

CONSUMER PROTECTION IN INTERNATIONAL ONLINE CONSUMPTION CONTRACTS: IN VIEW OF UAE LAW

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ABSTRACT

The accessibility to the internet is increasing rapidly nowadays, allowing the conclusion of a larger number of online international consumer contracts. Most national legislations handled consumer protection and internet contracts locally, as different jurisdictions have their own laws and regulations in that regard. However, there is no protection provided for online consumers globally. Therefore, consumers are in urgent need for protection at the present time where internet transactions witness a significant success internationally. This study covers this issue and its significance only according to the UAE law since it is very similar to other Arab laws in this regard. Therefore, the applicable UAE rules as well as the international judicial jurisdiction rules of UAE courts shall be applied. Such rules determine the cases which fall under the jurisdiction of UAE courts governing international consumer contracts entered into by state residents. It aims at determining the level of protection provided for the consumer by such rules and presents certain solutions that may raise the level of protection that the consumer must have, whether when determining the governing laws of contracts or stating the competent court to consider relevant disputes.

Keywords: Consumer Contract, Consumer Protection, Jurisdiction.

INTRODUCTION

Consumer contracts are deemed national in nature if all the contractual elements are from one state, yet they shall be deemed international contracts if they contain a foreign element;¹ recently, the latter is the most common. The reason here lies in the considerable progress in the internet. Using internet recourses as a platform for conclusion of contracts to satisfy consumer needs, led to the spread of international consumer contracts.

Business-to-consumer (hereinafter B2C) is the most common form of consumer contracts and may be used as a sample of the international consumer contracts to be examined for the purpose of revealing the legislative and judicial jurisdiction in the United Arab Emirates (hereinafter UAE) laws.

National contracts are doubtlessly subject to UAE laws and the Emirati courts are competent to consider national contracts in accordance with the jurisdictional rules of the UAE. Yet, consumer contracts that are concluded today are known as cross-border contracts (Bygrave & Svantesson, 2001). Such contracts are executed online through specialized websites and the parties are likely to be a trader or a vendor and a consumer, a natural or legal person; thus, they are deemed international contracts. The most common issues of such contracts are the

determination of the governing law (Al-Enazi, 2010), and the court competent to consider any disputes arising out of such contracts. Contractual and jurisdictional natures of internet sales frequently collide at the international level, in terms of various national laws of consumers and businesses. At present, internet jurisdiction in cases of international consumer transactions is not governed by a specific law that provides enforcement power for a foreign court judgment. Notwithstanding that all state aim to protect their citizens, whether consumers or businesses (Wang, 2008).

In normal international commerce contracts, which are Business-to-Business (hereinafter B2B) contracts, conflicts of law are resolved through the legal rules stipulated by the law; these indicate the cases where judicial jurisdiction falls under the national courts in disputes that include a foreign element. The issues here are: Are the same rules followed in determining the governing law and the competent court in international online consumer cases? Does this type of contract need specific rules to determine the governing law and the competent court?

The Emirati legislator intervened in national consumer contracts in order to protect the weak party, the consumer, whether during or before contracting. But, the question is: is that protection also provided under the Emirati private international law? (Umran, 1993)

As such, this research focuses on examining Emirati law as a sample of Arab laws since they are similar to a great extent. This study only handles the provisions for determining the governing law and the competent court in international consumer contracts as stipulated by UAE laws. The research problem focuses on revealing the level of the legal protection provided on international consumer contracts under UAE laws. This research uses an analytical approach to analyse legal provisions in Emirati law in order to discover the scope of the prescribed protection of consumer and the extent of the intervention required by the legislator so that protection shall be provided if inadequacies are discovered (Thabit, 1999).

Research Plan

This research shall be divided into two main parts: the first shall be dedicated to defining international consumer contracts and the relevant governing law. The second shall consider the international jurisdiction of UAE courts concerning international consumer contracts.

Definition of International Consumer Contracts

The Emirati legislator does not stipulate a specific rule of reference for international consumer contracts; nor does the legislator exclude the application of the party autonomy in the sense of freedom of contract, or self-arrangement of legal relations by individuals according to their respective will on consumer contracts. So, in principle, such contracts shall be subject to the general rules of private law in UAE regarding the applicable law on international contracts. This research shall discuss this issue and explain what is meant by international consumer contracts in UAE laws in two sections.

What is meant by International Consumer Contracts?

It is well known that consumer protection attracts the interests of legislation that offers different techniques on consumer protection before and during contracting (Khalil, 2009). The

need to provide consumer protection is principally raised from the position where the consumer suffers. In addition, there is no balance between the consumer and the vendor who provides a service or a commodity. The latter enjoys a strong economic power in its contractual relation with the consumer. The economically strong party imposes its conditions on the consumer, which leads to impose contractual obligations on the consumer that finally work for the vendor's interest. Therefore, the result would be an unfair contractual relation that requires the legislator's intervention to restore its balance (Gemie, 1966).

The term 'consumption contract' is a modern legal term. It is used to refer to traditional contracts, each in its own name, such as: sales, services, or loan contracts (Salama, 1996), and other contracts that intend to satisfy personal or familial needs. The legislator intervenes to protect the weak or non-professional party who wants to satisfy his needs through such contracts.

The term consumer is defined by the UAE legislator in Article (1) of Federal Law No. (24) of 2006 concerning consumer protection, as:

"Any person obtaining a commodity or service for or without a price to satisfy his own or another person's needs"

The Dubai Court of Cassation, in its decision on Appeal No. (239) of 2009, held on April 12th 2010, clarified this definition, stating that obtaining a commodity for commercial purposes is not considered consumption. The definition of 'consumer' does not apply as long as the purpose of buying is for trading rather than satisfying personal or familial needs. The judgment states:

"Whereas the activity of the Appellant according to its commercial license no. (...) is the trade of CDs and optical tapes, which confers upon it the character of a supplier and denies it as being the consumer, who obtains the commodity or service to satisfy his needs, not to trade with it."

Accordingly, the consumer is any natural person obtaining a commodity or service to satisfy his personal or familial needs, not to gain profit or professional interest. As such, consumption contracts, according to UAE Law, are contracts relating to a commodity or service for or without a price intended to satisfy a personal or familial need.

But, when do these contracts become international? The UAE judiciary confirmed in many judgments² that the contractual relation is of international character if a foreign element is connected with its own elements, such as the element of the parties, subject-matter, or the causation of such relation. Hence, the consumption contract is considered of international character if the provider or the consumer is a foreigner, if the commodity-the subject-matter of the contract—is located outside UAE, or the contract has been concluded or executed outside UAE. Therefore, international consumption contracts may be defined under UAE laws as consumption contracts to which a foreign element is connected.

Applicable Law to International Consumption Contracts under UAE Legislation

As previously stated, the UAE legislator does not specifically provide for determining which law is applicable to international consumption contracts. Therefore, the application of conflict of laws rules determine the law governing international contracts, such as an international sale contract or technology transfer contract. Article (19/1) of the Civil Transaction Law of the United Arab Emirates provides a rule in case of conflict of laws, which states that:

“Contractual commitments in form and context shall be governed by the law of the State where the common residence of the contracting parties is located. Should they have different residences, the law of the State where the contract is made shall apply, unless the parties agree otherwise, or the conditions show that another law is to be applied.”

It is clear from Article (19/1) that the applicable law to international consumption contracts is based on the express will of the contracting parties. If the parties chose a particular law to govern their contract, the contract is subject to that law. If the parties have not expressly agreed on the applicable law or have agreed that the contract shall be subjected to rules not pertaining to a specific national law, then Article (19/1) refers to applying the law which determines the intention and implied will of the contracting parties.

There are several evidences that reveal the implied will of the contracting parties to apply a particular law of a state. A single proof does not suffice to signify this undeclared intention; more than one piece of evidence is required. Such evidence includes if the parties agreed to subject their contractual disputes to courts of a particular state, it evidences that the parties have the intent to submit the contract to the law of such state. It also evidences that the parties intend to execute the contract with a particular language; or to agree upon a specific currency to be paid; or to use terms prescribed in a particular law; or to agree on the place of making or executing the contract (Ibrahim, 2001; Sadek et al., 2006; Riad & Rashed, 1999).

For contracts made through the internet, all the above evidences may also be used to infer the implied will of parties.

However, in case of failure of the express or implied will of the parties for contracts made through the internet, Article (19/1) determines which law governs the dispute by providing two options: if the contracting parties have the same place of residence, the common *lex domicile* shall be applied; if they have different place of residence, the *lex loci contractus* shall be applied (Jubair & Naseer, 2015).

The first rule, which is the common domicile, does not raise an issue in concluding the consumption contract through the internet. However, determining the place of the contract is considered problematic when contracting through the internet. If a consumption contract between two parties is concluded through the internet and the parties have not explicitly or implicitly agreed to a particular law to govern the contract, and do not share a common residence, the applicable law is the law of the state in which the contract was concluded. Yet, in which State was the contract concluded?

In the case of contracting between absentees through modern means of communication such as the internet, Article (142) of the Civil Transactions Law specifies the place where the contract is concluded as the place where the offeror is notified of the acceptance to the offer. In other words, the place of the contract conclusion shall be determined as the place where the vendor is notified of acceptance.

However, the difficulty is in determining the place where the vendor is notified of acceptance when the contract is concluded by electronic correspondence. In order to avoid such difficulty, the UAE Federal Law No. (1) of 2006 on Electronic Transactions determines the time when a data message is considered received.

Article 15 (2) of the UAE electronic Transactions Law provides:

Three: Unless otherwise agreed between the Originator and the Addressee, a Data Message is deemed to be received at the place where the Addressee has its place of business

Four: For the purposes of this Article:

1. 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;
2. If the Originator or the Addressee does not have a place of business, reference is to be made to the usual place of residence;
3. "*Usual place of residence*" in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

Hence, in joint reading of both the Civil Transactions Law and the Electronic Transactions Law, acceptance is received at the Offeror's workplace, if that is the place where the contract is concluded. If the Offeror does not have a workplace, the place shall be determined as the location where the Offeror resides. If the Offeror is a legal person which does not have a workplace or is unreachable, the place of the contract shall be determined as the location of his or her principal management headquarters or place of incorporation (Al-Enazi, 2015).

Consequently, the place of concluding the consumption contract through the internet is considered the workplace of the producer or the commodity/service provider because it is considered the place where the business was notified of the consumer's acceptance. This prescribes that international consumption contracts will be subject to the law of the workplace of the producer or service provider, not the law of the consumer's residence.

The International Jurisdiction of UAE Courts to Examine International Consumption Contracts

The UAE legislator did not provide special rules to determine the jurisdiction of the UAE courts to consider international consumption contracts, which results in subjecting it to the general jurisdiction rules under the UAE Civil Procedure Law to determine the international jurisdiction of UAE courts. By referring to these rules, which determine the jurisdiction over the law and facts involved in cases, they are divided into two categories: personal jurisdiction and territorial jurisdiction. These rules are tackled in two sections.

Territorial Jurisdiction

Article (21/2&3) of the UAE Civil Procedure Law deal with specific cases in which UAE courts are competent to consider cases involving a foreign element. This article stipulates that:

"Courts shall have jurisdiction over the foreigner who has no domicile or residence in the State in the following cases: (1) If the case is related to funds in the State... (2) If the case relates to an obligation concluded, executed or subject to its execution in the State or a contract to be documented therein..."

In accordance with these provisions, the courts of the State shall have jurisdiction over international consumption contracts filed against a foreigner if the subject matter relates to electronic funds in the UAE or to an obligation arising of international consumption contracts in UAE or performed or to be performed therein. Accordingly, the UAE court is competent to

consider international consumption contracts according to the territorial jurisdiction in the following cases (El-Hawary, 2008):

First: If the consumption contract funds exist in the UAE, the UAE courts shall have jurisdiction to examine the actions against the foreigner if the funds under the consumption contract exist in the UAE at the time of filing the case. The funds shall then be deemed to have been found after, during, or prior to the conclusion of the contract.

Second: If the consumption contract is executed, effected, or enforceable in the UAE: The issue of executing a consumption contract does not cause any problems in the determination of jurisdiction; if the consumption contract is executed or agreed to be executed in the UAE, the courts shall have jurisdiction to consider the case related to this contract. What may be problematic is the lack of jurisdiction of UAE courts in many cases related to consumption contracts, according to the place where the contract is concluded. When concluding the contract through the internet, such as cases of purchase for consumption through websites or electronic correspondence, in accordance with UAE law as discussed above regarding contracting between absentees, the place of conclusion of a consumption contract is the workplace of the provider of the commodities or services (the vendor). This results in the lack of the UAE court jurisdiction and leads the consumer to endure the difficulty of travelling to the state of the service provider or vendor for prosecution, as there is no other legal option available for UAE courts to have jurisdiction to examine the actions against the vendor.

Personal Jurisdiction

Articles (20) and (21) of UAE Civil Procedure Law specify four scenarios under which the UAE courts have international jurisdiction according to general personal jurisdiction depending on the legal status of the parties to the case. These scenarios are: when the defendant is an Emirati citizen, or a foreigner resident in the UAE, or a foreigner with a chosen domicile in the UAE, or in the case where there are many foreign defendants and the UAE is the home for one of them. One of these four scenarios is required for the UAE courts to have jurisdiction, whatever the type of cases.³

Some of the above four scenarios of personal jurisdiction can be applied to international consumption contracts without problems, but others may raise legal problems. For example, the nationality control of the defendant can be applied to consumption contracts without any problems, as the UAE courts are competent to consider the cases related to a consumption contract in the case of an Emirati defendant. Whereas the residence control of the defendant may be subject to problems, especially in the case where the consumption contract is concluded through the internet; these cases require the intervention of the legislator to protect the consumer.

Consider a UAE citizens' purchase of material commodities or software from a company through its electronic website for personal or familial use. If the company's residence or domicile is in the UAE and a dispute arises between the purchaser and the company, the courts of the UAE are competent to consider the case because the defendant is a UAE citizen. But, if the company is foreign and has no domicile or workplace in the UAE, the UAE courts shall not have jurisdiction over the dispute according to the control of the defendant's domicile. Therefore, the jurisdiction will be held by the courts of the state in which the defendant is located.

Thus, applying the control of the defendant's residence or domicile to international consumption contracts may lead to consumer contracts being considered before courts of

jurisdiction in the furthest points of Earth, as the consumer executes consumption contracts with electronic stores scattered around the world via the internet. There is improbability that the contracting store's location is in the consumer's country. This may lead to many difficulties, including the difficulty of moving to those faraway courts, which pushes them to abandon the idea of bringing forth a rightful case. Additionally, this contract is subject to laws that have not been explained to the consumer or do not provide sufficient protection.

Another legal problem raised by web-concluded consumption contracts is the agreement between the consumer and producer on the jurisdiction of a particular court to consider contract disputes. Most websites are using standard contracts (adhesion contracts), which stipulate pre-established, non-negotiable conditions, including those relating to the determination of the competent court to consider any contract disputes. The consumer has limited options: either reject the contract or accept it along with all attached conditions (Zhang 2008)

For the above reasons, the increasing use of international consumer contracts of adhesion has generated questions on how the web-concluded consumption contracts should be dealt with and what rules for such contracts are needed to avoid these problems and to protect the consumer.

A recent development is that some national legislations⁴ and international conventions⁵ resort to adopting a rule of competence aimed at protecting the consumer as the weaker party in the contractual relationship with the seller. This rule is based on two concepts to be clarified as follows: first, the jurisdiction of the court shall be of the domicile of the consumer; and second, protecting the consumer from using adhesion web-concluded consumption contracts by imposing conditions upon consumer that avoid the court of jurisdiction of his domicile.

First: Court of jurisdiction shall be of the state of the consumer's domicile. On 27 September 1968, Paragraph (3) of Article (13) of Brussels Convention between the member states of the European Union (EU) provided that jurisdiction shall be awarded to the court of the state of the consumer's domicile if:

“(1) In the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; (2) The consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.”

It is evident from the above provision that the court of jurisdiction shall be of the state of the consumer's domicile if the seller addressed an invitation or an advertisement in the said State; if the producer displayed an advertisement via television, magazines or newspaper or any other media to the consumer; if the producer electronically promoted its business in the state of the consumer's domicile or in various territories including the consumer's state; and if the producer's store has sent electronic mail (email) to residents in the same territory whereby the producer's intention is understood as promotion of goods (Mohamed, 2009), and the consumer takes actions to conclude the contract or express acceptance in his domicile.

Second: Protecting the consumer from stipulations that impose international jurisdiction. The conditions of jurisdiction-such as the agreement on the jurisdiction of a particular court to deal with potential disputes-raise the problem of infringement of the consumer's rights, as the consumer often has to submit to such conditions without discussion or modification; a consumer

would not freely and without pressure accept jurisdiction of a court alien to him. However, a consumer must either accept all contractual conditions, including the condition of jurisdiction, or reject them all.

In order to protect the consumer from such stipulations, some international conventions established conditions for the lack of respect for such an agreement, such as Article (15) of the Brussels Convention which provides that the consumer is not obliged to agree on the jurisdiction of a particular court if that agreement was prior to the dispute; it shall only be valid if it was subsequent to the raising of the dispute, or if the agreement gave the consumer the right to choose the court (Salameh, 2000; Mohamed, 2009; Hussien, 2007). The same is stated in Article (2) of the Hague Convention of 30 January 2005 on choice of court agreements,⁶ which decided not to rely on jurisdictional agreement if the contract is concerned with personal or familial consumption.

CONCLUSION

This research reviewed the subject of consumer protection under UAE private international law, which leads to the following conclusions:

With respect to the law applicable to international consumption contracts, it was found that the consumer's legal protection regarding the determination of the applicable law does not ensure the application of UAE law as the consumer's law. At no point did the legislator address such protection. No legal provisions are available for consumer protection with respect to the competent law governing consumption contracts. Thus, the general rules of conflict of laws are *prima facie* applied, which refer to the application of the law agreed upon by the consumer and the producer or the law of common domicile of the parties. If the parties do not have a common domicile, the law where the contract is concluded shall apply. This approach in determining the law for international consumption contracts does not achieve the minimum degree of intended protection for the consumer in several respects:

Determining the competent law according to contractual choice of law often leads to the application of the law chosen by the producer or provider of the commodity. This is because the producer is the powerful party in the contractual relationship, and dictates its contractual terms. Further, most consumption contracts, especially those concluded through websites, are adhesion contracts which contain pre-designed conditions that are not subject to discussion or modification. This includes a condition to determine the law concerned with the consideration of disputes that may arise and the consumer only has the choice to either reject the whole contract or accept the same.

If the producer and the consumer do not have a common domicile, the consumption contract will be governed by the law of the place in which the contract is concluded. As mentioned above, some consumption contracts are made through websites, which are considered as contracts between absentees. Under UAE law, the rules for determining the place of the contract between absentees specify the place of conclusion of said contract as the place where the Offeror is informed of the acceptance (country of the producer or the provider of the commodity). This leads to consider the place of concluding the contract as outside the UAE, where jurisdiction to govern consumption contracts shall pertain to a foreign law and may not provide the desired protection for the consumer.

Therefore, it is proposed that the UAE legislator intervenes and explicitly stipulate that consumer contracts should be excluded from the scope of the contractual choice of law, or that a special conflict of laws rule on international consumption contracts be promulgated, whereby consumer contracts are subjected to the law of the state of consumer's domicile.

This approach is commonly followed by many international conventions and national laws in order to determine consumer protection. In this regard, the 1980 Rome Convention on The Law Applicable To Contractual Obligations⁷ is recalled, which decided in Article (5/2) to exclude the contractual choice of law if it would deprive the consumer of the protection provided by the law of his domicile. So is the case under the principles of the 2015 Hague Conference on Private International Law, which decided, in Article (1), Paragraph (1), to exclude consumption contracts from the scope of application of the contractual choice of law.⁸ Also, some national laws established a special conflict of laws rule for consumption contracts, such as Switzerland's Federal Code on Private International Law⁹ of 1987, as amended on 1 July 2014, which singled out Article (120/1) to determine the law for consumption contracts: to apply the law of the consumer's habitual residence to contracts concluded for personal or familial needs.

The Tribunal of International Consumption Contracts

This study has shown that if international consumption contracts are entered remotely via the internet, the application of personal jurisdiction on such contracts raises the following issue:

Application of the defendant's home or residence to the consumption contract: The problem is that the application of the defendant's home or residence to electronic consumption contracts may lead to consumer claims being heard in state courts that are far from the consumer's domicile, as the consumer enters into consumption contracts with online stores spread across the world; the possibility that the store with which the consumer has contracted is in his state is weak, and this may cause several difficulties. The consumer may, in order to protect a simple right, incur substantial financial expenses that exceed the value of the right; and also bear the hardship of moving to those distant courts, which promotes the abandonment of the idea of instituting a claim for consumer rights. This contract may also be subject to a law not explained to the consumer or does not provide the right protection for consumer in the same way as consumption contracts concluded within the UAE.

The problem between the consumer and producer or supplier of the commodity is within the jurisdiction of a particular court set by pre-established conditions that are not subject to discussion or modification. This includes a fixed determination of the court, and the consumer can only reject the whole contract or accept it subject to all conditions.

To avoid such problems, it is proposed that the UAE legislator follows the approach of international conventions that have addressed consumer protection and related issues, such as the Brussels Convention of 1968, by establishing a rule of competence aimed at protecting the consumer as the weaker party in the contractual relationship with the seller. Thus, the proposed rule may determine the jurisdiction of the court as the consumer residence or domicile, and protect the consumer from the requirements of international jurisdiction, by enacting a rule that would make the former jurisdiction irrelevant if the contract agreement was not in favour of the consumer.

ENDNOTES

- ¹ For the purpose of this research, this type of contract shall be called international consumer contracts in order to be differentiated from national consumer contracts, and foreign party shall therefore mean the non-national party for the court before which a dispute is considered. It is well-established that a contractual relationship includes three factors: the parties, the subject matter, and the reason. If any of the above factors is not a national factor for the court, the relation shall be deemed an international relation and raises a legal conflict. For instance, consumer contracts entered into between a citizen and foreigner or by citizens outside their home country are international contracts.
- ² The Federal Supreme Court in Appeal No. 364 of 24 Judicial, dated 17/05/2005 (First instance Circuit), Appeal No. 255 of 21 Judicial, dated 25/11/2000, and Appeal No. 255 of 21 Judicial, dated 25/11/2000.
- ³ With the exception of the real actions related to a real estate abroad, see Article (20) of UAE Civil Procedure Law No. (11) of 1992.
- ⁴ Among such laws, we will state the following: Switzerland's Federal Code on Private International Law of 1978: Articles No. (112), (113) and (114/1); please review explanation of such provisions and comment thereon in Ahmed Abdulkarim Salameh, *'Internet and The Private International: Separation or convergence'*, op. Cit., P. 66 et seq.
- ⁵ Among such agreements, see: Brussels Convention concluded on 27 September 1968, Article (3), paragraph (3), and provisions of this Convention are published on the website of the Court of Justice of the European Union: http://curia.europa.eu/common/recdoc/convention/en/c-textes/_brux-textes.htm accessed 8 February 2018
- ⁶ Convention on Choice of Court Agreements 2005, Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>, accessed 18 February 2018.
- ⁷ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC). Official Journal L 266,(9 October 1980). (EU Council of the EU Documents).
- ⁸ The Hague Principles on Choice of Law in International Commercial Contracts, See also: The preparatory works and the texts of these principles at: <https://www.hcch.net/en/home>
- ⁹ Article (120/1) states: "Contracts pertaining to goods or services of ordinary consumption intended for a consumer's personal or family use, provided such use is not connected with the consumer's professional or business activity, are governed by the law of the consumer's habitual residence..." See the text of this law at: http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf, accessed 18 February 2018.

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