

The formal conditions for the validity agreement specified for the competent court in E-commerce contracts

Presented by

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Introduction

The proof of e-commerce contracts is most important dilemma which is raised, because the electronic writing^(١) is issue which scholars and laws differs in its authentic, the laws define conditions to this authentic, but the scholars differs in its interpretation, Where the rules of the European regulation No. ١٤٤ /٢٠٠١(٢) and put the writing requirement of as a key prerequisite for validity the agreement of specified competent court, this regulation permitted the oral means , but it certified by written ratification.

The previous regulation spoke on another condition to prove specified the court competent agreement, related with habits and customs of international trade, so if this agreement is consistent with habits and customs of international trade, this agreement will be acceptable, this condition is not writing, but, in the same time, this means for proving the agreement specified of court competent.

Based on the foregoing, this research will be divided to two sections the first one will deal with E- writing in specified agreement of the competent court in E- commerce contracts, second section will handle with the unwritten means which prove this agreement, like as following manner:

Section one: E-writing in specified agreement of the competent court in E- commerce contracts.

Section two: Unwritten means to prove agreement specified for the competent court in E- commerce contracts

(١) The use of electronic circuits and electron devices to reproduce symbols, such as an alphabet, in a prescribed order on an electronic display device for the purpose of transferring information from a source to a viewer of the display device, **for more information, see at,** <http://encyclopedia.thefreedictionary.com/electronic+writing>

la (٢) Règlement ٤٤/٢٠٠١/CE du conseil du ٢٢ décembre ٢٠٠٠ concernant la compétence judiciaire, reconnaissance et l'exécution des décisions en matière civile et commerciale, http://www.droit-technologie.org/fr_legislation/reglement-competence_judi_caire_-٢٢١٢٠٠_.pdf_.٢٢.٢.٢٠٠٤

Section one

E-writing in specified agreement specified for the competent court in electronic commerce contracts

This section will divide to two points, the first one explains “how to accept electronic writing as a means of proving the specific agreement for the competent court internationally in international legislation”, the other point is “the acceptance of electronic writing as a means of proving the specific agreement of the competent court internationally in national laws”, as following:

A – The accept electronic writing as a means for proving the specific agreement of the competent court internationally in international legislation:

The writing is an advanced method for proof, because it's easily prepared, and is so direct methods for proof, because its significance is directly on act which intended to prove.

Accordingly, the rules of the European Community (٤٤/٢٠٠١)^(١) put the writing requirement as essential condition in the agreement specified for the competent court, as stipulated article "٢٣ paragraph (١)," which included the forms of agreement specified the competent court internationally , this agreement subjected to Four forms, are " in writing, or orally but supported by written ratification , or the agreement would be agreeing to the habits of the parties, or to customs of international trade"^(٢), but **Do the electronic written agreement specified to**

^(١)The **Brussels Regime** is a set of rules regulating which courts have [jurisdiction](#) in legal disputes of a civil or commercial nature between individuals resident in different member states of the [European Union](#) (EU) and the [European Free Trade Association](#) (EFTA). It has detailed [rules assigning jurisdiction](#) for the dispute to be heard and governs the recognition and enforcement of foreign judgments, for more information, see at, http://en.wikipedia.org/wiki/Brussels_Regime.

^(٢) *Duaso Cales (R.)*, La détermination du cadre juridictionnel et législative applicable aux contrats de cyberconsommation, en ligne, <http://www.lex-electronica.org/Articles.v^-%201.Duaso%20%20cales.pdf>,

international competent court, has the same legal authentic of traditional writing (paper writing) ?

The Model Law on Electronic Commerce issued by the United Nations represented in the United Nations Commission on International Trade Law (UNCITRAL) in 1996 interested the concept of writing on the electronic support, it recognized electronic writing, and it is equal in value functional to write on paper ⁽¹⁾ Article VI included "if the law required being information in written form, the data message is sufficient for this requirement if the information is available durable " In Article (17) of this Convention included the specified agreement for the competent court may consider as writing, if the information contained in this agreement can be seen later, and is available permanently ⁽²⁾ .

And the rules of the European Community (1992)⁽³⁾ recognized the principle acceptance of E- writing in proof, as identified in this regard, in Article 13, paragraph (2) stipules all electronic transport allows sending information- which consist the specified agreement for the competent court - permanently, it considered as a written agreement⁽⁴⁾ .

⁽¹⁾ A. Caprioli (E.), Sorieul (R.), le commerce électronique international: vers l'émergence des règles juridique transnationales, Journal du Droit International, Juris –Classeur édition, paris, 1997, p.p. 232:307.

⁽²⁾ A. Caprioli (E.), Sorieul (R.), le commerce électronique international: vers l'émergence des règles juridiques transnationales, Journal du Droit International, 1997, Op.cit., p. 38.

⁽³⁾ Recognition and enforcement of judgments in civil and commercial cases was originally accomplished within the European Communities by the 1968 Brussels convention: a treaty signed by the then six members of the Communities. This treaty was amended on several occasions and has now been almost completely superseded by a regulation adopted in 2001, the Brussels I regulation. Today the convention only applies between the 10 pre-2004 members of the European Union and certain territories of EU member states which are outside the Union: these being Aruba, the French overseas territories and Mayotte It is intended that the Brussels Convention will be replaced by the new Lugano Convention, the latter being open to ratification by EU member states acting on behalf of non-European territories which belong to that member state, **for more information, see at, http://en.wikipedia.org/wiki/Brussels_Regime**

⁽⁴⁾ Article 13 ale. "2":(Toute transmission par voie électronique qui permet de consigner durablement la convention est considère comme revêtant une forme écrite".

Included Article IV, paragraph (٧) / (b) of the draft Hague Convention on Jurisdiction international and foreign judgments in civil and commercial matters^(١) " the specified condition the competent court become correct in terms of form, if it transport by any method of communication which make the information available in continuance"^(٢) .

"Directive sur les contrats à distance"^(٣) considered electronic contracting which contain the specified condition for the competent court is undoubtedly true if the conditions installed via e-mail, so as far as the information is available permanently in computer, while the announcement of the terms on the screen, which followed by printing is non-sufficiency in evidence^(٤), in addition to the provisions of Article VI of the UNCITRAL , when the law requires the information in written form, data message complete this requirement, if the access to this data is easily , continuance, prosecute ^(٥).

It is clear from the foregoing narrative, the position of international conventions of authoritative E - writing, it is mainly dependent on the availability information durable which enable Contracting Parties to check it in later , accordingly, the agreement which define the competent court internationally is available on the computer permanently and

(١) The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is a multilateral treaty governing the enforcement of judgments entered by one nation's legal authorities in other signatory nations. It is one of a number of conventions in the area of Private International Law of the Hague Conference on Private International Law in ١٩٧١, for more information, see at, http://en.wikipedia.org/wiki/Hague_Convention_on_Foreign_Judgments_in_Civil_and_Commercial_Matters

(٢) "Hague Conference on Private International Law", on line at, http://hcch.evision.n. Index_en.php?Act=text.display&tid=١٠&litigation, ١٩.١٢. ٢٠٠٢.

(٣) Directive ٩٧/٧/CE du Parlement européen et du Conseil du ٢٠ mai ١٩٩٧ concernant la protection des consommateurs en matière de contrats à distance, online at, <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:٣١٩٩٧L٠٠٠٧>

(٤) *Thibault (M.)*, Droit international privé et commerce électronique: état des lieux, enligne:<http://www.juriscom.net/themes.commerce.contrat.signature.etpreuve>. Lectr on iqu e ,٢٢ .٣. ٢٠٠٣.

(٥) United Nations Commission on International Trade Law (Unictal), online on, http://www.uncitral.org/uncitral/en/about_us.html

parties can access it at any time later, it considered fulfill writing requirement , it has validity.

B - The acceptance of electronic writing as a means of proving the specific agreement for the competent court internationally in national laws:

Article I, paragraph "a" of Egyptian law N° ١٥ of ٢٠٠٤ organizing the electronic signature and the establishment of the IT industry , referred the definition of electronic writing ^(١) "**it is all letters, numbers, or symbols, or any other signs fixed on a electronic, digital or optical support, or any other means similar which is given perceptible Indication** ", in the same article paragraph (b)," defined the electronic editor "**as a data message containing information which created and incorporated into or stored or sent or received in whole or in part, by electronic or digital, optical means**" as stated in Article (١٥) of the same law " electronic writing and electronic editors in civil, commercial, and administrative transactions has the same authentic for traditional writing in official documents ,when it satisfies the conditions which stipulated in this Law and in accordance with the regulations prescribed by the Regulations of this law^(٢) .

And the concept of formality which is required in the specific agreement for the competent court internationally in civil codification of Quebec is different, in Article ١٤٨, paragraph (٤) did not specify the format of specific agreement for competent court internationally as a condition for its validity, according to the law of the Province of Quebec, the specific agreement for the competent Court internationally can take any form ,as long as there is no special provision specifies the formal requirements to this agreement, another mean, the law did not require respect for a special form in the drafting of the contract ^(٣), it is important that the

^(١) See at, Law No. ١٥ of ٢٠٠٤ on E-signature and Establishment of the Information Technology Industry Development Authority (ITIDA), online, <http://www.wipo.int/wipolex/en/details.jsp?id=١٢٥٤٦>

^(٢) See at, Law No. ١٥ of ٢٠٠٤ on E-signature and Establishment of the Information Technology Industry Development Authority (ITIDA), Op.Cit.

^(٣) Code civile du Québec, Editeur officiel du Québec, le dernière version, disponible à, http://www.publicationsduquebec.gouvqc.ca-dynamicserch_telecharge_Php?type=&file.ccq.ccq.htm,

contract is drafted as which reflects the mutual consent between two parties , another mean, it is enough the intention of the parties for the conclusion of the contract, this intention must be clear and explicit and unambiguous, and this leads us to consider the specified agreement for the competent Court internationally is an consensual agreement and not formality in the law of the Province of Quebec.

Section two

Unwritten means to prove agreement specified for the competent court in E- commerce contracts

A - Other means to prove the specific agreement of the competent court internationally, and their vulnerability Informatics:

The Directive (EC) No. (٤٤/٢٠٠١) noted on the other forms of specified agreement for the competent Court internationally, the first is a verbal agreement which ratified in writing form, which is located in particular on the specified condition of the competent court and not on the entire decade included for this condition, otherwise it considered incorrect^(١) .

The contractors enjoy complete freedom for contracting according to their conditions, and therefore there is no hamper to make agreement between the parties to identify the competent court internationally verbally, and the ratification is writing electronically, as long as the parties have accepted this method in their agreement, if the agreement - which identify internationally the competent court- is writing by electronic way, the ratification of the verbal agreement between the parties to identify the competent court internationally can write in the same way.

Art"١٣٧٩", ٢٢ .٥.٢٠٠٥

paris, ٢٠٠١, p. ٢٢٤. .^(١) *Mayer Heuze (V.)*, Droit International Privé, L.G.D.J. édition

The Council Directive (EC) No. (٤٤/٢٠٠١) also added other forms drafting the specified agreement for the competent court, which is formulated the agreement - even if it is not written - agree to the habits of the parties or customs of international trade.

The persons may generate in their transactions some habits, if they conclude the agreement conformity with their habits, this agreement is true, even it did not take the written form ,because the Convention put these formulations as a choice, and if the specified agreement for the Court of competent internationally approved customs in International trade - even if it were not under the written form -, this agreement is true.

B- Apply the customs of international trade on e-commerce contract (^١)

the problem doesn't be in the agreement which agree with the contracting habits between the parties, or the norms of international trade, but the problem is the possibility for apply of such customs and habits in e-commerce contracts

There is nothing to make agreement between contractors expressly to apply the customs of international contracts in E-commerce contracts, but if there is not assigning an explicit consent of the contractors to abide by those customs, Did suppose to consensual intention of contractors to apply these customs on E- commerce contracts?.

Law Jurists differed about the answer to this question, some of them confirmed that the customs of international trade has the conventional

(^١) International Commercial Law is the body of law that governs international sale transactions, a transaction will qualify to be international if elements of more than one country are involved, Since [World War II](#) international trade has grown extensively, seeing the increasing importance of **international commercial law**. It plays a vital role in world development, particularly through the integration of world markets., [Lex mercatoria](#) refers to that part of international commercial law which is unwritten, including customary commercial law; customary rules of evidence and procedure; and general principles of commercial law, for more information, see at, http://en.wikipedia.org/wiki/International_commercial_law

character, not mandatory, the applying of these customs depended on express will of the contract's parties^(١), and others argue that those customs have the force of legal rules, which applies in the absence of an accord by the parties, because these customs and traditions reflect the true reality of the international law which represents as obvious bases of implicit will's merchants community, as a result therefore, they deserved to be described as customs which have legal force^(٢).

Other law jurists ruled out some possibility of applying those norms and customs of international trade in the field of electronic transactions, to the following causes:

١ - These rules- the international trade rules- do not reflect the reality of the new technology and is parallel with the developments which occur in electronic environment; therefore, it is not suitable for belief to abide by its provisions.

٢ - It is premature to consider these habits and customs reflect the implicit will of the parties to international electronic contracts, so their application will be subject to the express agreement of the parties to be bound by its provisions^(٣), pursuant to previous, the satisfaction of the Parties for the formulation of the specified condition to the competent court according to the customs of international trade is a necessary and important, in other words the customs of international trade cannot be applied to any matter relating to contracts of e-commerce without the explicit consent of the parties, in the absence of this frank satisfaction cannot be applied to these norms and customs on these E- contracts .

It can be applied the customs of e-commerce on matters relating to

^(١) *Kassis (A.)*, Le nouveau droit européen des contrats internationaux, L.G.D.J. édition, paris, ١٩٩٣, p. ٥٧٧ et s.

^(٢) *Cachard (O.)*, La régulation internationale du marché électronique, L.G.D.J. édition, paris, ٢٠٠٢, p. ١٤٢.

^(٣) *Cachard (O.)*, La régulation internationale du marché électronique Op.Cit., p. ١٤٢ et s.

electronic contracts by explicitly or implicitly consent ^(٧), the E-space community has the characteristics of the "communauté", and are subject mostly for uniform rules "Netiquette" which develop and grow in the Internet Society, and accordingly, if the formulas of specified agreement for the competent court internationally which concern to contracts of e-commerce accord to the customs of e-commerce, it become valid, as well as the parties embraced - explicitly or implicitly - to accept.

It should be noted here, if the law of the chosen court requests editorial written for this condition, with no recognition of the existence of a similarity between the electronic writing and traditional writing, this E-agreement which contain the specified competent court internationally, is not true^(٨), another mean, If the law of chosen competent court agreement requires editorial written for the condition, and it is not considered electronic writing like as traditional writing, this E-agreement for the competent Court internationally is not valid.

Conclusions

- ١- E-writing is the one of the means which used to prove the agreement specified competent court recently, because the hand writing was the strongest mean to proving in the past, and it is still the strongest, but it developed to become electronic writing.
- ٢- Many of international conventions recognized of E-writing as a mean for proving the agreement specified competent court, like Hague convention, Unictal.
- ٣- Many of national laws recognized also of E-Writing as mean for proving the agreement specified competent court, like Egyptian law, and another Arabic law.
- ٤- The E-writing is equal with traditional writing when the electronic writing is performing the same functions of tradition writing.
- ٥- E-Writing contains many of information by electronic means, but this information is available permanently.

^(٧) *Godel (M.H.)*, Le contrat du commerce international, en ligne à, http://www.stoessel.cli.hei.dip.contrats_commerce_international, ٢٥.٢.٢٠٠٦.

^(٨) *Bottini (R.)*, Détermination de la juridiction compétence et commerce électronique international entre professionnelles, Litec édition, paris, ٢٠٠٠, p. ٢٦.

- ٦- There are another means which are not writing to prove the specified competent court, like a customs of international trade, another mean, and the specified competent court is certified, if it is agreed with these customs.
- ٧- These unwritten “customs of traditional international law (*Lex mercatoria*), the customs of electronic commerce (*Lex Electronica*) confirmed in many international conventions, like European regulation N° ١٤٤ /٢٠٠١.
- ٨- E- Commerce has not customs, because it is new, but the *Lex Electronica* represents as customs for the new kind of E- commerce.
- ٩- The parties of E-contracts can apply the customs of traditional international commerce if they agree to apply these customs.
- ١٠- Some scholars of law refuse the principle “ applying the traditional international trade customs on electronic commerce contracts, although the parties agree to this applying , because the E-commerce is private society , its electronic nature don't accept any traditional customs, so it has its private customs.
- ١١- In point of view the author the customs of traditional international trade can apply in E- commerce contracts, because the principals of international trade is one whether traditional or electronic one, the difference is just the mean of performing the commercial transactions.

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 - <http://en.wikipedia.org/>