an equitable allocation of the risk of loss of electronic communications. It takes into account the need to offer the originator an objective default rule to establish whether a message can be seen as having been received or not. At the same time, however, paragraph 2 recognizes that concerns over security of information and communications in the business world have led to the increased use of security measures such as filters or firewalls which might prevent electronic communications from reaching their addressees. Using a notion common to many legal systems and reflected in domestic enactments of the UNCITRAL Model Law on Electronic Commerce, this paragraph requires that an electronic communication be capable of being retrieved in order to be deemed to have been received by the addressee. This*

²⁷ Ghulam Nabi Feizi Tabab, Op.cit. pp. 430 and 431.

²⁸ United Nations Convention on the Use of Electronic Communications in International Contracts, Op.cit., p.6.

requirement is not contained in the Model Law, which focuses on timing and defers to national law on whether electronic communications need to meet other requirements (such as “processability”) in order to be deemed to have been received²⁹”.

About recognizing the recovery capability of electronic communications, the note of Secretariat of the United Nations Commission for Electronic Commerce considers it as a thematic issue that is beyond the scope of Convention 2005. Moreover, the assumption that electronic communication is recognized accessible by an addressee that is filed on his e-mail address and can be ineffective because the addressee actually has no means for accessing electronic communications.³⁰

Apart from the above, another important difference between the Convention 2005 and the UNCITRAL Model Law on e-commerce has not been determined in the rules related to the receipt of electronic communications sent to the address. In this case, UNCITRAL Model Law has distinguished communications sent to another system other than the designated system and the communications sent to the information system of addressee in the absence of agreed information system. In the first assumption, until the addressee not accessed data message, electronic communication is not considered received. In justifying this rule, it is said that if originator ignores the commands of the addressee and sends electronic communications to another information system other than the designated system, it will not be reasonable to consider it received until the definite access of addressee to the data message. In the second assumption, vice versa, the model law is based on the principle that it isn't important for addressee that data message to be sent to which system. In this case, it can be reasonably assumed that he will accept electronic communications sent to any information system.³¹ In this regard, the United Nations Commission for International Trade believes that the developments taken place since the enactment of UNICTRAL Model law require the abandonment of the initial rule. In addition to this accepted issue that various entities have

²⁹. Ibid.61.

³⁰ Ibid.

³¹ Ibid.

different e-mail addresses and cannot be expected to do receiving communications in all their addresses that legally has binding results.³²

About the time of sending and receiving data message as was said, two important points should be noted:

The first point- As some authors have rightly emphasized, according to Articles 26 and 27 of the Iranian E-commerce Law, in many cases, the time of sending and receiving will be the same. Because, on the one hand, in accordance with Article 26, the sending of data message is successful when it enters an information system out of control of originator, on the other hand, in accordance with Article 27, a receipt is done when the information system of addressee is filed³³.

The other assumptions predicted in Article 27 have exceptional aspect. Thus, in spite of the fact that we consider the theory of sending acceptance or receiving acceptance, the time of conclusion of the contract, in electronic commerce, according to the concurrence of sending and receiving data, the message of both views will be met. Only in exceptional cases as failure of information system of addressee or the late recovery of the data message, there is distance between the time of sending and receiving data message that in this case, it is obvious that it should be referred to the rules of law and judicial procedure for determining the time of conclusion of contract. Of course, due to the lack of clarity of Iran's legal regulations in this area and the lack of judicial precedents, it should be inevitably referred to the theory of legal scholars and their interpretation from provisions related to the time of conclusion of contract.

Second point- Since Iranian government has adopted the United Nations Convention on the Use of Electronic Communications in International Contracts 2005, and its provisions on sending and receiving data message are slightly different from the provisions of the Iranian Iranian E-commerce Law, this question is raised that in cases of difference, which regulations should be followed? The answer is that on the one hand, Convention 2005 observes international contracts and does not include contracts concluded inside Iran or contracts that are not considered international. On the other hand, the note of the Secretariat of the United

³² Ali Rezaiee, Op.cit., p 115.

³³ Ibid.

Nations Commission on Electronic Commerce (UNCITRAL) has explicitly made positioning in this field. According to this note: *"The Convention on Electronic Communications to prevail over national law that according to it, electronic communications are considered received when regardless of whether they are understandable or usable or not is controlled by the addressee"* ³⁴.

Therefore, the Iranian E-Commerce Law and Electronic Communications Conventions 2005 will each be able to enforce and apply in its scope, so far in domestic contracts, as well as in international contracts that the party not joined to Convention 2005, the Iranian E-commerce Law (if Iranian law is the governed law) will be applied and in international contracts that its other part is the member of Convention 2005, undoubtedly the recent convention regulations will be governed.

B) The place of formation of contract

Given the cross-border and virtual nature of electronic communications, it is possible for contracting parties to residence in different places, sometimes in different countries, and their information systems are located outside their place of business and residence. In this case, the question arises where the place of concluding or forming a contract is? Determining the place of conclusion of contract is particularly important in terms of identifying the law governing the contract and, consequently, determining the effects of the contract. As the time of formation of contract, the Iranian E-Commerce Law did not respond directly to this question, but it guided us to the answer by specifying the place of sending and receiving data message. Article 29 of the Iranian E-commerce Law stipulates, in accordance with paragraph 4 of Article 15 of UNCITRAL model law on e-commerce in this area: *"If the place of information system is different from the place of receiving data message, the following rules shall apply: A. The place of business or work of originator is the place of sending data message and the place of business or work of addressee is the place of receiving data message, unless agreed otherwise. B. If the originator has more than one business or work place, the nearest place to the principle of transaction will be the place of business or work. Otherwise, the company's main place is business or work place. C- If originator or addressee has no place of business or work; their*

³⁴ United Nations Convention on the Use of Electronic Communications in International Contracts, Op.cit.

legal residence will be criterion."

In the interpretation of Article 29, it is necessary to pay attention to several points:

The first point- The authors of the Iranian E-commerce Law, in adapting of paragraph 4 of UNCITRAL Model Law, has not paid enough attention for the following reasons: On the one hand, the introduction of Article 29 is ambiguous. Because the phrase *"if the place of information system is different from the place of receiving data message"* unmeaning. Regardless of the fact that such an introduction is not required explicitly; the legislature could explain it as follows: "If the originator's place of information system is different from the place of information system of addressee." On the other hand, legislature in the translation of part (a) from paragraph 4 of Article 15 of UNCITRAL model law that is mistaken in paragraph (b) of Article 29 of Iranian E-commerce Law, because, in accordance with this part of model law: *"(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business"*³⁵.

The comparison between the two texts specifies that, firstly, in article 29, paragraph (b), only it is referred to "if the originator has more than one place of business or work" and the place of business of addressee is forgotten. Secondly, in paragraph (b) of Article 29 of Iranian Law, the term "work" has also been added which is unknown in Iranian E-Commercial Law. Thirdly, instead of *"closest relationship to the underlying transaction"* in paragraph (b) of Article 29, there is the term "closest place to the transaction principle", which lacks any legal status. Fourthly, contrary to the model law, which predicted the absence of operations, in paragraph (b) of Article 29, there is the term "otherwise the main place of company is the place of business or work", which, according to the terms of the beginning of clause is unmeaning.

The second point- Article 29 to determine the place of sending or receiving data message- which, if it involves offer or acceptance, it can be the place of formation of contract - the "place of business or work" is the criterion and only when the originator or the addressee does not have business or work place has known the legal residence as the place of sending and receiving data message. The term "place of business or work" is objectionable in several aspects. First, Iranian Commerce Law enforcers have placed "business or work place" in the same place as

³⁵ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, Op.cit, p.11.

the "residence" concept. While even if this term is synonymous with the "important center of affairs" or the "center of operations", according to Article 1002 of Iranian Civil Code, the case may be regarded as one of the criteria of determination of the residence of natural persons and legal persons and cannot be considered the same with residence. Secondly, regarding legal persons, the prevailing view in Iranian law is that, according to Article 590 of the Iranian Commercial Law and the first article of company registration law, the residence of legal persons is their main center. In this case, the "place of business or work" will have an unfamiliar concept.

If it is said that choosing a "place of business or work" to coordinate with foreign countries is in international contracts, the answer would be that the legislature could use other known criteria, in Iranian Commerce law, such as "main center", "center of operation" or "important center of affairs" instead of the term "residence".

Third point- According to Article 28 of Iranian E-commerce Law, which states: *"The provisions of Article 27 of this law are regardless of the place of information system."* It is specified that the determination of time of sending and receiving the data message does not essentially affect the place of sending and receiving data message and cannot be considered as the criterion for determining the place of the contract. However, there will be no obstacle to use the time of sending and receiving data message as a sign to prove the place of sending and receiving data message.

Fourth point- With regard to the phrase *"Unless contrary to it is agreed,"* that at the end of paragraph (a) of Article 29 of Iranian E-commerce Law, it becomes clear that the rules related to the place of sending or receiving data message have a complementary aspect and not authoritative. In other words, the legislature accepted the principle of freedom of will in the field of sending or receiving data message that could be the place of the contract.

The United Nations Convention on the Use of Electronic Communications in International contracts 2005 has devoted Paragraphs 3 and 4 of Article 10 to sending and receiving place of data message: "3. *An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.* 4. *Paragraph 2 of this article applies notwithstanding that the place where the information system*

supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article"³⁶.

In the explanatory note of the Secretariat of the United Nations Commission for Trade Law, in justification of paragraph 3 and 4, it is stated: *"The purpose of paragraphs 3 and 4 of article 10 is to deal with the place of receipt of electronic communications. The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law, namely, that very often the information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the place of an information system is not the determinant element and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt and that this place can be readily ascertained by the originator"*³⁷.

The explanatory notes state: *"Paragraph 3 contains a firm rule and not merely a presumption. Consistent with its objective of avoiding a duality of regimes for online and offline transactions and taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the phrase "deemed to be" has been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction other than the jurisdiction where the place of business is located simply because that was the place where an electronic communication had reached the information system where the addressee's electronic address is located"*³⁸.

In comparison between the provisions of Article 29 of Iranian E-Commerce Law and paragraph 3 of Article 10 of Convention 2005, it can be said that in the recent regulations, contrary to Article 29, only one criterion is set to determine the place of sending and receiving data message and that is the "place of business" of originator and audience. According to article 10, paragraph 4, of the convention, this place will be the basis of determining place of receiving, even if the place of the information system is outside the place of receiving data message.

³⁶ United Nations Convention on the Use of Electronic Communications in International Contracts, Op.cit. p.7.

³⁷ Ibid. p.64.

³⁸ Ibid.

As stated in the discussion of the time of sending and receiving, despite the signature of United Nations Convention 2005 by Iran, it should not be considered it in conflict with the provisions of Article 29 of the Iranian E-Commerce Law, because the electronic commerce law will be applied in domestic contracts and Convention 2005 in international contracts.

Conclusion

Iranian E-Commerce Law has provided the required legal infrastructure for the formation of electronic contracts. In what is related to the time and place of sending and receiving data message and its contents, which can be offer and acceptance, this law is inspired from provisions of United Nations Commission on International Trade Law (UNCITRAL). However, on the one hand, due to mistake in translating or misinterpreting these provisions, the rules in this field, especially regarding the place of sending and receiving data messages not have sufficient legal precision and on the other hand, UNCITRAL regulations in this area are different from Convention 2005 of United Nation on the use of electronic communications for the conclusion of international electronic contracts, although the scope of the recent convention is mainly international contracts that form using electronic communications. Regarding the time of electronic contracts, the Iranian E-commerce Law did not directly consider the offer and accordance from provisions of UNCITRAL model law, and not positioned in favor of any existing theories at the time of intercept of offer and acceptance (sending, receiving or informing) and assigned its detection to the courts. Regarding the way of establishing will or capacity of consumers or the subject of electronic contracts, the Iranian E-commerce Law not has specific rules. In this context, it seems that the legislator has assigned it to the judge's discretion, although no judicial precedents has been established in this regard.

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