

ONLINE SALES CONTRACTS: A STUDY OF THE UAE LAW

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ABSTRACT

Online sales contracts are concluded between parties who are not necessarily present in the same location, and who are usually located in different countries having different legal jurisdictions. This fact gives rise to several issues including the determination of the applicable law to online sales. Thus, this analytical study endeavors to examine the adequacy of UAE legal rules in determining the applicable law to online sales contracts, and analyze the solutions presented by the UAE legislator, if any, for determining the same. The study concludes that the main issue in determining the applicable law to online sales contracts lies in determining the place of conclusion of the contract. The study further concludes that the UAE legislator solved this issue by presuming a certain place as the place of conclusion of the contract regardless of the actual location of its conclusion. The study suggests the insertion in the UAE law of a provision that takes into consideration the actual place of conclusion of the contract where such place is capable of being determined.

Keywords: Online Sales Contracts, Electronic Transactions, Conflict of Laws.

INTRODUCTION

The volume of electronic trade via the internet is increasing, as millions of commercial transactions are taking place online. Among the most important of these transactions are sales conducted through websites such as eBay, Amazon.com, Shopping.com, etc. These types of sales are usually referred to as online sales, through which people can directly make purchases over the internet using their computers or smart phones. Online sales can be conducted through consumer-to-consumer (C2C) contracts, business-to-business (B2B) contracts, or business-to-government (B2G) contracts.

Online sales contracts raise several legal issues including the issue of proof, specifically when the applicable law to the contract requires writing to prove the sale. Another issue involves referring offer and acceptance to the parties who send them. In addition, the applicable law to the transaction could require submission of the original sale contract for endorsement purposes. Other issues involve determining the applicable law to online sales.

Notwithstanding the abovementioned issues, this study is limited to determining the applicable law to online sales under UAE legislations, leaving aside the other issues to be addressed in future studies. Moreover, this study is limited to non-consumer online sales contracts as consumer sales contracts are subject to consumer protection laws in most national legislations, and are thus not necessarily regarded as international sales contracts. This means that consumer sales contracts do not generally raise the issue of the applicable law to the transaction.

In order to address the research problem of this study, in examining the sufficiency and efficiency of the UAE legislations for determining the applicable law to online sales contracts, this study is divided into two main sections. The first section attempts to address the problems associated with determining the applicable law to online sales contracts, and the second section attempts to identify the solutions presented by the UAE legislator for determining the applicable law.

Determining the Applicable Law to Online Sales Contracts

Article (19(1)) of the UAE Civil Transaction Law No. (5) of 1985 provides that:

“The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply”

It is apparent from the above provision that the UAE legislator subjected contractual obligations to the law expressly or impliedly chosen by the parties to govern the contract, naming it as the applicable law. But, if no particular law was chosen by the parties as the governing law, then their contractual obligations shall be governed by the *lex domicilii* of both parties, when their domicile is the same. However, if the parties reside in different states, the *lex loci contractus* shall apply.

Online sales contractual obligations can also be subjected to the above provision, because the UAE legislator, in the above provision, did not specify a certain method by which the transaction must be formed for the provision to apply. Thus, whether the transaction was conducted between attendees or absentees, and whatever was the method by which the parties transacted, contracts are governed by Article (19(1)), and so are online sales contracts.

Moreover, it is apparent that the legislator, in Article (19(1)), conferred upon the parties the right to choose the applicable law to their contract. This choice of applicable law in online sales contracts can be expressed through electronic means, such as the exchange of e-mails or through websites (Al-Abaseery, 2003).

If the parties did not agree upon the applicable law, or chose to apply rules not pertaining to the national law of a particular state (Salamah, 1996), then Article (19(1)) provides that the contract is subjected to the law which, as evident from the circumstances, the parties intended to apply. This means that the court shall search for the implied will of the parties.

In cases when the express or implied intent of the parties is not present to determine the applicable law, Article (19(1)) provides complementary rules by which the judge is obliged to abide for determining the applicable law. The judge must apply the common *lex domicilii* of the parties when the parties reside in the same state. Yet, if the parties do not reside in the same state, the *lex loci contractus* shall apply, meaning the law of the state in which the contract was concluded.

The application of the first complementary rule, i.e. the common *lex domicilii* of the parties, does not raise any issues as far as online sales contracts are concerned. The judge applies the common *lex domicilii* of the parties unless otherwise expressly or impliedly agreed upon by the parties. Also, if the parties to online sales contracts do not reside in the same state, the judge applies the *lex loci contractus*.

Determining the place of conclusion of the contract does not raise any issues when the contract is concluded using conventional methods. However, when the contract is concluded via

the internet, determining the place of conclusion of the contract could be very difficult. Hence, according to Article (19(1)), if the parties concluded an online sales contract but did not expressly or impliedly specify an applicable law, and were residing in different states, then the applicable law is the *lex loci contractus*. But the question is: in what state was the contract concluded?

Accordingly, the main issue raised by online sales contracts when determining the applicable law thereto is determining the state in which the contract is concluded. An important question that comes to mind when addressing that issue is: can reference be made to the general rules of contracts relating to time and place of conclusion of contracts between absentees for determining the state in which an online sales contract is concluded? This of course, taking into consideration that contracting via the internet is either considered contracting between absentees with relation to time and place, or contracting between attendees in terms of time and absentees in terms of place.

In order to consider the contract to be concluded between attendees or absentees in terms of time, there has to be a certain time gap between making the acceptance and the offeror's knowledge of it (Khattab, 2001). Thus, if there is a gap between the time acceptance was sent to the offeror and the time the offeror became aware of it, then the contract is considered between absentees in terms of time. Yet, if there is no such time gap, then the contract is considered between attendees in terms of time.

Online sales contracts, however, are not automatically presumed to be contracts between absentees in terms of time and place. This is because, depending on the medium used for contracting, a time gap does not necessarily exist between sending acceptance and the offeror's knowledge of it (Al-Kandary, 2004)¹. Some online sales contracts are considered contracts between attendees in terms of time and absentees in terms of place.

Hence, the electronic means of concluding contracts via the internet are divided into two categories with relation to the existence of a time gap. The first category includes means that do not allow for a time gap between the issuance of acceptance and the offeror's knowledge of it. These can be referred to as instantaneous means, such as concluding a sales contract through a website, or when the buyer and seller use audiovisual technology (e.g. smartphones video call). The second category includes electronic correspondences (e.g. emails). Under the second category, an online sales contract would include a time gap between the time of issuance of acceptance and the offeror's knowledge of it (Hedley, 2006).

With regard to determining the place of conclusion of contract when using instantaneous communications means, jurists are of the view that contracting through telephone is considered between absentees in terms of place and attendees in terms of time (Al-Sanhoury, 1952; Tanago, 2009; Al-Sadda, 1979; Al-Jammal, 1999; Al-Ahawany, 2000). This is because the acceptor and the offeror can hear each other while communicating. Thus, if the offer is made through telephone and is not met with acceptance instantaneously, the offer is terminated. This is unless the offeror proves that the offer remained open throughout the telephone call and that he accepted the offer before the call ended. The contractual session is therefore determined by the time of the telephone call, ending once the call ends or by changing the subject of the call. Whereas, as far as determining the place of conclusion of the contract is concerned, such determination is subject to the rules related to contracting between absentees.

Contracting using instantaneous means through the internet can also be subjected to the above rule. Hence, using direct call applications via the internet leads to the lack of a time gap between the issuance of acceptance and the offeror's knowledge of it. Modern communications

applications such as those downloadable and capable of installation in smartphones or computers have various characteristics, including the high-speed audiovisual communication and text-messaging. Concluding contracts through these means leads to the elimination of the time gap, which means that the contract would be subjected to the same rules as contracting through the telephone.

Thus, in cases when the contract is concluded using direct communication means such as websites, which eliminate the time gap between the making of acceptance and the offeror's knowledge of it, the contract of sale is considered to be between attendees in terms of time and absentees in terms of place. The time of contract is hence considered to be the time the communication is made through the website. Yet, the place of the contract is determined according to the rules of contracting between absentees, which is either the location of the acceptor or the location of the offeror.

However, when the contract is concluded using electronic correspondences, it is considered concluded between absentees in terms of time and place. This is because of the time gap between making the acceptance and the offeror's knowledge of it, as well as the existence of the parties in different locations.² Here, the time of contract is considered to be either the time of dispatch of the electronic message, or the time of receipt of the electronic message, or the time the offeror becomes aware of the electronic message containing acceptance (Furmston, 2001). The place of contract in this case is either the place where the acceptor is located or the place where the offeror is located.

Consequently, the question that comes to mind is: when would the place of contract be considered as the place where the acceptor is located, and when would it be considered as the place where the offeror is located?

The above question has been answered by jurists, referring to contracts concluded using conventional methods, through four different theories to determine the place of contract (Al-Sanhoury, 1952; Marqas, 1987; Al-Sadda, 1979; Sultan, 1987; Yahya, 1985; Al-Sharqawy, 1991; Tanago, 2009; Najidah, 2002; Khattab, 2001; Al-Su'ud, 1990). Some of these theories consider the place of contract to be the place where the acceptor is located, while others consider it to be the place where the offeror is located. The theory of declaration of acceptance and the theory of sending of acceptance consider the place of contract as the place where the acceptor is located, being the place wherein the acceptor declared his acceptance or sent it to the offeror. Nevertheless, the theory of receipt of acceptance and the theory of knowledge of acceptance consider the place of contract as the place where the offeror is located, being the place wherein the offeror received the acceptance or became aware of it.

This brief presentation of the juristic theories regarding the determination of the place of contract indicates that the contract is concluded either at the place where the acceptor is located or the place where the offeror is located (Al-Enizi & Sharaiyra, 2017). Yet, the issue raised by contracting through electronic correspondences remains unsolved. This is because it is difficult to determine the location of the acceptor at the time of declaring or sending acceptance, and the location of the offeror at the time of receiving acceptance or becoming aware of it.

The issue arises when the contract is concluded through instantaneous communication means such as audiovisual electronic applications. In this case it is difficult to determine the location of the acceptor or the offeror except when they are contracting, for example, using telephone, in which case the country wherein they are located could be determined. Yet, in some modern technical applications it is difficult to determine the location of the acceptor or the offeror, as in the case where either party is on board a plane or a ship at sea while contracting.

A question that comes to mind at this juncture is: how can the location of the parties at the time of conclusion of contracts using websites or modern technical applications be determined? And what are the solutions provided by the UAE legislator for this issue?

Solutions Provided by the UAE Legislator for Determining the Applicable Law to Online Sales Contracts

It has previously been established that the main issue in determining the applicable law to online sales contracts lies in determining the place of contract. Thus, if the contracting parties have not expressly or impliedly agreed upon a specific law to be applicable to the online sales contract in terms of substance or form, or when they do not have a common place of residence, then the applicable law is that of the state in which the contract was concluded.

Determining the place of conclusion of online sales contracts is not only important for determining the applicable law, but also for determining the competency of the UAE judiciary in hearing disputes involving such contracts. Hence, Article (21(3)) of the UAE Federal Civil Procedure Law provides for the competency of the UAE courts to hear lawsuits filed against foreigners who have no residence in the UAE if the lawsuit is related to a contract concluded in the UAE.³

The UAE legislator addressed the issue of determining the place of conclusion of contracts made through the internet, as well as the issue of determining the location of the acceptor and that of the offeror when contracting through the internet. Yet, in order to examine the solutions provided by the UAE legislator, the provisions addressing the same must be analyzed as follows:

The Provisions of the UAE Electronic Transactions Law Related to Determining the Place of Conclusion of Electronic Contracts

The UAE Federal Law No. (1) of 2006 on Electronic Commerce and Transactions addressed the determination of the place of dispatch and receipt of electronic messages under Article (15(3 & 4)). The rules under this Article were derived from the UNCITRAL Model Law on Electronic Commerce of 1996, particularly Article 15(4)) regarding the place of dispatch and receipt of data messages.⁴

The UAE legislator provided for presuming certain places as the places of dispatch and receipt of electronic messages, taking into consideration the difficulty of accurately determining the actual location of the originator at the time of dispatch or the location of the recipient at the time of receipt. The presumption provided by the legislator is as follows:

The UAE Electronic Transactions Law considers the electronic message dispatched from the place where the originator has its place of business, and considers it received in the place where the recipient has its place of business unless otherwise agreed by the originator and recipient.⁵

It is clear from the above that the place of dispatch of the electronic message is the place agreed upon by the sender and the recipient. Thus, if the parties agree upon a certain state being the location of dispatch of the electronic message, then the message is considered dispatched from that state even if it was actually dispatched from another, and even if the electronic systems and equipment were located in another.

Moreover, if the parties agree upon a certain state as the location of receipt of the electronic message, then the message is considered received in that state even if the place of business or residence of the recipient was not actually in that state. Furthermore, no regard would be made to the actual location of the electronic systems and equipment through which the message was received.

Yet, if the parties do not agree upon certain locations as the locations of dispatch and receipt of the electronic messages, then the legislator intervenes to resolve the issue. The legislator in such cases interprets the parties' silence to the effect that their intent was directed toward considering the places of business of the parties as the locations of dispatch and receipt. Hence, the legislator considers the message dispatched from the place of business of the originator, and received at the place of business of the recipient.

The UAE legislator, under Article (15(4)),⁶ provided for various situations under which the places of business of the parties are difficult to ascertain. An example is when one of the parties has more than one place of business, or when the party has no place of business at all. These situations were addressed by the legislator through the following presumptions:

If the originator or the recipient had more than one place of business, their presumed place of business is considered that which is more related to the contract if there was such a contract, but if there is no such contract, their principal place of business. Hence, if the electronic message contains an offer or acceptance, and the party making the same has more than one place of business, and then the presumed place of business is that which is more related to the contract. The place of business is considered related to the contract when the contract is associated with any of the activities of the place of business or when it would be performed within the jurisdiction of that place of business.

If the originator or the recipient had no place of business, then the place of dispatch of the electronic message is presumed to be the place of residence of the originator. Similarly, the place of receipt of the electronic message is presumed to be the place of residence of the recipient. Nevertheless, the originator or recipient of the electronic message could be a juridical person (a corporate entity) who has no place of business, or whose place of business most related to the contract could not be ascertained. In this case, the electronic message is considered dispatched or received at the place in which the management center of the corporate entity is located, or the place where the corporate entity is incorporated.

Observations on the Provisions of the UAE Electronic Transactions Law Related to Determining the Place of Conclusion of Electronic Contracts

The UAE Electronic Transactions Law permitted the parties to the contract to agree upon the desired places of dispatch and receipt of the electronic message. The parties can agree that the electronic message, containing an offer or acceptance, be considered dispatched or received at a place other than the place of business of the acceptor or offeror, or a place other than their actual location at the time the message is dispatched or received. This agreement, in its reality, is an agreement upon the location of the acceptor, the location of the offeror, and upon the place of conclusion of the contract.

Hence, *prima facie*, the contractual relationship could be a national relationship all elements of which are connected to the UAE and governed by UAE law. Yet, when the parties agree to consider certain places to be the places of dispatch and receipt of the message containing acceptance, this could lead to determining the place of conclusion of contract to be in another

state. This results in the insertion of a foreign element into the contractual relationship, transforming it from a national contractual relationship into an international one, thus raising the issue of conflict of laws.

Comparatively, had the contract been concluded using conventional means, such as exchanging offer and acceptance through normal mail, telex or fax, the place of conclusion could not have been difficult to determine and the governing law could have been readily specified.

The UAE Electronic Transactions Law addressed the issue of determining the place of dispatch and receipt of the electronic message in cases of non-agreement of the parties. The Law presumes the place of business of the originator to be the place of dispatch of the electronic message. It further presumes the place of business of the recipient to be the place of receipt of the electronic message regardless of the actual places of dispatch and receipt. Thus, it is impliedly assumed that the location of the information system through which the electronic message is sent would be disregarded if it is different from the place of business of the originator. Similarly, it is impliedly assumed that the location of the information system through which the electronic system is received would be disregarded if it is different from the place of business of the recipient.

The UAE legislator did not specifically provide for disregarding the location of the information system or the location of the technical equipment as places of business. The UAE legislator did not address the presumption when one of the parties to the contract use a domain name or email address related to a certain state, and whether that state could be presumed to be the place of business of that party.

The place of conclusion of online sales contracts could be determined under UAE legislation by combined reading of Article (142)⁷ of the Civil Transactions Law, and Article (15(3 & 4)) of the Electronic Transactions Law as follows:

If the electronic message contains acceptance, with absence of the parties' agreement to the contrary, the place of receipt of acceptance is considered to be the place of business of the offeror. Additionally, if the offeror had no place of business, the place of receipt of acceptance is considered to be the place where the offeror usually resides. Accordingly, the place of conclusion of online sales contracts under UAE legislation is determined as the place of business of the offeror; and when the offeror has no place of business, the place of conclusion of the online sales contract is the place of residence of the offeror. Moreover, when the offeror is a juridical person which has no place of business or which place of business could not be determined, then the place of conclusion of the online sales contract is considered to be the location of its main management center or the place of its incorporation.

To sum up, the applicable law to online sales contracts under UAE legislation is the law expressly or impliedly agreed upon by the parties. If the parties do not agree upon a specific law to govern their contract, the online sales contract shall be governed by the law of the common residence of the parties. If the parties had no common place of residence, and they do not agree contrary to the provision of Article (15(3)) of the Electronic Transactions Law and Article (142) of the Civil Transactions Law, the online sales contract shall be governed by the law of the state where the business of the offeror is located. If the place of business of the offeror could not be determined, the online sales contract shall be governed by the law of the state where the offeror resides. Yet, if the offeror is a juridical person which has no place of business or which place of business could not be determined, the contract shall be governed by the law of the state in which its main management center is located or the law of the state in which it is incorporated.

CONCLUSION

Based on the above discussion, it becomes clear that the main issue in determining the applicable law to online sales contract under UAE legislation lies in determining the place of conclusion of these contracts.

The juristic theories regarding the determination of the place of conclusion of contracts between absentees consider the contract concluded either at the place where the acceptor is located or at the place where the offeror is located. Moreover, the UAE legislator adopts the theory of knowledge of acceptance, which considers the place of conclusion of contract to be the place where the offeror is located. However, these theories do not solve the issue as it is difficult to apply them directly to online sales contracts.

The UAE Electronic Transactions Law addressed the issue of determining the place of dispatch and receipt of electronic messages in cases of absence of any agreement by the parties. The Law presumes that the place of dispatch of the electronic message is the place of business of the originator. The Law also presumes that the place of receipt of the electronic message is the place of business of the recipient.

The place of conclusion of the contract under UAE legislation can be determined by a combined reading of Article (142) of the Civil Transactions Law and Article (15(3 & 4)) of the Electronic Transactions Law. This leads to the following conclusions:

If the electronic message contains acceptance, the place of receipt of that acceptance is considered to be the place of business of the offeror, unless otherwise agreed. Yet, if the offeror has no place of business, the place of receipt of acceptance is considered to be the place where the offeror usually resides, unless otherwise agreed.

The place of conclusion of online sales contracts, accordingly, is considered to be the place of business of the offeror, or the place where the offeror usually resides if he has no place of business, unless otherwise agreed. But if the offeror is a juridical person, such as a corporate entity, and has no place of business, or has a place of business which could not be determined, the place of conclusion of the contract is considered to be the location of its main management center or the place of its incorporation.

Finally, for determining the applicable law to online sales contracts under UAE legislation, the following conclusions can be drawn:

The law governing online sales contracts shall be the law expressly or impliedly agreed upon by the parties. However, if the parties do not agree upon a specific law, the law to govern the online sales contract shall be the common *lex domicilii* of the parties.

If the parties do not have a common place of residence, and do not have any agreement contrary to the provision of Article (15(3)) of the Electronic Transactions Law and Article (142) of the Civil Transactions Law, the online sales contract shall be governed by the law of the state where the business of the offeror is located.

If the place of business of the offeror could not be determined, the contract shall be governed by the *lex domicilii* of the offeror.

If the offeror is a juridical person, and has no place of business, or has a place of business which could not be determined, the online sales contract shall be governed by the law of the state where the main management center of the juridical person is located, or the law of the state where it is incorporated.

RECOMMENDATIONS

In cases where there is no specific agreement by the parties as to the place of dispatch and receipt of electronic messages, it is recommended that the UAE legislator provides for considering the place of dispatch to be the actual place where the originator is located. Similarly, it is recommended that the legislator provides for considering the place of receipt of the electronic message to be the place where the recipient is actually located. Only if the actual location of the originator or the recipient at the time of dispatch or receipt of the electronic message could not be proved, then it would be presumed that the parties are located at their places of business. Such provision, it is suggested, could be worded as follows: *“In the absence of any evidence to the contrary, the electronic message is presumed to be dispatched from the place of business of the originator, and is presumed to be received at the place of business of the recipient.”*

With regard to determining the place of business of any of the parties, it is recommended that the UAE legislator expressly provides, under the Electronic Transactions Law, for disregarding the location of the network server that hosts the website, or the parties’ use of a domain name or email address related to a specific state, as being a presumption of the place of business of the parties. This is because the network servers and other electronic equipment that can be used for dispatching and receiving electronic messages need not necessarily be present at the actual place of residence or business of the parties. For example, a person can establish an online store that is hosted on a number of servers located in different states, and sometimes the founder of the online store is unaware of the geographical locations of these servers. Thus, it would not be accurate to consider the location of the servers as places of business only because they host the online store. Moreover, the acceptor or the offeror could use a domain name or an email address related to a state other than where they are located because of certain merits, but that does not justify the presumption that the party is located in the state having that domain name.

ENDNOTES

1. The authors of this paper disagree with the view that contracting through the internet is always considered contracting between absentees in terms of time and place.
2. Unless, it can be assumed, the parties were making correspondences, such as emails, while both being in the same location. In such cases, if proved, the contract would be considered concluded between absentees in terms of time but attendees in terms of place, hence not raising an issue regarding the determination of the applicable law to the contract.
3. Article (21) of the UAE Civil Procedure Law No. (11) of 1992 provides: *“The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases: 3) If the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts.”* To the same effect, see Article (28(2)) of the Jordanian Civil Procedure Law No. (24) of 1988.
4. Numerous national laws were influenced by the provision of the UNCITRAL Model Law on Electronic Commerce, including: Article (18) of the Jordanian Electronic Transactions Law No. (58) of 2001; Article (15(3)) of the Bahraini Electronic Commerce Law; Article (17(3 & 4)) of the Emirate of Dubai Electronic Transactions and Commerce Law No. (2) of 2002; Article (17(5 & 6)) of the Irish Electronic Commerce Law of 2000; Article (18(4)) of the Philippines Electronic Commerce Law of 2000; and Article (29) of the Iran Electronic Commerce Law.
5. Refer to Article (15(3)) of the UAE Electronic Transactions Law.
6. Article (15(4)) of the UAE Electronic Transactions Law provides: *“For the purposes of this Article: 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; b) if the Originator or the Addressee does not have a place of business, reference is to be made to the usual place of residence; and c) 'usual place of residence' in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted."

7. Under this Article, the UAE legislator adopted the theory of knowledge of acceptance for determining the place of conclusion of contract between absentees. The said theory, as explain earlier, considers the place of conclusion of the contract to be the location of the offeror. Article (142) of the Civil Transactions Law provides: "(1) A contract made between parties not in each other's presence shall be deemed to have been made at the time and place at which the offeror learns of the acceptance unless there is an agreement or a provision of the law to the contrary. (2) The offeror shall be deemed to have learned of the acceptance at the time and place at which such acceptance reaches him unless there is evidence to the contrary."

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