

Research Article

Some Aspects of E-Sales in the Light of the Ambiguity

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Abstract: The growing increase in the application of modern electronic instruments, led to the increase of E-contracts and the exchange of E-documents. Although the contract of sale is proposed as one of the most widespread commercial exchanges, the E-commerce Code has kept silent and most decrees have remained uncertain. Specially, in terms of the elimination of the physical space in E-sales, some issues like the option of meeting place, the option of inspection and also concluding official sale, become very important. The present study is a brief opportunity to study the mentioned debates.

Keywords: E-sale, immovable property sale, option of inspection, the option of meeting place

INTRODUCTION

With regards to the legislator's silence in presenting a definition about E-sale, it is inferred that, E-sale is not a new type of contract. It's just a new form of sale contracts, the means and forms of which has altered. Yet, it was worth considering that the legislator would specify the respective commandments and then the duty in the domain of E-sales, towards some of the issues of the traditional sale, such as the option of meeting place, which necessitates a physical space for its realization, could be determined. Therefore, the author's motive was studying such issues, to offer the present study.

The current study considers examining whether the option of meeting place and inspection, could be imaginable in the case of E-sales; and also how it could be possible to organize an official sale in a virtual space.

The present study is proposed in three parts: the nature of E-sale in the first part and then options and official E-sale will be sequentially studied.

THE NATURE OF E-SALES

Although E-commerce is a part of the title of the Iran's E-commerce Code, with scrutinizing in this law, it is clearly established that the legislator, by no means, has represented any definition about E-sales, E-commerce, or E-contracts; rather it has just defined the means of telecommunication and telecontracts, thus it can be inferred that the legislator intended not to consider the E-contracts, in terms of essential, separated from the traditional contracts.

While in some of the regulations, including articles 1-2-the England E-exchange, it is provided that the commercial exchange, directly or indirectly, in any form or model, includes the exchange of services, goods or anything people purchase in their industrial, commercial, handicraft activities, ... (The Electronic Commerce Regulations, 2002).

On the other hand, by scrutinizing in article 191 of the Civil Code, which considers the contract fulfilled, merely if it's joined to what implies the intention, the consensual principle of the contracts gets manifested; so it is inferred that creating contracts in Iran's legal system, requires no specific formalities. Also, particularly about the contract of sale, the article 388 of the indicated law provides that, sale means the transferring of the ownership of the property for the known consideration, without requiring any other terms, for the realization of the sale contract. So that the legislator considers the contract of sale realized, with offer and acceptance, after the agreement of the vender and the vendee in the considerations and even considers no specific statements for offer and acceptance, rather views all statements explicitly indicating the sale, as the constituent of the contract of sale. Therefore, contract of sale, is created upon the declaration of the vendor's and the vendee's intention, through offer and acceptances, exchanged by data messages in the virtual space. As provided in the provision 1, article 11 of the Uncitral E-commerce sample code, offer and acceptance can be in the form of data message. So, E-sale is a modern form of the traditional sale and their commandments are the same. For example, object of sale, either dealt with virtually or traditionally, either as a physical or digital and electronic object, has to be

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identified in terms of material, type and amount. But in some issues, related to the electronic method and the virtual space, explaining the commandments of the sale contract, requires more discussion, including the commandments of the options, especially the option of meeting place, which will be studied in the present study.

OPTIONS

With regard to what mentioned before, the nature of E-sale is not different from the traditional sale, but the E-sale is just different from the traditional sale, in terms of the way of conclusion and takes place in a modern form. Thus the discussion about the commandment of the options in E -sale is similar to the traditional sale, but in some cases, the modern form impacts the traditional form. They will be discussed below.

The option of inspection: Among the proposed options in sale contract, it is obvious that the option of inspection enjoys the most efficiency. The option of inspection is relevant where the vendor has not seen the goods while concluding the sale contract and has purchased that, just according to the offered descriptions, or according to the previous inspection. In this case, if he can't find the mentioned particulars in the received goods, he has the right to cancel the contract. Katooziayan (2008) By some scrutiny, it is clarified that in transactions concluded in the virtual space, the vendor cannot see the object of the designed goods while transacting and so it is obvious that after inspection, if there is any lack of coincidence between the mentioned particulars of the goods and the received goods, then according to the option of inspection, he has the right to cancel the contract. What is worth noting is it that in most cases, the goods are displayed in the virtual space through the catalogues and pictures, so that in most cases, the vendor embarks on purchasing the goods, simultaneously with the declaration of acceptance. Thus, now the question is, whether we can admit that, while concluding the contract of sale, by the vendor and through the computer's monitor, the inspection has taken place as it is meant by the legislator or not. In this way, if the indicated assumption is considered as inspection, regarding the inspection of the goods at the time of conclusion and if after the delivery of the goods, the particulars are not in coincidence with the goods viewed in the virtual space, the vendor will not have the right to cancel the contract, invoking the option of inspection. So, in accordance with the article 410 of the Civil Code, the option of cancellation of inspection, because of the lack of coincidence in the particulars of the sailing object with the particulars, according to mentioning of which, the vendor has embarked on purchasing, is valid, while the vendor has not inspected that previously. With regards

to the assumption that the indicated sample is regarded as inspected, since the vendor has inspected the goods at the time of conclusion and has not purchased the goods merely through the mentioned particulars, so the option of cancellation in this respect is no longer probable.

But the important point is it that inspection is fulfilled just when the vendor observes the goods tangibly; in a way that observation brings about information and knowledge about all the particulars and characteristics of the object. Fazel Harandi (2008b), this is while in the virtual space, just a picture of the object is inspected. Therefore, it is worth considering that even in the physical space, if an object is observed through the window shop, but the vendor cannot see all its the corners well, or the seller doesn't deliver the object, to be observed out of the window shop and close to the vendor, we can't say that the inspection has taken place. All the more so, since in the virtual space, the object for sale is not physically and tangibly at hand and observed, rather the picture of the object is inspected, it is comprehended that in the virtual space the possibility of the object inspection does not exist. According to such circumstances, because of the virtual space in E – sales and the absence of the object in the physical space, the inspection has no relevance; so, the vendor purchases the items in the virtual space, according to the particulars mentioned by the seller. Thus, he will be qualified for the option of the cancellation of the contract, merely invocatin to the article 410 of the civil code.

Option of meeting place: Considering that, in accordance with the article 397 of the Civil Code, after concluding the contract, the parties are allowed to apply this option just during the meeting of contract and while they have not yet dispersed. The question proposed here about E-sale is, whether in this type of contracts it is possible to realize the option of meeting place or not.

About this option, especially with regards to the texts of the Islamic Jurisprudence in the definition of on the spot, it is established that the physical presence of the transaction parties, next to each other in the location of the concluding the sale contract, is of great importance. Moreover, the physical presence of the vendors and vendees at the time of contract was so important that, because of the prevailing case in the settlement of the parties, while concluding the contract, this option is called the option of meeting place; the place where the parties of the contract of sale, create the contract in that place (Fazel Harandi, 2008a). Thus, considering the spiritual and emotional relation between the transaction parties and their impression on each other, before dispersion, is an important issue that is considered in on the spot description and the option resulted from that. Therefore, because of the absence of physical space in E-transactions, the physical and on the spot presence of the parties has no relevance, so the

possibility for the existence of the option of meeting place in E-transactions is no longer probable. Although in some cases, the users embark on the offer and acceptance of the sale contract simultaneously, another belief might be created, so that because of the spiritual relation between the parties, on the spot description is proven and so the option of meeting place finds relevance. Bakhtiyarvand (2012) but it is worth noting that the emphasis of the option of meeting place is on the physical presence of the people next to each other, to the extent that the parties' separation, extinguishes the option of meeting place. So that, according to the opinion of some individuals, even with the least displacement of the parties to the transaction, the separation takes place and if the parties move together, then the separation has not occurred. Fazel Harandi (2008a), this crucial point, confirms the importance of the presence of the parties next to each other. Thus, by emphasizing that this principle is a necessity for the contracts and the options are the exceptions imposed to this principle, it is worthy that they wouldn't be generalized in cases of doubt. So, the presumption is the absence of the option of meeting place in E-sales.

But it's important to mention that basically, there is no feeling of necessity for the existence of meeting place at the level of the international commerce, since there is another facility there is another facility, at international level and that is called the right of renunciation, at international level and that is called the right of renunciation. The right of renunciation is the right that permits the transaction parties to declare their renunciation of the concluded contract within a fixed time limit, without the need for mentioning any specific reason and so, it is as if no contract has been concluded from the beginning. Jaafarzadeh (2005) in Iran's E-commerce Code, the application of this right is reserved for the consumer, so that according to the article 37 of the indicated law, the consumer has the right of renunciation until 7 days. In accordance with the article 38 of the mentioned law, if the object of sale is a merchandise, this time limit begins from the date of the goods' delivery to the consumer and if it's a service, the time limit begins from the date of conclusion.

With regards to the above cases, it is obvious that in the presence of such facility in the E-commerce Code, there is no need to apply the option of meeting place from the part of the vendor.

THE OFFICIAL E-SALE

Although in Iran's legal system, the sale contract is a kind of consensual contract, some types of sales are official by the explicit law, for example the sale of coins contract, can be named as one of those contracts.

Immovable property sale: In Iran's legal system, different and to some extent contradictory comments have been proposed about the creation of immovable

property sale, so that some individuals consider the executing of formal document, as the constituent elements of this contract and some other, with the emphasis on the consensual contract, consider the execution of the formal document, merely effective in the proof of contract. Shahidi (1999) but the approach of the E-commerce Code against the immovable property sale is noteworthy, so that in the article 6 of the indicated law, it is provided that with the exception of the cases relevant to the immovable property documents, data messages are valid. Thus, if we believe in the assumption that considers the execution of the formal document, as the constituent element of the immovable sale, the data messages won't even possess the validity of the traditional writing in respect of immovable property, let alone that they would possess an evidentiary value, higher than the formal documents. Thus, the creation of the sale contract in respect of the immovable property is not possible through electronic instruments. On the other hand, if we believe in the consensual sale of the immovable property, the mentioned assumption will be noteworthy. As it is established by the comparison of the two indicated provisions, the legislator in the provision (b) considers the pharmaceutical sale through data messages as invalid, while in the provision (a) does not point to the immovable property. Rather, in this study, it stipulates that the documents of the immovable property ownership cannot be in the form of data messages. In other words, in accordance with and with the emphasis on the principle of consensual contract, the transacting parties can embark on transferring the immovable property ownership through electronic means such as computers, so that the contract of sale is created in this way. But the E-documents are not considered in this regard, as the reason for ownership; rather, the transacting parties have to embark on creating traditional documents by the use of E-documents, so that the positive of ownership would be the transferee.

The sale of coins against other coins: Sale of coins is the sale of gold and silver for each other Jaafari Langroudi (1998) and according to the article 364 of the Civil Code, it's one of the non-fungible official contracts, in which taking the possession of the sailing object is one of the constituent elements of the contract, so that without this possession, the sale of coins is not fulfilled. On the other hand, in regards to the famous opinion of the Islamic Jurists of Imamiye (Katoozian, 1999) the possession of the object in the sale of coins is required on the spot, in other words, is the possession on the spot possible while concluding the sale of coins contract in the virtual space?

As we mentioned before, the presence of the vendor and vendee, on the spot description has no relevance. In other words, on the spot description, in

terms of the presence of the vendor and vendee, next to each other and their spiritual and emotional impression on each other is considered, but such description is not realizable in virtual space. Basically, because of providing the description of speed in contracts and transactions, the borders were passed through each other; and by creating the virtual space, every specific formalities and observance of the physical presence were avoided. Thus, the physical and on the spot possession in virtual space is impossible, but with regards to the article 369 of the mentioned law, it is inferred that the possession of each object is proportionate to the type of the goods being transacted, thus, in respect of the digital goods like essays or music, being taken into possession of the vendor through downloading, the physical delivery has no relevance and the possession is fulfilled through downloading and at the time of purchasing the digital goods, but it's obvious that in respect of gold and silver, the possibility of virtual possession is cancelled out.

So, according to the above circumstances and with regards to the impossibility of on the spot possession in virtual space, the realization of sale of coins through electronic means is not possible.

CONCLUSION

The physical space and presence has no relevance in electronic instruments, so, some discussions like certain options such as the option of meeting place which needs the physical presence of the transaction parties at the time of the sale contract conclusion, are impossible to be accomplished through the electronic means. Moreover, the inspection of the object doesn't really take place in the virtual space and through the computer monitor; therefore, if the vendor finds any lack of coincidence in the particulars of the object with the displayed object in the virtual space, then he can apply the option of inspection for cancelling the contract.

With regards to the important fact that the on the spot possession is not possible through electronic means, in official contracts such as sale of coins which require some specific formalities to be created, i.e. the possession of the object of sale on the spot, possession in the virtual space and consequently the creation of the official sale will not be fulfilled.

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