

Characteristics of the Sales Contract in E-commerce under Jordanian Legislation. Analytical Study

Ahmad Ibrahim Alsharu* Amjad Muflih Alhamad Khaled Mohammad Khwaileh

Assistant Professor, Faculty of Law, Irbid National University, Jordan

* E-mail of the corresponding author: a.alsharu@inu.edu.jo

Abstract

In e-Commerce, sales contract is a vital element in the trading and selling of commodities and in the provision of services, resulting in increased production and profit. Sales contract assures that commodities are efficiently delivered to consumers with consideration towards consumer needs, and supply and demand. This study examined one major issue relating to sales contract in e-Commerce, a vital mechanism in economic development, by combining sales contracts on products and services. For consumer protection, Jordanian legislators should ratify rules and regulations to govern the practices between parties. A descriptive analytical method was applied in this study for its suitability in legal provisions initiation. Analyses were performed to attain outcomes that will fill the research gaps concerning sales contract aside from determining a legal way for contract in e-Commerce. In Jordan, the lack of legal regulatory framework that stimulates sales contract has caused issues among producers, distributors, and consumers.

Keywords: Sales contract, e-Commerce, Jordan, Legal, Regulation

DOI: 10.7176/JLPG/118-02

Publication date: February 28th 2022

1. Introduction

Commercial contract law or the classical contract law espouses the freedom of contract principle. Clearly, the classical contract law advocates the laissez-faire attitude towards the economy which predominated the 19th century. In this contract, the involved parties were ruled by rational self-interest, and courts' interventions were only for giving effect to the parties' agreement and disputes settlement to reflect a new economic model that would call for the intervention of the legislature so that the involved parties are protected from unfairness and unreasonableness.¹

Amendments made to the contract law have resulted in the modern contract law with its primary purpose of facilitating commercial relations whereby fair dealing and judicious expectation by the parties become its key standards.² As the modern contract law eases commercial relations and safeguards the legitimate and judicious expectations of the involved parties, it is deemed appropriate in the context of e-commerce.³

In Jordan, the applied general theory of contracts follows the freedom of contract Articles 87-249 of the Jordan Civil Law 1976 (JCL) whereby the involved parties are considered equals in their corresponding bargaining power. In fact in this country, the general principles provided by JCL is the only governance system in dealing with consumer issues, on-line and off-line. JCL treats all parties as equal in terms of bargaining power. At the same time, the restrictions imposed by JCL and other regulations cannot be ignored. The imposition of Jordanian legislature on the traditional contract theory is discussed in the next subsections. Specifically, this study attempts to find out if the restrictions are limiting the traditional contract theory or are they allowing the involved parties to bargain virtuously, of which is enforceable.

2. Legal system in Jordan

In Jordan, the legal system follows Civil Law 1976 (JCL 1976) jurisdiction. This jurisdiction is comparable to the French law jurisdiction model whereby the rules are codified into written statutes. The codification is the task of the legislative authority. In general, the civil law system is distinct from common law system. Notably, countries that adopt the civil law system generally have extensive legal frameworks whereby all matters are comprehensively specified and the legislation is regularly updated to keep up with the current issues. It is important to regularly update the legislation to prevent gaps, especially in the context of Electronic Commerce Consumer Contract (ECCC).

The Jordanian legislation also has Shari'a influence, and since JCL leads the private law branches,⁴ the

¹ Richard Stone, 'The Modern Law of Contract' [2009] ICCLR 23, 24.

² See Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' [1997] L.Q.Rev. 433, 438. Hisham Tahat, 'Legal Issues Related to the Formation of Electronic Contracts: A comparative Study of English and American Law' (PhD Thesis, University of Aberdeen 2006) 20

³ Marwan Al-Ibraheem, Hisham Tahat, 'Regulating Electronic Contracting in Jordan' (21st BILETA Conference: Globalization and Harmonization in Technology Law 2006) 21.

⁴ Abdelnaser Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' (2012) BJHSS 45, 47. (In Arabic).

Islamic jurisprudence “fiqh” becomes applicable when certain rules are lacking in the legislation, such as in sales contract.¹ Concerning the applicability of Shari’a law and the lack of rules situation, Article 2 of JCL states that (2) in the situation where the court lacks relevant provision in this Code (applicable to all enactments) on the issue at hand, the rules of Islamic Fiqh (Jurisprudence) shall be referred for the recourse more compliant to the provision of the Code. On the other hand, if such recourse is non-existent, the Shari’a principles should be referred, but if such recourse is non-existent also, (3) the custom of the land shall be referred, or otherwise, the rules of equity will apply. (4) The judicial decisions and jurisprudence shall be made so long they are not objectionable to it.²

2.1 Contract under the Jordanian Civil Law

JCL was passed in 1976 replacing the 1876 Ottoman Majalla (The Ottoman Courts Manual ‘Hanafi’).³ The Ottoman Majalla was based on the contract principle which becomes the Islamic contract foundation. Meanwhile, the provisions of JCL are based on the Egyptian Civil Code of 1948 that follows the Napoleonic code. Nonetheless, JCL remains an Islamic-oriented approach as it mostly follows the Islamic principles and the sovereignty of contract principle.

Jordan regards JCL as a principal law because it is the source of all private law branches.⁴ Furthermore, JCL becomes the sole alternate legal framework when certain regulation is absent, involving a situation in which the involved parties have equal bargaining power. However, there is an exception, as provided by article (204) with regards to unfair terms in an adhesion contract. JCL forms the core principles of commercial contract rules that endorse equality between the involved parties, and the freedom of the involved parties become the pillars of the contract freedom principles.

As mentioned earlier, Jordan possesses no specified law for sales contract, and the general principles of Civil Laws have been the mechanism used in restricting the use of the traditional contract theory. In this regard, there has been a concern over transactional relationships that are being affected by imbalanced bargaining power.⁵ In fact, the late 20th century is witnessing contract freedom with reduced intellectual attraction, and the contract is bound to various exclusions in positive law.⁶

2.2 Electronic Commerce Consumer Contract of Jordan

The Jordanian legislation, in its Jordanian Electronic Transaction Law 2015 (JETL), refers the electronic contract as an agreement that is entirely or partially concluded using electronic devices.” In the definition of electronic contract drafted by JETL, the one notable feature is the recognition of the electronic method in concluding contracts. Somehow, observing the provisions of JCL, the validity of the contract is affirmed through the presence of the primary elements of contract irrespective of the used medium. Specifically, JCL stated a contract as one that is concluded through telephone or other comparable means,⁷ and so, a contract is valid when concluded through telex or through the Internet. In accordance with this doctrinal principle, observing article 102 of JCL, the Jordanian Supreme Court of Cassation has stated that contracting through the use of telex shall be treated as one that was concluded between parties in a single place with them all physically present during the completion of the contract.⁸

In discussing Jordanian legislation and the freedom of contract principle, the issue is more about the influence of the will of the involved parties in the development of ECCC. In other words, the problem is not so much about whether the involved parties were willingly involved in the ECCC. Hence, sales contract will only be valid if the involved customers declare their wills freely, and so, without acquiescence from all involved parties, sales contract will not materialise. Nonetheless, acceptance of the contract terms will bind the involved

¹ Adnan Alsarhan, *Jordan Civil Code: Sources of Obligations* (1st, Dar Althaqafah, Amman 2005) (In Arabic).

² Mohamed Olwan, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World 2007) 137.

³ Mohamed Olwan, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World 2007) 137.

Ottoman Journal of Legal Rules 1876 or the Civil Code of the Ottoman Empire, Majallah al-Ahkām al-adliyyah, Available online [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf). It is worth mentioning that JCL is influenced by "Sharia", which refers to Islamic Law represented in the main source of rules in Islam. Therefore, JCL has stipulated in article 2 that "The provisions of this law shall apply to all matters it deals with, and if the court do not find applicable provision, then it has to apply the rule of Islamic Jurisprudence "Fiqh", which is more "appropriate" to this law, then it has to apply the general principles of Islamic Sharia', then by customary rules, then by natural law "principles of fairness". For more details see Hayajneh, 'The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?' (n 31) 606, 611.

⁴ Abdelnaser Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' [2012] BJHSS 45, 53.

⁵ Abd El-Razzak El Sanhuri, Medium commentary on the new Civil Code: Part 1 (1st, Dar Alnashr, Cairo 1952-1970) 120-130

⁶ Chitty on Contracts (29th, Vol 1, Sweet and Maxwell, London 2004)12.

JETL, s 2.

⁷ JCL, s 102.

⁸ Supreme Court of Cassation (1990/1202) – Jordanian Bar Association, Vol 1 and 2, p 1713.

parties to the agreement.¹ In this regard, all parties must be able to freely choose their contractual parties. However, if there is an imbalance in the bargaining power, as can be exemplified in the ECCC situation, the weaker party, frequently the consumer, may be at a disadvantage, especially in terms of contract information and T&Cs.²

3. Characteristics of the Sales Contract

Sales contract comprises a number of distinctive characteristics. This contract is a consensual, netting and binding contract for both parties. It is also a contract that involves ownership transfer.

3.1 Consensual Contract

Sales contract is completed when acceptance and offer matches, and this contract is a form of consensual contract that generally does not require specific form, or a formal procedure, with the exception of certain cases of which the law requires certain form or procedures like in the sales of real estate and fixed property. As such, sales contract of such items³ will be validated by the fulfilment of formal conditions postulated by the law. An example is the use of registration. Here, the formal condition becomes the contract basis, rather than a circumstance of proof.

Considering the significance of sales contract in real life, and considering that the sale in the contract is associated with state sovereignty, particularly for sales contracts of real estate and immovable funds, laws and legislations drafters have provided clarification of this contract using certain formal procedures.⁴

3.2 Netting Contract (Exchange)

Sales contract may be classed as an exchange contract, owing to the fact that all involved parties are aware of what other contracting party is surrendering to them in order to receive something from them in return. Meanwhile, the netting or exchange may be specific or probabilistic⁵, whereby in specific netting, the involved parties may be informed of the consideration that they will take, and the consideration that they will give when the contract concludes. As such, in this type of netting, the involved parties have specific obligations in terms of value and amount upon the completion of the contract. This can be exemplified by the sale of a vehicle at fifteen thousand dinars.

Meanwhile, in probabilistic netting, the involved parties will not be aware of the amount to be taken by each party as well as the amount to be given out to the other party when the contract concludes. Clearly, contract of this kind is tainted by ignorance and such contract is generally unlawful. In contracts with probabilistic netting, onuses may be dictated by an unknown event, like in terms of when or how or magnitude. For this reason, it is impossible to ascertain the amount of gain or loss to be incurred by the involved parties. Insurance contract is one common example.

Sales contract is generally considered a netting contract, with the exception that the netting in it is of a precise value, allowing the involved parties namely the seller and buyer to know the specific amount to take from and give to the other party upon the conclusion of the contract.⁶

3.3 A binding Contract for both Sides and a Contract of Transfer of Ownership

The conclusion of a sales contract by the will of its parties binds the involved parties to the contract. Upon contract conclusion, contrasting obligations are created for the involved parties and no party can one-sidedly dismiss their obligations.⁷ Ownership transfer also can occur through sales contract, allowing the ownership of an item to be transferred to the buyer from the seller upon the conclusion of the contract. The conclusion of the contract may involve delivery of item, the possession of item, or any other formal procedure. In the process, exceptions, as mentioned in the legislation, relating to certain sales, for instance, those involving real estate, mobile properties of a special nature, such as ships and cars, need to be observed, as the ownership of the aforementioned is not transferrable without registration.

¹ Haloush, Haitham A. "A Practioner Guide To The Unfair Competition Law In Jordan." *The Open Law Journal* 2, no. 1 (2009).

² Alhusban, Ahmad. *The importance of consumer protection for the development of electronic commerce: the need for reform in Jordan*. Vol. 39. University of Portsmouth, 2014.

³ Alnsoor, Ali. "The legal framework of electronic contract in the Jordanian legislation." *Global Journal of Politics and Law Research* 5, no. 5 (2017): 46-62.

⁴ Abu Baker, Mohammed Khalil, Sara Mohammed Al-Arasi, and Mohammed Fahmi Al-Ghazwi. "Provisions Regulating Commercial Distribution Contract in Jordanian Law." *Hamdard Islamicus* 43 (2020): 221-233.

⁵ Najida, Ali: *Al-Wajeez in the Sale Contract*. d i. Egypt: Arab Renaissance Publishing House. 2003 AD. p 9

⁶ Tahat, Dr. "Regulating Electronic Contracting in Jordan." *Available at SSRN 1498320* (2005).

⁷ Alnsoor, Ali. "The legal framework of electronic contract in the Jordanian legislation." *Global Journal of Politics and Law Research* 5, no. 5 (2017): 46-62.

4. Conclusion

Jordanian legislation and sales contract involving e-commerce demonstrate that freedom of contract is not about whether or not the involved parties entered into an ECCC freely, but it is more about the influence of the will of the parties to establish the ECCC. In other words, the contract is validated by the voluntary declaration of consumers of their wills; a contract cannot be created without assent.

In increasing the confidence of consumer towards e-commerce, acceptable level of protection needs to be established. Hence, restrictions should be imposed on the freedom of contract. Here, ECCC is subjected to substantial number of legislative regulations whereby the only deliberate aspect of the freedom of contract will be whether or not to partake in the contract. Such decision will trigger a set of obligations ascertained by law.

References

- Hisham Tahat, 'Legal Issues Related to the Formation of Electronic Contracts: A comparative Study of English and American Law' (PhD Thesis, University of Aberdeen 2006) 20
- Marwan Al-Ibraheem, Hisham Tahat, 'Regulating Electronic Contracting in Jordan' (21st BILETA Conference: Globalization and Harmonization in Technology Law 2006) 21.
- Abdelnaser Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' (2012) BJHSS 45, 47. (In Arabic).
- Adnan Alsarhan, Jordan Civil Code: Sources of Obligations (1st, Dar Althaqafah, Amman 2005) (In Arabic).
- Mohamed Olwan, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World 2007) 137.
- Abdelnaser Hayajneh, 'Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law' [2011] EJSS 277, 278
- Abd El-Razzak El Sanhuri, Medium commentary on the new Civil Code: Part 1 (1st, Dar Alnashr, Cairo 1952-1970) 120-130.
- Alhusban, Ahmad. The importance of consumer protection for the development of electronic commerce: the need for reform in Jordan. Vol. 39. University of Portsmouth, 2014.
- Najida, Ali: Al-Wajeez in the Sale Contract. d i. Egypt: Arab Renaissance Publishing House. 2003 AD. p 9
- Haloush, Haitham A. "A Practioner Guide To The Unfair Competition Law In Jordan." The Open Law Journal 2, no. 1 (2009).
- Abu Baker, Mohammed Khalil, Sara Mohammed Al-Arasi, and Mohammed Fahmi Al-Ghazwi. "Provisions Regulating Commercial Distribution Contract in Jordanian Law." Hamdard Islamicus 43 (2020): 221-233.
- Tahat, Dr. "Regulating Electronic Contracting in Jordan." Available at SSRN 1498320 (2005).
- Alnsoor, Ali. "The legal framework of electronic contract in the Jordanian legislation." Global Journal of Politics and Law Research 5, no. 5 (2017): 46-62.