

# THE RIGHT TO PRE-CONTRACTUAL INFORMATION IN E-COMMERCE CONSUMER CONTRACTS: UAE LAW AND COMPARATIVE PERSPECTIVES

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## ABSTRACT

*This article examines the consumer's right to pre-contractual information in the United Arab Emirates: substance, remedies, and liability. Comparative overtures to the French system help locate limitations in Emirati law, especially concerning the standing afforded to consumer associations in deletion lawsuits and the right of retraction.*

**Keywords:** Pre-Contractual Information, E-Commerce, Consumer, Right of Retraction.

## INTRODUCTION

A paramount purpose of e-commerce regulation is to foster trust in transactions that take place in an asymmetric environment. There are several criticalities in e-commerce transactions that do not arise-or do not feature as prominently-in contracts concluded through traditional means, and which bring about a certain asymmetry. For example: the virtual environment in which transactions are entered into and the non-physical nature of any documents exchanged between the parties; knowledge differentials between them; the cross-border nature of many transactions; advertising as the sole means for the consumer to learn about the product-which places him or her in a particularly vulnerable position vis-à-vis sellers' exaggerated claims; concerns for the privacy of the consumer; and the digital nature of some of the exchanged goods or services that are stored in electronic databases. Taken together, these factors stress the importance of legal guarantees in favour of the weaker party-whom in e-commerce contracts is the consumer. In particular, they emphasise the centrality of dependable pre-contractual information, to the effect that the right to be informed should sit at the centre of a legal regime for e-commerce regulation. This means that professional e-commerce sellers ought to be placed under a stringent duty to disclose pre-contractual information. This redresses the asymmetry, whereby a consumer is called to make purchase decisions at a distance, without being able to inspect in person the product or the features of the service.

This article situates all of these questions-concerning the regulation of e-commerce transactions-with respect to the legal system of the United Arab Emirates (UAE). This is both a growing e-commerce market, and a jurisdiction as yet under examined in the international scholarly conversation. In this piece, I offer a close reading of UAE Federal Law No. 24 of 2006 on Consumer Protection (Consumer Protection Law), the Cabinet of Ministers Resolution No. 12 of 2007 on Executive Regulations to Federal Law no. 24 of 2006 (Executive Regulations) and Federal Law No. 19 of 2016 on Combating Commercial Fraud (Commercial Fraud Law), all in the light of the broader private law framework set out in UAE Federal Law No. 5 of 1885 on Civil Transactions (UAE Civil Code)<sup>1</sup>. For this purpose, Section 1 begins by introducing key

terms, such as “*electronic consumer*”, “*electronic contract*”, and “*pre-contractual information*”. Section 2 reviews such remedies as termination and rescission, whenever the duty to provide pre-contractual information hasn’t been fulfilled. Section 3 explores the basis for a claim for damages in the same event, and finally Section 4 looks at the right of retraction, which is currently an option in French and European consumer legislation, and could significantly strengthen the Emirati framework as well. The conclusion reviews some of the main findings of the analysis, it also summarises our recommendations for amending the existing UAE consumer protection framework in the light of comparative considerations.

## Definition of Key Terms

### The Electronic Consumer

The best place to begin a close reading of the existing UAE legislation on consumer protection in e-commerce transactions is the definition of “*consumer*” found at Article 1 of the UAE Consumer Protection Law:

*“Any person who obtains goods or services-with or without charge-to satisfies his personal need or others’ needs”.*

This is a broad definition that’s meant to include every possible service or commodity, irrespective of whether it was obtained against payment of a sum or not. This extensive definition is in place to foreground the protective goal pursued by the Emirati legal system-supporting people sourcing goods or services to meet their own or others’ personal needs-instead of the specific means such a person might be using in the contracting process. It is useful to consider this drafting choice, in the light of the interpretive principle spelled out at Article 262 of the UAE Civil Code, whereby:

*“The absolute shall be given effect without limitation unless it is limited by an express provision or tacitly”.*

Hence, the scope of application of the Consumer Protection Law extends to all buyers acting in a personal capacity, regardless of the method of entering a particular transaction-whether in person or through electronic means.

Since this article is focused specifically on e-commerce consumer protection, it is appropriate to bring in the definition of an “*electronic transaction*” found in another piece of Emirati legislation, Federal Law No. 1 of 2006 on Electronic Transactions and Trade (Law on Electronic Transactions). Article 1 defines an electronic transaction as follows:

*“Any dealing, contract or agreement concluded or enforced in whole or in part by electronic messages”.*

This definition is not limited to a particular contract type, but extends to any agreement for purchase, lease, or usufruct a consumer might conclude to source the goods or services needed by him or her, or by others. This definition is to be interpreted broadly, in line with the protective intent spelled out at Article 3(1) of the same law, stating that the UAE Law on Electronic Transactions aims to “*protect the rights of electronic users and determine their*

*obligations”.*

Reading these definitions side-by-side, a working definition of “*electronic consumer*” can be extrapolated, as: the person who concludes various electronic agreements including-but not limited to-contracts of purchase, rent, loan, or usufruct, in order to source the goods and services needed to satisfy his or her personal or family needs, without intending to re-market them and without having the technical ability to do so. This initial definition serves to orient our examination of the distinguishing features of electronic contracts, in order better to understand their distinctive legal regime<sup>2</sup>.

## **The Electronic Contract**

### **Definition**

In terms of construction and substance, an electronic contract does not enjoy a special regime, different to the general one put forth in the UAE Civil Code. The one distinguishing feature inheres the circumstances of its conclusion, namely: it is made by and between two persons who are not present, but through the Internet. Thus, it is “*electronic*” by virtue of the means through which it is concluded. The UAE Law on Electronic Transactions regulates the formal aspects of an electronic contract at Article 11, which states at Para 1 that:

*“For the purposes of contracting, it is allowed to express the offer and acceptance in whole or in part through the electronic message”.*

This is followed up, at para. 2, by the clarification that the form in which an electronic contract is concluded-i.e. through one or more electronic messages-does not, on its own, invalidate the contract, or otherwise cause it to be unenforceable. In view of the foregoing, an electronic contract is therefore simply an agreement that has been perfected using the electronic exchange of information and data over the Internet, in order to create contractual obligations. Beyond the offer and acceptance that bring the agreement into being, electronic contracting embraces a wider set of exchanges that might involve: offers and advertising concerning goods and services, electronic purchase orders, electronic invoices, and electronic payment orders.

### **Characteristics of an Electronic Contract**

The distinguishing feature of an electronic contract is that the very means by which it is entered into-namely offer and acceptance transmitted over the Internet-bestow upon it an atmosphere of negotiation “*in absentia*”. Electronic contracts are always executed without the physical presence of the contracting parties. In this sense, e-commerce contracts are a sub-category of contracts concluded at a distance with means of remote communication. For comparison, Article 2 of European Directive 97/7/EC on the protection of consumers in respect of distance contracts defines a “*distance contract*” as:

*“Any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.”*

The feature of being “*electronic*” simply adds to the notion of distance contract the specification that the contract has been concluded via the Internet, even though its subject matter may well resemble that of contracts concluded in person (Mojahed, 2003). Moreover, electronic contracts are predominantly entered into for a commercial purpose, and usually involve parties, one of whom is acting in a professional capacity and the other as a consumer. This is why electronic contracts are sometimes referred to as “*e-commerce contracts*”—an expression that is used interchangeably in this article. Once again, this implies no substantive difference to the commercial contracts that might be concluded in person. While a significant portion of electronic contracts occurs between professionals, our focus here is specifically on e-commerce contracts between consumers and professionals. This is what attracts the qualification as “*consumer contract*”, and thereby activates a set of safeguards protecting the position of the consumer (Ibrahim, 2005). In terms of proof, when the existence of an electronic contract is disputed, this can be established with an electronic document and signature: the former attests the parties’ respective obligations, while the signature is what confers authority to that document (Mojahed, 2003). Lastly, electronic contracts are often fulfilled through various forms of electronic payment methods.

### **Pre-Contractual Information**

In the context of a consumer contract, the right to pre-contractual information serves to redress the imbalance existing between the recipient of the goods or services sourced from a merchant, and the latter’s professional-grade knowledge of the subject matter of the contract. While the right to pre-contractual information is a widespread measure for consumer protection, it becomes even more pivotal in the regulation of e-commerce transactions. This is because of the increased dependence by the consumer on information made available by the merchant, due to the default condition of contracting at a distance through remote communication media. Such a situation creates more hazards than usual, which might in turn lead to the consumer’s expectations being frustrated.

Article 7 of the UAE Consumer Protection Law provides a detailed specification of what is encompassed in the term “*pre-contractual information*” as I have been using it. Specifically, all consumer contracts (including those negotiated in person) require the merchant to provide:

*“Information about the goods’ type and nature, composition, product name, production or packaging date, the net weight, country of origin and country of exportation (if exists), directions for use (if possible) and expiry date, with the attachment of a detailed list inside the package in Arabic language regarding the goods [sic] composition and specification, directions for use, risks and other information, in the manner decided by the implementing Regulation to this Law.”*

This level of detail corresponds to the rationale, whereby the merchant should disclose all important information related to the contract, to compensate for the informational asymmetry vis-à-vis the consumer. This includes information that might materially affect the consumer’s satisfaction from the commodity or service, or harm his or her financial interests or health in the course of normal use. Furthermore, the article’s opening line reads: “*Without prejudice to the texts of the relevant Laws and Regulations*”. This clause implies that simply providing information does not absolve merchants from ensuring their products conform to any applicable technical regulations.

While the text of the law does not directly use the term “*pre-contractual information*”, this is the doctrinal term used to describe information that one party is under a duty to supply, to ensure that the purpose of the contract is not frustrated on account of withheld information that is only accessible to one of the parties (Mahmoud, 2002). In the case of consumer contracts, the duty to provide all essential information applies systematically on grounds of the asymmetry between the consumer and the professional provider of goods or services. On this basis, “*pre-contractual information*” in e-commerce contracts is the subject of a positive duty befalling the merchant: to supply an electronic consumer with all data that might materially affect the consumer’s satisfaction from the contract, including-but not limited to-the contract’s location, and the identity of the producer and/or the supplier.

## **The Right to Pre-contractual Information in E-commerce Transactions**

### **Justification**

The imbalance between a consumer and a professional seller acts as justification for heightened safeguards to protect the former. This section adds detail to that picture. First of all, contracting through electronic means gives merchants access to a potentially larger market where trading does not occur face-to-face. Hence, the technical arrangements that make e-commerce possible place merchants in an advantageous position, unrestrained by the geographical and reputational constraints of face-to-face trading, which calls for stronger safeguards. Another advantage enjoyed by the merchant is related to his or her greater familiarity with the subject matter of the contract, in contrast to the consumer’s occasional interest in it (Dowidar, 2006). This imbalance is intensified by the condition of contracting at a distance (Mousa, 2000).

Related to this is the phenomenon of “*submission contracts*”, or “*contracts by adhesion*”, where consumers are simply given the choice to accept or reject the merchant’s pre-drafted terms. The expression “*submission contracts*” highlights that the choice given to the consumer is simply to submit to, or reject as a whole, the terms offered by the stronger party (Omran, 1986). Article 145 of the UAE Civil Code limits the scope of consumer consent in such situations only to those terms that a seller uses “*as standard*” with the general public-excluding any provisions drafted only for a specific consumer. This safeguard does not require the presence of economic imbalance, such as monopoly conditions or the subject matter being an essential commodity. Instead, it applies automatically to any contract that the merchant pre-drafts for all his/her customers. Should a “*submission contract*” also give rise to economic imbalance, Article 248 of the UAE Civil Code gives courts the authority to redress that imbalance, or exempt the weaker party as justice demands-this is a right that cannot be relinquished, and any contrary clauses would be deemed null and void. The burden of proof in this case is limited to establishing that the contract was concluded “*by adhesion*” to pre-formulate terms, and that the application of those terms would lead to arbitrary outcomes. If a consumer succeeds in establishing these conditions, the judge’s authority to mitigate the contract obtains. At the same time, these provisions only come into play when a contract already exists, and do not provide specific protection for the pre-contractual stage, where the e-commerce consumer remains unable to inspect any goods or to negotiate in person the specifications of a service-which makes him or her particularly vulnerable to exploitation from the other party. At the same time, it is rules such as this that-by finding systematic application in consumer contracts-have helped shape a

presumption of imbalance against consumers in their dealings with professional merchants. This presumption, in turn, is what justifies the duty of pre-contractual information on the part of merchants in consumer e-commerce transactions.

It can be useful, in order to appreciate how the presumption of imbalance against the consumer has become a centrepiece of consumer legislation also beyond the UAE, to look at the evolution of the regime for standard form contracts in France—a legal system that bears historical ties with the Emirati one, through the civil law influence of the Egyptian codification (Ballantyne, 1986). In order to afford protection to consumers in this type of contracts, a specific provision has been crafted at Article L-212-1 of the Code de la Consommation (French Consumer Protection Code). This article voids all arbitrary clauses that “*give rise to an excessive imbalance in the rights and obligations of the parties*”, which professionals—and especially large companies—might have the economic force to impose on a consumer. Moreover, in order not to leave the burden on consumers to pursue litigation to establish precedents against the use of particular clauses, the French legal system has adopted a proactive approach, authorising at Article L-212-1 the Conseil d’État (the highest court on administrative matters) to issue decrees proscribing certain categories of clauses as either presumptively arbitrary, or as forbidden in all cases. In a further effort to reinforce the proactive protection of the consumer, Article L-621-2 of the French Consumer Protection Code also allows French consumer associations (who may act on behalf of consumers, pursuant to Article L-621-1) to initiate so-called “*deletion lawsuits*”, in which they may ask a court to invalidate all clauses that resemble one that has been found arbitrary, in the standard contracts issued by the defendant merchant. Lastly, as a further safeguard—in case this channel wouldn’t be taken up to an extent that could ensure material protection to consumers—Law No. 95-96 amended the French Consumer Protection Code by giving the competent judge broad powers to assess the arbitrariness of abusive clauses. This was done in response to calls for issuing formulas to help courts determine the degree of imbalance that would warrant a finding of arbitrariness on a case-by-case basis, whenever the arbitrariness of a clause (that was not already included in pre-existing lists) might have been at issue (Abdel-Baset, 2006).

### **Termination for Breach of the Duty to Provide Information**

A consumer contract concluded after the seller withheld pre-contractual information can be terminated by the consumer for defects of consent—such as when his or her assent to the contract was deliberately obtained through mistake, fraud, or unfairness—under the general rules of contract law. However, when the contract has been concluded without knowledge of covert defects, many consumer legislations also allow the consumer to rescind the contract on this alternative basis.

### **Termination under the rules for mistake**

Mistake refers to an erroneous conviction that doesn’t hold up in reality (Abdel-Baset, 2006). It becomes a defect of consent when a person enters into a contract under the decisive influence of the mistaken conviction. When withholding pre-contractual information on the part of the merchant leads to mistake—or to a fraudulent transaction on the part of the consumer (in which case, provided it also leads to an unfair outcome)—the general rules of contract law on

defects of consent (Articles 193-198 of the UAE Civil Code) provide relief. In the case of mistake, the UAE Civil Code provides relief whenever the mistake can be evinced from the contract itself or from ostensible circumstances, the nature of things, or established traditions (Article 193); when it involves the nature, object, or formation of the contract (Article 194); when it involves decisive elements for one contracting party, like a specific object or party, or specific features thereof (Article 195). Article 196 also allows termination for mistakes of law concerning the matters spelled out in Articles 193 to 195 (e.g. the mistaken assumption that a given contract might be enforceable).

In relation to e-commerce contracts specifically, the following question arises:

*“Does the withholding of information by the merchant, in and of itself, amount to sufficient ground for termination for mistake?”*

In the case of consumer contracts, a merchant is under a positive obligation effectively to inform the other party in order to resolve any ambiguity. Failure to do so, when it leads to a consumer entering into a contract, will give rise to a ground for termination for mistake. Besides, the presence of a positive obligation to provide pre-contractual information can also support an evidentiary presumption that, when such information has been withheld, the merchant was aware of the withholding and that his or her omission would have a material impact on the consumer's willingness to enter into the contract (Mojahed, 2003). This also means that simply offering for sale goods or services via the Internet isn't *per se* enough to avoid subsequent termination for mistake. Instead, pursuant to Article 7 of the UAE Consumer Protection Law, a full description of the product needs to be provided in terms of its nature, characteristics, and price. Some commentators have also argued-on the back of Article 195 of the UAE Civil Code-which the right to pre-contractual information might also encompass more specific details, above and beyond the general characteristics of the goods or services provided (Mojahed, 2003). This, in case those characteristics constitute a determining reason for a particular consumer to enter into the contract. This opinion acknowledges an additional person-specific criterion for tailoring the scope of pre-contractual information, thereby affording the consumer a broader set of grounds to terminate the contract in the face of the merchant's withholding of information.

### **Termination under the rules for deceit and unfairness**

General contract law rules on defects of consent in the UAE Civil Code also afford protection against deceit-i.e. a wilfully induced erroneous belief that leads one party to enter into a contract (Article 185)-as long as the deceit manifests in a materially unfair contractual agreement (Article 187). This means the presence of deceit isn't, *per se*, automatic grounds for termination, but only when it materially damages the deceived party. Here, Western readers might notice a difference vis-à-vis systems that base the enforceability of contract merely on the parties' consent. This divergence comes from the deeper basis of UAE contract law in Islamic jurisprudence. Islamic jurisprudence is less focused on subjective intentions (i.e. the deceiving party's internal determination to deceive the other party), and only ascribes consequences to those intentions if they upset the basis of contract which, in Islamic jurisprudence, is primarily to do with a balanced and productive exchange that thereby benefits society (Islam, 1998).

These safeguards against deceit that apply to all contracts have been increased with

specific reference to consumer contracts. Article 27 of the Executive Regulations giving implementation the UAE Consumer Protection Law specifically proscribes misleading advertising. In addition, Article 6 of the UAE Consumer Protection Law seems to supplement the provisions of general contract law, forbidding the offer of goods or services “*which are adulterated, putrid or misleading which may inflict damage to the consumer interest or health in the course of ordinary usage*”. This seems to establish a lower threshold than under general contract law. Namely: what makes deceit sanctionable isn’t “*material unfairness*”, but the possibility of damage to the consumer’s interest or health “*in the course of ordinary usage*”. The UAE Commercial Fraud Law, at Articles 1 and 2, goes into some depth in detailing what amounts to commercial fraud (alteration of products and services sold to the public) and deceit (deliberate withholding of information that would be essential to the conclusion of the contract). Both of these acts would vitiate the ensuing contract under Article 185 of the UAE Civil Code and-under the conditions set out in the Commercial Fraud Law-will also give rise to criminal offences.

This provision makes clear that the criterion for termination for fraudulent concealment, i.e. deceit by omission of information, is tailored to the position of the deceived party-in our case the e-commerce consumer (Borham, 2005). The presumption of asymmetry against the consumer in e-commerce consumer contracts not only justifies a positive obligation to disclose information on the part of the professional, but should also inform the standard to be applied in interpreting Article 186 of the UAE Civil Code in consumer cases. In particular, the withholding of pre-contractual information in consumer contracts-which a merchant is anyway under an obligation to disclose-will also engender a presumption that such information would have been important to the consumer and that the merchant, being a professional, remains responsible for sharing that even without a specific request. At the same time, a gap remains in the current legal regime for e-commerce consumer protection, since the UAE Consumer Protection Law doesn’t really contemplate partial withholding, i.e. the mention of only some information relating to the product. This means it is currently up to courts to determine that on a case-by-case basis, and it is respectfully submitted that it would reinforce the predictability of e-commerce consumer transactions if the law were amended so as to provide some more specific guidance. For example, deeming partial disclosure tantamount to deceit whenever it inheres to essential features of the goods or services at hand.

### **Rescission under the warranty for pre-existing defects**

As an alternative to termination for defects of consent, a consumer may also avail him/herself of the warranty for defects provided under Article 543 of the UAE Civil Code. This article establishes a presumption that goods sold are being sold “*free from defects other than those customarily tolerated*”. This warranty also covers pre-existing defects, i.e. defects that came into existence before the item passed under the control of the buyer (Article 543 of the UAE Civil Code). In the case of pre-existing defects, Article 545 of the UAE Civil Code only limits the seller’s responsibility to those instances in which the buyer was aware of the defect, or in which the seller had expressly excluded a warranty for pre-existing defects (unless the seller deliberately concealed the defect, or the buyer was not in a position to discover the defect independently). In the presence of a pre-existing defect, Article 544 of the UAE Civil Code entitles the consumer to rescind the contract by returning the item and claiming back the

purchase price.

While these are the general rules applying to every contract of sale, consumer contracts have attracted increased safeguards. As a term of comparison, the French judiciary has interpreted the guarantee for pre-existing defects liberally in consumer contracts. This, on the basis of the assumption that the seller acts in a professional capacity and should therefore possess a greater ability to spot defects in the goods he or she trades in (Abdel-Baset, 2006). Those defects of which the professional seller is supposed to be aware should also, in turn, be fed back to the consumer (Zaki, 1987). In the UAE Civil Code, the term of reference is less the buyer's specific experience, and more that of an ordinary person (Article 544/4 of the UAE Civil Code). This means that a judge tasked with adjudicating a dispute around warranty for pre-existing defects would normally take into consideration all the circumstances related to the effect of the pre-existing defect on the buyer's satisfaction, according to the latter's ostensible purpose when entering the contract (as long as such purpose could be evinced from objective circumstances that an ordinary person would notice) (Abdel-Baset, 2006). Article 33 of the Executive Regulations of the UAE Consumer Protection Law raises this standard, by requesting that merchants specifically guarantee the consumer from any latent defects that make the product sold unfit for its ostensible purpose. In this case, the heightened protection is based on the assumption of the consumer's lesser expertise in the transaction, and by his or her inability directly to inspect the item by virtue of the transaction being concluded online. To limit his or her exposure to subsequent rescission for pre-existing defects, the only way a professional seller has available is to make sure he supplies the consumer with a written description of all the features-including the defects-of the item, and that the consumer accepts them. Any reticence on this matter will involve facing rescission-unless the buyer were also a professional, in which case the general exemptions stated in Article 545 of the UAE Civil Code would apply.

### **Civil Liability for Failure to Provide Pre-contractual Information**

When a seller has failed to abide by the duty to come forth with information about goods or services that he or she is offering to a consumer, this will also entail incurring civil liability for this breach, in order to compensate the damage suffered by the consumer as a result. This section specifically reviews the conditions that need to exist for such a claim for compensation to be fruitful.

#### **The Basis of Liability**

There have been a variety of opinions around the basis for liability for failure to provide pre-contractual information, some considering it a form of contractual liability, and others a tort by omission. Zaki reviews a first set of opinions that construe this failure as breach of a contract for the exchange of information (Zaki, 1987). The German jurist Rudolf von Jhering postulated instead a guarantee contract to cover the pre-contractual phase (Zaki, 1987; Jhering, 1861). Further, French jurist Saleilles argued that a contract does not simply bind the parties to the letter of their agreement, but also to requirements set out by law and accepted by custom. On this basis, he then suggested that an implicit guarantee is to be read in each contract, whereby the parties ensure that their behaviour during the contracting stage will not set the contract off on shaky grounds that might later lead to its termination (Saleilles, 1907; Al-Sharqawi, 1981). Yet

others have based liability for withholding pre-contractual information on a promise to contract, or on a promise that the eventual sales contract will be valid (Abdel-Baset, 2006). The weakness with an approach that bases liability for withholding information on some form of contract between the parties is that it overlooks the parties' express will to be contractually bound only at the point of agreeing to the eventual contract, not before. Moreover, if the contract covering pre-contractual information is construed as a source of secondary obligations, it follows that termination of the main contract will also deprive those secondary obligations of their legal basis. These critiques lend credit to the suggestion that the basis of pre-contractual liability is best sought outside of the sphere of the contract (Frag, 1981). This position is reinforced by the fact that the duty to provide consumers with exhaustive pre-contractual information is often enshrined in the law—a position first adopted by European legislation and French consumer protection laws and followed by the Emirati legal system—and therefore does not require postulating the existence of a contract.

In view of the foregoing, it seems that the criteria for assessing liability, in the event of failure to provide pre-contractual information to the consumer, ought to be found in tort (Articles 282–298 of the UAE Civil Code). This means that a merchant who fails to provide pre-contractual information is responsible for an omission that contravenes an explicit legal duty to provide that information. Central to tort liability in the UAE system is the commission of a harmful act (Jadalhaq, 2019). The presence of a harmful act then obliges the perpetrator to provide compensation (Abdel-Baset, 2006). To establish the conditions for compensation in tort, the consumer needs to trace his or her damage to incomplete or missing information withheld by the merchant. The merchant must be in default of legal provisions that obliged him to provide the missing information, and a causal relationship needs to exist between that omission and the damage suffered by the consumer (Mahmoud, 2009). For the causal relationship to hold, in this case, a demonstration of the merchant's intention to conceal information and to harm the consumer is also necessary<sup>3</sup> (Chehata, 1967). In the following sub-sections, I attempt to chart more closely how the rules of tort liability ought to be read in connection with the duty to provide pre-contractual information to a consumer.

### **The Elements of a Claim for Breach of the Duty to Inform**

UAE law allows a claim in tort even in case of an omission, pursuant to Article 282 of the UAE Civil Code, whenever the inaction either breaks the generalised duty not to harm others, or when it is elsewhere forbidden by more specific rules. To ground a liability claim in tort, certain elements have to be present, namely: a harmful act, damage suffered by a victim, and a causal connection between the first two elements.

### **The Harmful Act in Withholding Pre-contractual Information**

A harmful act is generally understood to be an act that oversteps accepted limits of conduct. In connection to the duty to provide pre-contractual information in e-commerce transactions, this might take either a negative or a positive form. In the negative form, it is the simple omission of information that the merchant knows pertains to elements of the e-commerce contract that would be deemed essential by the other party. The scope of this obligation—as mentioned earlier—is quite wide to compensate for the fact that the item is in the possession of the

seller, and the buyer is unable to inspect it at a distance, apart from the information provided online by the other party. A breach of the duty to provide pre-contractual information can also take the form of positive behaviour, such as when false information is provided about the specifications of the item or service, or its possible uses, in such a way that the consumer is incentivised to enter into the contract. In the latter case, Article 285 of the UAE Civil Code clearly establishes that misleading another person is a source of an obligation to compensate the damaged party. With reference to consumer contracts, Article 16 of the UAE Consumer Protection Law affirms the applicability of the general rules on liability, over and above any contrary provisions included in the contract. Furthermore, Article 27 of the Executive Regulations to the Consumer Protection Law prohibits any acts that-through advertising-may mislead a consumer. Article 8(6) of the same Executive Regulations also establishes a right to obtain compensation “*for inferior or unsatisfactory goods or services, or any practices harming consumers.*” These provisions directly support compensation claims by consumers who were wronged by merchant’s breach of specific legal duties they hold vis-à-vis consumers. Additionally, in a consumer contract, the presumption of asymmetry against the consumer makes it easier to prove that the seller’s withholding of information was a harmful act, and especially the merchant’s intention to cause harm when he or she was aware of the importance of the omitted information for the consumer (Ahmed, 2003).

### **Damage and Causal Relationship with the Merchant’s Conduct**

The merchant’s omission isn’t, per se, grounds for liability. Compensation additionally necessitates that the plaintiff suffered damage as a consequence of having had his or her rights or legitimate interests infringed-whether those rights and interests relate to bodily integrity, assets, or reputation. Absent such harm, no claim for compensation arises. While the infringement of the obligation to provide information will be easy to prove, the presence of damage in this case proves trickier to demonstrate because it involves a counterfactual question. Namely: to ask what would have happened, had the consumer been able to rely on the withheld information at the time of concluding the contract (Al-Baqi, 2004). Here is just a list of possible scenarios that would demonstrate the presence of harm: when the consumer has not been able to fulfil the purpose for which he or she sourced the goods or services; when the consumer missed an opportunity to seize a better alternative; or when he wasn’t able to enter further transactions on the basis of the item or services not having the expected characteristics. In turn, the merchant might oppose a number of exceptions, such that an extraneous cause broke the causal chain between his or her omission and the consumer’s damage. Examples of this could be the following: the consumer’s failure to read instructions correctly; a software failure preventing the consumer from visualizing the information provided by the merchant. This sort of exceptions would free the merchant from possible liability. In view of the foregoing, it seems fair to conclude that the liability of the merchant in case of withholding pre-contractual information can be activated even by a (negative) omission of conduct that is otherwise required under consumer legislation. Namely: informing the consumer of all aspects of the proposed contract. When the consumer has been misled by such omission, his or her right to compensation obtains (Article 286 of the UAE Civil Code).

Generally speaking, no ad hoc remedies exist for deceived consumers, beyond those provided for in the general rules on defects of consent and tort liability. A consumer that has

been deceived is entitled to terminate the contract on grounds of mistake or-if the mistake was deliberately induced-of deceit. Moreover, should the consumer have suffered damage as a consequence of entering into a contract on the basis of missing information, he or she will be able to demand compensation in tort. At the same time, the scope of these remedies still appears rather limited. For instance, there may often be cases when a consumer will suffer harm from hastily entering into a contract, or purely on grounds of not having enough familiarity with e-commerce. In these cases, his or her purpose in contracting will be frustrated, and yet none of the aforementioned remedies would avail whenever there are no defects of consent or when no omission is established. While this suggestion might appear to overreach in favour of the consumer to a Western readership, it has its basis in the rationale for the enforcement of contracts under Islamic jurisprudence. Indeed, in the Islamic legal tradition, the binding force of contracts is less a matter of deferring to the parties' will, and more one of ensuring a socially beneficial transaction has occurred-which is not the case when a weaker party is allowed hastily to enter into contracts that end up meeting only the expectations of the stronger one (Islam, 2009).

### **The Right of Retraction**

An interesting measure-with a preventative intent-is the right of retraction from an e-commerce transaction that the consumer later regrets. This right was introduced, among others, in France, where it was dubbed "*the right to reconsider*" the merit of any sales concluded at a distance. It consists in the possibility to reverse the transaction by returning any items and receiving a refund, or to exchange them for other items (Subaih, 2008). Considering that hastily concluded contracts currently have no remedy under the general rules of tort liability and of defects of consent, it seems surprising that the UAE consumer protection regime has not contemplated including one such option, which acts precisely as a "*buffer*" against transactions that within a short time turn out to be regretful for the consumer. It therefore seems appropriate to examine how the right of retraction works in the French legal system, in the hope that such a possibility might enter the Emirati consumer protection framework as well in the future.

#### **Scope of the Right of Retraction**

The scope of application of the right of retraction, as it had originally been introduced in France, included all distance contracts, including televised selling, selling through catalogues or brochures, or advertising of goods with an indication of the current applicable rates. The right of retraction was originally introduced by Article 1 of Law No. 88-21 of 6 January 1988 for a term of seven days, and was later extended pursuant to the European directive 2011/83 to fourteen days. The rationale behind the right of retraction was to protect the e-commerce consumer, who could not inspect the sold item because of the distance that made him or her solely dependent on the seller's advertising. The right of retraction was originally enacted with a delay of seven days from receipt of the sold item-thereby giving the consumer the right actually to inspect it. It is noteworthy that the right of retraction is not limited to products, but it also includes services that are offered at a distance, such as airline tickets, trips, and tourism and hotel services (Qasim, 2005).

### **Exercise of the Right of Retraction**

Upon reconsidering the merit of a distance transaction, a consumer might return the item against a refund, or they might also demand the seller to exchange the item they received initially for another item. The consumer need not provide any reasons: the distance negotiation and the consumer's inability to view the item in person have been assessed in the legislation as sufficient reasons. Moreover, the consumer is not under an obligation to provide compensation. In the legal conversation within the Muslim world, some commentators have questioned this right, since it greatly dilutes the binding force of contract. Others have suggested that the presence of a right of unilateral retraction puts the contract on hold until a legally stipulated delay of reflection has expired for the benefit of the weaker party (Ismail, 2009). In the light of this, it seems important to remind oneself that the right to exchange goods with no questions asked amounts to less than an outright rescission of the contract when returning those goods: it is therefore less disruptive of the essence of contract, compared to returning an item for a refund of the price. This is why, if the rescission option were considered too harmful to the essence of contract, one might envisage subordinating it to the request for exchange before making the refund option available. This would involve the consumer obtaining another item first and, only after having considered whether the exchanged item allows him or her to carry through with his or her intended purpose, will it then make sense to dissolve the contract in case that was still not the case. This would make a "*right of retraction*" consistent with the ground for contract enforceability in Islamic legal reasoning, as enforcing a mutually satisfactory transaction.

In the legal systems where a right of retraction has been implemented—such as France—the right of retraction is exercised without the need for a court ruling. At the same time, it goes without saying that this right is conditional on the item being returned in the condition in which the consumer received it. For reasons of space, it is not possible to explore further the question of what happens in case the item has been returned in a worse condition and has therefore lost value. Instead, it is important to notice that the right of retraction is considered a matter of public order. This is a position that could gain traction also in a jurisdiction inspired by Islamic jurisprudence, since it would directly safeguard fulfilment of the social purpose of trading, which is one of the recognised bases for contract enforceability in Islamic legal thought. This means that any agreements limiting or excluding the right or retraction are to be deemed void.

### **The Effects of the Right of Retraction**

The version of the right of retraction currently in force in France (Articles L-221-18 ff. of the French Consumer Protection Code) specifies that the merchant is bound to refund the consumer within fourteen days of being informed by the consumer of his or her exercise of the right of retraction (Article L-221-24)—although this might be postponed to the date of receiving the items or being forwarded proof of postage. In the event of a delay in refund, each passing day accrues interest for the consumer over the sum paid to the merchant. On top of this, withholding a sum that is no longer owed could also form the basis of a criminal offence against the seller—the threat of criminal sanctions acting as a powerful deterrent against delay tactics on the part of the merchant<sup>4</sup> (Qasim, 2005; Muwaffaq, 2009). As far as the consumer is concerned, instead, no financial consequences befall the latter; except for bearing the cost of sending any items back (Article L-221-23 of the French Consumer protection Code; Issa, 2001; Abd, 2009).

This brief overview of the right of retraction in the French legal system reveals a significant gap in the current Emirati framework for e-commerce consumer protection. By failing to grant a cool-off period akin to that available in French and European legislation, the Emirati legal system is still heavily reliant on after-the-fact litigation for redressing the imbalance between professional merchants and consumers, rather than affording consumers a powerful preventative remedy to ensure that only those transactions go through, with which both parties are satisfied.

## CONCLUSION

This article has provided an analytical survey of the protective regime for e-commerce consumers under Emirati legislation. The centrepiece of such regime is the positive obligation for the merchant to provide all the relevant information that might affect the consumer's expectations around the product or service, prior to the formation of the contract. The rationale for such an obligation is to redress the presumptive disadvantage faced by the consumer. For an omission of pre-contractual information to trigger remedies or claims for compensation, it is necessary (1) that the consumer is not already aware of the information he or she claims to be missing and (2) that the merchant could indeed have known the relevant piece of information (this knowledge will often be assumed in case of a merchant acting in a professional capacity). The scope of the duty of pre-contractual information extends to all information that would affect the consumer's ability to draw value from the transaction.

When these conditions obtain, the consumer may either terminate the contract on ground of mistake or-whenever the merchant misrepresented the features of his or her product or service-of deceit. In the latter case, termination will only be available in the presence of an evident disparity in the contractual balance. Consumers might also rescind the contract by returning the item and claiming back the price, on grounds of breach of the warranty for pre-existing defects that were not disclosed by the merchant. Last, but not least, whether or not the consumer is successful in terminating or rescinding the contract, he or she will still have recourse to a claim for compensation in tort, for damage brought in violation of the obligation for merchants positively to reach out to the consumer and share essential contractual information.

While Emirati legislation is well assorted in terms of redressing violations of the obligation to inform the e-commerce consumer, it has fallen short of granting a right of retraction on the model of French and European consumer legislations. This, it is submitted, would form a welcome addition by providing a preventative remedy that the consumer might adopt if, for any reason, he or she came to realise-soon after the conclusion of the contract-that he or she missed important details that would materially frustrate his or her expectations from the transaction. Another feature that was found in foreign legislation, but which remains absent in the Emirati framework, is the standing afforded to consumer associations to undertake "*deletion lawsuits*" on behalf of consumers, to proscribe the use of certain widely used clauses that routinely give rise to unfavourable outcomes for the consumer.

In closing, I would also like to flag the need for greater clarity concerning the scope of consumer transactions covered by the duty to provide pre-contractual information to the weaker party. For instance, it would be useful in connection to banking and credit services to specify that the consumer is entitled to an unambiguous statement of applicable interest rates, and to allow redress in cases of fraud. Secondly, it would be desirable to unify the many provisions that

provide informational safeguards to consumers—from laws against fraud to those on advertising—in a comprehensive legislative instrument. The clarity of the legal regime in favour of consumers will be an important area of legislative development in future years, as the United Arab Emirates seeks to establish an integrated market for the benefit of its residents.

### ENDNOTE

1. Unless otherwise specified, all English-language citations from Emirati legislation are drawn from the official translations supplied by the UAE Ministry of Justice at [Elaws.moj.gov.ae](http://Elaws.moj.gov.ae).
2. Alongside judicial means of enforcement for consumers' rights, the UAE have also put in place an administrative infrastructure for consumer protection. The Ministry of Economy for the entire Emirati Federation has set up a hotline to gather evidence of complaints and violations of consumer rights in online environments. This initiative has been accompanied by an electronic platform (Esteda'a) that mediates claims for defective goods by electronic consumers, as well as presenting information about the hazards of defective goods and publishing a list—in Arabic and other languages—of hazardous products in newspapers for a period of three days. By routing their complaint through Esteda'a, consumers can hope to see their issues concerning defective goods addressed within 24 hours, as opposed to average waiting times of three to six months when acting in their own name. Esteda'a also allows producers to recall any defective products from the Emirati market. Moreover, each federated emirate has groups tasked with consumer rights issues based in the economic development ministry of the respective emirate. These groups implement plans and procedures to improve consumer protection, as well as receiving complaints and undertaking awareness raising initiatives. As an example, the Department of Economic Development of the Emirate of Abu Dhabi houses a Consumer Protection Department tasked with promoting a safer environment for consumers by researching and implementing consumer protection regulations and procedures. The same department may also receive complaints from the public, either of a general nature (e.g. high prices) or specific to particular transactions in the hope of finding a resolution. Finally, the Emirates Consumer Protection Association exists to support consumers' issues and complaints in relation to the growing e-commerce sector.
3. Emirati tort law displays evident points of affinity with Islamic jurisprudence. In Islamic jurisprudence, the paradigmatic tort is the destruction of another person's property. It is around this image that tort liability has been constructed. So, for an act to attract tort liability, the act must first violate a pre-existing rule. Second, it must cause damage to the victim. Subjective intent or capacity is not essential elements of tort-questions of personal negligence therefore remain spurious in Islamic tort law. This is evident in cases where the damage suffered by the victim is a direct material outcome of the perpetrator's conduct: here, no considerations of intention or capacity enter the ascertainment of liability. However, when damage isn't the immediate material outcome of the perpetrator's illicit act—as in the case of withholding information the merchant is under an obligation to provide in an e-commerce contract—then the indirectness of the chain of causation justifies liability, when it is additionally buttressed by an intention to cause harm. In case of withholding information in e-commerce consumer disputes, the intention to cause harm forms one of the elements to be established in a claim for damages. See British Institute of International and Comparative Law. Introduction to Islamic law.
4. The French legal system treats the refusal of the professional to refund sums paid by the consumer, when the latter exercises the right of retraction, as a criminal offence in the field of competition, consumption, and the suppression of fraud. This offence attracts a penalty of up to six months' imprisonment and a fine of 7,500 euros.

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