



Regulating Electronic Contracting in Jordan

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Abstract

With the advent of the internet as a medium for forming commercial contracts, Jordan was one of the first countries in the Arab world to enact legislation to regulate online contracting, with the Electronic Transaction Act 85 of 2001. Given that Jordan is a civil law country, and contract law rules are embodied in the Jordanian civil code, this paper examines whether the act creates new rules for online contracting or whether the civil law rules are still sufficient to be applied in the electronic environment. In addition, this paper summarizes two of the obstacles that might face in the application of this Act in Jordan. The first is the need for providing consumer friendly rules to protect consumers in the online environment, since the internet is a place where fraud and mistakes can easily happen. The need for consumer protection rules becomes more necessary because neither the Act nor the civil code nor, indeed any other regulations in Jordan, provide safeguards to consumers from the abuse and risks existing in the online environment. The second hindrance is that the internet technology infrastructure is not regulated with standards that achieve stability and trust for consumers in Jordan.

Keywords: E-commerce, Civil law, Consumer protection, Jordan

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1. Introduction

The twenty-first century has brought with it a new electronic environment for forming commercial contracts and with this new environment have emerged new methods of making contracts. The use of Email and websites are now popular methods for forming valid contracts, but these new ways of making contracts are not without legal concerns. Many issues may arise in online contracting. Deciding when and where online contract is formed and the interaction of electronic agents are the best examples of legal concerns that arise in online contracting. The question that arises here is how we should regulate the legal problems occurring in online contracting. Another way of asking this question is whether we need new rules to govern the issues arising in online contracting or whether the traditional civil law rules are sufficient to regulate these issues.³

The method of answering this question will be by exploring the harmonization between the contracting rules in the Electronic Transaction Act and those in the Civil Code. This will be discussed in the first part of this paper. The second part seeks to explain two main obstacles facing the development of electronic commerce in Jordan. The first obstacle is the absence of consumer protection instruments either in the Electronic Transaction Act or in the Civil Code to protect online consumers. The second is a lack of an established legal framework for internet technology infrastructure when doing business through online stores and for regulating the internet service providers (ISPs) as it is the case in Europe for example.

³ By traditional contract rules, we mean the rules that embodied in the Jordanian Civil Code 1976. This Code is the main legislation in areas of private law in general and law of obligations in particular in Jordan. This Act was enacted in 1976 and came into force in 1/1/1977. It replaced and superseded the previous Ottoman Civil Code (Al- Majalah) of 1877.

2. The application of the Electronic Transaction Law

Like most countries all over the world that have enacted legislation in respect to E-commerce, Jordan has introduced the Electronic Transaction Law⁴ (ETL) to regulate electronic commerce. This Law is considered as special legislation that applies to transactions conducted by the internet. Courts should govern online contracting issues according to this Act. However, this does not necessarily mean the exclusion of the application of other laws. Traditional contracting rules in the Jordanian Civil Code can still be applied where there is no provision to regulate the issue in the ETL.⁵

The Electronic Transaction Law has a broad application in respect to transactions carried out over the internet, applying to all kinds of transactions. Transactions such as computer information transactions or those related to the sale of goods and services are regulated under the scope of this Law. Also the scope of the Act applies to all the parties that make online transactions. This means that this Law governs consumer to consumer contracts (C2C); business to consumer contracts (B2C) and business to business contracts (B2B).⁶ In addition, the Act governs Transactions "approved by any governmental department or official institutions, in whole or in part".⁷

Nonetheless, this act like the UNCITRAL⁸ requires explicit consent from both of the parties that they are going to conduct their transaction using the internet. Article 5/A of the Electronic Transaction Law states that "Unless a provision in this Law states otherwise, the provisions of this Law shall apply to the transactions on which the parties thereto agree to implement the transactions thereof through electronic means."

This scope, even it gives the act the merit for regulate all the commercial activities on the net, but it goes far from the essential goal of its application. The Act should essentially govern electronic contracts formed essentially between two main parties at the

⁴ Electronic Transactions Law No. (85) Of 2001

<http://www.bakernet.com/ecommerce/e-transactions%20law.doc> . Accessed Feb 2006

⁵ Art. 3/a

⁶ Art 4/A.

⁷ Art.4 /B of the Act.

⁸ www.uncitral.org

Regulating electronic contracting in Jordan

commercial context especially in respect to business to consumer contracts. This is because most commercial activities occur between a business firm on one side and a consumer on the other. This requires a legal framework that facilitates this kind of activity, especially in respect to consumers. However, the application of this act does not exclude the application of any act relevant to the transaction.⁹ This non exclusion implies that the Civil Code in Jordan is still applicable to transaction carried out through the internet.

Returning back to the main question of this part which is whether the legislative approach in Jordan aims to provide new electronic contracting rules as a reflection of the emergence of electronic interaction, or whether these rules are comported with the general approach in the civil code in unifying the rules. It can be said that the legislation for electronic transaction in Jordan neither creates new rules for electronic contracting nor excludes the application of the traditional contracting rules in the civil law. This gives us a clear indication of the main aim of the legislation in unifying the contracting rules in the online or offline environment. Even this Law is considered as a special legislation for electronic commerce but the contracting rules are the same. This adoption of this way of analyses returns to two main reasons. Firstly, before the emergence of internet technology the Civil Code policy implied that the application of the embodied contracting rules should be extendable to new methods of communication. The provision of the Civil Law gives us a clear indication that new methods of communications such as the phone or any similar method are under the scope of the Civil Law application. This is clear from the Article 102 which indicates that "Contracting by telephone or any similar method shall in respect of the place be considered as if it has been completed between two contracting parties not present when the contract was made."

Secondly, an analysis of the Electronic Transactions Law provisions, gives us a clear indication of the aim of unification between the contracting rules whether they are for the physical world or for the online world. There are no new rules that create or establish legal positions different than that in the Civil Code. For example, within the few

⁹ Art 3/A

Regulating electronic contracting in Jordan

contracting rules in the Act,¹⁰ none of them regulate the mechanism of forming contracts through the net or the moment of conclusion online contract. On the contrary, the provisions of the act aim principally to clarify legal issues surrounding electronic contracting rather than establishing new rules. For example Article 15 clarifies the controversial problem of determining when and where the message is deemed to be sent or received. This article, however, does not establish the rules of contract conclusion, but merely explains the time of sending or receiving the message.

The aim of unification of the contracting rules in the ETL returns to the main source of this Law. The ETL relies to large degree on the Model Law (UNCITRAL). This is clear through the provisions of the law which are to some extent similar to those in the Model Law. This is due to the influence of the UNCITRAL in electronic commerce legislation in Jordan. The Law in Article 3 aims to facilitate the use of electronic means. This is a general goal for the Law. This has been done by adjusting contracting rules to cope with the electronic environment and removes obstacles that face online contracting in general and regarding electronic contracting rules particularly. Many examples in the act show the trend towards unification of the rules in Jordan. Providing details provisions for electronic contracting rules will affect the main goal for that unification. Therefore, the electronic agreements should be given the same legal effect as traditional paper based contracts. This principle is clear in most legislation around the world.

But this aim is not the whole of the story. This Act can be described as a first step in regulating electronic commerce in Jordan, which requires further steps in two areas. Firstly, the Model Law as a source for this Law does not succeed in answering several questions relating to online contracting, such as providing trust and transparency to the actors in the electronic environment. This is because the UNICTRAL is a Model Law aiming to provide general provisions without interfering in of the national legal system of any country, as any legal system has its own policy which comports with the economic, social and cultural nature of that country. Applying this reasoning in the case of Jordan, we do not find any provision reflecting the policy behind some commercial parties concerns in the online environment, such as providing rules regulating the consumer or the

¹⁰ Arts 7 -19

Regulating electronic contracting in Jordan

business rights and obligations. Especially one when considers that the online environment is a place where many mistakes and errors and some times even fraud, can happen easily. There is a particular need for legislative action to provide some trust to the participants.

Secondly, the Jordan legislature has not taken advantage of the opportunity to consider some of the e-commerce legislation in the modern countries in regulating the establishment of online stores and the activities of Internet Service Provider, as is done in the UK or at the European level. These two criticisms can be the most major obstacles facing online contracting in Jordan as we will discuss in the following section.

3. Obstacles that Face Online Contracting in Jordan

Here in this part, two of the main criticisms that face the E-commerce legal framework in Jordan will be discussed in the following:

3.1 Consumer Protection:

In general there is no comprehensive consumer protection legislation in Jordan. Most of the consumer protection rules are embodied in the general rules of the Civil Code or in the Commercial Law. For example, any action brought for damage caused by defective products will be primarily premised on the law of tort or contract.¹¹ Also in the case of a claim for personal injury under the tort of negligence, or a claim for breach of contract, or misrepresentation, the case will be governed by the general principles of these Acts. Also most of the rules regarding forming contractual relations in the traditional way can be governed by Civil law rules. Some of these rules themselves embody a kind of consumer protection such as those related to duress or mistake while forming the agreement.¹²

¹¹ According the Civil Code Art (512/1), the sale of goods contract "shall be deemed to be made on the presumption that the sold property is free of defects except for what is customarily allowed". In paragraph 2, the law gives the buyer the option to return or accept the sold property.

¹² Mohammad Obeidat, Consumer Protection and Electronic Commerce in Jordan (An exploratory study) available at http://www.thepublicvoice.org/events/dubai01/presentations/html/m_obeidat/m.obeidatpaper.html Accessed March 2006.

Regulating electronic contracting in Jordan

The rules which can be described as consumer friendly rules are applied in the physical world of contracting where the parties are in the presence of each other and the consumer can touch, feel, even in some cases taste, the product. But in the online environment, the situation is different in two ways. Firstly, the transaction in the electronic setting is carried out at a distance, and there is no physical presence of the parties. This absence of physical presence has given rise to some concerns that policy makers must protect the actors engaging in such activities.¹³ So, in order for e-commerce to achieve its full potential, consumers must feel that online transactions are safe, trustworthy and fair. Secondly, online sales often involve increased risk and uncertainty over that present in similar transactions in a traditional medium, thereby requiring increased protection.¹⁴ This is a result of such transactions being so revolutionary both in the manner in which they occur, as well as a failure to fit within common conceptual paradigms. For instance, in the traditional sale, a consumer will go to a physical store to purchase the item. He can try, see and touch the item which is not possible in the online environment.

Therefore, any legislature aiming to provide clarity and trust in the electronic setting will try to reframe the actors rights in the context of the electronic environment, especially with regard to the consumers. This goal requires rules that can protect consumers within the electronic medium. There was a call for adopting consumer protection rules in the electronic environment before the enactment of the ETL.¹⁵ Unfortunately, the ETL does not contain any explicit consumer friendly rules in the electronic environment. There is also no equivalent of the UK Consumer Protection Act in Jordan.¹⁶ Neither is there legislation that regulates distance contracted such as the distance selling regulations in the UK, nor provisions protecting consumers from the abuse of sellers and suppliers in the online environment. This is as we explained above returns to the copying of UNCITRAL

¹³ 25 David R.Johnson and David G.Post, 'Law and Borders,The Rise of Law in Cyberspace ' (1996) 48Stan. L. Rev.1367. See also Saami Zain, Regulation of E-commerce by contract: Is it fair to consumers, 31 UWLA L.Rev.163, 2000, pp163-186.

¹⁴ Saami Zain, above note,168.

¹⁵ U.S.-Jordan Joint Statement on Electronic Commerce ,available at <http://www.sice.oas.org/Trade/us-jrd/St.Ecomm.pdf> Accessed March 2006

¹⁶ Ian Walden, Regulating electronic commerce: Europe in the global E-conomy.E.L.Rev.2001, 26(6), 529-547. See The Consumer Protection (Distance Selling) Regulations 2000; available at <http://www.opsi.gov.uk/si/si2000/20002334.htm> .

Regulating electronic contracting in Jordan

rules in the ETL. Of course this does not comport with a national legislation that reflects the policy behind this act. The consumer bodies felt that e-commerce needed a more comprehensive set of regulations in order to ensure orderly development of e-commerce in the country.¹⁷

Consequently, this factor demands greater protection for the consumer. In order to achieve this protection, Jordan's legislature should ensure that the consumer should feel that online contracting is as fair and safe as traditional contracting, and can do this by enacting consumer friendly rules in the electronic environment.

3.2. Establishing a framework for internet technology infrastructure

Another important neglected aspect of regulation in Jordan is the ignorance of providing a legal framework for establishing online stores. The way of providing online activities should be governed to allow online commercial activities to flourish. From one side, it is difficult to trust online stores without knowing the origin and registration number of these stores. From another side, the application of the rules cannot be done unless there is requirement that Internet Service Providers comply with the regulations. For example, there is no equivalent article to that in the UK which stipulates "the service provider has not made available means of allowing [the individual] to identify and correct input errors"¹⁸

It is true that in December 2000, regulations were promulgated under the ETL to govern the operation and licensing of internet cafés,¹⁹ but these regulations do not regulate online contracting in any way. They require only that all the internet cafes be licensed by the government, and that owners and managers must record the names of all names of all users and the sites they visit.²⁰

¹⁷ See the suggestions from the chairman of Consumer protection Association in Jordan in his paper, above note 12.

¹⁸ The Electronic Commerce (EC directive) Regulations 2002, SI2002/2013, Reg.15

¹⁹ Report about Privacy and Human Rights in 2003 Jordan

<http://www.privacyinternational.org/survey/phr2003/countries/jordan.htm> Accessed March 2006

²⁰ Internet Café Regulations -instructions for Regulating the Work of the Internet Centers and Cafés and the Bases for their Licensing for the Year 2001, § 4 (December 2001)

http://www.reach.jo/documents/New_Laws/R3/Internet_Cafes_Regulations.pdf Accessed March 2006

4. Conclusion

Jordan has missed a great opportunity to provide a complete legislation for regulating online commercial activities. The enactment of Electronic Transactions Law is only the first step that needs further steps to allow the online commercial activities in Jordan to flourish. The electronic commerce sector should have different supported instruments to encourage users, consumers and businesses to go online without any fear. Clarifying the rights and duties for the parties is very important. Besides actions should be taken from the private sector to carry activities and encourage consumers to do online business. These tasks should be taken not only from legal point of view but also from the commercial sectors themselves. For example, through provide trust and transparency instruments either to the business firms or to the consumers. This needs special attention especially as this sector is still new to all participants in online commercial activities.

Jordan has also missed a great opportunity by ignoring the general principles of the Jordan-US Statement on Electronic commerce²¹ which stress the importance of providing consumer protection instruments. It would be much better if Jordan incorporates these principles into its Electronic Transaction Law, since such principles include an important language regarding security, transparency, and consumer protection for actors in the online environment.

²¹ Note 15 ,above