Formation of e-Contracts under Iranian Electronic Commerce Act

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Abstract - The time and place of formation of a contract comprise significant legal effects under the law of contracts. In case of electronic contracts, the determination of time and place of dispatch and receipt of an electronic message plays a significant role to determine the time and place of formation. The Electronic Commerce Act of Iran provides a number of provisions concerning the formation stage. The modification of the dispatch and receipt provisions has a significant impact to fulfill the present legal-commercial demands in line with new technologies. This paper aims to provide legal recommendations for amending the time and place of dispatch and receipt rules of an electronic message. We used the analytical-comparative method to the principles and legal effects of formation under the Iranian Electronic Commerce Act. The results conclude that the dispatch and receipt principles have some defects and silence features. Moreover, the related provisions are not adequate to address legal issues arising from new technologies like internet.

Index Terms - Iran, Electronic Commerce law, Electronic Contract, Dispatch and Receipt, Electronic Message.

I. INTRODUCTION

The value of online transactions shares 3% of the Gross National Product (GNP) of Iran which is mostly in the area of e-learning technology, e-tickets, public services fees, consumers’ purchase of goods and services, exchange of documents and mostly in Business-to- Consumers (B2C) model [1].

The Deputy Minister of Industry, Mine and Trade (MMIT) in education, research and technology, Ali Asghar Tofigh announced on 19 October 2014 that Iran ranked 69 with respect to the electronic commerce (e-com). He added that in the year 1392 (solar hijri calendar that is 21.03.2013 to 20.03.2014) the value of e-com reached to the USD 2.63 billion through 394 million transactions [2]. Moreover, the Iran e-com belongs totally to private sectors and the government plays the planning and protecting role, the Deputy of ECDC, Mrs. Faranak Razeghi said [3]. She added that the Iran e-Com value is one third of the universal average.

Although many infrastructural projects have been completed or are going on to develop e-commerce transaction, Iran is still far from the ideal point. The technical and infrastructural basis would be effective to promote e-com if supported by laws and regulations. As the information and communication technology (ICT) rapidly progresses and changes, the law also must adapt and be updated.

This study is an analytical-comparative approach to the principles and legal effects of formation of the electronic contract (e-contract) under the Iranian legal system. We examine the adequacy of related provisions of the Iran Electronic Commerce Act (IECA) to the present legal demands and commercial interests of the country while comparing with the international electronic commerce law (ECL) instruments. However, one of the major limitations of the study is the lack of any official translation of the IECA and related regulations.

The formation process comprises of many legal steps and requirements which considering all, is beyond the limits of this paper. Hence, we will concentrate on one of the important issues in the formation of e-contracts that is the time and place of dispatch and receipt of an electronic message.

Like ordinary contract, the conclusion process of the e-contracts complete through a valid offer and acceptance. The determination of time and place of offer and acceptance play a key role in the conclusion and determination of governing law. However, as there are different legal principles selected by each legal system, the electronic commerce Acts (ECA) usually define and determine the dispatch and receipt rules of an electronic message (e-message). The dispatch and receipt rules lead to the determination of the time and place of offer and acceptance and subsequently the conclusion of an e-contract.

II. CODIFICATION BACKGROUND

The Electronic Commerce Policy of the Islamic Republic of Iran was adopted by the Cabinet according to the request of the Supreme Council of Information and Article 138
The term ‘e-contract’ is not defined by the IECA under Art 79 and 80 of the IECA for the Cabinet approval. It also charged with the duty of drafting the related June 2005. The MIMT is responsible for the implementation of the ECA and according to the request of the MIMT on 26 Development Master Plan including 43 Sections under Art 79 The Cabinet adopted the Electronic Commerce transactions. Clauses [5]. It is the main statute that regulates e-com classified into six Chapters including 81 Articles and seven finally entered into force on 22 January 2004. The Act is Guardian Council of the Constitution after seven days and Parliament ratified it on 7 January 2004, approved by the started by the fifth Parliament and ultimately the sixth Commerce 1996 (MLEC). The legislation process of the IECA Trade Law (UNCITRAL) Model Law on Electronic preparations of the United Nations Commission on International Trade, MIMT) were the main parties involved in the Ministry of Trade (now is the Ministry of Industry, Mine and the Industries and Mines Committee of the Parliament and the Interchange for Administration, Commerce and Transport), The Iranian EDIFACT Committee (Electronic Data Interchange for Administration, Commerce and Transport), the preparation and drafting of the IECA Bill based on the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 (MLEC). The legislation process of the IECA started by the fifth Parliament and ultimately the sixth Parliament ratified it on 7 January 2004, approved by the Guardian Council of the Constitution after seven days and finally entered into force on 22 January 2004. The Act is classified into six Chapters including 81 Articles and seven Clauses [5]. It is the main statute that regulates e-com transactions. The Cabinet adopted the Electronic Commerce Development Master Plan including 43 Sections under Art 79 of the ECA and according to the request of the MIMT on 26 June 2005. The MIMT is responsible for the implementation of the Act. It also charged with the duty of drafting the related By-laws in consultation with the related government bodies under Art 79 and 80 of the IECA for the Cabinet approval.

III. FORMATION OF E-CONTRACT

The term ‘e-contract’ is not defined by the IECA expressly. However, there are some reference provisions which define it indirectly. Art 2 (S) of the IECA defines ‘Distance Contract’ as, “It is an offer and acceptance with regard to goods and services between supplier and consumer using the telecommunication means”. According to the above description, the combination of offer and acceptance has been regarded as an e-contract, if they are created through telecommunication means. In fact, this provision specifies principal concluding components of an e-contract.

The subject matter of e-contracts can be goods or services. Hence, if one party uses electronic means for offering, it will be regarded as an e-contract if the other party accepts it through electronic message. However, this definition seems to refer to B2C only. The phrase ‘distance contract’ has been defined in this interpretive provision but it is not used in any subsequent provisions which is contrary to the principles of codification. In Arts 16 and 33 the single term ‘contract’ is used. However, the phrase ‘distance dealing’ used in Arts 37 and 47 and the single term ‘dealing’ used in Arts 29, 34, 39, 40 and 41 of the IECA. There is a debate amongst Iranian jurists as to the terms ‘contract or aqd’ and ‘dealing or muamalah’ are synonym and some believe that muamalah indicates a contract with financial aspect [6] [7].

Considering the application of general rules of contracts for e-contracts, the definition of e-contract shall be similar to the traditional contracts. The ‘electronic’ attribute attached to the contract indicates the means of conclusion only, not a specific type of contracts [8].

Formation, performance and termination are three main stages of a contracting process. However, the formation is considered as the determinative stage in the conclusion process. The formation encompasses both procedural and substantial elements, interpreted and protected by the imperative and optional rules of law in each legal system. Hence, it comprises of many elements and steps which are addressed under the law of contract. Hereupon, we will consider the means of e-offering and e-accepting which are two important elements in the formation process.

The IECA does not provide for the definition and principles of electronic offer and acceptance (e-offer, e-acceptance). The draft Bill in Art 23 provides that: “offer and acceptance can be declared through a data message”. This Art finally was removed. The IECA, following the MLEC and international practice, provides for the principles on the determination of time and place of dispatch and receipt of a data message (Table 2). This will lead to the determination of the offer and acceptance and subsequently the time and place of formation of an e-contract.

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Under Art 30 of the Act, the general principles of the law of contracts are applicable with regard to attribution of data message, acknowledgment of receipt, time and place of dispatch and receipt of a data message (Arts 18 to 29). Therefore, the general principles under the Iran Civil Code (ICC) apply to e-contracts along with the IECA provisions. The IECA tried to keep away itself to be a substantial Act affecting by the MLEC approach.

IV. DISPATCH AND RECEIPT RULES
The determination of time and place of conclusion is one of the important factors clarify the startup of the contracts’ terms, conditions and bindingness of offer and acceptance upon all parties to the contract [9]. It will also lead to determination of the governing laws and regulations, competency status of the parties like the status of a bankrupt businessmans’ transaction, transfer of ownership and scheduling the stages of commodities delivery, time laps and other related matters [10].

The place of conclusion will lead to the determination of both the governing law of the contract [11] and competent court in case of conflicts [12]. In commercial cases and movable property disputes, the court where the contract was made is one of the competent courts for hearing [13]. However, this process is sometimes a challenging issue influenced by the nature of new technologies.

The MLEC having a recommendatory aspect was updated by the UNCITRAL in the form of a convention called ‘the United Nations Convention on the Use of Electronic Communications in International Contracts 2005’ (UNCUEC). The MLEC and UNCUEC both recognized the different approach of each country in the determination of time and place of conclusion and left the issue to the domestic laws. Basically by providing the dispatch and receipt rules of a data message, the legal systems can determine the time and place of conclusion based on their domestic laws of contract. The IECA also allocated Arts 26 to 30 to the dispatch and receipt rules.

There are four theories to determine the time of formation adopted by different legal systems. These theories are Declaration Theory, Mailbox Rule, Receipt Theory and Information Theory [14]. Under the first and second theory, the contract concludes when the addressee accepts the offer, however, the difference is in the method of announcement (Table 1).

<table>
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<th>THEORY</th>
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<td>DECLARATION THEORY</td>
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Under the principles of the law of contracts, a contract is concluded merely when the addressee accepts the offer even if the offeror does not inform; i.e. ‘declaration theory’. However, since the intention is intangible, it must be displayed through any means. Hence, the dominant view amongst the Iranian jurists is the application of the mailbox rule to determine the time of formation of a contract. [15][16] Under Art 191 of ICC, “A contract only becomes complete through the real intention of the contractor, and this real intention must be accompanied by some factor which proves that there was such an intention”. So, the Act merely requires the intention through a means of indication. In case of e-contracts, the real intention of the parties are sufficient if detected through an e-message.

V. TIME OF DISPATCH

Art 26 of the IECA includes mailbox theory impliedly. However under Art 30, the general rules of contracts apply for the determination of time and place of dispatch and receipt of a data message. Art 26 provides that: “The dispatch of a data message occurs when it enters an information system outside the control of the originator or the person sent the data message on his behalf.”

According to this provision, the time of dispatch is when the data message enters the information system of the addressee. The status of the e-agent also is not clear under Art 26. This principle was adopted in line with Art 15 (1) of the MLEC. According to Art 15 (1), “Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator”. The practical result of applying Art 15 (1) is the same if applying either declaration theory or mailbox rule by any legal system [17][18]. The status of electronic agent also should be determined by the Act especially with regard to the time of dispatch and receipt, although there is a reference in Art 18 (b) of the IECA.

Art 15 (1) includes an exception ‘Unless otherwise agreed’ which recognizes any methods in contrary to the general rule if agreed by the parties influenced by the principle of party autonomy. The drafters of to the IECA followed the principle of Art 15 (1) but did not recognize the said exception which is a defect. However based on Art 30 of the IECA, the parties can agree in contrary according to the general principles of the ICC. Art 30 provides, “Legal effects after attribution, receipt acknowledgement and time and place of dispatch and receipt of a data message, the subject matter of section 2 to 4 of topic four of this Act and also the content of a data message are governed by general rules”. It impliedly indicates the non-determinative aspect of Art 26, and recognition of the parties’ agreement in contrary.

Art 29 (a) of the Act also recognizes the freedom of contracting parties to determine the ‘place’ of dispatch as an exception. Logically, there is no difference in freedom of parties to agree on the place or time, so it is suggested to
VI. PLACE OF DISPATCH

In online contracting, it is difficult to determine the location of contracting parties like sending a data message by a person from A country, traveling by airline of B country over the territory of C country. IECA and the MLEC have adopted the ‘place of business’ as a criterion to determine the place of dispatch. The place of legal domicile (habitual residence) also has been referred to as another criterion under the IECA. However there is no emphasis on the physical location of information systems.

Art 15 (4) of the MLEC has considered the place of business of originator as the place of dispatch of the data message. The parties can agree on determination of place of dispatch [25]. However the provision kept silent about the phrase “or a person on his behalf”. As the location of parties’ information system maybe changed or not being clear if communicating in different States, the MLEC provides for an objective criterion which is ‘place of business’ [26].

Art 29 of the IECA impliedly explains the place of dispatch. This provision was drafted in line with Art 15 (4) of the MLEC. Art 29 provides that “If the establishment place of the information system differs from the place of receipt of the data message, the following rule shall apply:
A) Unless otherwise they agreed in contrary, the place of business or workplace of the originator is the place of dispatch of the data message, and the place of business or workplace of the addressee is the place of receipt of a data message.
B) If the originator has more than one place of business or workplace, the nearest place to the origin of the contract, is the place of business or workplace, otherwise the principal place of the company is the place of business or workplace.
J) If the originator or the addressee lacking place of business or workplace, their legal domicile will be regarded as proof”.

Based on Art 590 of the Iranian Commerce Code and Art 1 of the Companies Registration Act, the dominant view is based on the domicile of legal persons. Since the Art 29 was drafted based on Art 15 (4) of the MLEC, it is doubtful why the term ‘workplace’ has been used, which has no reference under the domestic law. The phrase “unless agreed in contrary” at the end of Art 29 (1), indicates the principle of party autonomy and the imperative aspect of the Art.

The UNCUEC also considered the place of business for the determination of place of dispatch. Art 10 (3) of the UNCUEC provides that “An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6”. Under Art 6, the parties have right to determine their place of business. If the place of business did not indicate by parties and have more than one place of business, then the place of business with closest relationship to that contract (Art 6.2). In case there is no place of business, then the habitual residence of the natural person (Art 6.3). Art 6 (4) and (5) highlight the irrelevancy of the place of information, a domain name or electronic address in determination of place of business. The Art is silent with regard to the place of companies operate online with no physical address [27].
VII. TIME OF RECEIPT

Art 10 (2) of the UNCUEC has provided certain rules with regard to the time of receipt of an electronic message. The illustration of Art 10 regarding conditions of retrievability and awareness of the addressee is more suitable in case of undesigned address. However the said convention has provided more or less the same rules as Art 15 (2) of the MLEC [28]. Moreover, it has priority in case of sending an electronic communication to a wrong address of the addressee by the originator, while the addressee becomes aware about it and its accessibility. Art 10 (2) of the UNCUEC provides that:

“time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address”.

Art 10 (2) is technology neutral [29]. The phrase ‘electronic address’ used by this provision, is more appropriate in comparison with ‘information system’ used by the MLEC. The said provision does not recognize counter agreement to this principle by parties whereas MLEC has recognized parties’ agreement to determine the time of receipt.

There are two situations and one presumption forecasted by Art 10 (2). Firstly, the time of receipt of an electronic communication in case of determined e-address is when it becomes capable of being retrieved whereas under the MLEC, when the data message enters the information system, the receipt will occur. When the addressee has designed an electronic address and normally checks it for his electronic transactions, in this case, the time of receipt is when the electronic communication is retrievable at that address, whether he became aware of that message or not. Hence in practice, the time of receipt is the time when recorded at that address regardless he checked his address or not.

Secondly, if the addressee determined an e-address, but the data message is sent to another address for any reason, or the addressee did not determine any address, the receipt occurs by fulfilling two conditions, retrievability at that address and awareness of the addressee regarding the sending of electronic communication. The Art clarifies that an e-message is capable of being retrieved by addressee when it reaches to his electronic address.

Art 15 (2) of the MLEC indicates the time of entrance of a data message to an information system for this situation. In a situation where the addressee did not determine any address, it impliedly indicated his consent to receive an electronic communication in any of his electronic address. So it is presumed that the electronic communication has been receipt by him when it reaches to any of his electronic address. The dispatch under Art 15 (1) and receipt under 15 (2) are simultaneous except if the data message has been sent to a non-designated address of the addressee [30].

The IECA exactly followed Art 15 (2) to determine the time of receipt. Under Art 27, “The time of receipt of a data message is according to the following conditions:

A) If the addressee determined a fixed information system for receiving a data message, receipt occur when:
1- The data message enters the fixed information system.
2- If the data message retrieves in case it has been sent to an addressees’ information system other than the fixed one.
B) If the addressee did not fix an information system for the purpose of receipt, the receipt occurs when a data message enters the addressees’ information system”.

This provision does not recognize parties’ agreement to determine the time of receipt, although as we stated earlier it is governing by the general principles of the law of contracts. Also it is suggested to change the phrase ‘information system’ to ‘electronic address’ to be in line with the UNCUEC and adapt with new technologies, instruments and especially internet.

So under the above mentioned provision, if the addressee has determined a specific information system, the time of receipt is when it enters that information system. This is similar to the provision the MLEC. If a specific information system has been designed but the originator did not send the data message to it, the time of receipt is when he retrieves the data message. The phrase ‘capable of being retrieved, under the UNCUEC is an equitable clause in compare with ‘retrieves’ as a person always can claim he has not retrieved the data message. The awareness of the addressee also is another improvement by the Convention. In case the addressee did not design any information system for that specific transaction, it means that he agreed to receive the data message in any of his information system.

VIII. PLACE OF RECEIPT

The IECA and the MLEC have adopted the place of business as a criterion to determine the place of receipt similarly to the place of dispatch in Art 29 and 15 (4) respectively. The place of legal domicile (habitual residence) also has been referred to as another criterion. However, there is no emphasis on the physical location of information systems. As a contract form when the acceptance joins the offer, usually the place where the acceptance meets the offer, is the place of formation.
Art 15 (4) of the MLEC provides that: “Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:
(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence”.

Art 29 (b) attempts to determine the place of dispatch and receipt by using the words ‘originator’ and ‘addressee’ in sections (a) and (c) while dismissed in section (b).

As it may happen that the residential place of the addressee is different from the place of his information system, to prevent future disputes, the UNCUEC considered the place of business as the place of dispatch for the originator and as the place of receipt for addressee as well under Art 10 (3).

X. Conclusion

The formation is the important and primitive stage in life cycle of a contract. The determination of time and place of formation play a significant role to clarify the startup of the terms and conditions of contract and the rights and duties of the contracting parties. In case of e-contracts, the determination of time and place of dispatch and receipt of an electronic message will lead to the determination of the time and place of formation of a contract in each legal system.

The MLEC, as non-binding reference, provides certain principles for dispatch and receipt of the data message. The Iranian legislature followed the MLEC in the drafting of the IECA like many other countries. However, the MLEC was suitable for the technologies at that time like the Electronic Data interchange (EDI). The UNCITRAL has drafted a convention which is binding upon its signatories (UNCUEC 2005) adaptive with new technologies, especially the internet. Through UNCUEC, the drafters amended the MLEC’s provisions on the time and receipt of an electronic message.

The principles governing the time and place of dispatch and receipt of a data message under the IECA which are derived from the MLEC, are not adequate with the new technologies like internet. It is suggested that in future amendments of the Act, these principles which comply with the UNCUEC principles should be incorporated into the Act. They are more practical and suitable for the present advancements in technology. Although the UNCUEC is governing the parties from two different countries, it has the ability to be applied at the domestic level as well. Joining the UNCUEC by the government would facilitate this process.

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[11] Art 968 of the Iran Civil Code provides that: “Obligations resulting from contracts are governing by the law of place of formation, unless the contracting parties are foreign subjects, and determine another governing law over the contract explicitly or implicitly”.

www.ecdcconference.org
Article 10 (1) of the UNCUEC on time of dispatch provides that:

“(1) The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received”.


Article 14 of the UNCUEC: “Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1”.

Art 15 (4) “Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence”.


Art 15 (2) of the MLEC clarifies that: “Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; or

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee”.
