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ORIGINAL ARTICLE

The Effect of Taking Delivery in Electronic Contracts in the Two Legal Systems of Iran and France

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ABSTRACT : Electronic contract means an agreement of counter offer and acceptance via online international network and distance connection using audio and visual tools. In electronic contracts taking delivery is very important. Regarding technical features and contract methods and the way of supporting their legal effects, these contracts require recognition and precise matching of them with laws and principles dominated over contracts. Accordingly, lawyers imagining immediate occurrence "taking delivery and delivering" avoided discussing about the time of acceptance credit in such contracts. This article is an endeavor using descriptive and analytical method by library studies to discuss the concept of "taking delivery" in electronic contracts in the two statutory laws of Iran and France in order to present the effect of taking delivery in electronic contracts. According to the studies doing and concluding electronic contracts is not different from present contracts except the method of binding them, and the process of French is to bind at the time and place of delivering the acceptance letter. In the law of Iran, according to the manner of some legal articles, the main effect of taking delivery for the formation of contract and obligation of parties to their consequent commitments regarding specific consensual contracts, but in objective contracts according to the effect of taking delivery in such contracts in the two legal systems of Iran and France before delivery of the case of transaction no contract is concluded, even if an agreement exist regarding such transaction.

Key terms: taking delivery, acceptance, contract, electronic

Introduction

One of the most important issues and elements regarding contracts which are significant in the present customs is electronic contracts and specifically the effect of taking delivery on such contracts. In terms of law science taking delivery means a document or writing that is exchanged between promisor and promisee.

Generally, electronic contracts regarding the main conditions of contract and adjusting consequent effects depends on decrees and general principles of the right of contracts and commitments. Therefore, occurrence of electronic contracts has no significant effect on later issues and foundations of specific law. But what is clear is that in any type of contracts the way of declaring wills is important which is not exceptional in electronic contract so that taking delivery plays a significant role in such contracts. Accordingly, in this article it is tried to define taking delivery and discuss the effect of it on statutory laws of Iran and France.

The First Issue: the concept of "taking delivery" and its effects

Taking delivery (Ghabz or in Persian) lexically in the Persian language means catching by hand or taking by the entire palm (Moein, 1985, vol. 7, p. 2634) such as taking delivery of soul that means taking the life of someone. Also it means contraction and closing that is used against expansion (ibid). In terms of law it means a document or writing that is exchanged between promisor and promisee (Jafari Langroudi, 1993, Vol. 2, p. 40).

By taking delivery, we mean that goods will be owned by customer or his/her representative. There is no doubt in this concept, but its achievement with credit of different cases has many different qualities (Mohaghegh Damad, 1985, Vol.1, p. 191).

The law maker of civil law regarding definition of taking delivery has considered it as owning a good by a customer. Whenever the article 369 Gh.M stated: "delivering means to give the goods to be owned by customer so that it should be propertied from deviations of possessions and exploitations; and taking delivery means gaining ascendency of customer over the goods, and according to article 369 Gh,M delivering in the goods disputations has different qualities and it should be so that being called delivering by custom. In the civil law, wherever here is a criterion for transferring obstruction, it is delivering no taking delivery (cases of 378 and 388 and 453 Gh.M). aw scientists have emphasized on this issue that the custom concept of taking delivery is the criterion for decision making that according to unity of article 369 Gh.M that regarding delivering considers the final criterion as custom, the sensitive and mundane possession is not the purpose and taking delivery over every asset according to features of it has specific patterns. On one hand, there is no obligatory for taking

delivery to have possession over assets, because by awareness of buyer the asset might be delivered to its storage, or an asset which previously under other names possessed by them are no loaned to him/her and taking delivery in this state is continuity of the same previous possession (Emami, 1983, Vol. 2, p. 449; Katozian, 1995, Vol.1, pp. 166-167). Also, according to the article 532 of commerce law delivery of the bill or bill of lading is considered as the delivering decree of the goods (Sotodeh Tehrani, 1997, Vol.4, p. 178). Agreement of cooperators at the time of transaction regarding the method of taking delivery is considered as taking delivery. In means that for example a person has bought a good and ordered to deliver the stock to him/her that in this case delivery of the stock means taking delivery of buyer, though still is not sent to firm and storage (Mohaghegh Damad, 2006, p. 203).

Taking delivery in most of the contracts and some of the unilateral legal acts such as divorce has some important and principal effects. Iran's civil law in discussions of contracts, transactions, commitments and obligations incurred without a contract has concerned the role of taking delivery and presented the decrees and its impacts that below some of them will be discussed. Taking delivery as the condition of a correct legal action; in the civil law, taking delivery is known as the rightness and occurrence condition of some of the contracts such as imprisonment, contracts of constitute for the right of exploitation (article 473 Gh.M), pious endowment (article 59 Gh.M), sale of coins against other coins (article 364 Gh.M), rent (article 772 Gh.M), a gift of the substance (article 798 Gh.M). But in some cases the explicit form of taking delivery is not considered as the correctness condition, but some of the writers interpreted the obligation of the contract obligation from the structure of some legal actions such as debt, free loan of non-fungible things, and deposit and considered them as objective contracts. But, this idea is not definite and has some hesitations (Katozian, 1994, Vol. 1, p. 49) and according to hesitation of lawmaker it included the consent based principle of contracts and occur with offer and acceptance and taking delivery in them is considered as an agent for commitments and legal obligations of parties.

Taking delivery as a necessary condition; if taking delivery is the necessary condition of legal action with offer and acceptance of parties in the contract are occurring without certainty and each of the parties can breach the contract and getting taking delivery contract is necessary and then by willing of one party cannot be breached. In the statutory law of Iran the only indication that seems taking delivery is its obligatory condition is in the case of will and giving something to the ownership of another that after taking delivery of testator by legatee the will is necessary to him and cannot reject it.

Taking delivery as a result and necessity of contract; in the consensual contract that occur after offer and acceptance and parties are required to apply their commitments, taking delivery and delivering are concerned as the impacts and requirements of contracts, such as contract of sale and rent and any other exchanging contract. In such contracts taking delivery and delivering action are seen as complementary of mutual parties' commitment that are on the basis of created contract not complementary of the contract itself. It is concluded that if taking delivery is not formed the necessities of contract nature that means causing ownership would not be corrupted (Noroui, 2005).

Whenever, the verdict no. 2105 in December 21, 1940 in the third branch of the High Court of Iran stated that: "assuming that a transaction occurs (sale) lack of fixing taking delivery would not be merely rejecting the effect of transaction" (Matin, 2002, p. 88).

Second Issue: the concept of electronic contract

Contract means consensus and mutual cooperation of two or several wills for creating legal impacts (Katozian, 2003, Vol.1, p. 21) or creating a legal identity (Shahidi, 2003, p. 41). Each contract is constituted of two parts: offer and acceptance against the idea of some people mainly concluding contract in the electronic environment naturally has no significant difference from concluding traditional contract and such a contract has not challenged the traditional concepts of general principles of contracts, therefore electronic contract can be defined as: consensual of two or more wills in the form of offer and acceptance in the electronic environment and as well in addition to offer and acceptance in objective contracts taking delivery is necessary (Mafi and Kawyar, 2013). In the law of Iran's electronic commerce some terms such as "distance contract" are used that means: "offer and acceptance about goods and services between supplier and consumer using distance communication instruments" (article 2 of e-banking –commerce law). According to these definitions it should be stated that whenever the contract is to be concluded using traditional form, even if its application occur in cyber space, it should not be considered electronic. Therefore, if the consensual of wills is by presence and application of the contract is in internet space, such a contract is not electronic.

UK E.center has defined e-banking –commerce as "every type of commerce or official transaction or information exchange that can be enforced using every type of information and communication technology (Lawrence, 2004, p. 211).

Electronic contract is a type of consensual that with the entire necessary conditions for mutual consent and necessary actions for agreement electronically and via data of the message is created or by computer or similar electronic tools (Tan Harry, 2002, p. 273). Generally, electronic contract regarding the principal conditions of contract and adjusting the impacts for it depends on decrees and general principles the right of contracts and commitments. But, respecting technical features and methods of concluding and supporting its legal effects require understanding and precise matching of it with principles and general rules over contracts. Electronic contracts regarding concreteness conditions or subjects have no different nature from common contracts, but they are new descriptions on the environment of forming contracts which lawmaker has not predicted a specific regulation for it (Maghami Nia, 2012).

Accordingly these contracts except in the case of conclusion that is tools and hardware and electronic software are not different from other contract and according to the type and title of contracts are concluded.

Some of the lawmakers have defined electronic contract as: "a consensual that its offer and acceptance of mutual parties in World Wide Web by distance online communication via audio visual tools can be exchanged (Mojaheh, 2000, 39). According to drastic changes that information technology created in the commercial affaires and the two features of speed and simplicity is given to and there is no need to be present in the court, but through new electronic technologies deliver their ideas and suggestions for the addressee. The mutual party can answer by the same way or express a new proposition. Whenever a contract occurs between parties, it is called "formation of a contract between those missing" (Amiri Ghaem Maghami, 1999, Vol.2, p. 238).

By contract of attendants we don't mean that parties should be present in a meeting, but it means a contract which parties conclude it in a face to face session, whether in one meeting or two places (Jafari Langroudi, 2000, Vol. 1, p. 155), such as contract by telephone that though parties are present in the two place, but such a contract respecting the time of construction is not in line with contract of those missing but this contract respecting the place of formation belongs to contract of those missing (Amiri Ghaem Maghami, ibid, p. 241). In the laws of Iran, though by relying on some articles of civil law such as article 219 and 223 it is possible to approve validity and rightness of electronic contracts. Accordingly, approving the law of electronic commerce in January 7, 2014 transactions that occur by internet and new communication systems can be legalized and the process of electronic commercial relationships can be rule-governed (Elsan, 2005). Article 5 of the stated law that is stated under the title of "chapter four of credit of private contracts" is presented and validated specific contracts of parties regarding the changes in production, delivery, receiving, storage or processing data of the message.

Regarding concluding contracts that legally depend on documentary or formal form, these contracts in electronic environment for lack of providing or application of such rituals like formal signature of competent authorities or registering it in formal notary offices such as purchasing immovable assets are facing structural or security obstacles. But obviating this issue and concluding dependent contracts to specific rituals are depending on the grounds for structural conditions for specific legal regulations that require the active role government in this issue. Creating offices of offering the certificate of signature approval or rituals of approving transaction by legal source require providing technical mechanism and legal adjustment about it.

Regarding the written form of contract in the law of Iran and most of the countries, mutual parties relying on related laws by referring to servicing centers get the electronic signature certificate that is approved using electronic signature and should be validated by reference agent. But currently regarding formal contracts such as purchasing contracts of immovable properties in the electronic environment technically and legally they are not prepared. According to the methods of electronic communication technology methods, the form of electronic contract binding is not integrated. In the France, there was no difference between electronic contracts and general ones regarding relying on civil law (Baker and Mc Kenzie, p. 55). In Iran electronic offer and acceptance should be formalized relying on some legal articles such as article 193. With respect to this article transaction should be achieved by an action which represents the goal and satisfaction such as taking delivery and delivering except in the cases that law has exempted. Each contract that is concluded electronically, whenever the legal conditions are regulated about them if having legal conditions would be valid, such as main features of transactions and electronic contracts, annexation of it, distance, consensual, and using electronic software in concluding contracts.

Annexation basis; a contract that is concluded electronically is considered as an annexing contract, because, the seller of the good and services with necessary information and general conditions is showing the contract in the internet. Buyer or

consumer while tendency for buying can accept it under the same declared conditions.

Distance basis: of the main features of electronic contracts is that certainly by electronically or in electronic space without physical attendance of mutual parties should be concluded (Aboaldosoghi, 2003, p. 72). Even attendance of parties in the electronic environment is not in real meaning. Accordingly electronic contract is a set of distance contracts (Mamdoh Ibrahim, 2005, p. 21). The main consensual basis of contract is to be electronic; it means freedom in declaring the wills in line with article 191 of civil law in the nature of concluding electronic contracts. Also, according to article 10 of civil law "private contracts are enforceable to those who concluded them, whenever they are not against law", the principle of consensual basis of contracts and such electronic contract did not preclude parties from specifying an appropriate form of contract.

Generally, a contract that the means or environment of concluding it is not electronic is not considered as an electronic contract. Therefore, concluding contract by means of electronic tools is a specific feature of electronic contracts.

One of the features of electronic contracts is the electronic bases of paying the price or services. Even electronic payment in some cases is considered as commitment and at the time of practical indication on the will of customer is considered. Today, in electronic transactions there are different tools of electronic payment that replaced traditional monetary and cheque system.

Third Issue: acceptance in electronic contracts

When there is a contract between people and they are in contact by means of letter, telephone, telex, fax, and e-mail, the answer to the stated question will answer legal questions and result in different results. Accordingly, specifying the time of forming contract for introducing the rights and duties are so important, because as much as contract is not concluded the offeror can avoid his/her suggestion. But after annexing acceptance to it and formation of contract, the principle will be overcame and there is no reversal for offeror of the right; except in the cases of the cause of contract or law (Nori, 2005). Also, by specifying the time of contract the sudden death of offeror or acceptance party would have no effect on the destiny of contract, unless in the case of lawful contracts or contracts that is concluded by credit of unilateral party (Bananiasari, Bita).

In addition to stated cases, correctness or the effect of contracts by a bankrupt business man and achievement of the credit nature of the contract and consequently the process of impacts is of the other impacts that are the case in formation of contracts. Specifying the place of forming contracts according to specifying the competent court is important. According to article 13 of the law of civil procedure in commercial lawsuits and any lawsuit of movable properties that result from the contract, plaintiff can refer to the court of the place which the contract has been concluded.

Regarding contracts being concluded electronically, in the cases of ambiguity the place and time of forming contract four theories were offered: statement of intention, theory of delivery, theory of receiving and theory of informing (refer to, Rashidi, 1998, pp. 29-50).

For example: a French trader has documented about selling an amount of cloth in a letter to an Iranian trader and delivers the letter to the post office and after receiving of the letter to the Iranian trader, this person has written his acceptance in the letter and deliver it to the French trader and by studying the letter will be informed of acceptance of Iranian trader. In this example according to the theory of statement, contract is formed in a time and place when the letter of acceptance is written. According to the theory of delivery, contract at the time and place when the acceptance letter is delivered by post is formally occurred. According the theory of receiving contract occur at the time and place when the acceptance letter received to offeror and finally regarding the theory of informing the time and place of forming contract is the time and place which the French trader informed about content of the letter and acceptance by Iranian trader.

Through these ideas, the theories of statement and informing for their simple recognition of their time are less concerned. Also on the basis of some people the two first idea are close to each other and referred to as the theories of issuing as much as the third and fourth are highly similar. Finally, we can say that the two principal ideas exist in this regard: the theory of issuing acceptance, theory of informing from acceptance (Safaei, 2003, 74). It seems that in Iran's legal system acceptance whenever it was occurred has some effects and knowledge of offeror to accepting condition is not the effect of acceptance. When in the offer it is told that knowledge of addressee is the condition of its effect, therefore, when ignorance of addressee offer cooperation of the intention of parties for creating a credit nature of contract, and in the other words, consensual of intentions are rejected and acceptance is not comparable to comparison and consider the knowledge of acceptance addressee as the condition of effect: even if statement of agreement was achieved and credit nature of contract reached the final stage.

Accordingly, the acceptable theory in the law of Iran is the theory of delivery. Justifying that from the

time of delivery of acceptance changing in its content is not on behalf of the person and whatever delivered is definite intention of him (Nori, 2005).

Article 191 Gh.M of Iran in this respect indicated that "contract will be achieved for documentation under condition of relying on what indicates the intention." According to this article regarding Iran's civil law in contract between those missing whether using communicating tools to be used at the same time or not, contract at the time of statement and acceptance will be formed. In addition the time of concluding a contract is the time when the last part of contract is achieving. In this case it is stated that in the case of electronic contract the theory of receiving should be considered, because regarding electronic contract the condition of getting out of control achieved when information enter the information system of the mutual party (Karimi, 2004, p. 16). Finally we should say that regarding general contracts each theory regarding electronic contracts the theory of "receiving acceptance by means" should be preferred (Nori, 2005).

In the law of France, from 1981 which the court of this country regarding contracts by post enforced, issued verdicts and the theory of delivering acceptance is accepted and it is stated that the time of concluding in such contracts corresponds the time of delivery of letter to the post having considered the entire aspects. The same solutions might be applied regarding concluded contracts by fax, telex, or concluded contracts through electronic interfaces (J.GHESTIN.1988. P281).

Also, the judicial verdicts of later procedures of judicial system of France between the theory of statement and informing and receiving are divided, but most of the modern writers accepted the system of delivery or receiving.

Regarding the place of electronic contract it is stated that the place of forming contract is a place when the last section of contract-acceptance- has occurred, that is a place which acceptance has been stated (Safaei, 2003, p. 78). In other words, the place of contract is recognizable by the time of contract. It means that the place of contract that is the last part of contract (acceptance or taking delivery) occurred. In the article 26 of Iran's e-banking –commerce it is stated that "delivering data message achieved when an information system is out of control the main principle or replacement."

Regarding the acceptance without any condition in e- commerce we can say that whenever the text massage delivered, acceptance has been issued.

In the legal system of France in an assumption that offer and acceptance between those missing by media with different time setting the judicial system is disturbed and still reached no united theory, therefore, the idea is that at the time and place of delivering the letter of acceptance is concluded (Parviz. Owsia.1994.pp50-556).

In this legal system contracts issued by the same time setting media such as telephone, respecting the time of forming contract between attendants is possible, but respecting the place of forming contract, the contract is considered between those missing (parviz. Owsia.1994.550).

Finally, it should be indicated that respecting the time of determinacy and credit of acceptance there is no difference between traditional and electronic contract. Thought lawmakers imagining immediate occurrence of "taking delivery and delivering" from discussions regarding the time of acceptance credit in the present contracts avoided, but they should say that even between the time of sale delivery of good and receiving them by mutual party there is a distance article 193 of civil law and procedure in France the time of definite acceptance should be when delivery is declared to the mutual party, therefore, if (A) sold a software with 100$ to (B) and since electronic receiving has been the sign of acceptance, but for disruption in internet the good never reached the customer one cannot say that currently acceptance occurred, but as mentioned in specific consensual contracts regarding the effect of taking delivery no problem arose, but in objective contracts (such as contracts that by means of them the right of exploitation established: pious endowment, mortgage, and a gift of the substance in articles 47, 59, 772, and 798 Gh.M) that in addition to consensus of parties a third agent called taking delivery is necessary. Taking delivery is the condition of occurrence or at least achievement of contract.

Conclusion

Electronic contracts regarding subject and later conditions regarding credit are not different from traditional contracts and generally they are similar to concluding them in real world and in this respect there is no significant difference between these two space and the only distinction between them is the method of concluding or environment of concluding them and for the same reason dependency of electronic contracts are general principles of contracts for formation of contracts whether electronic or else regarding general condition of transaction that in article 190 on ward is declared.

Regarding the effect of taking delivery in contracts which are taking delivery of correct conditions for them, if taking delivery is not occurred there would be no contract, and in contracts which taking delivery is necessary condition of them, if no

taking delivery occur, in fact contract occur, but it is legal contract and after taking delivery it will be changed into obligatory contract which in electronic contracts is in the same way. Also, in electronic contracts, the same way is formed; therefore, n the objective contract which is concluded electronically, taking delivery is the requirement of contract and by concluding it occurrence is conditioned.

The doctrine and judicial procedure of France regarding the time and place of forming contract the law is distressed and still no united idea is reached; therefore, the common idea in that country is that contract at the time and place of delivery of letter including acceptance will be enforced and in objective contracts taking delivery is the rightness condition; therefore, by understanding from article 193 of civil law and judicial procedure on France law, the precise time of acceptance in electronic contracts should be the time when delivery in its custom terms is done. In this view delivering is the general condition of occurring contract. Regarding specific consensual contracts, the issue of the effect of taking delivery causes no problem, but respecting objective contracts that taking delivery of the case of transaction is necessary whether in Iran's legal system (articles 47, 59, 772, 798 Gh.M) or laws of France, taking delivery is the condition of occurring or at least achieving the contract.

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