creative commons

COMMONS DEED

저작자표시-변경금지 2.0 대한민국

이용자는 아래의 조건을 따르는 경우에 한하여 자유롭게

- 이 저작물을 복제, 배포, 전송, 전시, 공연 및 방송할 수 있습니다.
- 이 저작물을 영리 목적으로 이용할 수 있습니다.

다음과 같은 조건을 따라야 합니다:

저작자표시. 귀하는 원저작자를 표시하여야 합니다.

변경금지. 귀하는 이 저작물을 개작, 변형 또는 가공할 수 없습니다.

- 귀하는, 이 저작물의 재이용이나 배포의 경우, 이 저작물에 적용된 이용허락조건을 명확하게 나타내어야 합니다.
- 저작권자로부터 별도의 허가를 받으면 이러한 조건들은 적용되지 않습니다.

저작권법에 따른 이용자의 권리는 위의 내용에 의하여 영향을 받지 않습니다.

이것은 이용허락규약(Legal Code)을 이해하기 쉽게 요약한 것입니다.

Disclaimer

dCollection

[UCI]I804:24011-200000264542
조선대학교
CHOSUN UNIVERSITY

2015 年 2 月

博士學位論文

A Comparative Study on Consumer Protection in E-commerce Transactions

By

Yehya Hossen Ali

College of law, Chosun University

조선대학교
CHOSUN UNIVERSITY

A Comparative Study on Consumer Protection in E-commerce Transactions

2015 年 2 月 25 日

By

Yehya Hossen Ali

College of law, Chosun University

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

A Comparative Study on Consumer Protection in E-commerce Transactions

指導教授 권 상 로
Kwon Sang Ro

이 論文을 博士學位 申請論文으로 提出함

2014 年 10 月

By

Yehya Hossen Ali

College of law, Chosun University

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Yehya Hossen Ali의 박사학위논문을 인준함

위원장 조선 대학교 교 수 김 재 형 (인)

위 원 조선 대학교 교 수 Borhanian (인)

위 원 광주여자대학교 교 수 박 종 렬 (인)

위 원 조선 대학교 교 수 정 구 태 (인)

위 원 조선 대학교 교 수 권 상 로 (인)

2014년 12월

조선대학교 대학원

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

A Comparative Study on Consumer Protection in E-commerce Transactions

目 次

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

전자상거래에 있어서 소비자보호에 관한 비교법적 연구

Yehya Hossen Ali
Advisor: Kwon Sang Ro
College of Law, Chosun University

Abstract :

일반적으로 소비자들은 거래상의 약소계층이기 때문에 현대 법률에서는 현재 전자상거래에서의 소비자보호에 중점을 두고 있습니다. 민사입법에서의 일반적인 법률은 소비자들에게 적절한 보호를 주고 있지 못하지만 최근 법률에서는 전후 단계의 거래에 있어서의 소비자 보호에 관한 더 많은 방법을 창안해 내고 있다. 소비자 보호에 관한 생각은 오래동안 존재해왔지만 소비자 정의에 대한 법적 협정이나 합의는 부재상태였습니다.

이 연구는 4개의 장으로 나뉘어져 있고 첫 번째 장은 소비자의 정의에 대한 논의와 유럽연합지침 뿐만 아니라 이집트와 프랑스의 법률에 따른 입법상과 재판 단계의 전자상거래상의 개념에 대한 논의에 중점을 두었습니다. 또한 이장에서는 전자상거래의 개념과 소비자의 정의를 명확히 하는 것과 어떠한 연관이 있는지에 대해 간단히 다룰 것입니다.

두 번째 장에서는 전자상거래에서의 전자서명과 문서화와 인증 측면에 따른 전자상거래에서의 손으로 쓰는 서명을 대체하는 전자서명의 중요성 증가에 대해 논의합니다. 이 장에서는 전자서명의 개념과 진위를 증명하는 정도, 그리고 뿐만아니라 인증기관들이 수행해야하는 역할개관과 함께 전자서명의 문서화에 대해 다룰 것입니다. 또한 국제적 노력과 비교 법안을 고려하여 전자서명의 다양한 형태와 조건들에 대해 논의할 것입니다. 비교는 이집트와 프랑스 법률 그리고 많은 유럽연합지침에서 만들었습니다. 세 번째 장에서는 전문적이고 강자의 제공에 의한 강자와 비교했을 때 한쪽은 비전문적인 약소계층이 있는 상황에서 비전문계층의 이익을 상대의 비용으로 현실화하는 목표와 함께 전자상거래에서의 임의 조항에 대한 논의가 있을 것입니다. 준수계약은 임

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

의조항을 포함하고 준수계약의 출현은 임의조항의 창출을 이끄는 가장 중요한 이유 중 하나였습니다. 많은 연구자들이 주장하는 것과 같이 이것은 임의조항이 나타나는 생산적인 분야입니다. 이 장에서는 준수계약의 의미와 특징들에 대해 간단한 설명과 준수계약과 나란히 어떤 전자상거래에서의 범위가 소비자들에게 고려될 수 있는지 설명할 것입니다. 임의조항의 의미와 무효력에 대한 분석을 할 것입니다. 마지막으로, 이 연구는 전자상거래에서의 임의조항 규정과 어떻게 그들을 대항할 것인지 제시할 것입니다.

네 번째 장에서는 전자상거래를 철회하는 소비자의 권리에 대한 논의와 법적성질, 계약철회 그리고 구속력의 정도가 계약에 영향을 주는 것에 대해 설명할 것입니다. 이 장에서는 가장 국제적으로 널리 퍼지고 있는 법률협약 형식 중 하나인 온라인 거리 또는 주류 판매 계약에 대해 논의할 것입니다. 광대한 발전과 현대소통수단의 진보는 이러한 형식의 계약 이용률 증가에 기여하고 있고 이것은 그들의 풍습과 연결된 이슈의 범위를 예를 들어 소비자 철회 권리, 이러한 협약의 법적 성질, 구속력 그리고 계약 후 철회권리 또한 그것의 결과를 차례로 확장하고 있습니다.

이 연구는 유럽, 프랑스 이집트의 해당 법률을 비교하고 그들에게 있는 각각의 조항들을 명확히하고 소비자들과 다른 거래 상대에게 적용하는 효과에 접근하기 위해서 비교할만한 규을 포함한 지침을 분석합니다. 그리고 법원의 견해와 다른 재판 경향을 이 연구에서 제기된 많은 이슈들에 관해서 검토할 것입니다. 전자상거래의 규제를 다룬 아랍 법률과 아티클에 특히 주의를 줄 것입니다.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

1. Introduction

Recent technological developments have led to the introduction of several laws and regulations regarding consumer protection. In particular, technological developments in the field communications has resulted in the use of electronic devices in everyday life for individuals and businesses alike, which also changed the way transactions and business deals are carried out, both in terms of the original agreement or in terms of fulfilling legal obligations. The emergence of E-commerce and its widespread use has had a major impact on legal systems of traditional contracting and led rise to borderless internet shopping, and the subsequent procedures to gain access to electronic contracting, of which the consumer often constitute an important part of. Thus the need for consumer protection arose in the online market. Confidence in the online market is one of the most main requirements for the consumer in order to meet the personal need. As the consumer is generally at risk as a weaker party of the contract, legal protection for the consumer in both the pre and post-contracting stages are considered very important in cases where the consumer may need a particular commodity thus becoming exposed to the risk of being subject to unfair terms and conditions, as the company is generally the stronger party in the contracting process.
In addition to the above, legal protection, a lack of security, network problems and consumer protecting in online contracts are the most important and frequent topics regarding consumer needs that require further research.

The aim of this study is to outline the needs of consumer protection from traditional and technical perspective, to find out the extent of consumer protection needed before the conclusion of the contract, and to clarify the status of legislation related to consumer protection and the recognition of consumer rights in all phases of the E-contract.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Accordingly, this study is divided into four chapters, the first of which is titled "The Concept of the Consumer in E-Commerce, This chapter explains the concept of the consumer on a legislative and judicial level in the Egyptian and French Laws and European Directives. This chapter also analyses the concept of E-commerce how it contributes to defining the Consumer. In particular, comparisons are made in the Egyptian and French legislations as well as a number of European directives and legislations, with an analysis on various legal provisions contained in Egyptian, French and other European directives. Attention will also be paid to Arab laws and articles which serve to regulate electronic transactions.

The second chapter will discuss the Electronic signature in E-contacts, the concept of the electronic signature and the extent of proving its authenticity, as well as the documentation of the electronic signature with an outline of the role authentication agencies have to play. It will also discuss the varying forms and conditions of the electronic signature in light of international efforts and comparative legislations.

The third chapter will deal with the issue of arbitrary clauses in E-commerce contracts explaining the meaning and features of the compliance contract briefly, then explain to what extent the consumer can consider E-Commerce and compliance contracts.

The fourth chapter is going to discuss the consumer's right to withdraw from e-contracts: The basic rationale for having the right to withdraw in distance contracts is due to the vulnerability of the consumer especially as the consumer does not see the goods when making the distance contract.

The right to withdraw began to form an important element in benefiting the European consumer protection law and is expected to continue to develop,

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

however at the same time it has had a large impact on the principle of pacta sunt servanda.

A consequent mandatory right to withdraw in E-consumer contracts needs sufficient justifications to accommodate prejudices against important principles, such as the principle of pacta sunt servanda which will be highlighted in the first topic of this chapter.

Accordingly, this chapter has been divided into two topics, with the first covering the concept of the right to withdraw in contracting, its legal nature and the extent of its binding force impact on the contract. The second theme will deal with provisions required for exercising the right to withdraw in contracting.

This study compares applicable European, French and Egyptian laws and analyzes the directives contained in the text of comparable regulations to help clarify the respective policies behind them and to assess their effects on the consumer and the other contracting party. Following this, the researcher reviews court opinions and other judicial trends with respect to many issues that have been brought up in this research, Finally, the study shows that there is a need for additional legislations in the Egyptian law to resolve many problems uncovered in this research revealing a general lack of governmental interest in consumer protection. This deficiency in the Egyptian law is in contrast to the more progressive legal instruments authorized under French law after the issuance of the new French consumption law No. 344/2014. In conclusion, the study recommends that Egyptian legislators rectify this shortcoming and modify the text of Egypt's Consumer Protection Act to balance the consumer's interests with the interests of other parties involved in the contract.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

2. The concept of the consumer in Electronic-commerce (E-commerce) contracts

In order to reach a specific definition of the consumer in E-Commerce Contracts, we must first state the traditional definition of the consumer and what this term consists of then move on to the concept of E-Commerce.

2.1 The consumer's definition

The importance of defining the concept of the consumer generally is to determine
the scope of application of the Consumer Protection Act in terms of the people, and thus determine the beneficiary of the protection afforded by this law. The consumer is defined by some as the focus of protection and the center of its purpose" [1].

It is well known that the basic science that was concerned with stating the terms of consumption and the consumer was that of economics. Consumers are the main engine of the economy, the production is carried out for them and sales are also directed to them" [2], so the term consumer is considered a new term to lawyers, as it was originally in the interest of Economists" [3].Therefore, this concept of the consumer was not a matter of legal jurisprudence until the second half of the 20th century.

---

1) Mohamed Al Morsi Zahraa, Civil Protection of the E-Commere, Dar Al Nahda Al Arabia, First Edition , 2008, p.73.
2) Mohamed Saad Khalifa, The Problems of Selling Through the Internet, Dar Al Nahda Al Arabia, 2004, p.43.
3) Hassan Abdul Basset Gemiey, Spcial Protection for the Satisfaction of the Consumers in the E-Commerce Contracts, Dar Al Nahda Al Arabia, 1996, p.8.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

In this study, we will deal with the simple presentation of the consumer's concept at the legislative and jurisprudence levels. The "First Topic" will attempt to answer two main questions:

- To what extent can the professional who contracts items not fall within his/her field of specialization as a consumer?
- Does the term consumer refer to both natural and juridical people or is it limited to one of them only?

2.1.1 Traditional concept of the consumer

The term consumer linguistically and terminologically is driven from the verb consume which means perish and is meant to describe the state of spending money or the destruction of things" [4]. The consumer in its economical concept is the person who makes the consumption. As for the legal concept of the consumer, it is stated in the presentation of the consumer in various legislations that were issued in relation to the consumer and his/her protection, as well as also being stated in judicial opinions that have made much effort in this regard. This will be explained in the following:

2.1.1.1 The legislative concept of the consumer

2.1.1.1.1 The concept of the consumer in the Egyptian Law:

The Egyptian legislator defined the consumer in the first article of the consumer protection law No. 67/ 2006 as he/she to whom a product is presented to in order to cover a personal or family need or who enters into a contract in this regard" [5]. This is the same definition which was

4) Al Wajeez Dictionary, Special Edition for the Ministry of Education, 1420 H., 1999 G, p.651.
5) The Official Newspaper, Edition No. 20 Repeated, 20 May, 2006.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

mentioned in the execution list of this law which was issued by decree No. 886/2006" [6].

As far as the Egyptian E-Commerce Law Bill is concerned, there was no mention of any definition of the consumer in the first article of that bill which was dedicated to definitions" [7] despite the importance of the consumer's definition in the E-commerce field, as we will explain later in this study.

2.1.1.1.2 The Consumer Concept in the French Law and the European Directives:

The French legislator has shown great interest and emphasis on consumer protection through issuing various legislations which all aim to achieve the best possible protection for the consumer" [8] among these legislations are:

(1) Law No. 1137/72 issued on December 1972 regarding the consumers' protection in buying and selling within the place of residence.

(2) Law No. 22/78 issued on January1978, regarding the notification and protection of consumers in credit transactions.

(3) Law No. 23/78 issued on January 1978, regarding the protection and notification of the consumers of the products and services which included articles of the consumer protection against the arbitrary and unfair conditions imposed on the consumers by the other parties in the contract.

(4) Law No. 660/83 issued on July 1983, regarding the safety of the consumer concerning anything related to achieving the consumers' protection when they use the commodities, tools and food products.

---

6) Al Wakae Al Massryia, Edition No. 271 followed, 30 November, 2006.

7) This Law is available in: http://www.alealaw.com/16845-topic (25 May 2012)

8) Nabil Mohamed Sobh, Consumer Protection in the Electronic Transactions, Law magazine, issued by the Scientific Publishing Council, University of Kuwait, Appendix of Edition No. 3, Year 29, September 2005, p.135.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(5) Law No. 14/88 issued on January 1988, regarding the consumer' s protection, and the organizations' right to sue and notifying the consumers.
(6) Law No. 21/88, issued on January1988, regarding the TV based selling transactions.
(7) Law No. 421/89, issued on June1989, regarding the consumers notification and protection.

Other legislations also include issuance of the French Consumption Legalization No. 949/93 on July 1993 which included articles related to the protection and notification of consumer sin general .Also the French decree No.741/2001 issued on August 2001aimed to provide protection to consumers in distance contracting" [9].

From these laws and legislations the French legislator aimed to provide pre-sale protection to the consumers, which in this case differs from the forms of the previous types of protection which were limited to post-sale protection only and took the form of responsibility or invalidation" [10] Despite issuing all these laws and legislations and others as well there was no specific definition of the consumer in any of them.
Lacking of Concepts for the Consumer in the French consumption legalization No. 949/93 Issued on July 1993.

The French legislator pointed and indicated to the term consumer in the French consumption legalization, by using various terms such as purchaser, buyer or borrower without specifying any particular definition of neither the concept nor the term. Accordingly, the consumer definition was not

9) Ord. No. 2001-741 due 23 aout 2001 portant transposition de directive communautaires et adaptation au droit communautaire en matier droit de la consummation. JO 25 aout 2001, P. 13645, D. No. 30, 2001, p.2486.
10) Kilani Abdulradi Mahmoud, Faculty of Law, University of Mansoura, Dar Al Nahda Al Arabia, 2005, p.14.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

mentioned in the French consumption legalization, as was the case in the French decree No. 741/2001.

The legislator did not define the professional in the same consumption legalization, contrary to the applicable methodology in many of the European directives. Otherwise, it would have been possible to abstract a definition of the consumer through the description and explanation based on the contrary concept approach" [11] that resulted in the existence of great ambiguity in the concept and definition of the consumer which is based on a dual factor as well:

(1) The absence of a clear and direct definition of the consumer in the French Consumption Law.
(2) The variable use of terminologies which resulted in the uncertainty of the application of the French Consumption Law" [12].

The absence of a definition for the consumer in relative legislations led to disputes in jurisprudence in France regarding the definition. The reason behind this was included in the text of the article No. 35 of the law No. 23/78 issued on January 1978 regarding the arbitrary conditions. It was mentioned in the text of this article that the mentioned legislation's texts were limited to "the contracts which were held between the professionals and non-professionals or the consumers. Here the phrase "non-Professionals or consumers" insinuates that the two terms are not identical.

---

11) Youssif Shendi, The legal Concept of the consumer, analytical comparative study, Law and Legislations magazine, issued by the Scientific Publishing Council, UAE University, 44th edition,24th year, October 2010, p.189.
12) Leornard Cox. Definition du consommateur, medef - daj, september 2010, p.3. Disponible sur: http://master.scienccespo.ft/droit/site/master.sciencepo.fr.droit/files/usersaudeepsteinvuln%C3%A9rabi.lit%C3%A0%20droit%20la%consommation.pdf.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Based on the above text, differences in jurisprudence occurred regarding the concept of the non-professional' s impact on the consumer's concept" [13] this will be explained in further detail later on in this study.

That dispute was fueled by the absence of the consumer's definition in the consumption's legalization as we mentioned before which meant this issue was left unresolved. Part of the Jurisprudence believes that the French legislator at that time was ambiguous, since it is impossible and illogical to achieve the effectiveness and efficiency of the application of the consumer's protection law if there was no specific definition of the consumer in that law" [14]. The law always needs to set its addressees particular criteria and categories" [15], therefore, some concluded that" [16] the ambiguity of the French legislator was due to two reasons:

- The legislator did not adopt a single criterion to define the consumer, sometimes it referred to group of people and other times it referred to other categories of behavior and sometimes to both at the same time.
- The French consumption legalization was not formed at the same time; rather it was presented in consecutive phases. Each text came with an inclusive definition of the consumer independently without taking the harmony of all texts together.

Another part of the Jurisprudence believed that the French legislator followed two styles and methods in specifying the beneficiaries of the laws it presented. One of these two methods was indirect as the exclusion of protection limited the work to that which is done for unprofessional purposes only. The second was direct as it targeted the consumers in a direct

13) Alsayed Mohamed Alsayed Omran, Consumer's Protection during forming the contract, a comparative study, Monsha't Al Maaref, 1986, p.9.
14) Leornard Cox. Ibid., p.2.
15) Omar Mohamed Abdulbaki, Contractual Protection of the Consumer, a comparative study, p.38.
16) Youssif Shendi, Ibid., p.154.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

manner either in the form of societies or others as in the text of the article No. 35 of the law No. 23/78." [17].

Despite the absence of a specific definition for the consumer in the French consumption legislation, the source of the majority of problems was due to the lack of definitions for the mentioned law's application's limits.
The French Minister of Justice did not see any problem in this regard. When questioned about the absence of an accurate definition for the consumer in the French law, and that it was a source of many difficulties causing difficulties in specifying the jurisdiction of the law application and consumption rules on many of the verdicts, as well as whether there was a plan to set an accurate and specific definition of the consumer within the first article of the French consumer's law, the minister of justice replied that "the absence of a definition of the consumer in the consumption legalization was due to the special nature of the law. He added that "the absence of the consumer's definition in the mentioned law does not represent a serious problem according to the French legal traditions; on the contrary, it represents a flexibility factor, because it allows the court to apply the consumption's rules according to the nature of each case separately" [18].

2.1.1.1.3 The consumer's definition in the French consumption's Law No. 344/2014 issued on March2014:

The new French consumption law has limited the dispute related to the consumer's concept and defined it in the 3rd article as "any materialistic person who acts for purposes that do not fall within his/her commercial, professional or job limits"[19].

---

17) Kilany Abdulradi Mahmoud, Ibid, p.17.
18) JO Le. 19/04/2005 p.4085, available at: http://questions.assemblee-nationale.fr/q12/12-54125E.htm. (29 May 2012).
19) Art. Prelimnaire. Cree par LOI No. 2014/344 du 17 mars 2014, art. 3, prec. Au sens du present code. Est considere comme un consommateur toute personne physique qui agit a des fins aui n' entrent pas dans le cadre de son activite

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

2.1.1.1.4 The consumer's concept in the European Directives:

Various European directives were issued with the aim of providing protection to the consumer, of which are:

(1) Council Directive 93/13/EEC April 1993 on unfair terms in consumer contracts" [20].

(1) Directive 97/7/EC of the European parliament and the council on May1997 on the protection of consumer sin respect of distance contracts" [21].

(2) Directive 98/6/EC of the European parliament and the council on February 1998 on consumer protection in the indication of the product prices offered to consumers" [22].

(3) Directive 1999/44/EC of the European Parliament and the Council on May1999 on certain aspects of the sale of consumer goods and associated guarantees" [23].

(4) Directive 2002/65/EC of the European Parliament and the Council on the 23 of September 2002 concerning the distance marketing of consumer financial services" [24].

(5) Directive 2005/29/EC of the European Parliament and the Council on May 2005 concerning unfair business-to-consumer commercial practices in the internal market" [25].

(6) Directive 2008/48/EC of the European Parliament and Council on April 2008 on credit agreements for consumers" [26].

---

commercials, industrielle, artisanaleou liberal.

20) Official Journal L 095, 21/04/1993, p. 0029-0034.
21) O.J. L 144, 04/06/1997 p. 0019-0027.
22) O.J. L 080, 18/03/1998 p. 0027-0031.
23) O.J. L 171, 07/07/1999 p. 0012-0016.
24) O.J. L 271, 09/10/2002 p. 0016-0024.
25) O.J. L 149, 11/06/2005 p. 0022-0039.
26) O.J. L 133, 22/05/2008 p. 0066-0092.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(7) Finally, Directive 2011/83/EU of the European Parliament and of the Council on October 2011 on consumer rights" [27].

All the above mentioned directives agreed on a single definition for the consumer which is the definition included in the last directive issued regarding the consumer which is the directive No. 83/2011 where the consumer was defined to be any natural person in the contract covered by this directive and acting for purposes which are outside his/her trade, business, craft or profession" [28].

Also, the professional was defined in this directive to be any normal or juridical person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his/her name or behalf, for purposes relating to trade, business, craft or profession in relation to contracts covered by this directive" [29].

2.1.1.2 the jurisprudence's concept of the consumer

Without tackling the wide or narrow views of this concept due to their connection with the second topic of this study, in this section more light will be shed on some of the jurisprudence's definitions relating to the consumer's concept which are various and defined by the jurisprudence as "the natural or juridical person who enters into a legal action in order to obtain money or service with the aim of having the final usage of it. The same description is extended to cover the professional who enters into a contract outside his/her field of specialization[30].

Some believe that the description of the consumer can be given not only

---

27) Dir 2011/83/EU of the European Parliament and of the Council of 25 October 20111 on consumer rights. O.J. L 304, 22/11/2011 p. 0064-0088 available at: http://eur-lex.europa.eu/LexUriServ/LexUniiServ.do?uri=O.J:L:2011:304:0064:01:En:HTML

28) Art. (2/1), Dir. 2011/83/EU.

29) Art. (2/2), Dir. 2011/183/EU.

30) Omar Mohamed Abdulbaki, Contractual Protection of the Consumer, a comparative study, Monshat Al Maref, 2004, p.41.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

those who obtain their basic needs and requirements or luxurious items to cover personal or family needs, but also to cover those who buy finance or services for use in their industry or trade" [31].

Another part of the jurisprudence is defined by the consumer as "every person who buys a commodity or a service for personal or family usage and excludes those who use them for professional usage" [32].

Another part defined it as "every natural or juridical person who enters into a contract in order to obtain commodities or services or to be presented with the purpose of covering personal, family or professional needs outside his/her field of specialization" [33],It was also defined as "the person who enters into a contract in order to obtain their needs of commodities and services to use outside his/her field of specialism and profession" [34].

Finally, some defined it as every natural or juridical person, either a trader or not, who enters into a contract with a professional, to fulfill his/her personal or family needs or to obtain commodities or services against financial payments as long as the concept of the contract held between them does not fall into the professional' s field of activity" [35].

As we can see from the above mentioned definitions; we notice that some of them have adopted a wider concept of the consumer, while some others adopted the narrow approach, which will be explained in more detail in the second topic.

---

31) Alsayed Mohamed Alsayed Omran,Ibid, p.8.

32) Jean Galais - Auloy, Linfluence du droit de la consommation sur le droit civil des contrats, R.TD. CIV. Avr. - juin, 1994, p.239.

33) Kawthar Saeed Adnan Khaled, Protection of the E-Consumer, Ph.D. Thesis, Faculty of Law, Banha University, 2010, p.45.

34) Khaled Mamdouh Ibrahim, Consumer's Protection in the E-Contract, Dar El Fikr Al GameI, 2008, p.24.

35) Hamad Allah Mohamed Hamad Allah, Protecting the Consumer against the Abusive Conditions in the Consumption's Contract, Dar El Fikr Al Arabi, 1997, p.34.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

2.1.2 Limits to the concept of the consumer

This topic is dedicated to answering the questions asked at the beginning; How far can the professional/trader who enters into contracts in areas outside of his/her field of specialization be considered as a consumer? Does the juridical person enter within the limits of the consumer' s concept or is he/she limited to the natural person only?

2.1.2.1 How far can the professional who enters into contracts regarding items that don't fall within his/her field of specialization be considered a consumer?

2.1.2.1.1 On the legislative level:

All legislations related to the consumer's protection have agreed in principal to describing the consumer as the person who acts for non-professional purposes. But they disputed later on giving this description to the trader/professional who enters into contracts outside their field of specialization.

A. The supporting view to considering the non-specialized professional/trader as a Consumer

This view was adopted by the Lebanese and Moroccan legislators. The Lebanese law No. 13068/2004 was then reached and used to define the consumer as the one whose "purposes do not directly relate to his/her trade/profession. Also, according to the Moroccan law No. 31008/2011 the legislator defined the consumer as one who "fulfills his/her non-professional needs. These definitions indicate that each of the Lebanese and Moroccan legislators are in support of considering the trader/professional as one enters

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

into contracts on items that do not fall within his/her field of specialization as a consumer.

B. The opposing view in considering the non-specialized trader/professional as a consumer

<u>The Laws that adopted this stance are:</u>

(1) Consumer Protection Law No. 67/2006, where the legislator mentioned the definition of the consumer in the first article "to fulfill his/her personal or family needs" without mentioning the professional or trade related needs. This definition indicates that the Egyptian legislator adopted a narrow approach towards the consumer's concept, based on that which the person contracts to fulfill his/her personal needs and not the professional ones. Accordingly, the trader/Professional within the parameters of this law is not considered as a consumer and does not qualify to receive protection whether the contract falls within his/her field of specialization.

(2) The directives which were issued by the European Union were related either directly or indirectly to consumer protection. [36] All of them mentioned the phrase "acting for purposes which are outside his/her trade, business or profession" when they defined the consumer , reflecting the European legislator' s trend to adopt a narrow approach to the consumer' s concept, thus the professional who contracts outside the scope of his/her field of specialism is left unprotected. The legislator' s position is proven here through defining the trader/professional with differing names as every natural or juridical person who acts within his/her profession or trade.

(3) The French Consumption Legalization No. 949/93 has adopted an approach that does not directly or indirectly indicate the acceptance or

36) Jean Galais - Auloy, Ipid., p.239.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

refusal of considering the professional/trader who enters into a contract outside of their field of specialization as a consumer under the fact that there is an absence of a specific and accurate definition of the consumer in that legislation. As for the new French consumption law, it precisely concluded its approach in this regard and adopted the narrow approach of the consumer' s concept and considered him/her a person who acts for purposes that fall outside the field of his/her trade, profession or business. Accordingly he/she is not included in the protection that is provided by this law to the non-specialized professional/trader.

In conclusion to this, the Egyptian, European and French legislators have all taken this narrow approach towards the concept of the consumer.

2.1.2.1.2 The judicial opinions and judicial Directives:

(1) Judicial opinions: were divided over the concept of the consumer and its split into two sides; the first adopted the narrow approach of the consumer's concept while the second adopted a wider approach.

First view: The narrow approach

According to this view; the consumer is he/she who enters into legal actions to satisfy or fulfill his/her personal or family needs and not for professional or trade purposes.

The supporters of this view believe that the non-specialization of the professional/trader doesn't represent a weakness when entering into a legal action to serve a project or profession because he/she is not economically weak and can use or hire an expert to compensate for lack of experience. The narrow approach is also the only way to achieve the legal certainty for the consumer on the one hand, and on the other hand it serves to avoid the large economical differences and gaps between the consumers and the professionals/traders" [37].

37) Chalres delvin court, la definition du consommateur, article, 15 avr. 2008, Disponible sur:

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

This can be countered by stating that each professional/trader is not necessarily economically strong, and can be relatively weak in facing other traders/professionals. Even if in most cases the professional/trader is stronger than the consumer, it doesn't lead to the assumption that the consumer is also economically strong. Consequently, the consumer in this case can use the services of an expert to compensate for the lack of experience on their side.

Second View: Predominantly in modern jurisprudence, this view adopts a wider approach to the consumer's concept
According to this view, the consumer's description not only covers those who obtain their needs to satisfy or fulfill personal or family needs but also those who obtain them to cover professional needs.

The supporters of this view find support in article No. 35 of the French law No. 23/78 mentioned earlier in this study. After the jurisprudence's majority adopted a wider approach to the consumer's concept, they were once again on the issue.
First side: This side views the legislative texts which were issued with the aim of providing protection for the consumer have to have brought up the description of the professional or the trader, which necessitates describing the consumer, within the frame of the mentioned texts, as the nonprofessional" [38] The meaning of that is, the basic confrontation was between the term consumer and the term professional without taking into consideration if the professional/trader is contracting within the field of his specialization or not.

---

http:/charlesd.monjournalweb.com/contenus-b1/la-definition-du-consommateur-b1-p7.htm (29 May 2012).
38) Alsayed Mohamed Alsayed Omran, Ibid., p.9.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Second side: This side views the expansion of the consumer' s concept from the perspective of searching if the professional/trader is contracting within his field of specialization or not. It considers the professional, if contracting outside his field of specialization, to fulfill or satisfy his personal or family needs, as a weak consumer who needs legal protection similar any other consumer. Therefore taking into consideration his/her lack of knowledge in the technical details of the contract subject. Furthermore, if the professional/trader is contracting within the limits of his field of specialization, then he/she is no longer considered a consumer and doesn't deserve nor need protection because he/she is assumed to be the stronger side of the contractual relationship"[39].

Third side: This side adopts the wider approach of the consumer concept by taking into consideration the used means in the contract. It views the generalization and diversification of the risks that surround the consumer who contracts by means of E-Commerce as a reason to adopt the wider approach to the terminology" [40].

The modern view is more widely agreed upon to adopt the wider approach of the consumer's concept to extend the protection over the professional/trader who contracts outside of his field or area of specialization. Specifically, with the 'Third side' who justifies this expansion by taking into consideration E-Commerce as the means of contracting. Whereas, it is a relatively new means of contracting and has its own unique related risks that are not remote from either the consumer or the professional/trader in the mentioned assumption. As a result, justice between the two parties is accomplished.

---

39) Omar Mohamed Abdulbaki, Ibid., p.40, also see Ph.D. Kawthar Saeed Adnan Khaled, Ibid., p.45.

40) Mohamed Shoukry Srour, E-Commerce and the Means of Consumer Protection, a research presented to the Legal and Security Aspects of the Electronic Transaction, Dubai Police Academy, UAE, during the period from 26 till 28 April 2003, p.108.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Judicial Views:

As far as the European Court of Justice is concerned, the professional is not considered a consumer if he/she was found acting inside a field of profession. This was emphasized by its verdict issued on January 2005" [41].

As far as the French judicial is concerned, the absence of a specific and accurate definition of the consumer in the French Consumption Legalization No. 949/93 is due to the fact that the French Judicial became of large evaluative authority in deciding who is to be considered a consumer and who is to be considered a professional/trader. As per each case separately, it resulted in a judicial hesitation in this regard.

The situation here differs from the Egyptian and European judicial situation. The Egyptian and European judicial authority is a tied up and limited authority and is not as flexible as the French one because as we mentioned before, the Egyptian law and the European directives had from the beginning firmly decided on the matter regarding the consumer's concept.

The French judicial always depended on three criteria in deciding to what extent the non-specialized professional can be considered as a consumer" [42] these criteria are: The purpose of the action, the non-specialization of the professional and the direct connection.

(1) The Purpose of the Action Criteria:

This criterion is based on research whether the purpose of the action that has been held is related to fulfill and/or satisfy a personal or professional need that deserves to be legally protected as the action which is to satisfy and/or fulfill a personal need.

The French supreme court adopted this criteria in its verdict issued on April 1986 in the First Civil Circle between Mr.Bodier, who is an insurance agent,

41) ECJ, 20 janvier 2005, C-27/02, Petra Engler contre Janus Versand GMbH.
42) Yousif Shendi, Ibid., p.190.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

and the company Rayconile. In this case, the court had to decide if the text of the article No.34 of the law which was issued on January 1978 regarding the arbitrary conditions applied to Mr. Bodier. The appeal courts considered him as a consumer and he accordingly qualified for the application of the mentioned article. Contrary to that, the supreme courts decided that Mr. Bodier was to be treated as a professional and he was therefore excluded from the text of the article No. 35" [43].It is clear from this verdict that the sentence adopted the narrow approach of the consumer concept. Mr. Bodier was excluded from the limits of protection which is provided to the consumer because he enjoys a great deal of effectiveness and efficiency regarding the company's basic works and because he satisfied and fulfilled the needs related to his work or activity as well as acted to make profit" [44].

(2) The Non-Specialization of the Professional Criteria :

According to this criterion, to be considered as a consumer one must not practice their professional specialism, meaning anyone who contracts to satisfies non-professional needs" [45], so the non-specialized professional is considered a consumer. As per this criteria the legal protection umbrella can be extended to an unlimited number of people outside of their nature, either they were professionals or consumers, because what has been the center of concentration is whether the action that took place was outside the limits of the professional's area of specialization" [46].

The French Supreme Court adopted that criterion in its verdict which was issued on April 1987, which is slightly over a year from its first verdict issued on of April 1986.

---

43) Charles delvin court, Ibid.
44) Ibid.
45) Osama Ahmed Badr, Consumer Protection in the E-Contracting, a Comparative Study, Dar Al Jamet Al Jadidah for Publishing, 2005, p.63.
46) Ibid., p.66.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

There were a series of verdicts based on the previous foundation sand adopted the wider approach of the consumer's concept until 1995.

We find that the verdict which was issued on April 1987, was a contract with one of the commercial companies which worked in the field of realestate, the contract was regarding the purchase of alarm devices in places that are rented by the company within its field of activities in order to protect its locations. It was found, later, that the device was defected, and, when the company wanted to invalidate its contract with the seller, the court considered the contract's terms to be arbitrary.

Accordingly, they were invalidated as they did not take place first hand, despite the fact that the company was considered a professional who worked in the field of real estate, but the contract fell outside of its field of specialization regarding the used technology in the alarm device. Therefore, the company in this case is of the same state of ignorance which can be the case with any consumer. The court concluded that the company qualifies for the application of the texts of the law which were issued on January 1978 related to the consumer's protection against arbitrary conditions" [47]After the French judicial adopted this criterion during the period of 1987 to 1993, expelled it due to many criticisms which were directed to it and started to adopt the direct connection' s criteria.

(3)The Direct Connection's Criteria:

According to this criterion, research is done to decide if there was a direct connection between the contract subject and the activity that is practiced by the professional. If such connection is found, then that person can be considered a professional and not a consumer. In case a direct connection was not found or established, the person concerned can be considered a

47) Cass. Civ. Ire 28 Avr. 1978, D. Sirey, 1987, n 42 e cahier.-somm. Commentes, p.455, par M. jean - luc Aubert. Bull. Civ. Iv,n 134, p.103.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

consumer and as such would qualify for legal protection.
The French Supreme Court began to adopt this approach for the first time in its verdict which was issued on January 1995 where the sentence was given not to apply the text of the article No.35 of the law issued on January 1978 related to the arbitrary condition son the person who enters in to money and services supply contracts which have a direct connection with his/her professional activity. The contract in this case was an electricity supply contract between a professional and the French electricity company. The court saw a direct connection between this contract and the activity of the professional" [48)]

The French Supreme Court continued to adopt these criteria in its verdicts and sentences. Later to the issuance of the French Consumption Legalization No. 344/2014, there was no place for such hesitation by the French judicial regarding the clearance of the consumer's concept and its limits in the mentioned legislation.

2.1.2.2 Does the consumer concept include the natural and juridical person or is it limited to the natural person only?

Deciding if the juridical person can take the description of the consumer or not, is of special importance in knowing how far the juridical person can benefit from the protection which is provided by the consumer's protection law. We will tackle this problem by researching its conditions in both the legislation and judicial fields.

48) Cass. Civ. Ire 24 janv. 1995, D. sirey, 1995, 8e cahier -informations Rapides. N. 8, p.47.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

2.1.2.2.1 The Legislation's Position

There is variation in the consumer's protection legislations between supporters and opposition regarding giving the consumer's description to the juridical person or not.
The supporting view has adopted the Lebanese consumer protection law No. 13068/2004, the Iraqi consumer protection law No. 1/2010 and the Moroccan Law No. 31008/2011 for what was mentioned in each of them that the definition of the consumer included the natural and juridical persons.

The legislations which adopted the opposition's attitude were the consumer protection law No. 67 for the year 2006 which indicated "satisfying his/her personal or family needs". This phrase indicates that the consumer is a natural person only because it is difficult to say that a juridical person will enter into a contract to satisfy personal or family needs. Also this view adopted by the French consumption law No. 344/2014, which mentioned in the consumer' s definition that the latter is a materialistic person and did not mention whether he/she was a juridical person. The European directives also stated directly and accurately that the consumer description is applicable only on the natural person and not the juridical persons.

On the other hand, most of the Egyptian jurisprudence agreed to apply the consumer's description on the juridical person in addition to the natural person" [49] Where part of the jurisprudence sees that limiting the consumer's concept to natural persons only is unjustifiably narrowing the consumer concept. Because there are juridical persons such as societies, unions, charity organizations whose activities don't include or imply professionalism

49) Ayman Saad Slime, The Abusive Conditions in the Contracts, a Comparative Study, Dar Al Nahda Al Arabia, 2011, p.39.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

or profit making or money gaining because they enter into contracts with the aim to fulfill human goals such as buying food or clothes for orphanages or poor families who receive their support and assistance.
Accordingly, they need the protection which is provided by the consumer's protection law for natural persons as well" [50].
While part of the French jurisprudence believes that it should not apply all the texts that are related to the consumer on the companies even those who enter into contracts outside their field of specialization" [51].

We agree with the Egyptian jurisprudence's opinion in extending the limits of the legal protection to the juridical persons in cases where it aims to reach a human goal. The protection can also be extended to juridical persons who contract on things that fall outside their field of specialization. As for those who enter into contracts within this frame they don't deserve the protection. This is an opinion that suites the current times in which modern and new means of contracting are becoming more popular every day. The latter can result in turning the juridical person into the weaker part of the contract due to the amount and ratio of risks as mentioned before.
Therefore, it can be said that the consumer is every natural or juridical person aiming through the contract to satisfy personal or professional needs outside his/her field of professional specialization.

2.1.2.2.2 Judicial Position:

The European Court of Justice has followed the European legislator's steps which was followed in the European directives, and adopted the narrow approach of the consumer as being a natural person only. As stated in its verdict issued on November 2001, the view to limit the consumer concept to the natural person only seems in many cases unjust, because it may in

---

50) Pierre Fernandez, available at: http://aufildudroit.over-blog.com/article-1014418.html.publie le.
51) Youssif Shendi, Ibid., p.177.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

sinuate that all the juridical persons are professionals, which is not the actual case" [52].

Contrary to the European Court of Justice's position, the French supreme court did not settle this dispute regarding the consumer's concept due to the absence of an accurate and specific definition of the consumer in the old French consumption legislation. It swung back and forth in hesitation between adopting a narrow or wide approach to the consumer concept. In some cases the court adopted a large approach through which the juridical person emerged inside the consumer concept and parameters, which was confirmed by the court in its verdict that was issued on April 1987 as mentioned before, in which the sentence was in favor of the reales tate company despite the fact that it was a juridical person.

In other cases, the court adopted the wider approach to the consumer concept and limited this concept to natural persons only. This was confirmed by the court' s verdict which was issued on March 2005,in which the court confirmed that as a principal the consumer is to be considered a person rather than a group. a natural person" [53].This in fact was a verdict built on another verdict issued on the 22 of November 2001" [54].

Recently however some developments emerged in the French Supreme Court's sentences and verdicts where the court confirmed in its sentence issued on December 2008, that the companies were not applicable to the consumers' description.

The Supreme Court also confirmed in its sentence dated April 2 2009 that the article No.136/1 of the French Consumption Legalization only applies to individual consumers" [55] which was supported by the new conception the

52) Cass. Lerech. Civile. Arret du 15mar2005, available at http:www.clauses-abusives.fr/juris/ccass050315f.htm. (30 march 2013).
53) Leonard Cox. Ipid., p.5.
54) Cass.Civ.1ch. 2 avr. 2009,08/11/231, available at http://legimobile.fr/fr/jp/j/c/civ/lere/2008/12/11/07-18128.
55) Cass.civ.1.ch.2.avr.2009,08-11.231, available at

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

current consumption's legalization.

To summarize the above, the Egyptian, French and European legislators all adopted a narrow approach to the consumer's concept, such that the professional who contracts outside of their area of specialization and the juridical person, emerge out of the protection limits provided by the consumer's protection law because they do not match the given criteria.

---

http://www.casydroit.fr/jurisrudence/lere-chambre-civile-2-avril-2009-LA-COUR-DE-ASSATOPM-PREMIERE-CHAMBRE-CIVILE-A-RENDU-1-arr/C122164 (june. 2013).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

2.2 The E-commerce concept and how far it is reflected on specifying the consumer's definition [56]

Electronic commerce in Europe is expanding rapidly. The European Union (EU) has enacted legislations aimed at preventing barriers to e-commerce between the EU member states and protecting European consumers" [57]. One only has to mention the enormous success of eBay, Facebook, Google, Second Life or Amazon around the world to illustrate how consumers and businesses alike have embraced electronic commerce and the internet in the last decade. Indeed, focusing on eBay alone, the site counts a staggering 86.9 million active users worldwide, 1 billion page views per day, and reports a net income in excess of $1.78 billion for 2008 unsurprisingly in the EU" [58].

The auction website eBay acts as a platform where the seller and buyer can deal on-line and directly achieve an agreement. The payment is agreed between the two parties and does not go through the website as consumers seem to be quite reluctant to bid on-line" [59].

Despite the flourishing of E-commerce in general, its development is not the same in all countries and varies from one country to another. In Europe it can be

---

56) Lucas Bergkamp and Serge Clerckx, Hunton & Williams, Electronic Commerce in Europe, 13 December, 2000, P. 1210. Available also at: http://www.hunton.com/files//publication/8a4273b0-5c0e-4e2b-a1d6-20a120adef70/presentatio/publication/attachment/2fba156f-7524-4260-bfbb-a4a8cdc49074/electronic_contracting.pdf(11 march. 2012).

57) Christine Riefa, The reform of electronic consumer contracts in Europe, towards an effective legal framework. Lex Electronica. Vol. 14 No. 2, 2009, p.3., available at: http://www.lex=electronica-org/docs/articles_244.pdf (12 Oct. 2011)

58) Jean-Raymond Fayat, frederik nevejan and Fredrik. Nordquist, Consumer confidence in Commerce, 16th Conference, BILETA, April 9th - 10th 2001, University of Edinburgh, Scotland, p.7 available at: http://www.bileta.ac.uk/content/files/conference%20papers/2001/Consumer%20Confidene%20in%20E-Commerce.pdf (27 Feb. 2012)

59) Chrstine Riefa, Ibid., p.3.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

categorized as follows:

(1) A mature market in Northern Europe, including the UK, Germany and the Nordic countries where between 60% to 80% of Internet users are online purchasers

(2) A growth market in France, Italy and Spain where the number of online purchasers is lower compared to the number of internet users, but where the number of new online purchasers is growing fast, signaling a strong potential for growth in the short and medium term" [60].

If we look at the Internet alone as one of the most important E-Commerce means, it can be found that by 2009, the Internet contributed □100 billion to the UK economy. The UK's internet economy is one of the strongest in Europe (worth 50bn) with UK consumers being the biggest online shoppers, which indicates and confirms that the Internet is becoming a fixed and solid tool and means in the lives of many of the people all around the world" [61].

As for the spread of E-Commerce in Arab countries, it seems slow compared to European and Western countries. The inevitable question here is related to knowing the basic factor which controls the growth of E-Commerce and causes it to flourish.

Here, it can be seen that the consumer's confidence in the E-Commerce represents an important and essential factor in the flourishing of trade via this means. Therefore, the ratio of sales over the Internet is high in the UK, as mentioned before due to the consumer's confidence in the Internet which is relatively high in these countries when compared to other European countries. It is one of the highest four countries in which the confidence factor is available in Internet based transactions" [62] Based on recent findings, the consumer's

60) See. Report on "protecting consumers online", a strategy for the UK, office of fair trading, December 2010, p.4, available at http://www.oft.gov.uk/shared_oft/consultations/eprotection/OFT1252.pdf. (4 JUNE. 2011).

61) Report .OFT. prev., p.9.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

confidence in Internet based transactions during the year 2009 had reached around 79% in the UK while in France only reaching roughly 64%" [63].

Therefore, due to the importance of the confidence factor in achieving a rise in E-Commerce, it was suggested that some programs related to achieving considerable ratios of confidence on the consumer's side in E-Commerce to be broadcasted" [64], such as the on-line disputes settlement programs or programs that present trusted commercial outlets, and to put these programs in the consumer's machine which adds confidence and safety to the E- Commerce markets, and to confirm this suggestion in addition to being a source of confidence to the consumers, it is also in favor of new companies or those who are setting themselves up in the new market or those who are not yet known internationally, It is also possible to establish a site on the Internet which contains guidelines for consumers with the aid and help of the companies who are going to help the consumers in avoiding the risks of contracting over the Internet." [65].

E-Commerce Legislations:

Due to the importance of E-commerce, as previously mentioned, it has received the attention of many legislators around the world. Based on that, many national and international legislations were issued in the electronic transactions and dealings field. However, E-Commerce did not receive the due attention from the Egyptian legislator. It is worth mentioning that the USA is one of the pioneering countries in showing great attention and care for E-Commerce and encouraged using the Internet to carry out business deals.

---

62) Ibid., p.10.
63) Jean - Raymond Frederik, Ibid., p.4.
64) Ibid., p.4.
65) Report ,OFT, Ibid., p.13.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

There are various legislations related to E-Commerce some of which are mentioned below:

(1) The French law No. 575/2004 issued on June 2004 regarding the confidence in the numeric economy" [66].

(2) The French law No. 230 for the year 2000 issued on March, 2000 regarding information technology and the electronic signature.

(3) The French decree No. 741/2001 issued on August 2001 regarding the distance contracting.

(4) The manifests issued by the British Parliament DS REG" [67] in 2000 regarding the consumer's protection in remote selling. The parliament later issued a modification in 2005.

(5) The United Electronic American Law in 1999.

(6) The Korean law related to the consumer's protection in E-Commerce in 2007.

<u>Arab Legislations</u>:

(1) The Tunisian law No. 83/2000 regarding partnering and E-Commerce.

(2) The Jordanian law No. 85/2001 regarding the electronic dealings and transactions.

(3) Dubai law No. 2/2002 regarding the transactions, dealings and electronic commerce.

(4) The UAE law No. 1/2006 regarding the transactions, dealings and electronic commerce.

(5) The Sudanese electronic transaction and dealing law for the year 2007

(6) The Omani electronic transaction and dealings law issued in 2010, Sultan'

---

66) L. n° 2004-575 du 21 juin pour la confiance dans leconomie numerique. available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&fastPos=2&fastReqId=566190513&categorieLien=id&oldAction=rechTexte.(20 May. 2012).

67) Distance selling regulation, available at: http://www.legislation.gov.uk/uksi/2000/2334/pdfs/uksi_2002334_en.pdf

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

No. 69/2008.

(7) Palestinian electronic transaction and dealings law for the year 2010.

(8) Qatar electronic transaction and dealing law No. 16 /2010.

Some of the International Authorities and Organizations:

The UNCITRAL law regarding the electronic commerce issued was authenticated and approved by the UN's Commerce Committee on the 16th of December 1996, which contains some regulatory rules that can be applied in many countries. Generalizing these rules aims to establish an acceptable base for contracting over the Internet on an international level without affecting the consumer's need for protection in these countries" [68].

Issues by the European Union:

Many directives adopted the definition of E-Commerce but there are two core European directives that are considered key" [69] in regulating E-Commerce and Remote Contracting, which are:

(1) The Remote Contracting directive (DSD) No. 7/97 which was issued on the 20 of May,1997.

(2) The E-Commerce directive (ECD), No. 31/2000 which was issued on June,2000.

Although many legislations were issued in relation to electronic commerce, there is still some difficulty in making these legislations. The reason behind this is traced back to the existence of a conflict between two of the basic factors which must be taken into consideration when making these laws. These factors are:

- The permanent objective of any project in achieving the consumer's protection in distance contracting.

68) Hisham Tahat, factors affecting E-Commerce contract law, 20th Conference, BILETA, April 2005, Queen's University of Belfast.

69) Christine Riefa, Ibid., p.3.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

- The development and flourishing of E-Commerce based on the consumer's confidence and trust. As previously explained, setting common rules to facilitate Internet based commerce is required" [70].

Specifying and Division:

It should be explained that sometimes there is confusion between the term E-Commerce and the term E-Business despite them being two different terms. E-Business is a larger and more accommodating term which includes the E-Commerce, E-Banks, E-Governments and E-Insurance Companies. While E-Commerce is usually a commercial activity that is done by electronic means and within the electronic environment" [71]. It can be noticed that in some cases the E-Commerce term is used to describe the Internet based trading and commerce (Internet Commerce) while from a practical prospective the Internet based commerce is one of the branches of E-Commerce" [72], although it plays the most important role in the development and flourishing of E-Commerce. For the many contracting advantages it has, one of the most important advantages is the speed in concluding commercial transactions and deals and the ease of dealing in addition to increasing the size of the E-Commerce by using the Internet more than any other means of E-Commerce.

Therefore, this study will focus on this particular branch of E-commerce known as Internet based commerce. This study will begin by outlining the meaning of E-Commerce with regard to its legislative and jurisprudence aspects , then move on to present how far the E-Commerce concept is reflected on the consumer' s personality and characteristics, and the emergence of a new approach of the latter inside an electronic environment.

---

70) Electronic Commerce Directive.
71) Hisham Tahat, Ibid., p.1.
72) Faysal Mohamed Mohamed Kamal, the legal protection for the E-Commerce Contracts, a Ph.D. thesis, Faculty of Law, Cairo University, 2008, p.13.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

2.2.1 The E-Commerce Concept

This Topic speaks about the concept of E-Commerce in two consecutive sections. The first is dedicated to highlighting the meaning of E-Commerce on a legislative level, and the second to present the judicial opinions in this regard.

2.2.1.1 The Legislative Definition of E-Commerce

In Egypt there was no issuance until now of any law that organizes E-Commerce contracts, although there were many laws issued to organize E-commerce in various countries around the world.

Factors that may limit to a great extent the spread and growth of E-commerce and cause a huge gap between the consumers and the producers [73], may also lead to a lack of any organized consumer protection when contracting via this means. That was in spite of issuing the Egyptian law regarding the Electronic Signature No. 15 for the year 2004. It was better and of more importance to issue a law which organizes electronic transactions, dealings and contracts, especially the Egyptian E-Signature law which aims to regulate the authentication of E-Contracts" [74].

However the definition of E-commerce was included in the first article of the Egyptian E-Commerce Law Bill, and it was defined as "a commercial transaction that is remotely completed using an electronic means". As stated from this definition, it did not specify any particular E-Commerce means, thus taking into consideration the rapid development in the means of E-commerce" [75].

---

73) Ibid., p.14.
74) Hisham Tahat,, Ibid., p.4.
75) Faisal Mohamed kamal, Ibid., p.51.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Despite criticisms of the Egyptian legislator's position which fully acknowledged E-Commerce, it is found that many of the legislations issued to organize the constitutions of E-Commerce laws and E-Transactions did not include any definition of E-Commerce although the very aim of issuing them was to organize its constitutions; among these legislations are:

(1) The French law No. 230 /2000
(2) The French decree No. 741/2001 regarding the distance contracting.
(3) The unified E-Transactions law in 1999
(4) The European Directive No. 31/2000 regarding the E-Commerce
(5) The UNCITRAL law, issued in relation to E-Commerce, where it suffused to define the "Electronic Data Exchange ". It was defined as "The transfer of data electronically from a computer to another computer by using a decided upon criteria to form information and data.

It is also noticed that most of the Arab legislations issued regarding E-Commerce were affected greatly by the UNCITRAL law related to E-Commerce. It can also been seen that the texts of some of these legislations are transcripts from other legislations through similarities between them. As such, part of the jurisprudence [76] views the application of these texts unsatisfactory in many aspects due to the following:

(1) The currently applicable legislations can't cope with many cases that actually exist, in addition to the fact that there is a great deal of ambiguity in the basic articles of these legislations.
(2) These legislations do not treat the cases that are erected and formulated from the rapid and swift changes in the numeric world, and can' t cope with the technological developments which modify its constitutions to match the consumer's transactions and deal over the Internet as well as cover the legislations that were formed in order to provide the consumer

76) Khaled Mamdouh Ibrahim, Concluding the E-Contract, Dar Al Fikr Al Gameie, 2006, p.36.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

with suitable protection.

(3) Mostly, the legislations were not adhered to, and as the OFT Sweep web-site revealed, almost one third of the retail traders in the UK breached laws which were issued regarding E-Commerce.

That doesn't mean that all the issued legislations in the field of E-Commerce were not defined as the Tunisian law No. 83 for the year 2000 issued in regard to E-Commerce and bartering, had defined the E-Commerce as " commercial transactions that are done via electronic exchanges. It was also defined in the Dubai law No. 2 /2002, regarding electronic commerce and transactions that "commercial transactions are those that are done by means of electronic correspondences.

It also defined the distance contract in the text of the article no. (121/16) which was modified by the French consumption law No. 344/2014 as "any contract between a trader and consumer that is related to selling a commodity or providing a service over a distance without the materialistic existence at the time between the trader and the consumer, with the exclusive use of one or more of the distance communication means" [77] It should also be taken into consideration that this definition was mentioned in a directive that was issued originally to protect the consumers' rights and not to organize the constitutions of the E-Commerce.

77) Christine Riefa, Ibid., p.4-5.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

2.2.1.2 The Judicial Definition of E-Commerce

Just as E-Commerce has received a great deal of attention to the legislators in many different cases, it also received the attention of the jurisprudence acknowledging its importance in modern times.

Therefore many Jurisprudence have paid much attention to the definition of the E-Commerce, and defined it from the judicial angle to be "an exchange of data and information in an automatic mean which is based on modern technology, by using modern means such as E-mailing, electronic transfers and exchange of money for banks, digital money and smart cards, and using telex and fax in different commercial operations" [78]. It is clear from this definition that if we shed more light on E-commerce means and electronic payment methods than E-Commerce can itself be better defined.

Another side to the jurisprudence defined it as "an electronic market in which the sellers, middlemen and buyers communicate while products and services are presented in a virtual or digital form. The prices are paid using electronic money" [79] In a simple manner, the E-commerce was defined as "practicing the commercial acts via an electronic mean" [80] It was also defined as concluding the commercial deals and agreements of the commodities and services over the Internet to remotely communicate, in some cases, the delivery and payments made over the network, in other cases the payment only takes place through the network, and as for the delivery, it takes place outside of the Internet network in physical form" [81].

78) Art. (121/16), Mod. Par L. No. 2014-344 du 17 mars 2014 - art. 9 (V): (1).
79) Art. (2/7), Dir. 2011/83/EU, prev.
80) Mohammed Zaheeruddin. Evidentiary Value of Electronic Transactions, the electronic transactions conferece in U.A.E. , during the period from 19 to 20 May, 2009, p.20.
81) Iman Mamoun Ahmed Soliman, concluding the E-contract and proving it, the legal aspects of the E-Commerce's Contract, Dar Al Gamei' a Al Gadeeda for publishing, 2008, p.19.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Finally, part of the jurisprudence has defined it as "the process for promoting and exchanging commodities and services and concluding the relevant agreements and deals by using the communication means and the electronic exchange of data and info. Regarding distance, especially there is no need to gather the parties in one place if the commitments can be carried out electronically or in a material and tangible manner.

By looking at the previous definition it can be concluded that some have shed the light on the means of E-Commerce while others concentrated their attention on the method or way of fulfilling the commitments through stating how the delivery and payment are to be carried out. From all of these definitions, the E-Commerce's contract can be seen as:

(1) A contract that is held over a distance or remotely with all parties gathering at the same time over the Internet without the need to meet in a specific place. It is therefore a contract that receives confirmation of acceptance chronologically but not geographically.
(2) It is usually an international contract, through which each party is located in a different country, although sometimes all parties can be located in the same country or even city. However in the latter case it is not considered as an International contract.
(3) The commercial activity is an essential base for the E-Commerce's contract[82].

It is worth noticing the last factor which proves to be tackling the legal nature of the E-Commerce's contract. Without digging too deep into this issue, questions regarding the meaning of commercial activity in the sphere of this contract arise. Does it mean that the purpose of the contract is to make a commercial profit, or that both parties of the contract are traders/professional? or does it mean that civil activity exits from the framework of E-commerce contracts?
The importance of explaining and clearing this matter in the variation of legal

82) Mohamed Alsayed Arafa, Ibid., p.284.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

sentences and constitutions is related to sections of the mentioned law that are applicable to this contract. Part of the jurisprudence believes that parties of the contract are the ones who determine the description of the E-Commerce contract. For example whether the contract was civil or commercial, if both parties of the contract are traders (B2B)(Business to Business)or the contract was commercial for both of them. However if parties of the contract are not traders/professionals and the other is a consumer (B2C)(Business to Business)then the contract is commercial for the first and civil for the second. In this case the contract is classified as a mix contract while others do not believe it necessary to require the activity to be commercial in order to classify it as E-Commerce" [83].

The activity can be civil and be a mixed, but even though this activity or work enters within the frame of E-commerce, the main point is that it should be carried out via electronic means" [84]. It is believed that whatever the nature of the activity or work might be, whether commercial or civil; it enters within the E-Commerce parameters as long as it was concluded via electronic means.
The consumer in this case deserves and qualifies for the legal protection regardless of the personality of the other contracted party, whether a trader or professional craftsman, or simply a person who is contracting for the first time and doesn't have any experience in the commercial field. The reason behind that is the increase of risks that surround the consumer in contracts held via electronic means.

83)Taher Shawki, Ibid., p.24.
84)Mohamed Al Morsi Zahraa, Ibid., p.9.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

2.2.2 The reflection of E-Commerce's means in the contract on the consumer's personality

There is no doubt that modern contracting methods and means have a great effect on the consumer's personality. Currently the consumer is no longer a simple and humble person as in the past. Through considering contracting via modern means such as the means of E-Commerce, it is found that the consumer is in need of an educated person for consulting, who is fully aware of the risks of a contract and its advantages, obligations and commitments that come as a result.

Therefore, there are many risks from contracting via E-Commerce means that should be known to the consumer prior to being committed in order to avoid them. If the consumer was already subject to these risks, then he/she should be able to deal with them and benefit from the contract's advantages via this mean.

If we look at the advantages of this contract it can be seen that the means of the E-Commerce gives many advantages of which some are mentioned below.

(1) The E-Commerce is considered an important and effective mean to enlarge the limits of the local markets, so as to make them connect with each other on a global level and help to increase the effectiveness of marketing commodities and services.

(2) It helps to increase the speed of responding to the client' s requests and needs, compared to other paper work which may take more time in receiving the purchase order and responding.

(3) It works to reduce the postal correspondence costs as well as publicity and advertisements.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(4) Reducing costs by establishing E-Shops compared to the costs of building traditional shops as well as a positive reflection on the cost of completing business transactions.

(5) The ease of performing the resulted payments on commercial deals by means of E-Money which is globally payable and acceptable over a short period of time.

(6) The ability to know the prices and specifications of the goods and examine the commodities by viewing the illustration photos in the E-Catalogues and Manuals.

(7) The ability to establish direct and close relationships between the companies and their clients and suppliers when these companies use electronic data exchange systems.

(8) Enabling the companies to organize their financial operations as well as the productive and administrative operations and tasks with greater flexibility.

<u>The Consumer's use of these means in contracting achieves the following benefits:</u>

(1) The E-Commerce progressively presents to the consumers commodities and services for a cheaper price because it allows them to shop from more than one place and make quick price comparisons.

(2) The E-Commerce enables the consumers to shop and make electronic transactions and deals over 24 hours of the day and from any place on earth

(3) The E-Commerce helps to encourage competition meaning a reduction in prices and enhancing the level and quality of the product as a result of such competition. All this leads to more benefits for the consumer.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(4) The possibility of a fast delivery of products via E-Commerce means, especially with digital products.

However there are risks for this contract which cannot be neglected, the most important of which are:

(1) The consumer's inability to see or examine the products prior to purchasing them.
(2) The possibility customers, companies and banks having their confidential information disclosed to their competitors.
(3) The possibility of fake contracts over the Internet as well as cases of fraud and scams due to the absence of examining the identity of traders and others.
(4) The possibility of asking to import or selling banned products in the local markets of the importing countries.
(5) The ability to use fake credit cards over the Internet by stealing the card numbers when used on the internet, as such holding the card owners responsible for transactions which they never made themselves" [85].

These in addition to many of the problems faced by the consumer when carrying out the contract will be detailed later in this study. The consumer is therefore required to be a more positive and aware of that which is taking place, and to be up to date with modern technology. The consumer should also follow the modern means in contracting and understand their advantages and disadvantages as much as possible, especially in these times where advancements in technical development attracts consumers in no small measure.

85) Faisal Mohamed Kamal, Ibid., p.65.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3. The online electronic signature for the consumer

3.1 Introduction

Electronic-Commerce (E-Commerce) has spread widely in recent years, many international and local companies have established private sites for themselves online and some studies have estimated that E-Commerce has increased to 20% of the total world trade"[86] and it is expected that the rate will rise to more than this within the next 10 years.
The current age of data and information in which we currently live has led to the appearance of many news ways and methods in which one can sign contracts. Electronic signatures have received great importance around the world both in commercial or noncommercial trade and have therefore now become an important part in constituting the contracts in the world of digital technology"[87].

Several areas of research has been undertaken regarding the importance of the electronic signature in proving electronic dealings including the effectiveness of electronic signatures in facilitating the means of E-Commerce and its effect on convincing the consumer to begin using these means. In order to achieve this aim we must first clarify the characteristics of the electronic signature and show how it differs from handwritten signatures while also clarifying its aspects, thus

86) The electronic trade in the Arab world - Hassan El Hifny, p.19.
87) YEE fen lim B SC digital signature - certification authorities and law - paper presented at the Australian law teachers association annual conference hosted by Murdoch university school of law -Perth western Australia 29 September -2 October 2002-point 3- available at http :// Murdoch .edu,au/elaw/issues/v9n3/lim 03nf.html(l.v-29 April 2013).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

making it more recognizable locally and internationally and proving the signature's authenticity.

This study will be divided into two parts with the first, discussing the definition of the electronic signature and the extent of proving its authenticity. The second part will focus on authorizing the electronic signature while also highlighting the role authorization agencies.

3.2 The definition of the electronic signature and the extent of proving its authenticity

Despite the importance of the electronic signature there are several doubts regarding its reliability as well as the extent at which it is possible to reveal the forgery or alteration of electronic files"[88].

However, due to the recent rise in decoding unfamiliar technology and the advancement in technological progress there has become a growing importance surrounding the use of the electronic signature, and this is a new image for decoding which differs from conventional methods, along with the rise of document authorization agencies.

This has also led the authenticity of electronic signatures to be recognized on both a local and international level which will be further explained in the next section.

88) Ali Said Kassiem, some legal sides for the electronic signature - the economics and law magazine ,issue number 72 in 2002, p.40.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Egypt and other Arab nations:

The Egyptian law on electronic signatures number 26 (2004) was issued to organize the rules of the electronic signature. The legislator referred rules and adjustments in the usage of electronic signatures to the executive rule for this law which was issued by the decree number 109 in the year 2005. Most of the modern Arab legislators concerned with organizing electronic trade dealings put definitions on the electronic signature and implemented certain rules and adjustments around it.

These states included Tunisia, Jordan, Emirates and Qatar, in addition to many other Arab countries who have also prepared legislations in this field.

France:

several internal laws were issued within several states in and outside of the European Union regarding the electronic signature, Among them include the French act number 230 issued on March 2000.This law amended some rules in the French civil law to prove the authenticity of electronic signatures so electronic documents may be considered equal to the paper documents. Following this, the French decrees no. 272/2001 and no. 535/2003 were issued on March 2001 and April 2002 respectively.

Internationally:

As part of international efforts to acknowledge electronic signatures to the extent of handwritten signatures in electronic dealings the European directive number 1999/93"[89] was issued on December to determine the general frame for the electronic signature with the aim of also facilitating the usage of the electronic signature and contributing to its legal recognition through determining the conditions which will form the basis of its legal recognition as well as create

89) Directive 1993/93/EC - of the European parliament and of the council of 13 December 1999 on a community framework for electronic signature , official journal l 013 19/01/2002 p0012-0012 Available at :http//eur-lex. Europe .eu /Lex uriserv/;exuriserv.de?uri"= 3 1999l0093:en: HTML.(20 Jan 2012).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

legal systems for its authorization"[90] such the UNCITRAL law regarding the electronic signature was issued in the 34th United Nations committee of international trade law conference"[91]As a result of this law several countries issued several legislations based on the electronic signature"[92].

These enactments in organizing the electronic dealings shed light on two main aspects:

- Establishing an organized legal infrastructure for electronic transactions in order to place electronic documents on the same platform as conventional written documents, in addition to help electronic signatures become acknowledged with the same credibility as handwritten signatures.
- Increasing the confidence in electronic transactions through authorization agencies and imposing punishments and calling to account those who do not uphold the authorization"[93].

The following chapter will be divided into two parts. The first will be dedicated to defining the aspects of the electronic signature in Egyptian and French laws as well as some other comparative laws. The second part will explain the process of authenticating the electronic signature and the necessary conditions that must be put in place in order to authenticate it.

---

90) Maitre Valerie Sedallian, Preuve et signature □lectronique , LE 14 ET 15 AVRIL 2000- point http /www.juriscom.net /chr / 2 fr20000509.htm23 .disponsible sur.
91) This forum was hold in Vienna during the period from 26 June to 12 July 2001.
92) Ibrahiem el Dessuqui Abou Ellile-" Registering the e-commerce transactions - The paper submitted to the electronic banking works between sharia and the law - in the period from 10 -12 may 2003, Dubai, p.1862.
93) Ibid., p.1852.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.2.1 Understanding the electronic signature and its forms as well as defining the electronic signature and distinguishing it from traditional forms.

3.2.1.1 The definition of the E-signature

(1) The electronic signature according to the Egyptian law:

The electronic signature was defined in the article 1/c of the Egyptian law as "a text which can take the form of letters, numbers, signs or symbols which is defined by and made distinguishable to the signatory"[94]. It is the same definition mentioned in the article 1/1 of the executive rule of this law"[95].

The same definition is also mentioned in the draft of the Egyptian online trade law, the only difference between the two of them being that the draft of the online trade law did not mention the specific forms in which the electronic signature may consist of"[96].

(2) The electronic signature according to the French law:

According to the passage in the article no. 4/1316 of the French civil law added to the law number 230 in the year 2000, the electronic signature represents a safety measure to guarantee the identity of a person when performing certain acts or transactions. It is supposed that the safety of this means depends on there being no sign of contradiction in the electronic signature as determined by the signatory, with set conditions decreed by the state council to guarantee the safety of the action"[97].

---

94) The electronic signature law number 15, 2004 ,issued regarding the electronic signature , the formal magazine, issue number 17, April 2004.

95) This executive regulation issued by the decree number 109 for the year of 2005 for the year of 2005 in date of 15,May 2005 and was published in the Egyptian wakaeei newspaper, issue number 115, May 2005.

96) Art 1 the draft law available on :
http "///www.a;elexalaw.com/t6845-topic (27 May 2012).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

It is noticed that this definition suggests the safety tool used to determine the identity through of the electronic signature is through not finding any contrasting evidence in it. Meanwhile there are other enactments such as that of the Egyptian, The Emirates and the European directive which require some conditions for the safety or protection of the signature.

It is noticed also in the text of the previous article that the French legislator delegated the state's council the task of issuing the executive decisions which show the legal and technical adjustments necessary in proving the electronic signature's authenticity. To apply this, the decree number 272-2001 was issued on March 2001"[98] which set several adjustments that govern the establishment of the electronic signature and protect it by verifying its authenticity and set models for electronic certificates of accuracy.

A suggestion also given by the French state was issued by the French stat's council in decree number 535/2002 on April 2002,[99]to determine the conditions and adjustments related to issuing electronic certificates of accuracy for the electronic signature and to regulate authorization services "[100].

---

97) Art "1316/4-loi - n 2000-230du13 nars- 2000 portant adaption do droit de la prevue aux technologies de l information et relative ala signature electronique, jo n 26-14 mars 2000, p.3968.

98) Decr number 2001-272. 30 mars 2001- , pris pour l application de k article 131666-4 du code civil et relative al signature electronique jo 21 mars p 5070. Http ""//www. Legifrance . gouv.fr/affichtexte . de ?cid texte-=legitext000005630796(8.Des,2012).

99) Decr n2002-535. 18 avr . 2002 relatif al evaluation et ala cortication de la securite offerte par les produits et les systemes des technologies de l information - jo 19 avr 2002, p.6944.

http "//www.legifrance . gouv.fr/affichtexte .de ? cid texte =legitext 000005632663

100) Osama Abdul Aziz Ruby, the proofing of the electronic signature in evidencing , the paper submitted to the electronic dealings conference - in the period from 19 till 20 may 2009 - in THE EMIRATES CENTER FOR STUDIES AND STRATEGIC PAPERS., p.516/517.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(3) Defining the electronic signature in the European directives and the ideal UNCITRAL law regarding the electronic signature:

The electronic signature was defined in article 12 of the UNCITRAL law as being an electronic form of data that has been logically included or connected to a message. It is possible to be used in distinguishing the identity of the signatory regarding the message data and to confirm the signatory's information mentioned in the message data.

The European directive states that the electronic signature is distinguished by two forms which are considered the normal electronic signature and the advanced electronic signature"[101].

The normal electronic signature refers to the data in an electronic form connected logically with other electronic data serving as a means for documentation"[102]

Whereas the advanced electronic signature meets the following requirements

- To be uniquely related to the signatory.
- To be able to determine the identity of the signatory.
- To be established by using means kept and maintained by the signatory r that is under the signatory' s control only.
- To be linked with the relevant data that leads to detecting any change later made to this data"[103].

The second section of this paper shows that the above mentioned conditions are the same as stated by the Egyptian legislation in the article no.16 on the electronic signing law as a basis for proving the authenticity of the signature with evidence.

101) Art 1/1 and article 1/2 ,French decree number 272/2001.
102) Art2/1dir.1999/93ec<: electronic signature.
103) Art. 2/2 dir 1999/93/EC < Advanced electronic signature.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(4) Defining the electronic signature according to recent Arab legislations:

The electronic signature is defined as signing a document or an electronic dealing in the form of letters, numbers, symbols, signs and so on which provide a unique feature allowing the signatory to be distinguished"[104]. It is also defined as being electronic data that has been added, attached or is related with an electronic transaction that can determine the identity of the signatory and distinguish him/her from others in order to agree on the content of the dealings "[105] It may consist of letters, numbers, symbols or voice or treatment systems in an electronic form or attachment, or relate logically with an electronic message that is intended to document and approve a particular message"[106].

It is shown from the above mentioned definitions that the common perceptions surrounding the signature and its definition are as an attributed piece of writing. The image of the signature no longer fits under the development that takes place through an electronic median with unconventional patterns and shapes that cannot be touched"[107]

Thus the electronic signature can be defined as that which takes the form of numbers, symbols or letters set on electronic writings for signing a legal action through the internet, with the aim of determining and distinguishing the signatory, while the signatory also accepts the contents of the text which bears his/her signature.

104) Article (1) of the Omani law No. 69, 2008, Electronic Transactions Law.
105) Article (1) Electronic transactions, Palestinian law 2010.
106) Article (1) of the UAE Federal Law No. 1/ 2006 concerning the transactions and e-commerce.
107) Osama Abdul Aziz Ruby, ibid., p.509.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

3.2.1.2 Distinguishing between classical and electronic signatures:

The signature in general is any mark that can be added by the signatory with the intention of obliging the contents of the document"[108] Aspects of similarity and difference can be noticed between the classical signature and the electronic signature, but despite this, the electronic signature has achieved functional equality with the classical signature and its importance in dealings has become acknowledged to the extent that international efforts have focused on recognizing the electronic signature"[109] and in some cases, have equaled it to hand written signatures so that it may enjoy the same legal credibility.

Therefore the electronic signature complies with the classical signature in determining the identity of the signatory and expressing the signatory's personal consent with the contents of the writings and providing the electronic text with proof of authentication. However there is more than just one difference between the two of them, particularly in the form or the foundation on which the signature returns to and the risks which it faces.

<u>The Form:</u>

The classical signature according to article 14 taken from the Egyptian authentication law can be handwritten, a signature, seal or a fingerprint. But the electronic signature according to the text of the article number 1c from the law of the electronic signature number 15 in 2004 can take the form of letters, numbers, symbols, signs etc.

<u>The median or support of the signature:</u>

The classical signature always occurs on material and classical content, in most cases taking a paper form. But the electronic signature uses an electronic format, meaning that all electronic content can be stored physically or scanned.

---

108) Yee Fen Lim B.Sc, Digital Signature, Certification Authorities and the Law, Ibid., point.6.
109) Ibid., point.2.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Regarding the risks which the signatory faces:

Some experts view classical signatures and electronic signatures in the same light. Both face dangers of forgery as it is possible to store the electronic signature on a smart card that may be stolen and used if the password is available"[110] while, others find that the law has mechanisms to verify whether the hand written signature is authentic or not, as the court can refer to experts or other methods of clarification, thus being able to classify whether the hand written signature is authentic or not"[111] Therefore, in most cases the risks which the classical signature faces are limited due to the availability of the trustfulness and safety factors as it is based on a material pillar which unlike the electronic signature can detect any embezzlement easily.

Another view which is more widely accepted argues that the digital signature, which is considered among the most important forms of electronic signatures, can provide a high level of reliability due to capabilities of exposing forgery which use similar coding technologies based on one key for the coding and decoding process.

However nowadays, asymmetric encryption depends on a pair of two keys, one of them private and used in the coding process and the other is a general one used for description in a way which will be explained in more detail later on. Using these keys, the risk of hacking is drastically reduced. Further improvements to the quality of protection are expected to continue to develop with advancements in technology"[112].

---

110) Nazzal M. Kisswani, Anas A. AL Bakri, Regulating the Use Of Electronic signatures Given The Changing Face Of Contracts, MqJBL (2010) Vol 7, p.57, Available at: http://www.businessandeconomics.mq.edu.au/our_departments/accounting_and_corporate_governance/docs/publications/past_editions/volume_7/04Kisswani.pdf. (8,Mar 2013).

111) Yee Fen Lim B.Sc, Digital Signature, Certification Authorities and the Law,Ibid., point.7.

112) Tamier Mohamed soliman eldemiatti – proving the e-commerce transactions through the internet - comparative study - the first Issue - with out publication house 2009, p.358.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.2.2 The functions and forms of the electronic signature

3.2.2.1 Functions of the electronic signature:

It is possible to say that the main function of the electronic signature is simply to sign electronic documents. In some cases this can take place through transferring handwritten signatures into an electronic form through copying its picture into a word document"[113] In addition, 4 main functions of the electronic signature must be available including the documentation, safety and non-repudiation functions.

(1) The function of documentation:

The purpose of documentation is to guarantee the identity of the signatory and verify his or her identity through several means including interviewing face-to-face or via telephone"[114].

(2) The function of safety:

This is a way of protecting the data against alteration and verifying that the contents of the electronically signed message didn't experience any change to its data or embezzlement to its contents"[115].

(3) The function of secrecy:

To guarantee the secrecy of the information which the electronic messages contains so that it cannot be read by anyone except the intended receiver who can use a general access key given by the sender in order to prevent any unauthorized access to the mail contents and protecting it from potential alteration"[116].

113) Nazzal M Kisswani Anas Al bakri, p.55.
114) Ibid., p.56.
115) Tamier Mohamed Soliman-Ibid., p.355.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(4) The function of non-repudiation:

Here we notice the existence of a third party which provides electronic authorization and the existence of linkage between the general key and the private key related to the signature. This makes it difficult for the users of the electronic signature to deny the message data if disputes arise over it"[117].

3.2.2.2 Forms of the electronic signature:

If the Egyptian legislator classified the handwritten signature and prevented the signing, sealing or fingerprinting of it"[118].

Then the electronic signature would have several other forms regarding the degree of authenticity and safety. We can refer in brief to the major aspects which are: Signing with an electronic pen, scanning, the biometric signature and the digital signature.

(1) Signing via the electronic pen or scanner:

The electronic pen is a type of touch pen through which it is be possible to write on a touch screen prepared for this purpose, or on an electronic panel connected to the computer that has the required software"[119] It is similar to the scanner which can copy and move the manual signature on to a desired text, whereas here the electronic pen is used to move the handwritten signature onto the computer by the consumer putting his or her hand written signature using a pen on the computer screen. The hand written signature is then transferred by the computer and stored as a group of digital values that can be added to the message of the data"[120] However the disadvantage of this form is that it requires large sums of money that are not always available.

116) Ibid.
117) Ibid., p.356.
118) Art 14, Egyptian Evidence law.
119) Tamier Mohamed soliman eledemiatty - Ibid., p.345.
120) Ibid.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(2) Biometric signature:

This form of signature writing depends on the biometrics or the personal properties of the signatory like finger printing, dynamics of applying specific keys related with the computer, scanning the eye pupil, schemes for thermal drawings of the face using infrared rays, and biometrics for voice recognition"[121]These measures can be used by transferring them into a digital form and programming the computer not to unlock or use the signature model except after receiving the correct fingerprint"[122].

(3) The digital signature:

The digital signature is used in the field of the bank transactions, as the customer uses the magnetic banking card delivered by the bank which contains a password making the number the same as the signature issued by the customer "[123] This form is also used in electronic trade transactions. The digital signature requires the interference of a third party to guarantee the documentation of the signature and to determine the identity of the signatory. This is known as the authorizer whose job is to issue both the general and private coding keys for the customers based on their requests, as well as to issue a certificate showing the accuracy of the customer's signature, showing that the authorizers require advanced devices and special programs"[124].

This form depends largely on decoding so there is strong linkage between decoding and digital signatures. It is also recognized that coding is not used in the case of signatures only but also to guarantee the privacy of the dealings. It has also been used in military operations in instances where decoding is necessary"[125] such as in the First World War"[126].

---

121) Osama Abdul Aziz Ruby, Ibid., p.512.
122) Ibid., p.511.
123) Ibid., p.510-511.
124) Tamier Mohamed soliman eldemiaty. Ibid., p.357.
125) Ibid., p.356.
126) Virginie Etienne, le development de la signature electronique, master 2 recherche droit

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

The system of encryption: Symmetric and Asymmetric

Symmetric coding:

This is also known as coding for secret keys or classical coding. This kind of coding depends on one key used in the coding process and the decoding process. It is distinguished by its speed compared to other coding systems but it is also considered unsafe and high risk"[127].

Asymmetric coding:

Also known as modern coding or general key coding, this system is based on using an arithmetic equation to produce two different keys that are linked with each other mathematically and integrate with one other"[128] Therefore this system depends on a pair of two keys; one of them is privately kept with the signatory and is used in decoding, establishing putting the signature into text form. The other key is a general key that is sent to the receiver to decode and to authenticate the signature and safety of the message.

Both types of keys are represented by a certain code consisting of coding arithmetic and exchanging the data and signatures as the sender puts his signature on the message data prepared by the private key so the receiver can recognize it and ensure his or her signature by using the general key provided along with the message data. This system of coding is distinguished by its high confidentiality compared to other coding systems"[129].

---

des affaires. universite nord paris 13. Ann□e universitaire 2010-2011, p.16.

127) Yee Fen Lim B.Sc, Digital Signature, Certification Authorities and the Law,Ibid., .point.17.

128) Tamier Mohamed soliman eldemiatty, Ibid., p.356.

129) Osama Abdul Aziz Ruby, Ibid., p.511.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.2.3 Process of proving the authenticity of the electronic signature.

The electronic signature as previously mentioned has become a necessary tool in signing contract deals. It relies on signing contracts through the internet, thus the matter of recognizing the proof of the electronic signature in the authentication process has a great importance particularly in proving who the signature was signed by. It also has great importance with regard to protecting the consumer who signs contracts electronically as this form of signing contracts is continually increasing, therefore requiring its authenticity to be more widely recognized. According to the general rules of authentication it is considered that at the very least a signature should be used"[130].

It is worth mentioning that recognition of the electronic signature and accepting it in the authentication process was not an easy matter when considering the factor of trust in the signature"[131]However it is now recognized due to several factors that enforced its trust and the appearance of authorization capabilities.

3.2.3.1 Acknowledging the authentication process of the electronic signature:

The Egyptian legislator acknowledged the authentication process of the electronic signature, in the article number 14 of the electronic signature law by classing the electronic signature in the scope of administrative, commercial and civil spheres of the authentic assessments for signatures in the rules of authentication law in commercial and civil aspects.

It is noted that the legislator acknowledged the authenticity of electronic signatures in this article on the bases that certain conditions be met in article 18

130) Ibid., p.520.
131) Ibrahiem desuqui abou ellil , Ibid., p.1862.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

of the same law. The legislator also referred to the executive rule of this law to do the task of applying technological and technical adjustments related to the authenticity of the electronic signature in the proofing process.
The legislator then added in article 15 of the same law that electronic texts and writings are in the framework of administrative commerce and civil dealings of authentic assessments set for formal texts and writings in the rules of authentication laws.

Regarding the previously mentioned article, experts from a legal point of view see it as an unnecessary repetition from the legislator, in particular when stating that any text must at least contain a signature. Some experts saw that this repetition came as an attempt from the Egyptian legislator to copy the French legislator who made the same repetition by stating that the rule authentication in the 2 articles 3/1316 and 1/1316, from the law no. 230 (2000) seem to contain a mistake in the legal phrasing"[132]As the article 1/1316 from the above mentioned law mentions that any text which takes an electronic form is accepted as credible to that of a handwritten text. The legislator confirms the same rule in the article number 1/1316 of same law that "any electronic text is accepted like that of a handwritten text.

The legislator also confirms in the same law in article 3/1316 that the 'text which is electronically supported including the electronic signature is as reliable as the hand written text' The legislator confirms the same rule in the article number 3/1316 of same law that 'any electronic text is accepted like that of hand written text. The legislator also confirms in the same law in article 3/1316 that 'text which is electronically supported including the electronic signature is as reliable as any hand written text' Thus the article 3/1316 is not necessary with the presence of the article 1/1316" [133].

---

132) Osama Abdul Aziz Ruby, Ibid., p.520.
133) Julien Esnault, la signature □lectronique, ann□e universitaire 2002-2003,m□moire publie sur signelec .com le 21 Juillet 2003,p.30.Available at:

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

We think that the intention of the legislator in this is to confirm this rule not to repeat it because signing as evidence for authentication is always connected with writing. So the legislator admitted the authenticity of electronic texts which is considered as confirmation towards the recognition of the authenticity of the electronic signature, and equaling it with the handwritten signature.

Also the European directive no. 93/1999 issued regarding the electronic signature admitted the authenticity of the latter and declared in the article number 1/5/b"[134] that the electronic signature is accepted fully in legal procedures and imposed on the member states in the article 2/5 of the same directive which guarantees not to refuse the electronic signature or lose its validity or legal effect merely because it is in electronic form. Furthermore the statesmen of the first paragraph of the seventh chapter from the American law of unified electronic dealings issued in the year 1999 stated that no record or signature may lose its legal effect merely because it takes an electronic form.

It was also declared in paragraph (d) of the same law that if the law conditioned the existence of the signature then the electronic signature will fulfill the requirements of the law"[135]).

3.2.3.2 The necessary conditions that must be provided for the electronic signature to be considered credible:

All legislations which admitted the acceptance of the electronic signature in the authentication process agreed on the necessity to provide certain conditions for the signature to enjoy full credibility. Meaning that it can be accepted as credible only if it meets the following criteria:

---

http://www.signelec.com.le21juillet2003/ (5,Feb,2012).

134) Art 5/1b dir 1999/93/ec ojl013/19/01/2000p0012-0020.

135) uniform electronic transactions act available at (5Mar 2012)http //www.law,upenn,edu/bll/ archives /ulc/ecom uetaq final .pdf

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

- The linkage of the signature is with the signatory only
- The control of the signatory alone is on the electronic median
- There is a possibility to expose any amendments or changes in the electronic text or electronic signature.

This was included in the article number 18 from the electronic signature act number15 in the year 2004, the text of the 2 articles (1/1316-4/1316) from the French law number 230 in the year 2000, article 3/6 from the ideal UNCITRAL law regarding the electronic signature, and the article number b/2 from the European directive number 1999/93.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.3 Proving authenticity of the electronic signature

Talking about the electronic acceptance in general includes two main dimensions. These include discussions around the parties that carry out the authorization of the electronic signature and certificates of authorization. The following are details about the concept of each one of them and its rules. As this chapter will be divided into two parts, the first will explain the concept of the authorization parties in accepting the electronic signature, as well as its duties responsibilities. The second paper will be assigned for the electronic certificates issued by the authorization parties.

Authorization parties:

The authorization parties play an important role in the electronic legal field as they are considered as the link between the sender and the receiver. Their service creates trust and without it many dealers would refrain from making contracts"[136] Naturally this depends on the extent of neutrality of the party and it having no personal interests regarding the acceptance of the electronic signature.

The provider of the authorization service issues certificates referring to the necessary general key for decoding the message, and assures that this general key corresponds with the private key used in the signature. In determining the private key holder"[137] there are several companies working in the field of the electronic certification on a global scale and who are viewed by many as credible. Among these are Arnica, VeriSign, Webtrust and M Trust which all have sites and addresses online."[138].

136) Ayman saad selim / the electronic signature - comparative study, DAR ELNAHDA ELARABIA - 2004, p.83.
137) Ali Said Kassiem, Ibid., p.28.
138) Mohamed ahmed Mohamed nour gestinia - the extent of proving the electronic signature in the electronic trade contracting- doctorate thesis, faculty of law Cairo

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.3.1 The certification service provider

There is no special definition related to the electronic certification provider. In the Egyptian electronic signature law however there was a definition in the executive rule as being the licensed party to issue the electronic certificate and providing services related with the electronic signature"[139] Later on in this study the Egyptian legislator's definition will be further explained as well as the electronic certificate in its core law, which is a much debated matter as the basics in setting the definitions is the task of the experts and not the task of the legislator.

When the legislator takes on this task then it is not possible to accept the certificate in the core of the law without setting a definition for the provider of the certificate and leaving the executive regulations.
In the French decree no. 727/2001, the authorization service provider was defined as being any person who issues certificates or provides other electronic services related to the electronic signatures"[140] In the european directive no. 93/1999 the authorization service provider is defined as the natural or juridical party who issues certificates or provides other services related to electronic signatures"[141].
In the law of Qatar it is defined as being the licensed person to keep the infrastructure of the general keys to issue the authorization certificate and to provide services related to the electronic signature"[142] From the side of the jurists, the authorization provider is defined as being the 'person in charge of issuing certificates including determining the identity of the signatory and

university - 2005, p.242-243.
139) Article number 1/6, The executive rule of Egypt.
140) Art 1/11 decre n 2001-272-30 mars 2001 prec.
141) Art 2/11 dir 1999/93 EC .
142) Art 1 , Qatar Law number 16, 2010- Related with the dealings and the electronic trade "

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

confirming whether his or her relation with the electronic signature is sound' Some others defined the authorization party's role as "issuing authorization certificates in the capacity of an authority or institution whose management is run by an actual person or a licensed entity working from one of the state institutions.

Its function is to issue the certificates for the electronic authentication which links the physical person or entity and the general key, or any other task related to the electronic signature"[143]which helps in determining whether the identity of the person and his or her electronic signature matches. The authorization party records also the data of the certificate prepared for a suitable period. It can do these registrations electronically using new secure systems"[144].
The electronic authorization certificate will be approved depending on whether the provider of the authorization service is well qualified or certified. The place of authorization issues electronic keys used in the signature making process. These are the general and private keys, or what are otherwise called the asymmetric keys.
This formally shows the relation between the signatory and the keys.

In addition to this, the place of certification or authorization verifies the content of the dealings between the parties whether it is safe or dangerous, or if there is no sign of forgery or embezzlement. Among its tasks are pursuing the commercial sites on the internet to enquire about them and their potential dangers so that they that can detect if a site is unsecure. The authorization party will send warning messages to dealers exposing them if they are unsecure"[145].

---

143) Ayman saad selim - the electronic signature - comparative study, Darvelnahda Elarabia, 2004, p.83.
144) virginie etienne le developpement de la signature electronique, Ibid., p.41.
145) Ibrahiem Eldesuqui Abou Ellile, Ibid., p.1869.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

3.3.2 Obligations of the certification service provider

The Egyptian legislator imposed in the electronic signature law in its executive regulations the following requirements on the part of the certification service provider:

- It is not allowed for the provider of the certification service to practice any activity for issuing electronic authorization certificates except with a license from the authority of the information technology development industry"[146].
- It is not allowed for the certification service provider to stop practicing the activity which it is licensed to practice or to merge in any other place or to waive the license of others except after getting prior written approval from the authority"[147].
- Maintaining the secrecy of the authorization provider's information while being linked with the electronic signature so that the provider may not disclose its information to anyone else"[148]
- The provider of the service of certification must in all cases not sign any contract with the customers except after getting approval for the model of the contract from the authority according to the rules and regulations set by the board of directors in this regard to guarantee the rights of the interested parties"[149].
- The provider of the certification service must submit the guarantees and the insurances which are set by the board of directors for the authority to cover any damages or risks related to the interested parties. This is in the case of terminating the license for any reason or covering any violation of obligations mentioned in the license"[150].

146) The first paragraph, article number 19 of the Egyptian law of the electronic signature.
147) Look at the second paragraph of the article number 19, ibid.
148) Art 21,Egyptian electronic signature law.
149) Art 13, the executive rule, Egyptian electronic signature law.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

3.3.3 The responsibility of the certification provider

It not possible to view the electronic signature as being trustful without considering the legal rights that emerge in cases where the authorization service provider fails"[151] to fulfill its obligations of upholding the safety of the consumer in its dealings. Thus, if the general rules for the responsibility did not provide the full protection in this regard, any text related with the laws issued regarding the electronic signature can complete this protection.

3.3.3.1 The responsibility of the certification service provider according to the general rules:

It is known that the civil responsibility according to the general rules is divided into doctrine responsibility and shortage responsibility. It can be noticed that the provider of the authorization service has two separate types of functions. The first is to contract the relation with the consumer according to the provider of the service rendering the service of the electronic authorization. This is a compulsory relation governed by the signed contract between the two parties and places responsibility on the service provider. Secondly, the link between the provider of the authorization service and any other person who depends on the certificates which it issues will reduce the responsibility of the authorization provider.

The following explanation briefly presents two types of responsibilities

(1) The contracting responsibility:

The contracting responsibility is produced by one party not fulfilling its contract obligations, if they were fulfilled incorrectly; the responsible party makes a mistake or due to damage. Based on the above, it is conditioned that the

150) Art 14, executive rule, Ibid.
151) Virginie Etienne le developpement de la signature electronique, Ibid., p.35.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

contracting responsibility is fully on the side of the provider of the authorization service so if any of the agreements are breached then the provider of the service will be obliged to compensate.
The breach of contract occurs when the provider of the authorization service does not fulfill the agreed obligation to protect the consumer.

The existence of a causal relation between the error and the damage means that the error must be attributed to the provider of the service and will be the reason for the damage experienced by the consumer. In this case the latter will have the right to seek compensation. Originally the aggrieved consumer will face the burden of proving the occurrence of the fault and damage, as well as the existence of the causal relation between the two parties, unless in cases where the responsibility is supposed.

(2) The shortage responsibility (non-contractual):
The shortage responsibility will be based on the relation between the acceptance service provider and a third party who depends on the certification service rendered by the service provider. This responsibility will occur for example if the signed writing was not valid or if the dependence on the certificate's content was no longer valid, did not verify the signatory' s identity enough, or if the information mentioned in the authorization and its date were not accurate"[152].

3.3.3.2 The responsibility of the service provider according to areas of responsibility in the electronic signature law and the European directive:

The Egyptian law did not issue any specific text referring to responsibility regarding to the electronic signature and executive regulations on the part of the authorization service provider. Also there was no indication about the

152) Virginie Etienne - le development de la signature electronique, Ibid., p.36.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

responsibility of the certification service provider or details about its legal position in either of the articles no. 1316 of the French law and no. 230(2000) issued regarding information technology and the electronic signature of March 2001.

The same goes for the French decree no. 272-2001, issued on March 2001. This led some French experts to consider that the lack of any discussion surrounding the responsibility of the service provider, suggesting it is simply an assumed responsibility"[153]. It has in fact been discovered that the French legislator suggested this responsibility in the law no. 575/2004 issued on June 2004 regarding trust in digital economics that can provide better protection for the consumer rather than protection based on responsibility or general rules of the civil law.
As the article number 33 of the above mentioned law stated regarding the assumed responsibility of the service provider for damages that may occur on those who depend on the certification.

Some of these cases may include:

- If the incoming information of the certificate and its date are inaccurate.
- If the required data for obtaining the authorized certificate is not complete.
- Issuing the certificates did not lead to verifying that the signature holder was in possession of the correct private and general key.
- If the service provider did not record the cancelation of the certificate.

The responsibility of the service provider in this case will be the suggested responsibility if there is not enough evidence of intentional error or negligence "[154] supposing the responsibility will cause the exemption if the one harmed

153) Maitre Cyril rojinsky signature electronique" le decret et la loi devront etre completes articles -premier publication " les echos 11 avril 2001 47 available at http :/www/juriscom.net /pro82/ce20010419.htm (11,Jan ,2013).
154) Art 33/1 loin2004-575-du 21 juin 2004 pour la confiance dans le economy numerique available

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

was either a service user, consumer, or any other party who may be exempt from the burden of proving the error made by the service provider so that the responsibility of the authorization service provider is doubled to not only having assumed responsibility which gives a higher level of protection to the consumer but also the burden of proving this responsibility.

Also the article number 2/6 of the European directive states that the service provider's responsibility for the damages enjoined on any person or entity may depend on this certificate. The following is mentioned regarding this.

- The accuracy for the data collection mentioned the accredited authorized certificate and the meeting of all stated conditions required to consider the accredited certificate.
- Guaranteeing that at the time of issuing the certificate the signature holder determined the identity in the certificate making the signature correspond to the data of verification.
- Guaranteeing that it is possible to use the data that was used to create the signature and the data of its verification was made so that the service provider established the data equally and was not negligent"[155].

From the text it appears that the legislator in the European directive suggested the responsibility of the authorization service provider towards the other parties due to the difficulty of proving the damages received from the side of the latter. The European directive asserted in the article number 2/6 the responsibility of the service provider for the damages that may be encountered on any person or entity that depends on the certificate of authorization in the case of not registering the cancellation of the certificate, unless the service provider proves that it was not negligent.

---

ahttp://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&fastPos=2&fastReqId=566190513&categorieLien=id&oldAction=rechTexte (20,Mar,2012)

155) Dir 1999/93/ ec art (6/1/A,B,C).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

3.3.3.3 Disregarding the responsibility of the authorization service provider

The second paragraph of the article number 33 of the digital economics law and the third and fourth paragraphs in article 6 of the European directive talk about the cases of excepting the authorization service provider from responsibility which are as follows:

- The acceptance service provider will not be responsible for the damages resulted from using the certificate which may exceed the imposed restrictions on such usage, unless the service provider from the beginning indicated to such restrictions or that it was easy for the users to access it.
- If the authorization service provider indicated in the authorized certificate the value of the dealings in which the certificate can be used, so that the provider of the service will not be responsible for the damages resulted from exceeding the maximum limit"[156].

The article 2/18 for the Bahraini law number 28 (2000) relates to the dealings and the electronic trade added to the cases of exempting the service provider from responsibility in the case that the person relying on the authorized certificate knows that the certificate was terminated, cancelled, stopped working , or canceled by the authorization service provider.

156) Art 6/3/4 dir art 33/2);oi n 2004-575du 21 juin 2004 prec-1999/93/EC.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

3.4 The electronic authorization certificate.

This part is divided into two consecutive sections of which the first one of will explain the electronic authorization certificate and the data that must be included in it and the second showing the extent of recognition for this certificate and its necessary conditions.

3.4.1 The electronic authorization certificate and the data it should include

<u>The definition of the electronic authorization certificate:</u>

The Egyptian electronic signature law defined the electronic authorization certificate in article 1 that it is the certificate which is issued by a licensed party which proves the linkage between the signatory and the data for establishing the signature.

While it is found in the French decree number 272/2001 that the normal authorization certificate and the accredited certificate are different to one another as the normal electronic certificate is the accredited authorization certificate linking the relation between the data for establishing the signature and the signatory"[157] Whereas the accredited authorization certificate is the certificate that meets the conditions stated in article 6 of this decree"[158] It also defined the electronic acceptance certificate in the European directive as being the electronic certificate linking the data related with the verification from the signatory, and assuring the identity of this person while meeting the requirements mentioned in the first annex of the directive by the provider of the authorization service who fulfills the above mentioned requirements in the second annex"[159].

---

157) Art 1/9 dece nn2001-272-30 mars2001prec.
158) Art 1/10 decr n 2001-272-30 mars2001-pre.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The ideal UNCITRAL law regarding the electronic signature is defined as meaning the message of the data or other records which assure the linkage between the signatory and the data of establishing the signature with"[160].

The conditions and requirements which the French decree and the European directive stated are that the same data must be included in the certificate of the electronic authorization to be accredited, which will be explained in more detail later on.

View of the jurists:

Some law jurists define the certificate of authorization as a certificate issued during the process of the electronic signature that proves the identity of the signatory"[161] Another view of the experts defines it as a certificate issued by a licensed authorization party which certifies whether the electronic signature is authentic or not, as well as meeting the conditions and the required terms necessary to provide reliable evidence"[162] The certificate of authorization was defined as an electronic message that was sent by a third trusted party whose task is to make a relation between the person or entity and the pair of asymmetric and symmetric keys"[163] Lastly, it is the certificate which is issued by a licensed party for authorization or approval to prove the attribution of the electronic signature to certain person depending on certain features allowing its distinction to be a reliable proof of authorization"[164].

It appears that from all the legal and scholarly definitions previously mentioned, the electronic authorization certificate must be issued from a licensed place of

159) Art 2/9/10, dir1999/93/EC.
160) Art 2/6-UNCITRALmodel law.prev.
161) Ayman saad selim- the electronic signature, Ibid., p.33.
162) Ibrahiem eldessuqui abou ellile - legalizing of the e-commerce transactions, Ibid., p.1873.
163) Virginie Etienne le development de la signature electronique, p.52.
164) Alla hassan motlik eltimimy, Ibid., p.21.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

authorization, and that this certificate must be able to ensure the identity of the person or party, so that the electronic authorization certificate in the context of the research subject will be a tool in the hand of the consumer in protecting the contract through electronic means by the attribution of the signature to the consumer, and proving its authenticity and removing any possibility of forgery later on.

The data that the electronic authorization certificate must include:

The article 1/6 of the French decree number 272/2001 and article 20 from the executive regulation of the Egyptian electronic law dealt with the following basic data:

(1) Indicating in the certificate of authorization that it is an accredited certificate"[165] and is valid to use for the electronic signature"[166].

(2) Revealing the identity of the authorization service provider and place of issue,[167] including the name and address of the issuing place, its head office, legal entity, and the state affiliating to the country of residence "[168].

(3) Determining the identity of the signatory including the name of the original signatory, real name or user name to reveal his or her identity, and determining whether this person has control over the tool of the signature referred to in the certificate"[169].

(4) Determining the beginning and end validity period of the authorization certificate"[170].

(5) The place of issuing the certificate"[171].

---

165) Art 6/1/a decr n 2001-272 30 mars 2001 prec annex l/a dir1999/93ec.
166) Art1/20 ,executive rule of the Egyptian signature law.
167) Art6/1b decr n 2001-272-30 mars 2001prec annex i/b dir 1999/93 ec art 9/1c/I uncitral model law, prev.
168) Art 3/20 , the Egyptian signature executive law .
169) Art 4/20 , the Egyptian signature law look also at ,Art -6/1c decr n 2001-272 30 mars 2001 prec annex l/c dir 1999/93EC
170) Art7/20 the executive rule of the Egyptian signature law.
171) Art 9/20 the executive law of Egypt.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(6) Determining the imposed constraints on the value of the dealings that certificates are used in"[172].

(7) Describe the quality of the signatory and the intended purpose for issuing the certificate"[173].

(8) The data for verifying the signature match the data for establishing the signature and is under the control of the signatory"[174].

3.4.2 Recognizing the capability of electronic authorization certificate

Most of the legislations admitted the electronic authorization certificate's proof of authenticity whether the certificate was issued nationally or international. The text in article 22 of the Egyptian electronic signature law states that the authority is concerned with accrediting the international issuing authorities which is determined by a board of directors. In this case the certificates issued by these places will be proved authentic as those issued by their national counterparts.

Also article 8 of the French decree number 272-2001 states that the electronic certificate issued by a provider of the electronic authorization service who is not a part of the European union has the same legal value of the electronic certificate issued by an authorization service provider who belongs to the European union"[175]The article 212 from the UNCITRAL law related to the electronic signature states that the certificate issued outside of the state and is legalized has the same legal effect as the certificate issued by the legislative state if it provides a significant degree of reliability and trust. It is noticed here that recognition of the certificate in the ideal UNCITRAL law is based on several significant principals which are:

---

172) Art 6/1i decr n 2001-272- 30 mars 201 prec annex l-1j dir 1999/93ec.
173) Art 5/20 from the Egyptian signature Law.
174) Art 6/1/e n 2001-272 30 mars 2001prec - annex l/e dir 1999/93/ec.
175) Art -8 decrn 2001-272-30 mars 2001 prec.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

- Rooting the principal of not distinguishing between national and foreign electronic acceptance or accreditation certificates
- Finding a standard for equality between the certificates of accreditation disregarding the place of issuing which can be reliable in the matter of recognition"[176].

Lastly the European directive number 93-1999 finds that the accredited certificate of authorization which it issues is equipped with the accreditation service available in a third or foreign state is legally equal to the certificates issued by the provider of the accreditation service inside the European union"[177] It is clear from the previous legislation texts that all of them admitted and equaled them with that of national accreditation certificates regarding its legal effect and credibility.

176) Tamer Mohamed sliman eldemiatty, the previous reference., p.577.
177) Art 7/1dir 1999/93/Ec.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

4. The arbitrary clauses of E-commerce contracts

4.1 Introduction

The arbitrary clauses of E-commerce contracts expression is a commonly used expression in the Egyptian Civil law as well as western countries with the USA being the first western country to legalize the arbitrary clauses of E-commerce Contracts, an action that took place in 1962 and was then followed by many European countries in the early 1970" [178] when many legalizations and laws were set in these fields. The most important of which was the Law issued in the UK in 1977 under the titled Unfair Contract Terms Act and the French law No 23/78 issued on January 1978 that was concerned with the protection of products and services for consumers and keeping them informed, including special texts relative to indemnifying the consumers against the arbitrary clauses and conditions imposed on them by other contracting entities.

The European Union's directive No. 13/93 was also issued on April 1993 regarding the arbitrary clauses and conditions in consumption contracts which aimed to organize a number of legalizations and laws related to Arbitrary Clauses in those contracts held between the professional and the consumer" [179]. Currently; Compliance Contracts are a common type in the business world. They represent the common approach of contracting at present due to technological and economic reasons" [180].

---

178) Ayman Saad Slime, Abusive Clauses of Contracts, comparative study, Dar El Nahda El Arabia, 2011, p.25.

179) Dir. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. O.J.L. 095, 21/04/1993, p.0229-0034, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriSery.do/uri=CELEX-31993L:en:HTML (13 Dec.2011).

180) Hamad Allah Mohamed Hamad Allah, Consumer Protection in Facing the Abusive

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

This type of contract is uncompromising and does not avail bargaining, discussions and arguments in many cases, resulting in making the consumer obliged to venture into a contract due to lack of alternative commodities or services. In this case the contract is a representation of the stronger party's law in the contract instead of the contract's base which constitutes the relationship between the contract parties in the civil law" [181].

Compliance Contracts include arbitrary clauses and the emergence of compliance contracts was one of the most important reasons leading to the creation the arbitrary clauses [182]. As a number of researchers have claimed it is the fertile field on which the arbitrary clauses clearly appear" [183]. This study begins by explaining the meaning and features of the compliance contract briefly, then goes on to explain to what extent E-Commerce Contracts along with compliance contracts can be considered for the consumer . Then the meaning of the arbitrary clause and its invalidity will be analyzed . Finally, the constitutions of arbitrary clauses in E-Commerce contracts and how to resist them.

Clauses and Conditions in the Consumption Contracts, Dar Al Fikr Al Arabi, 1997, p.46.

181) Mohamed Ibrahim Bindary, Protecting the Consumer in the Compliance Contract, a research presented in the consumer protection seminar in the constitution and law during the period from 6 to 7 December 1998. Faculty of Sharia and Law, United Arab Emirates University, p.1.

182) Ayman Saad Slime, Ipid., p.10.

183) Atef Abdulhamid Hassan, Consumer's Civil Protection against the Abusive Clauses, Dar Alnahda Al Arabia, 1996, p.52.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

4.2 The meaning of the compliance contract and how far E-Commerce contracts are included within it

In the pursuit to discuss compliance contracts, the first topic was dedicated to discussing the meaning of the compliance contract, while the second topic focuses on the extent at which E-commerce contracts can be considered among compliance contracts in the perception of civil law.

4.2.1 The traditional meaning of the compliance contract

Before we present the traditional and modern jurisprudence's perspective on the meaning of compliance contracts, it is worth mentioning that there is no precise definition for compliance contracts in the civil law articles dedicated for that purpose (Articles 100,149,151). In Article No. 100 only the acceptance in the compliance contracts was mentioned without stating the meaning of the compliance contract itself. Also, the legislator in the consumer protection act No. 67 of 2006 did not tackle the issue of compliance contracts nor define them.

4.2.1.1 The traditional concept of the compliance contract

The word compliance successfully describes the consumer involved in a compliance contract. There is usually no negotiation over the contract's articles and conditions, the consumer just joins in a document set by the other party, therefore the final form of the contract contains many articles and a blank space for the signature.

Traditional Jurisprudence defined the compliance contract as "the contract in which one of the parties submits and complies with conditions set by the other party without being allowed to discuss them, relating to commodities or

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

essential services which are subject to legal or actual monopoly or where competition is very limited in the relevant field" [184], It can also be defined as a contract by which one of the parties lacks the capability to negotiate freely under the contract's conditions" [185].

Based on the above definitions, jurists came to conclude a number of characteristics for compliance contracts, which are as follows:

(1) In a compliance contract, one of the two parties must be in a strong financial position resulted from enjoying legal or actual monopoly which emphasizes its superiority and ensures it continuity.

(2) The contract is to be related to commodities or services which are considered essential to the consumers or the beneficiaries.

(3) The acceptance of compliance contacts is directed generally and permanently to unspecified/anonymous individuals for unlimited periods of time.

Acceptance of the compliance contract is usually issued in a stereotypical form by using sophisticated language usually hard to comprehend by the consumer. It usually also contains many conditions that all point in favor of the dominant party, the consumer is to accept them all or refuse them al l" [186]. In this pursuit, a number of jurists have raised questions regarding the first point of these characteristics, that is, when can we say that the dominant party of the compliance contract is practicing actual monopoly of the commodity or the service if the contract was achieved via an electronic method? This was a huge jurisdictional debate and so will not be discussed here until the second topic of this study.

---

184) Abdulmonim Farag El Sadah, the Compliance Contracts in the Egyptian Law, Jurisprudence and Legal Comparative Study, Ph.D. Thesis, Faculty of Law, Foad the First University, 1946, p.77.

185) Luc Audet, Le Contrat D' adhesion Caracteristiques et consequences Juridiques. P.2, Disponble sur: http//www.droitdespme.com/documents/contract-adhesion.pdf (18 june 2012).

186) Abdulmonim Farah El Sadah, Ibid., p.58.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

4.2.1.2 The modern concept of the compliance contract

Those who are in favor of the modern trend did not hold to the previously mentioned compliance contract' s characteristics. Some jurists believe that the texts related to compliance contracts in the civil law (Articles 100, 149, 151), did not limit compliance contracts to a specific type of contract which would meet the requirements of current times. Also they eliminate negotiations between parties, regardless of the monopoly that is demonstrated by the dominant party of the contract to an essential and basic service and/or commodity"[187] whereas the traditional jurisdiction limited this type of commodity to essential and basic ones which are subject to legal or actual monopoly.

Additionally, part of the French jurisdiction believes that it is not always easy to determine the basic and essential commodity in the compliance contract. Also, such a matter is entirely left to the legal authority which rarely determines this issue in a clear manner"[188].
This means that the connection between a compliance contract and a commodity or essential service is considered a priority to the consumer similar to that of water, electricity and gas. This issue represented a judicial dispute because of the connection between the compliance and these types of commodities and/or services which limits the protection provided to the consumer within the boundaries of compliance contracts.
We believe that it can be taken into a separate criterion when defining how important or essential the commodity is to the consumer because it is a

187) Ayman Saad Selime,Ipid., p.16.
188) Brigitte Lefebvre, Le Contrat Dadhesion, La Revue du Notariat, Montreal, Vol. 105, sept, 2003, p.447, Disponible sur: http://papyrus.bib.umontreal.ca/jspul/bitstream/1866/1386/1/Contrat%20d27adhesionpdf (17 Mar 2012).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

relative matter that varies from one person to the other according to the nature of the commodity and how important it is for the consumer.

Also, according to the time in which the commodity exists, it can represent special importance for the consumer. Furthermore; contracts which involve essential and basic commodities such as water, electricity and so on, are forms of contracts for essential and indispensable commodities. Therefore the consumer can be in the position of compliance even if the issue doesn't include or is not related to contracting these types of services. To summarize this point, the contemporary Jurisprudence seems to be correct in adopting a modern concept for the compliance contract which suits current times and complies with civil law articles, where the compliance contract is the contract in which the consumer submits to conditions stated and set by the professional who doesn't allow nor accept any argument or discussion, and does not associate the contract with any other description" [189].

189) Ayman Saad Slime,Ibid., p.17.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

4.2.2 The extent at which E-commerce contracts can be considered as a compliance contracts to the consumer

The importance of this issue is based on the fact that considering the E-commerce contracts among the compliance contracts results in extending the due protection of the compliance contracts in the civil law to include the contracts which are remotely held via electronic means, therefore providing the consumer who enters into such contracts with protection.

The Jurisprudence was divided into three different viewpoints in this regard. The first approves and supports the idea of considering E-commerce contracts as compliance contracts. The second view refuses to consider it while the third view adopts the idea of differentiating between the means through which the E-contract is held to determine whether the E-commerce contract can be considered as a compliance contracts or not.
This dispute is based on the existence of the previously mentioned compliance contract 's characteristics on the E-commerce contract, the same basis on which most of the Jurisprudence have built their points of view on. The following sections include statements from the judicial point of view in this regard.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

4.2.2.1 The view which supports considering E-commerce contracts As a compliance contract to the consumer

First: supporting legal texts

The first paragraph' s text in the 17th article of the Egyptian E-Commerce Law bill considers that standard contracts which are electronically held among the compliance contracts in the civil law concept, can be interpreted in favor of the weaker party (the complying party), withdrawing the possibility of arbitrary conditions and terms which are included in them" [190], supporting the idea of considering E-commerce contracts and compliance contracts for the consumer.

Second: The judicial supporting opinions and views

The judicial supporting opinions and views are various because part of the Jurisprudence believes that in the E-commerce contract, the contract's contents are previously set and determined by the professional and available in the electronic web site in a rigid form. Also, the commodity and/or service are essential to the consumer without the possibility of any direct communication between the professional and the consumer which can avail negotiation. Consequently, the content of the contract is dealt with as a solid single unit" [191]. In addition, the text of article No. (100) of the Egyptian civil law, generally defined limits of the compliance contract which made its concept large enough to accommodate and include the expected economic and technological development as well. This placed electronically held contracts and compliance contracts within the concept of civil law" [192].

Part of the Jurisprudence believes, in support of this idea, that the monopoly

190) Kawthar Saeed Adnan Khaled, Ibid., p.511.
191) Mohamed Shokry Sorour, Ibid., p.132.
192) Mohamed Saad Khalifa, Ibid., p.28,29.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

in itself is irrelevant and unimportant, while the professional is in a position or a state which allows him/her to impose previously set terms and conditions on the consumer without negotiating or modification.

These terms and conditions allow the professional, due to misusing his/her economic influence, some exaggerated advantages which in turn result in upsetting the contractual balance between the two parties" [193]. It also believes that monopoly companies within the frame of compliance contracts are subject to a description that also applies to mega electronic Internet based companies. Freedom is given to the consumer in the comparison between the presented commodities and services, but the huge publicity by companies in addition to their economic power makes the consumer in need of protection to eliminate compliance aspects, as represented in the arbitrary terms and conditions of the contract "[194].

Based on all these opinions, the supporters of this concept agree that the E-commerce contract is considered as a compliance contract for the consumer" [195].

193) Mohamed Almorsi Zahra, Ibid., p.149,153.
194) Abudlhaq Himish, Eclectronic Consumer Protection, a Research Presented in the Electronic Banking Works Between the Sharia and Law, Chamber of Commerce and Industry, Dubai, between 10 to 12 May 2003, Third Book, p.1289.
195) Abdulfatah Bayoumi Hegazi, The Legal E-Commerce Protection System, First Book, Dar Al Fikr Al Gamie 2002, p.244.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

4.2.2.2 The opposing concept of considering the E-commerce contract as a compliance contracts for the consumer

Supporters of this approach agree on considering E-commerce among the negotiation contracts for the consumer and not among compliance contracts. In justifying this opinion different judicial opinions appeared because each of the opposing regimes had its own private justifications.

Part of the Jurisprudence believes that the necessary description is not considered one of the main characteristics in the contract which is held online. Because the consumer can find through the Internet offers for the same commodity from various suppliers. Also, the monopoly that exists in compliance contracts are a rare occurrence in Internet based contracting.
Therefore E-commerce contracts cannot be considered as a compliance contract merely because the consumer can only accept or refuse the articles of the contract as a consolidated unit. For the compliance case to happen the compliance characteristics must all take place together" [196].

Also by applying the text of the article No. (100) of the civil law on the E-commerce contract it is revealed that there is no monopoly over the commodity or the services from the professional side online because it is an international network that contains many sites that offer the same commodity and service.
The seller or the professional who presents previously set contract terms and conditions and does not allow relevant negotiation will lose a lot and will not find anybody to contract with unless the terms and conditions are reasonable and acceptable from the other party (the Consumer) who is usually looking for the best contract terms and conditions which are available

196) Omar Abdul Fatah Ali Younis, Ibid., p.163,164.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

online" [197].

Finally; this trend supports the point of view that the electronically based contract doesn't deprive nor prevent the consumer from negotiating and discussing the product with the professional. Since the consumer has the full freedom of acceptance and/or refusal. Also, the monopoly issue is a rare occurrence on the Internet because the Internet doesn't acknowledge the geographical borders between countries. Furthermore, it is an opened network that is available to every professional and supplier. Therefore we can't claim that there is a universal monopoly of a specific commodity and even if it is assumed rare to take place other compliance characteristics must also exist" [198].

4.2.2.3 A trend which supports the differentiation between the means of making the E-contract possible to determine if the E-commerce contract is among the compliance contracts or not

Supporters of this trend believe in the importance of considering the means of making the electronic contract and if there was a possibility of negotiating it between the professional and the consumer or not. If such possibility of negotiating existed; then it is not a compliance contract, rather a consensual contract. If the possibility of negotiation was eliminated or did not exist at first hand then it is a compliance contract. Accordingly, the following means of making the electronic contract should be taken into account:

<u>First: The contracts which are held via Web Sites</u>

Where data messages are exchanged on the web and usually the professional prepares a standard contract which includes standard general terms and conditions previously set and directed to the consumer population. The

197) Taher Shawki Moamen, Ibid., p.23.
198) Iman Mamoun Soliman, Ibid., p.65.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

consumer (The Audience) is to accept all the terms and conditions as a consolidated unit or refuse them, which in turn becomes a compliance contracts for the consumer.

Second: contracting via chat rooms

In contracting via chat rooms there is a good possibility and chance of negotiation between the professional and the consumer, thus not becoming a compliance contract.

Third: contracting via exchanging emails

Contracting via this means allows the professional to send responses to the consumer's email address. If the consumer wishes to enter into contract they can express their acceptance by writing a similar message sent to the email address of the professional. If the negotiation and discussion of the contract articles, terms and conditions were carried out in an email message, then it is not considered a compliance contract. On the other hand, if the email message contained a sample contract as an attachment which is to be filled out by the consumer in case of wishing to contract without having the ability or the right to modify any of the contract's terms and conditions, then it is considered a compliance contract" [199].

This trend is also generally because it takes into consideration the contract circumstances and if there were actual negotiations over the contract's articles or not. This trend also does not hold to the previously mentioned compliance characteristics in a rigid manner.

199) Kawthar Saeed Adnan, Ibid, p.509.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

4.3 The arbitrary condition concept and its invalidity

This study will discuss the meaning of the arbitrary condition on two levels, legislation and jurisprudence , as well as discussing the invalidity of this condition by means of listing the legal texts which indicates its invalidity.

4.3.1 The arbitrary condition concept

We can elucidate the arbitrary condition concept through presenting its relevant legislation definitions, also presenting the jurisprudence's opinion in this regard in each section.

4.3.1.1 The legislation concept of the arbitrary condition

First: The status in the Egyptian Law

Consumer protection law No. 76 dated 2006 was issued without including any definition of the arbitrary condition or its execution list. By referring to Egyptian civil law texts, it is found that the article's texts which tackled the compliance contracts and the arbitrary conditions which are Articles (100, 149, and 151), also did not contain any definition over the arbitrary condition. Some of them were limited in this pursuit to defining the acceptance of compliance contracts, while others were limited to explaining and presenting the judge's authority to invalidate the arbitrary condition without presenting any specific definition for it.

On the other hand, the Egyptian e-commerce law bill defined the arbitrary condition as "Every condition that prejudices the financial balance of the contract and every condition that includes an untraditional verdict" [200].

200) Article 17 of the Seventh Chapter of the Egyptian Electronic Commerce Bill.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Second: The Status in the French Law

The arbitrary conditions were defined in the text of Article No (132/1) of the French law as "the conditions which were not included in contracts held between the professionals and non-professionals or the consumers. So it becomes arbitrary and affects the contractual balance on account of the consumers. Accordingly it affects the rights and the obligation of both parties in the contract.

It is the same definition which was stated and confirmed by the French Supreme Court in its verdict issued on May1999" [201]. It added that it is an unacceptable condition that provides the professional with an advantage over the consumer.

It defined the arbitrary condition in article (3/1) of the European directive No. 13/93 issued regarding the arbitrary condition as "the individually non-negotiable condition contrary to the condition of good faith, resulting in a clear defect in the field of the rights and obligations of both parties that are the outcome of the contract on account of the consumer" [202].

It turns out from the previous definitions that the basic basis for the existence of arbitrary conditions are:

- It is a pre-set condition by the professional.
- The consumer is unable to negotiate regarding this condition, because it is an imposed condition on the consumer. Accordingly the consumer doesn't have the right to discuss or refuse or modify the content of this condition.
- The existence of this condition in the contract results in an imbalance on account of the consumer who becomes the weaker party in this contractual bond.

---

201) Cass. Civ.1re Ch. 4 mai 1999, (97-14.187), Disponible. Sur: http://www.easydroit.fr/jurisprudence/Cour-de-Cassation-Chamber-civile-1-du-4-mai-1999-97-14-187-Publie-au-bulletin/C40482/ (13,May 2014).

202) Art. (3/1), Dir. 93/13/EEC of 5 April 1993.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

In this regard, the French Supreme Court stated in its verdict issued on March 2013 in a case between Toyota Co. in France and the Consumers' Federation Union, that the ambiguous way in which the text and wording of the condition it self gave the consumer an impression that it can benefit from the traditional guarantee verdicts, related to specific work such as the repairs.

Based on that wording and text which actually was carried out by Toyota' sagent in France regarding the trans action of selling a car, the implementation of that guarantee was not related to the contract which resulted in a major imbalance between the right sand obligations of both parties of the contract. Accordingly the Supreme Court stated that the appeal court made a mistake by not applying the article No.132/1 of the French Consumption Law in this case" [203].

The previous definition applies to the consumption contract however its preparation means and methods may or may not be within the frame of a standard contract. There is no difference if these conditions are included in the context of the contract itself or if they were included in an appendix or in a separate paper that is attached to the contract such as the invoice or the product's inquiry form" [204].

---

203) Cass. Civ. Premiere chamber, arret No. 272 du 20 mars http://courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/272_20_25794.html

204) Ayman Saad Slime, Ibid., p.31.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

4.3.1.2 The judicial concept of the arbitrary condition

The judicial opinions and views varied in defining the arbitrary condition. Part of the Jurisprudence defined it as the condition is imposed by the stronger party in the contract on the weaker party, resulting in an imbalance between the rights and the obligations of the two parties in favor of the stronger party, or giving the latter an excessive privilege" [205].

Another definition was "a condition in the contract which results in an imbalance imposed by the stronger party in the contract based on its economic influence with the aim of achieving an excessive privilege over the other party" [206]. It was also defined as the condition that contradicts that which should prevail in the spirit of justice resulting in a contractual imbalance" [207].

The arbitrary conditions were also defined as "conditions that were singularly texted prior to signing the contract with the inability to negotiate them at a later stage" [208].

Finally, the arbitrary condition was defined as the previously texted condition by the strong economic influential party which gives it an excessive privilege at the expense of the other party" [209].

From the previous definition it can be seen that the purpose of the arbitrary

---

205) Ibid., p.49.

206) Omar Mohamed Abdul Baki, the Contractual Protection of the Consumer, a Comparative study between the Shariat and the law, Monshaat El Maaref, 2004, p.403.

207) Mohamed Ibrahim El Bindary, Ibid., p.17.

208) Ruth Atkins, Unfair Terms in Computer Contracts, 20th BILETA Conference, April, 2005, Queen's University of belfast, p.5, available at: http://bileta.ac.uk/content/files/conference%20papers/2005/Unfair%20terms?20in%Computer%20Contracts.pdf. (29.Mar.2012).

209) Saeed Saad Abdulsalam, The Contractual Balance in the Compliance Contracts, a Comparative Jurisprudence Study, Dar Al Nahda Al Arabia, 1998, p.50.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

condition's existence is to achieve a privilege or many privileges in favor of the professional over the consumer. The consumer' s rule is limited with the existence of the arbitrary condition to accepting or refusing. This privilege is either connected and related to the contract's subject or is considered among its results and outcomes.

This leads to the existence of two types of the arbitrary conditions; the first type is related to the conditions that lead to the imbalance between the rights and obligations of each party. The second type is related to the conditions which gives one of the parties an excessive privilege at the expense of the other party" [210].

The arbitrary condition which is included within the contracts that are held via traditional methods does not differ from the condition that is included within a contract held by electronic methods as expressed in the context of the fourth paragraph of article No. (132/1) of legalizing the French consumption in its modified text by the decree No. 2001/741, which stated that the mentioned roles in the previous paragraphs apply despite or regardless of the form or the mean of contracting.
Therefore, we can define the arbitrary condition in the E-commerce contracts as a condition or many conditions in the contract that are held between a professional and consumer via the Internet. It results in the contract's imbalance as the professional uses its economic influence to damage the consumer in order to obtain more privileges and advantages in this contract.

210) Ayman Saad Slime,Ibid., p.51.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

4.3.2 Invalidity of the arbitrary conditions in the E-commerce contracts

This topics will discuss the legal texts which indicate the invalidity of the arbitrary condition, then it will move on to discuss the effect of not invalidating the arbitrary condition of the whole contract or the possibility of continuing the contract without that condition .

4.3.2.1 The legal texts which indicate the invalidity of the arbitrary condition

First: In the Egyptian Law

The 10th article of the consumer protection law No. 67 dated 2006 indicates that "Any condition of a contract or a document or agreement which is relative to the contract with a consumer is invalid if that condition exempts the commodity supplier or the service provider of any of its obligation which are stated in this law, This text shows that the Egyptian law maker invalidated the arbitrary condition, but it was limited to state the invalidation of the arbitrary condition in the contract without organizing the verdicts and constitutions of the arbitrary conditions and how to prevent them.

Also, it was stated in the text that such conditions exempt the commodity supplier or the service provider of any of its obligations which are included in this law.

By mentioning this phrase the law maker has shed light on only arbitrary condition forms which are listed in the non-exclusive list of the arbitrary conditions forms in the European Directive appendix No. 13/93, as will be touched upon later.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Also, it was mentioned in the seventeenth article of the Egyptian E-Commerce Law Bill, that it is permissible to invalidate any arbitrary conditions in the compliance contracts. This article tackles electronic transactions where the contract negotiations are more difficult. Therefore justice necessitates enabling the weaker party to invalidate the arbitrary conditions that were unrecognizable and not discussed" [211].

The eighteenth article of the law bill also states "without disruption of the previous article, any arbitrary condition related to determining the financial cost or by reducing or exempting the commodity seller or the service provider of the responsibility is invalid"

The text of the eighteenth article of the previously mentioned law bill seems to resemble the text of the tenth article of the law No. 67/2006, in concentrating only on one specific form of the arbitrary conditions.

Second: In the French Law

The article No. 132/1 of the French consumption legalization which was modified by the decree No. 2001/741 issued on August 2001 dealt within validating the arbitrary condition, where the sixth paragraph of the mentioned article stated "The arbitrary conditions are considered as if unwritten " [212],this phrase indicates the invalidity of the arbitrary condition and considering it unwritten in the contract and of no value.

Applying this, the French supreme court stated in its verdict issued on May 2008 that the existence of the arbitrary condition in the insurance contract is of arbitrary nature according to the article No. 132/1 of the French consumption legalization, even though the court appeal did not apply the mentioned text and sentenced with its invalidity meaning that it made a mistake by doing so [213].

---

211) http://www.alexalaw.com/t6845-topic . (27 May 2012).
212) Art. (132/1/6) " Les clauses abusives sont reputees non ecrites.
213) Cass. Civ. Premiere chamber, arret nO. 54 du 23 mai 2008, available at :

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The French Supreme Court also supported the invalidity of the arbitrary conditions in its verdict issued on November 2007. Furthermore, the text of the article No (7/1) of the directive No. 13/93 made the member countries commit in favor of the consumers and competitors so that they have enough and effective means to prevent the existence and continuity of using arbitrary conditions from sellers or suppliers in contracts held with the consumer.

4.3.2.2 Invalidity of the arbitrary condition doesn't invalidate the entire contract

Invalidating the arbitrary condition results in the invalidity of the condition only, while the contract is still valid in all its other articles, terms and conditions. This result is effective by the article no. (149) of the civil law, where it stated that "if the contract proves to be of compliance nature and it included arbitrary conditions, then the judge may modify these conditions or exempt the weaker party from being obliged by them".

This text states the possibility of continuing the contract from the legal perspective after the judge modifies the arbitrary condition or exempts the weaker party from being obliged by it, it means that the subject judge does not have the right to invalidate the contract based on this condition as long as the contract is correct without the latter, and as long as the latter doesn't represent the motive behind making the contract while taking into consideration that the text is not related to the general system and it is not allowed to be agreed on, opposed or violated.

Also, it was included in the eighth paragraph of the article No. 132/1 of the French legalization that the consumption modified by the decree No. 741/2001, which includes an arbitrary condition remains valid in all its constitutions if it was possible to continue the contract without this condition" [214]. The directive No. 13/93 also confirmed this when it stated

---

http://www.courdecassation.fr/jurisprudence_2/premiere/chambre/civile_568/arret_n_11603.html

214) Art. (132/1/8): > Le contrat restera applicable dans toutes ses dispostions autre

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

"Not to commit the consumer to continue part of a contract which includes arbitrary conditions, and the contract remains obligatory to its parties if it was possible to continue to exist without these conditions" [215].

Part of the Jurisprudence supports that by invalidating the whole contract it may deprive the consumer from benefiting from the commodity or the service subject of the contract which it may need. Therefore the benefit of the consumer lies in invalidating the arbitrary condition only while keeping the rest of the contract valid. Invalidating in this case is proportional to that which affects the condition alone" [216].

It is not believed that invalidating the arbitrary condition alone while keeping the rest of the contract valid and effective achieves the benefit of the two parties, the professional and the online consumer, where the consumer benefits from the contract subject commodity or service.

At the same time the professional benefits from continuing the contractual bond with the consumer who may not wish to continue being obliged or committed by a contract that does not provide benefits due to its arbitrary conditions and may wish to enter into a contract with others online.

Part of the Jurisprudence sees that differentiation between three types of conditions is possible in considering the resulted penalty of invalidity. These conditions are:

- Conditions that invalidate the entire contract rather than the specific term or condition due to its grossness. such as the condition that makes one of the party' s commitments eternal.
- Invalidating conditions does not invalidate the contract as a whole, due to the fact that its grossness does not reach the limit that invalidates the

---

que celles jugees abusives sil peut subsister sans lesdites clauses .

215) Art. (6/1) dur, 93/13/EEC, 5 April 1993. Prev, . Not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

216) Atef Abdulhameed Hassan, Ibid., p.133.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

whole contract. The conditions become invalid but the contract remains valid in all its remaining terms and conditions. Which is called in France the "Unwritten Condition".

- Valid conditions that don’t annul the contract, but may be modified by the judge are agreed upon by both parties to achieve both their benefits, and then investigated after implementation or when circumstances change whether they are arbitrary for one of the parties. In this case the judge may modify these conditions to ensure the welfare and benefits of both parties" [217]. Among the examples of such types of conditions is the penalty condition in contracts which can be reduced according to article No. 224 of the civil law.

217) Ayman Saad Slime, Ibid., p.114.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

4.4 The Fight against arbitrary conditions in E-commerce contracts.

Generally, within fighting against arbitrary conditions in contracts, there are methods available for the consumer which can be used for this purpose. In addition to the existence of legal methods the legislator can always use one or more of them to achieve that goal.

4.4.1 The available methods for the consumer to Fight against the arbitrary conditions personally or by the consumer protection organizations

These methods include the possibility of the consumer to sue in order to invalidate the arbitrary condition which is contained in the contract held with the professional, as well as the role of the consumer's protection organization to interfere and collectively protect consumers.

4.4.1.1 Invalidating the arbitrary condition case

The consumer can personally sue to invalidate the arbitrary condition. Its argument in this case includes all the previously mentioned legislation texts related to invalidating the arbitrary condition. One of the most important texts is the 10th article of the consumer' s protection law No. 67 for 2006, which cancels every term that is included in a contract, agreement or document related to consumer commitment, if that condition means exempting the commodity supplier or the service provider from any of its obligations. Also, based on the text of the 6th paragraph of article 132/1 of the French consumption legalization, it stated that "The arbitrary conditions are to be considered as if unwritten" [218]. This phrase indicates the invalidity of the arbitrary conditions and considers it as if it were unwritten in the contract

218) Art. (132/1/6: > Les clauses abusieves sont reputees non ecrites .

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

and of no value. Accordingly the consumer can sue to invalidate this condition. In this case the consumer should prove the arbitrary subject condition" [219].

4.4.1.2 Interference of the consumer protection organizations

The consumer protection organization can interfere in a case presented by the consumer or a group of consumers in which the consumer claims to invalidate the arbitrary condition in a previously signed contract according to the text of article No (421/7) of legalizing the French Consumption. This was confirmed by the verdict of the French supreme court issued on February 2006, where the court confirmed that if consumer protection organizations approved to interfere in a case held by one of the consumers about the damages that happened to them, then according to the text of article No.(421/7)it can receive compensation for damages occurred for the collective benefit of the consumer" [220].

Taking into consideration that these organization's role in invalidating the arbitrary conditions case is limited to cases presented by the consumers in civil courts and not the administrative or commercial courts" [221] This was confirmed by the text of article No (421/6) for legalizing the French consumption which was modified by Law No 344/2014, issued on March 2014. The consumer protection organizations can also interfere through presenting a case to the court to delete the arbitrary condition sin the contracts held between the consumer sand professionals in accordance with the article No(421/6) on legalizing the French consumption.

---

219) Ayman Saad Slime,Ibid, p.124.

220) Cass civ. 1re Chambrre, 21 fevr. 2006. Bull. No. 95, Disponible sur: http://www.courdecassation.fr/publications_26/rapport_annuel_36/raport_2006_2284/quatrieme_partie_jurisprudene_cour_2293/ativites_economiques_commercials_financieres_2307/protetion_consommateurs_10031.html (13 JULY. 2014).

221) Ayman Saad Slime, Ipid., p.127,126.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The French supreme courts confirmed on March 2013, a verdict between Toyota in France and the Federal Union of the Consumers Syndicate, where the latter claimed that there are illegal arbitrary conditions related to the guarantee in the selling conditions of Toyota Co. in France, and asked for the elimination of these controversial contractual articles" [222].

The French supreme court also refused on November 2007 contestation that was presented by the Federal Union of Consumers (FUC) against America On Line Co. (AOL) regarding the deletion of certain specific phrases in copies of subscription contracts in an Internet service between them that was issued in 2000" [223] which confirms the role played by these organization in being able to actually sue for the consumers.

These organizations can also present a compensation claim for collective damage for the consumer which was not clearly stated in the French legalization of consumption. It was referred to in the text of article No. 422/1 about the importance of the collective defense of the consumers.

The French Supreme Court confirmed in its verdict issued on October 1999 that the authorized consumer protection organizations are entitled to ask the civil courts to correct what resulted from the existence of arbitrary conditions in the consumer's contracts by means of compensation for any direct or indirect damage occurred on the collective benefits of the consumers" [224].

The Supreme Court also confirmed in its verdict issued on May 1999 that the appeal court violated the text of article (421/6) of the consumption legalization when it announced the rejection of the demands which were presented by the consumers organizations on the bases that the disputed

---

222) Cass. Civ. Premiere chamber, arret No. 272 du 20 mars 2013 (12-, prec. 14.432).

223) Cass. Civ. Premiere chamber 10 nov. 2007, available at: http://www.legalis.net/spip.php/page=jurisprudence-decision&id_article=2086.

224) Cass. Civ. 1re ch. 5, oct. 1999, 97-17.559, Disponible sur: http://www.easydroit.fr/jurisprudence (9 jun. 2014).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

contracts held between the professionals and the consumers were inapplicable. Accordingly the appeal was refused" [225].

4.4.2 Methods of tackling arbitrary conditions through legislative interference

There are three legal methods through which the legislator can use one or more in pursuing this mission; they are:

First method:

The Judge is given authority to invalidate conditions which are thought to be arbitrary in the contract. These are conditions imposed on the consumer as a result of the professional misuse to its economic power which provides it with an excessive unfair advantage.

Second method:

An exclusive list of arbitrary conditions are prepared and if found in the contract will be considered invalid if the professional tends to impose them on the consumer, as it would be an infringement on the general system as set by the law.

Third method:

Formed by merging the previous two methods, where the legislator presents a general legal text that entitles the judge with authority to invalidate the arbitrary condition and at the same time, sets a list of conditions which can be considered arbitrary and treat them as if they were not included in the contract" [226].

Studying the three methods leads to the conclusion that the third method is the best in fighting arbitrary conditions, because it eliminates them

225) Cass. Civ. 1re Ch. 4 mai 1999, (97-14.187), prec.
226) Hamad Allah Mohamed Hamad Allah, Ibid., p.62.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

completely with the existence of an exclusive list of arbitrary conditions in addition to giving the judge the authority by law to invalidate these conditions.

Neither the Egyptian nor the French legislator applied this method though. The Egyptian legislator adopted the first method which benefits from the article No (149) of the civil law where the judge was given the authority to modify the arbitrary conditions or to exempt the complying party from being obliged to them. Also, according to the article No. (151) of the civil law, the judge's authority is not limited to modifying the arbitrary condition or deleting it to restore balance to the contract, but also, the judge has the right to interpret the ambiguous conditions to achieve the complying party who is the consumer in the consumption's contract which will benefit the latter, because usually the compliance contracts include ambiguous phrases and confusing articles and sometimes contradicting articles" [227].

As far as the French and European legislators are concerned each of them adopted the second method, which is represented in preparing a list of arbitrary conditions, but this list is not exclusive rather it is directive only. This helps to explain some of the forms that are related to some arbitrary conditions as will be discussed later. However, it should be noted that the French and the European legislators were close achieving the perfect method in tackling arbitrary conditions. It is believed that preparing a list of the arbitrary conditions as an exclusive list turns it into a rigid method of fighting these conditions.

Accordingly it may also deprive the judge from the estimating authority in this regard. As for the method used in the article No. 132/1 appendix of legalizing the French consumption and the European directive appendix,

227) Mohamed Ibrahim Bindary, Ibid., p.21.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

followed by the modification of article No. 132/1 and 132/2 by the decree No. 2009/302 issued on March 2009 in making this list inclusive is a method that provides the judge with estimation authority in how far the condition can be considered arbitrary or not. The following is an illustration of the first and second method, each in a separate section since they are the consecutive methods in this regard.

4.4.2.1 The judge's authority to invalidate the arbitrary condition

This section will try to analyze to what extent the judge can interfere and invalidate arbitrary conditions, considering that such interference is one of the most important methods in tackling arbitrary conditions, with the judge's main purpose being to achieve justice.

<u>First: The legislation's approach to the judge's authority to invalidate the arbitrary condition</u>

The Egyptian legislator did not cover this issue in the law No. 67 for the year 2006. While the text of article No. 147 of the civil law confirmed that " the contract constitutes the relationship between the parties, therefore it cannot be violated or modified except with the mutual consent of both parties or for reasons set by the law" , which indicates that the contract is to be carried out in all its contents without any modification unless both parties agreed on that or if there is a legal text that allows the judge to modify the contract's conditions or to repeal them, for instance in the case of the forced majeure article (147/2) of the civil law.

Article No. 149 of the civil law states that "if the contract was done by compliance and included arbitrary conditions, the judge may modify these conditions or exempt the complying party to achieve justice, with anything other than this being invalid.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

The mentioned text indicates that the judges censor authority over the arbitrary conditions is related to the general system, as such the contracting parties are not allowed to deprive the judge from this authority which is modifying or exempting some of the conditions which the judge deems arbitrary" [228]. By means of this text the legislator has set the judge's hands free to restore the missing balance in the compliance contract without any limit, except the justice limit when considering the contract's condition and removing the arbitrary conditions it includes" [229].

Although part of the Jurisprudence sees that the text in article No. 149 of the civil law does not commit the judge to modify the arbitrary condition or exempting the consumer from it. Rather it made the matter barely possible, even when the judge uses such entitled authorization, the text doesn't refer the judge to a specific criteria but instead a flexible one which is necessitated by the justice. All these matters form obstacles in the electronic consumer's path and do not provide enough protection" [230].

According to the European directive No. 93/13 relating to arbitrary conditions, the national judge in one of the member countries of the union can invalidate arbitrary conditions. Based on the second paragraph of the seventh article of the directive, in accordance with national applicable law, certain procedures can be taken in front of specific courts or in front of administrative associations to make a decision to determine whether the contractual conditions included were unfair or arbitrary, so the proper means can be applied and effected to prevent the continuity of such conditions" [231].

---

228) Ibid., p.20.
229) Ibid., p.17.
230) Mohamed Shoukry Srour, Ibid., p.133.
231) Art. (7/2), dir. 1993/13/EEC, 5 April 1993, Ibid.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

second: judicial trends

The European court of Justice confirmed the possibility of allowing the judge to evaluate the arbitrary conditions in its verdict dated 4th of June 2009. This sentence can be summarized in the event that took place on December 2004 where Mrs. Sustikne entered into a co-contract with a person named Pannon to offer mobile phone services. The contract was standard prepared by Pannon, and signed without any negotiations. Among the contract's conditions was a term that stated in case of dispute regarding the subscription or any related issue, then custody would go to the court jurisdiction which the official address of Pannon came under. This condition was not subject to any negotiation by either of the parties.

The courts confirmed that the purpose of the sixth article of the directive No. 13/93 will not be achieved, namely availing the consumer's protection, except by allowing the national judge to interfere and invalidate the arbitrary conditions.

It also confirmed that the role of the national court is not limited to just sentencing the contractual conditions as arbitrary, but also to study this issue by itself if the legal proofs and actual circumstances which are necessary for that exist, and whether the existing term in the contract qualifies to be arbitrary as stated in article (3/1) of the directive No. 13/93. When giving exclusive legal custody to the court in which the jurisdiction of the seller' s or supplier' s official work address is located within, it is considered an arbitrary condition" [232].

Also, the European Court of Justice confirmed in its verdict issued on April 2004 that the matter is up to the judge to decide if the conditions which are included in the contract require full payment of the price prior to affecting the delivery from the seller, or whether the supplier of their contractual

232) ECJ. Case C-243/08. Fourth Chamber of 4 June 2009. Available at: http://curia.europa.eu/juris/celex.js/celex=62008CJ0243&lang1=en&type=NOT&ancre. (29 June, 2013).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

obligations are arbitrary or not according to article No (3/1) of the directive No 13/93 regarding the arbitrary conditions" [233].

The European court confirmed in its verdict issued on November 2010, that the national judge should carry out an investigation to determine whether to grant the condition of exclusive regional custody in the place in which the supplier's main address is located in the contract held between the seller and the consumer, is a condition that falls within the directive No. 13/93 regarding the arbitrary conditions. If it is so, then the judge would take initiative to evaluate and decide if the condition is arbitrary or unfair.

In the same verdict it confirmed to ensure the effectiveness of the intended consumer protection by the legislation's authority of the European Union. In case there is a defect in the balance between the rights and obligations of the consumer and the supplier, which can be corrected by positive actions made by the court, the court must determine if the disputed condition was subject to negotiation between the supplier and the consumer" [234].

4.4.2.2 The non-exclusive list of arbitrary conditions

The Egyptian legislator did not adopt this method in fighting arbitrary conditions and accordingly did not determine specific conditions which can be considered arbitrary or an indicator for the judge in this regard.

It is found that both the French and European legislators followed this method by making a list of arbitrary conditions as a guiding list and non-exclusive.

The last paragraph of the third article of the directive states that the

---

233) ECJ. CASE C 237/02. Fifth Chamber of 1 April 2004 available at: http://curia.europa.eu/juris/celex.jsf/celex=62002CJ0237&Iang1=en&type=NOT&ancre.(29,MAY 2013).

234) ECJ. Case C-137/08. Grand Chamber of 9 Nov. 2010. Available at: http://curia.europa.eu/juris/celex.jst/celex=62008CJ0137&Iangle=en&en&type=NOT&ancre. (10 June, 2013).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

attachment of this directive is inclusive of a list that should be taken as a guiding list and non-exclusive of the conditions which can be considered arbitrary" [235].

The third paragraph of the article no. 32/1 in legalizing the French consumption in its modified text by the decree No. 2001/741 issued on August 2001 also states that the annex of this law includes an illustrative non-exclusive list of the arbitrary conditions, which if fulfilled considers all the conditions which are stated in the first paragraph of this article.

Indeed, there is a non-exclusive list of arbitrary conditions in the directive's annex No. 13/93, which was copied by the French legislator in the annex of article No. 132/1 of legalizing the French consumption in its modified form by the decree No. 2005/67 issued on June 2005. Despite this, the directive's attached annex is the same as the one attached in the French law and the first was stronger in commitment than the second one because the legislator in the directive stated that the conditions which were included in the annex must be arbitrary, while the French legislator used the phrase "could be arbitrary "Therefore the French law's attached annex is called the grey list considering that its contents could be arbitrary" [236].
The European Court of Justice confirmed in its previously mentioned sentence which was issued on April 2004 that the attached list to the European directive is just a guiding list and is non-exclusive of the arbitrary conditions where it pointed out that the existence of a condition in the list is not necessarily an arbitrary condition and that "the existence of a condition that was not included in the list might remain arbitrary or unfair" [237].

---

235) Art. (3/3), dir. 93/13/EEC, 5 April 1993. Prev. > The annex shall contain an indicative and non exhaustive list of the terms which may be regarded as unfair.
236) Ayman Saad Slime, Ibid., p.67.
237) Annalies Azzopardi, The contribution of Eu Directives to The objective of Consumer Protection, ed. II, 2012, p.55. available at: http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/ice_uploads/pd

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

As for articles No. 132/1 and 132/2 in their modified text according to the last decree issued in this regard which is decree No. 2009/302 issued on March 2009, it was clearer instating the arbitrary conditions in amore precise and clear form than the attachment of article 132/1where the first article's text stated the undisputed articles to be arbitrary. The second article stated the conditions which can be considered arbitrary unless otherwise proven by the professional.

First: The arbitrary condition according to the text of articles No. 132/1 and 132/2 which were modified by Decree No. 2009/302.

The text of article No. 132/1 which was modified by the decree No. 2009/302 stated that there are undisputed and clear arbitrary conditions following the restricted and banned conditions"[238].

(1) To include conditions that were not written before or to include them in an independent document not referred to directly in the contract while the consumer was not made aware.
(2) To bind the professional with the professional obligations to respect the conditions presented or made by personal agents/representatives.
(3) Giving the professional the right to change from one side the contract's duration article, its characteristics, prices of commodities that are required to be delivered or the services to be extended.
(4) Giving only the professional the right to determine if the commodities or the services provided match the contract or not. Or giving an exclusive right to interpret any of the contract' s articles, terms and conditions.
(5) Binding the consumer to fulfill its obligations while the service provider or the commodity supplier fails or stops to fulfill their obligations by their own will.

---

f/issue2/6b-2012.pdf (23 May 2013).

238) Art. (132/1), Mod. Par Decr. No. 2009/302 du 18 mars 2009, portant application de L' article L. 132-1 du code de la consummation. Art. 1.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(6) Excluding or determining the consumer's rights in obtaining compensation for the damages suffered in case the professional fails to meet its contractual obligations.

(7) Depriving the non-professional or the consumer from having rights to terminate or end the contract due to the professional's failure to fulfill professional obligations which it contracted to provide.

(8) Allowing professionals the right to end the contract according to their own estimation and evaluation, without allowing the non-professional or the consumer the same right.

(9) Allowing the Professional to keep the paid sums of money against services which it did not present, when the contract ends according to its own evaluating authority.

(10) Allowing the professional to renew the fixed period contract without notifying the consumer with its right to end it.

(11) Making the consumers or the non-professionals in case of terminating the non-fixed period contracts, pay compensation to the professional.

(12) Imposing the authentication task on the consumer or the non-professional which according to the applicable laws should be shouldered by the other party of the contract.

Although, within the frame of the eighth article of this list which is giving the professional the right to end and/or terminate the contract, the French supreme court sentenced in its previously mentioned verdict issued on November 2007 in the appeal that was held between the American Co.(AOL) in France, the Consumers Federation Union (CFU), and the Internet Service Providers Union (AFA) based in Paris in the appeal which was filed by (CFU) and included this verdict to make it illegal to terminate an Internet subscription contract without previous notice, there fore representing a serious infringement of both parties' basic obligations according to the contract document and the applicable laws. This affected certain parties including AOL in France, and accordingly the court appeal had made a

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

mistake when it considered that this condition did not represent any damage to the consumer"[239].

There are certain conditions that should be considered arbitrary according to the contents of the first and second articles in article No. 132/2 of the decree No. 2009/302 unless the professional proves otherwise or provides proof of the contrary. This has the following aims:

(1) Binding the consumer or the non-professional to fulfill their obligations while fulfilling professional obligations and delivering professional services is entirely up to themselves.
(2) Allowing the professional to keep the paid sums of money by the consumer in case the latter decides not to sign the contract or terminates it without enabling the consumer to have any compensation equal to or twice as much to that what has be deposited in case the professional decides to terminate the contract.
(3) Binding the consumer or the non-professional in case of un-fulfillment of its obligation to pay exaggerated or unsuitable prices with this obligation in a clear manner.
(4) Admitting the professional the right to terminate the contract without any prior notice during a reasonable period of time.
(5) Allowing the professional to make a transfer of contracts without the consent of the consumer which can result in reducing or limiting the consumer's contractual rights.
(6) Giving the professional the right to change from one side the contract's terms and conditions which are related to the rights and obligations of both parties other than those mentioned in the third article of 132/1.
(7) Setting a date to execute the contract, other than that which is allowed by the law.

239) Cass. Civ. L' ere chamber 8 nov. 2007.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(8) Terminating the terms and conditions of the contract in a more rigid and tough manner on the consumer.

(9) Limiting the proofs which are available to the consumer without any justification.

(10) Excluding or weakening the taking of any legal procedure or claiming compensation by the consumers, including the consumers' claim to accept the arbitrary condition which is not stated by the national law as a substitute to settle the disputes in front of the courts" [240].

Second: Arbitrary condition exceptions

There are exceptions to the arbitrary conditions as per the text of the article No. 132/2/1 of the decree No. 2009/302 there are also conditions that cannot be considered under any circumstances as arbitrary:

The exceptions for conditions being arbitrary as per the text of article No. 132/2/1/ of the decree No. 2009/302:

(1) The third term of the article No. 132/1 and the fourth and sixth terms of the article No 132/2 of this decree are inapplicable on the following:

A. The transactions which include money notes, financial tools, products and other services which are connected to a variation of prices in the market so that their indications and rates do not allow the professional to control their prices

B. Purchasing contracts, foreign currency exchange, traveler checks and international money transfers which are issued in foreign currencies.

(2) The third term of the article No. 132/1 and the sixth term of the article 132/2 doesn't prevent the financial services supplier to hold the right of modifying the interest rate paid by the consumer or other financial burdens related to financial services without prior notice, except in the case of existing legal reasons, provided that the professional is obliged to notify the consumer at the soonest possible occasion. The latter has the

240) Art. (132/2), Mod. Par d□cr. No. 2009-302 du 18 mars 2009, prec.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

right to terminate the contract immediately.

(3) The eighth term of the article No. 132/1 and the fourth term of the article No 132/2 do not prevent the financial services supplier from keeping the right to terminate the contract without specific prior notice from one party unless legal reasons provide that the consumer is to be notified immediately.

(4) The third term of the article No. 132/1 and the sixth term of the article No. 132/2 does not prevent the professional from keeping a term or a condition in the contract that suits the variation of product prices being delivered, or the services from being extended and modified from one party, only on prices which the consumer is notified of within a reasonable period of time enabling the termination of the contract if necessary.

(5) The third term of the article No. 132/1 and the sixth term of the article No. 132/2 doesn't prevent the existence of a condition in the contract which states that the professional can make modifications from one side related to changes in the used technology in the contract because it doesn't increase the prices or decrease the quality of the commodities "[241].

Third: The conditions which cannot be considered arbitrary in all cases

There are types of conditions which appear to be arbitrary but they are out of this classification and are subject to texts which are not applicable in the case of arbitrary conditions, these types of conditions are:

(1) The conditions which are related to the form of the contract: These are the conditions that draw the general frame of the contract such as the conditions which are related to the identity of the parties or the place where the contract is held. That which is arbitrary is only applicable on conditions related to the contents of the contract. Those conditions

241) Art. (132/2/1), Mod, par Decr. No. 2009-302 18 mars.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

related to the form are governed by texts which organize the defects of will or the organizing conditions of the validity of the contract" [242].

(2) The conditions that contradict this law text: If the contract included these types of conditions, they cannot be considered arbitrary, because the arbitrary condition is generated by environment and choice, and does not contradict general systems and cultures. Each of them also differs from the other regarding the resulted penalty, because the judge cannot modify the arbitrary condition or delay its execution to another time. The contradicting condition to the law is destined to be invalidated permanently. Consequently, the judge cannot keep this condition or modify it" [243].

(3) The conditions that are related to the contract place and the financial conditions: This was confirmed in the text of the seventh term of article No. 132/1 of legalizing the consumption where it confirmed that it doesn't emerge out of the framework of arbitrary conditions, as long as the conditions which are related to the place of the contract or the price, the sold money or the presented service, are texted in a clear and understandable manner. Accordingly these conditions are governed by articles and texts from the civil law" [244]. In conclusion, the organizing conditions imposed by the laws cannot be considered arbitrary.

242) Ayman Saad Slime, Ibid., p.59.
243) Ibid., p.61.
244) Ibid., p.63.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5. The consumer's right to withdraw from e-contracts

5.1 Introduction

The issue of the right to withdraw from E-contracts obtained the attention of the Egyptian legislation where they discussed this issue in the 8th article no. 67 for the year 2006, nevertheless this attention did not seem to be of sufficient value in particular where the legislature has focused on the 8th article when referring to contracting and omitted organizing the remaining reference provisions such as exceptions on the right to withdraw or other related arrangements and if it requires a certain form to practice...etc. Also, the Egyptian Legislature made this subject open to the availability of many conditions, which will be discussed later.

Also, the right to withdraw obtained the attention of the French legislators, where they organized their provisions in detail in articles (121-1-20, 2,4) from French decree-law no. (741-2001) which came in response to the European directives which aim to protect consumers in respect of distance contracting.

It is also observed that rights to withdraw originate from the national legal systems of various European countries, but in recent years it has emerged as a prominent feature of European contract law. Also, the European parliament presented a series of directives issued between 1985 and 2008."[245] Their directives include rights to withdraw in transactions that include directing distance

245) Omri Ben-Shahar and Eric A. Posner, The Right to Withdraw in Contract Law, the University of Chicago Law School, The Journal of Legal Studies, Vol. 40, No. 1 (Feb 2011), p.118.Available at: http://home.uchicago.edu/omri/pdf/articles/Right_To_Withdraw.pdf

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

contracting (no. 97/7), directing financial services (no. 2002/65) and directives (no. 2011/83) issued on Consumer Rights. These directives were issued, where the latter, based on a proposal from the European Commission, would absorb the previous guidance.

The right to withdraw began to form an important element in benefiting the European consumer protection law and is expected to continue to develop, however at the same time it has had a large impact on the principle of pacta sunt servanda.
A Consequent mandatory right to withdraw in e-consumer contracts needs sufficient justifications to accommodate prejudice to important principles, such as the principle of pacta sunt servanda which will be highlighted in the first theme of this chapter.

Accordingly, this chapter has been divided into two themes, with the first covering the concept of the right to withdraw in contracting, its legal nature and the extent of its binding force impact on the contract. The second theme will deal with provisions required for exercising the right to withdraw in contracting.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

5.2 Concept of withdrawal in contracting and its legal nature as well as the extent of its binding force impact on the contract

This theme is divided into three topics: The first is set to define the right to withdraw and justifications for its existence and while the second is dedicated to discussing the legal nature of the right to withdraw and its impact on the binding force of the contract. Finally the third topic deals with the forms and conditions of withdrawal in contracting.

5.2.1 Definition of the right to withdraw in contracting and justifications for its existence

The first section will focus on the right to withdraw concept , and then go on to justify the existence for this right.

5.2.1.1 Defining the right to withdraw

Juristic opinion became abundant regarding the definition of the withdrawal right, at which time one side of jurisprudence defined it as the "possibility and ability of one of the contractors to refer to his/her contracting at their own will, with the exception of general rules which make the contract once it is concluded a binding force, thus making it an agreement of two wills instead one and preventing it from being broken". This opinion ended with the view that this option in contracting is neither a personal right nor a state of limitation; as it is not just a granted license to the consumer but instead a "legal possibility" [246] which occupies a middle ground between a right and a license.

246) Ibrahim Dessouki abu elil, withdrawal from the contract to protect the satisfaction, Kuwaiti Lawyer magazine, Issue July–August – September 1985, p. 108,109.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

Another side of jurisprudence says that, the right of withdrawal gives the consumer the right to unilaterally go back on their decision to conclude a contract. As such, it is a far-reaching instrument, protecting one party from another party by restricting the binding nature of the contract" [247].

As some people defined it as the "right of the consumer to return the commodity or reject services during a certain period specified by law, without giving any justification, with the merchant commitment or service provider, according to each case, to return its value, with the consumer bearing the withdrawal expenses only"[248].

Some people have also determined that the consumer can exercise the withdrawal right under any circumstance, regardless of whether he or she originally intended to be bound by the contract and fully understood the terms of the agreement. In other words, withdrawal rights allow a consumer to avoid contractual obligations simply because he or she changed their mind, or, for example, because more attractive offers became available" [249].

Finally, the last side of jurisprudence defines that the right to withdraw allows consumers to terminate a concluded contract within a specific period of time without giving any reason for it"[250].

It became clear from the preceding definitions that withdrawal rights are paid for by all consumers, regardless of whether they wish to have and/or to

---

247) Marco BM Loos, Rights of Withdrawal, CSECL, Working Paper Series, University of Amsterdam, No. 2009/04, p.3, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1,350,224. (8 April in 2013).

248) Kausar Saeed Adnan Khalid, ibid., p.627.

249) Horst eidenm eller ,Why Withdrawal Rights, art. ERCL. 1/2011 , p.4, available at: (30May2013)http://www.degruyter.com

250) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Amsterdam Law School Legal Studies Research Paper No. 2013-05, CSECL, Working Paper series No . 2013-01, p.10, Available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192603 (7 May 2013).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

exercise such rights, as opposed to the costs associated with (the exercise of) withdrawal" [251].

Due to the mandatory rights of withdrawal, consumers have some time to reconsider their decision to conclude a distance selling contract. Allowing this 'choice' consumers may feel the need to prevail in investing their time and effort to searching for better deals during the cooling-off period"[252].

Based on the preceding definitions we can define the right to withdraw in contracting as a granted tool for the consumer, offer him/her protection from a suspect motive in concluding the contract without knowledge of all of its information, giving him/her the right to return the commodity or refuse the service during a certain period without giving any reasons.

5.2.1.2 Justification for the existence of the right to return

The basic justification for having the right to return in contracting by electronic means is that the consumer is in a state of disadvantage compared to the business or company with which they are dealing. Whether this is on a material or a cognitive level, especially if the consumer does not see the commodity purchased via the electronic contract until after it has been delivered.

Also, the need for the withdrawal right has already been remarked upon, that the right of withdrawal is meant to protect the consumer from making rash decisions"[253].

According to European legislators, this in addition to the existence of a private justification justifies having this right, in particular:

---

251) Horst Eidenmeller, Ibid., p.5.

252) Joasia A. Luzak, to withdraw or not to withdraw? evaluation of the mandatory right of withdrawal in distance selling consumer contracts taking, into account its effects on Behavioral Consumers, Amsterdam Law School Legal Studies Research Paper No. 2013-21, CSECL ., Working Paper No. 2013-04, p.17. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645. (24 May 3013).

I

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

First: Protecting consumers against aggressive commercial practices

The consumer is not able to make an informed choice as to whether the goods or services offered indeed meet their demands. Ultimately, the decision in this matter comes under the influence of the professional.

Second: Taking away barriers to cross-border trade

The consumer often has problems in picturing the goods or services offered. Furthermore, it will be more difficult for the consumer to better evaluate whether the goods or services offered match personal needs. On the one hand, it is hard to put the necessary questions to the trader.

Also the information that is given is often volatile in nature. For these reasons, the consumer is thought to be inclined to purchase the goods or services from the trader operating locally instead of surfing the internet and buying it elsewhere or possibly even abroad. It is thought that this disadvantage would diminish or be taken away if the consumer were allowed to rethink his/her decision after having received the goods.

The consumer could then examine whether or not the purchased goods meet expectations, assess their qualities and the reliability of the seller. In any case, for distance contracts the right of withdrawal seems to be aimed at enticing the buyer to engage in cross-border transactions.

Third: To encourage the consumer to use the Internet in the procurement process" [254].By analyzing these justifications, the side of jurisprudence perceived that the second and third motivations are plausible, and these justifications may reflect special European concerns. However these justifications are inappropriate and unconvincing, at least in Western countries where the psychological barrier against purchasing goods or services remotely at any time has disappeared"[255]. However, the first motivation is

254) Marco BM Loos, Ibid., p.6,9.
255) Omri Ben-Shahar and Eric A. Posner, Ibid, p.120.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

possible .There are long-standing concerns about aggressive doorstep sales tactics, telemarketing, and other situations in which consumers are vulnerable to "seduction," such as purchases of time-shares made during vacations.

5.2.2 The nature of the legal right to refer to the contract and its effect on the binding force of the contract

The legal nature of the right to withdraw in contracting disagrees with whether or not this right belongs to the general theory of the contract, and then discussing the impact of the right to withdraw on the binding force of the contract.

5.2.2.1 The legal nature of the right to withdraw in contracting

Jurisprudence has differed over the legal nature of the right to withdraw in contracting, and some jurists have tried to create the right system of withdrawal to the general theory of contracting. Others have also tried to search for the nature of this right outside the framework of this theory.

5.2.2.1.1 The right to withdraw belongs to the general theory of contracting:

Where the side of jurisprudence perceived that the right to withdraw is based on the idea of a **"non-legally binding contract"** and it is permissible for this contract to be withdrawn from the side which occupies the right to do so [256],while others have perceived that the right to withdraw in sales contracts done remotely degrades the **"provided sale experience"** [257].At the provided sale experience, it is permitted for the buyer to accept sales (sold quantity) or reject it, and the seller must enable the consumer to experiment,

256) Ibrahim Dessouki Abu Elil, Withdrawal from the contract to protect the satisfaction, Ibid, p.95.
257) Iman Mamoun Ahmed Suleiman, Ibid., p.146.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

so if the buyer refuses the sale, he/she must announce rejection in the agreed upon period, if there was no agreement on the term in a reasonable period, a term should be specified by the seller. If the period passed and the buyer does not reject the goods or services, although able to try them, then the buyer has already accepted the sale goods (AD 421/1 civilian).

The side of the jurisprudence was based on the idea of " standing term " in determining the nature of the right to withdraw where they see that the idea of standing term will interpret the distance contract once there is an agreement of administration while suspending its effects throughout the duration of the withdrawal so that the contract throughout this period is true from the moment of the management agreement despite its holding being ineffective between its parties and unnecessary for the consumer"[258].

While some people based the idea of "Avoidance clause" in determining the nature of the right to withdraw, which allows the possibility to change the contract if the consumer is dissatisfied with the contract after it has been completed within a period specified in the “right to withdraw” law"[259].Finally, some of the jurisprudence saw the time limit for withdrawal as given before signing the contract, supporting the opinion of the French jurisprudence by postponing the contract’ s conclusion until this time limit expires. However, after signing the contract there is a time limit added by the legislator on the condition that its achievement correlates with the concluding of the contract because there is a time limit when determining a consumer's satisfaction, thus an expiration of this time limit is legal evidence on the issuance of the final will meaning that this opinion is basing on the idea of the "suspensory clause"[260].

258) Youseph Shendi, The impact of the consumer's choice to withdraw from the contract to determine the moment of making the contract, the Journal of Sharia law , United Arab Emirates University, Q 24, Issue 43, July 2010, p.287.
259) Taher Shawqi moemen, Ibid., p.122.
260) Hassan Jmiei, Ibid., p.44.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

5.2.2.1.2 The right to withdraw does not belong to the general theory of contract: Proponents of this trend see that the right of return belongs to the range of "temporary rights," which expires either after its use or lapse of the period specified to him/her"[261],or similarly, that this right is inherent in a final contract and certain considerations enter the legislature to give the consumer the period for reconsideration in sales or in the contract"[262].They conclude with this view that the right of return falls within "Technical means" used by its legislature to protect the consumer satisfaction from moral or psychological pressure which exposed him to the urgency of the professional "[263].

We tend to regard the right to withdraw – in the framework of the general theory of the contract –that the sale provided that the consumer be allowed to experience the goods, then accept the sale or reject it, and the professional should allow the consumer to try it , and if the consumer refused the goods he/she shall announce the rejection in the agreed period, and if there was no agreement about the period, the professional should set a reasonable period specified, and if the period expires and consumer does not reject and he was able to try the goods, then the lack of rejection will be considered acceptable (AD 421/1 civilian).

Outside the framework of the general theory of contracting, it is considered closer to the technical means employed by the legislature to protect consumer satisfaction from moral or psychological pressure, which exposes him/her to the urgency of the professional, which is consistent with the rationale for the existence of the right to forego it.

---

261) Khaled Mamdouh Ibrahim, consumer protection in the E-contracts, Ibid., p.225.
262) Ahmed Saeed Zqird, the buyer's right to reconsider the sales contracts through TV,Law journal, University of Kuwait, Q 19, Issue 3, September 1995, p.229.
263) Ahmed Saeed Zqird, Ibid., p.232.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

5.2.2.2 The extent of impact on the consumer's right to return to the binding force of the contract

It is well known that the principle of the binding force of the contract is one of the most important principles which the law of contracts is based on. And one of its important effects is the stability of transactions between the consumer and the professional. So the question arises about the impact of the right to withdraw in contracting on the principle of the binding force of the contract.

Jurisprudence differed with respect to this matter, where some see that consumer deviation from the signed contract and before the expiration of the necessary time limit for practicing the right in withdrawal that it is not disagreed with the principle of the binding force of the contract, taking into account that the contract is not legally concluded only upon the expiry of this time limit"[264].

While other people see that the principle of sunt servanda commonly regarded as one of the pillars of contract law, that principle maintains that when parties have concluded a contract, they are bound to uphold their word and are required to perform their part of the contract. The right of withdrawal appears to affect the binding force of a contract in its core"[265].

While some people of jurisprudence based one of the ways to practice the right of stipulated withdrawal on Article VIII of the Consumer Protection Act No. 67 of 2006, which is **"withdrawal Sales and getting its value back"** to say that it touches the essence of contracting, with what is considered as a

264) Hassan Jmiei, Ibid., p.45.
265) Marco BM Loos, Ibid., p.3.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

violating the principle of the binding force of the contract"[266].

However, if the consumer choses the second method, which is " Sales Replacement " during the specified period in the law, it does not touch the essence of contracting and it doesn't touch the principle of the binding force of the contract, taking into account that the consumer in this case does not want to dispense with the commodity, but only he/she wants to replace it "[267].

Finally, some sides of the jurisprudence are based on the nature of the contract itself, where they see that it is not a legally binding contract and it became possible to return in it with the individual will of the consumer, as well as its consideration being sufficient for us and a way to reconcile under it between the binding force of contract and withdrawal from it; because the principle of the binding force of the contract and the necessity of its respect and its implementation confine oneself to the necessary contracts"[268].

We believe that in the framework of the text of Article VIII of the Law No. 67 of 2006"[269],the case of commodity replace mentor its return, can be divided to judge whether it is a violation of the principle of the binding force of the contract or not.

- In case the consumer replaces the commodity it does not represent a violation of the principle of the binding force of the contract whether it has been concluded with traditional methods or electronic methods because the consumer's consultation to replace the commodity in this case indicates an intention to search for the commodity that corresponds with

266) Article (147) civilians, see: Ahmed Saeed Zqird, Ibid., p.213. And also the same opinion, see: Mohamed Saad Khalifa, Ibid., p.91.
267) Ahmed Saeed Zqird, Ibid., p.213.
268) Ibrahim Dessouki, Withdrawal from the contract to protect the satisfaction, Ibid., p.98.
269) The text of the first paragraph of Article VIII of Law No. 67 of 2006.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

the consumer's actual needs and not just exercising rights guaranteed by the law.

- In case of withdrawal commodity, it must divide between whether the contract has been concluded through traditional methods or by electronic methods. So, if the contract has been concluded through traditional methods, the practice of the right to withdraw in this case represents a violation of the principle of the binding force of the contract; because the consumer in this case has a full opportunity to see the commodity and have knowledge of all the information of its characteristics and defects before contracting whether it is appropriate to his/hers needs or not.

But, if the contract has been concluded by electronic means, it can be said that the exercise of the right to withdraw to respond in this case does not represent a violation of the principle of the binding force of the contract, because the electronic method, especially Internet, does not allow the consumer sufficient opportunity to return in the contracting with withdrawal of the commodity if he/she finds that it doesn't suit their needs or doesn't represent binding force contract principles.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5.2.3 Back in the form of contract and conditions

This topic is divided into two sections: The first is dedicated to withdrawal in contracting and whether it requires specific a form adhered to by the consumer and the second focuses on the conditions for exercising the right to withdraw.

5.2.3.1. Form of withdrawal in contracting

The Egyptian legislature doesn't bind the consumer in Law No. 67 of 2006, by following specific forms to practice the right to return. But, in French law, the legislature talked about the form of withdrawal in the text of article (2/21/121) of the consumption Law No. 344/2014, where he confirmed that " the consumer must inform the professional with their decision of withdrawal in contracting before the expiration of the decided withdrawal deadline in Article 121/21 of this Law, and the consumer can fill in a form explaining it and submit it to the website of the professional online. Also, the consumer in this case undertakes the burden of proving that they informed the professional of their decision.

The current European directives do not provide one uniform answer as to how the consumer is to withdraw from the contract. The Distance Selling Directive and the existing Timeshare Directive only require notification of the withdrawal, but allow the notification to take place by any means as no mention is made of any form requirement, implying that such requirement is not allowed "[270].It is a matter, which doesn't raise large problems if the consumers' attitude is clear"[271].

270) Marco BM Loos, Ibid., p.17.
271) Joasia A. Luzak –Vanessa Mak, Ibid, p.11.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

However the directive of new consumer rights No. 83/2011 has a specialized Article 11 to talk about the Exercise of the right of withdrawal, and stipulated that in all cases, the consumer shall inform the trader of his decision to withdraw from the contract, before the expiry of the withdrawal period"[272].For this purpose, the consumer may either:

- Use the model withdrawal form as set out in Annex I (B).
- Make any other unequivocal statement setting out his decision to withdraw from the contract.

So, if the consumer selects the first way to fill in the electronic form for withdrawal in contracting, in this case, the trader must send to the consumer acknowledgment of "confirmation" with receipt of the form or withdrawal notice to a permanent middleman (agent) without delay"[273]. The consumer utilizes this method because it can enable them to present evidence that they practiced their right to withdraw in contracting within the prescribed time limit"[274]. Especially, the burden of proof of exercising the right of withdrawal during the deadline is a responsibility of the consumer, and Annex I of directive No. 2011/83 from this specimen contains the following data:

(1) **The trader's name**, geographical address and, where available, fax number and e-mail address are to be inserted by the trader.
(2) **Name,** address and signature of the consumer.
(3) **Delete as appropriate**[275].

Such a uniform regulation would lead to simplification and legal certainty. Consumer organizations generally prefer not to introduce form requirements

272) Art. (11), Dir. 2011/83 / EU of 25 oct.2011, prev.
273) dir.2011-83-EU, 25 Oct. 2011, Prev, Art.11-3.
274) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ibid., p.11.
275) dir.2011-83-EU, 25 Oct. 2011, prev, Annex (1-b).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

as to the notification of withdrawal the simpler, the cheaper and more effective the right of withdrawal is, implying a preference for option 1. From the business side, and even some consumer organizations, a form that allows for proof of the withdrawal, a registered letter, an e-mail or a fax message, is sometimes preferred (option3)"[276] The European Parliament advocates the introduction of a standard form, drafted in all the official languages of the Community. Such a standard form should serve to meet several concerns of the Parliament: simplifying procedures, saving costs, increasing transparency and improving consumer confidence. Such a standard form is also suggested in the reactions from consumer organizations to the distance selling consultation. The member states are divided on the matter of form requirements"[277].

The question shows how to deal with the situation in which the consumer has not met the form requirement but the trader has nevertheless become aware of the consumer' s intention to withdraw from the contract within the cooling-off period.

This situation may arise, in particular, where the consumer has returned the goods during the cooling-off period to the trader without explicitly withdrawing from the contract. this should be the case. The purpose of the form requirement is primarily of an evidentiary nature"[278].

And finally another question has arisen on the effectiveness of notice of withdrawal, that this notice is not effective unless the professional received during a period of his/her withdrawal and before the expiry of this period. This is problematic, in particular, if the cooling-off period is short. It may also be problematic if the period is longer, but the postal services are

276) Marco BM Loos, Ibid., p.18.
277) Ibid., p.18.
278) Ibid., p.20.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

reputedly slow"[279]. The consumer may be forced to send the notice by regular mail in case you are obliged to send the notice by ordinary mail in the case of not knowing the e-mail address of the professional or in case of closing the e-mail for the latter, in this case, we find that the notice sent by ordinary mail will take additional time to reach the professional before he actually receives it, which may affect the withdrawal deadline.

The directive of the consumer rights answered this question, and determined that the decisive moment that makes the withdrawal or withdrawal in contracting true and perfect on its appointed time is the moment to send notice or notice of termination on the part of the consumer to the professional"[280].

Based on that, if the consumer sends the termination notice within the cooling-off period, but the trader receives it after this period has lapsed, the withdrawal from the contract is seen as valid[281].

5.2.3.2 Conditions for exercising the right to withdraw in contracting

The general rule

Non submission to special conditions in the right to withdraw does not prevent the legislature from interfering with a legislative text and imposing special conditions for the realization of withdrawal in the contract"[282].

5.2.3.2.1 The terms of the exercise of the right of withdrawal in Egyptian law:

279) Marco BM Loos, Ibid.
280) Art.(11/2), dir.2011-83-EU, 25 Oct.2011. Prev.
281) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ibid., p.11.
282) Ibrahim Dessouki abu elil, Withdrawal from the contract to protect the satisfaction, Ibid., p.116.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

It is different in the Egyptian law on this issue, where we find that Article VIII of the Consumer Protection Act No. 67 of 2006 has put certain conditions for the possibility of exercising the right of withdrawal, and these conditions are:

(1) If a defect corrupted the commodity.
(2) If the commodity is not identical with the specifications.
(3) If the commodity is not identical with its specific purpose

These are conditions that do not depart from its being stipulated conditions of ensuring hidden defect in Article 449 civilian. We find that the text of Article Nineteen of the Egyptian e-commerce law gave the consumer the right to return in contracting without having to give any justification"[283].

5.2.3.2.2 conditions of exercise of the right of withdrawal in French law and the European Direction No. 2011/83:

According to the text of the first paragraph of Article (121/20) of the French consumer Law, as amended by Decree No. (741/2001), French legislators gave consumers the right to exercise the right to withdraw **without giving any reasons**. It is the same mentioned phrase in the text of the article (9/1) of Directive No. 2011/83. Some justifications support the attitude of the French legislator that circumstances of contracting are enough of a justification because the contract by electronic means eliminates the direct communication between the professional and consumer, and the latter may be blinded by the temptations of advertising on websites and facilities granted by the electronic market to show what in his favor, so as to justify withdrawing from the contract without giving any reasons"[284].

---

283) This project is available on the following website:(19, April, 2012) http://www.alexalaw.com/t6845-topic.
284) Shukri Mohammed Srour, Ibid., p.125.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

We believe that the imposition of certain conditions for the exercise of the right to withdraw in the text of Article VIII of Law No. 67 of 2006 does not come from being applied to the general rules relating to the existence of a defect in the goods. They are conditions that the legislature saw that it complies with the situation in Egypt and the difficulty of accepting the withdrawal of the commodity without giving any reasons in light of current economic conditions. But, for the lack of consumer's need to express any reasons or justifications for the exercise of the right to withdraw in accordance with French decree and European Directive, it will undoubtedly bring greater benefit to the consumer in the exercise of the right to return freely and take advantage of this right, which protects the cornerstone of satisfaction in contracting.

Conclusion:

The text of Article (121/20) of the French decree-law and text of Article Decree (9.1) of the European directive agreed with the text of Article Nineteen of the Egyptian e-commerce law with not binding consumers any conditions or justification for exercise of the right of withdrawal, and all the above texts differed with text Article VIII of Law No. 67 of 2006.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5.3 Provisions relating to the exercise of the right of withdrawal from a contract

These provisions include the necessary period for the exercise of the right of withdrawal and its validity start, and scope of exercising the right to withdraw in contracting, and the implications of exercising this right in the following manner:

5.3.1 The required time for exercising the right to withdraw in contracting and its validity

This requirement includes two consecutive sections, the first is dedicated to talking about the necessary time to practice right of withdrawal in Egyptian law and comparative legislations, and the second will discuss validity of this period for each of goods and services.

We begin the first section with the statement of advantages and disadvantages for withdrawal in contracting and then describe the position of the Egyptian and French law from this period and also position of directing rights of new consumer.

5.3.1.1 The time required to exercise the right to withdraw from a contract

The period for the use of the right to withdraw has been called a 'cooling-off' period. This term suggests that consumers are supposed to calm down, and soberly consider all pros and cons of taking a transactional decision. By providing consumers with an easy option to terminate the contract in case they had made a decision based on emotions rather than

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

logic"[285].

The period for the use of the right of withdrawal or the cooling-off period in the selling consumer contracts does not prevent consumers from concluding a transaction under the influence of emotions, but it makes this decision reversible"[286].

5.3.1.1.1 Advantages and Disadvantages of cooling-off periods:

The provision of a cooling-off period as an information remedy provides the consumer with the possibility to check the quality of the product he bought and to compare it with rival products; in this respect it enhances consumer choice. Therefore, we find support in economic theory for the idea of granting a right to withdrawal for online contracts as it eliminates the problems of adverse selection and quality deteriorations by setting up incentives for traders to improve the quality offered. The economic rationale of cooling-off periods, i.e. their ability to deal with market failures, gets further support from their voluntary acceptance in the context of self-regulation"[287].

But the disadvantages of cooling-off periods are equally multiple, as represented in the following:

(1) These disadvantages range from opportunistic behavior from the part of the consumer to increased transaction costs for businesses. If consumers can easily withdraw from concluded contracts, they may be tempted to abuse this right. When consumers can use the products during the cooling-off period and return it afterwards to the seller claiming bad

285) Joasia A. Luzak, to withdraw or not to withdraw? Ibid., p.11.
286) Joasia A. Luzak, to withdraw or not to withdraw? Ibid., p.12.
287) Andreia - Roxana Macsim, The New Consumer Rights Direction, The Maximum Harmonisation A Comparative Law And Economics Analysis Of Effects On Consumers And Businesses. The case of the cooling-off period from online contracts. Spring 2012, p.36, Available at: http://pure.au.dk/portal-asb-student/files/44659752/Thesis.pdf .(6 April 2013)

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

quality"[288].

(2) Cooling-off periods increase the costs of carrying out transactions because contracts are in effect completed only after the expiration of the cooling-off period, which causes delay and uncertainty for the trader.

(3) Cooling-off periods may lead the suppliers to leave the market because they may ask for higher prices proportional to the value of the product when the transaction is finally completed, in order to be compensated for the costs of transactions that were called off"[289].

It shows that the associated negatives with the duration of the withdrawal comes in several forms as the previous statement, while the principal benefit is only one and it comes in favor of the consumer"[290].

In this regard, side of jurisprudence sees that the granting of the right of withdrawal in contracting in specific cases is justified only if the benefits of use outweigh the associated costs"[291].

After having outlined the advantages and disadvantages of the withdrawal period, the issue of time periods set by each legislator to take advantage of this right was touched upon, observing that legislators in various states did not agree on one time period for withdrawing in contracting, and the time period in Egyptian law differed from that in the French law. Issued laws in some Arab countries also varied and the new European directive adopted a different attitude for this time period as well.

This in turn led to the confusion of some business owners and consumers because it causes legal uncertainty in cases where two or more rights of withdrawal are applicable, for example in the case of doorstep or distance selling

288) Horst eidenm eller, Ibid., p.5.
289) Andreia - Roxana Macsim, Ibid., p.36,37.
290) Ibid., p.38.
291) Horst eidenmeller, Ibid., p.7.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

of a timeshare"[292]. Indeed, it is not easy to establish what an optimal duration for the cooling-off period should be. In deciding on the duration, the differing interests of the consumer and the trader need to be reconciled as much as possible"[293].

5.3.1.1.2 the required time for exercising the right to withdraw in Egyptian law:

According to the text of the first paragraph of Article Nineteen of the Egyptian e-commerce law project"[294],it is permissible for the consumer to terminate the concluded contract electronically during the following fifteen days the date of receipt of goods (commodity) or from the date of contracting to provide the service. This time differed in Law No. 67 for the year 2006, as set by the legislator with fourteen days from the date of receipt of commodity.

We believe that the largest period in all cases achieves greater benefit to the consumer, which is mentioned in the e-commerce law project (draft).

5.3.1.1.3 withdrawal in the French law:

French legislation settled in consumer policy No. 949/93 on a time period of "seven working days" during which the consumer can exercise the right of withdrawal in contracting, as confirmed in the text of the first paragraph from the article (121-20), as amended by Decree No. (741-2001). "It is the same mentioned period in the model contract for e-commerce which was prepared by the French Chamber of Commerce and Industry for electronic transactions" [295].

---

292) Marco BM Loos, Ibid., p.4.
293) Ibid., p.10.
294) This project is available on the following website:
(25 May 2012). http://www.alexalaw.com/t6845-topic
295) Contract- type de commerce lectronique commercants - consommateurs, JCP

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The legislator then adjusted this term in the text of Article (121/21) amended with the Law of consumption No. 344/2014 and extended it to fourteen days during which the consumer can exercise the right of withdrawal instead of seven days" [296].Legislators added in Article (121/21 / 1) of the new consumption Act that "if information is not provided for the right of withdrawal referred to in Article (121/17) of the Act, is to extend the period reference to twelve months calculated from the expiration of the specified withdrawal term in the article (121/21).
However, if the professional provides this information during the extension period, then he/she should end the period of withdrawal after fourteen days from the day on which the consumer receives this information[297].

It should be noted that the term "seven working days," which had been approved by the French legislature, is the same stipulated period in Article XI of the issued regulations by the English Parliament in 2000 regarding the protection of the consumer in remote contracting" [298].

5.3.1.1.4 For the withdrawal period in European Union (EU) directives :

The European legislature also adopted and approved in the beginning, a period of seven days during which the consumer can exercise his/her right to return, which is confirmed by the Directive No. 85/577 [299],and distance contracting directive No. 7/97 [300]. Then the legislator averaged this trend

---

E., n 41,8 Oct. 1998, p.1581.

296) Art. (one hundred and twenty-one twenty firsts), Mod. L. par n ° 2014-344 du 17 mars two thousand and fourteen, pr ec., art. 9 (V),

297) Art. (121/21/1), cr par L. n ° 2014-344 du 17 mars 2014, pr c., art. 9.

298) This legislation is available on the following website:
http://www.legislation.gov.uk/uksi/2000/2334/pdfs/uksi_20002334_en.pdf

299) Art. (5/1), Dir. 85/577 / EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated per away from business premises, O J. L 372, 31/12/1985 P. 0031 - 0033, available at:
http: // Eur- lex. europa. eu / LexUriServ / LexUriServ.do? uri = CELEX: 31985L0577: EN: HTML. (12 Jan.2012).

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

and doubled this period and made it fourteen days instead of seven days. It was confirmed by the European Directive No. 65/2002 [301],Directive No. 48/2008 [302],and Directive No.83/2011"[303]on the rights of the consumer. Then, the legislature can impose the same exception to this period in the text Article X of Directive No.83/2011,where he stressed that:

(1) If the trader did not provide information to the consumer about the right to consult as required by Article (6/1 / h) of this directive, the period of withdrawal must be completed during twelve months from the end of the first period of withdrawal as specified in Article (9/2) of this directive.
(2) If the trader provides information to the consumer within a period of twelve months referred to, period of withdrawal must expire after fourteen days from the day on which the consumer receives that information.

It should be noted that it is different from the mentioned period in Article 6.1 of Directive No. 7/97, where the period is only three months rather than a full year as stated in the current direction.
It is worth mentioning that the mentioned information in article (6/1 / h) of Directive No. 83/2011 is information relating to the existence of the right of

300) Art. (6/1), dir.97 / 7 / EC. OJ L 144, 4.6.1997 P. 0019 – 0027, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:en:HTM (18 Nov. 2011)
301) Art. (6/1), Dir.2002 / 65 / EC of the European Parliament and of the Council of 23 September in 2002 Concerning the distance marketing of consumer financial services and Amending Council Direction 90/619 / EEC Directions and 97 / 7 / EC and 98/27 / EC, J. O L 271 , 09/10/2002 P. 0016 – 0024. Available at: http://eur-Lex.europa.eu/LexUriServ/LexUriServ.do?uri = CELEX: 32002L0065: EN: HTML . (22 Feb. in 2012).
302) Art. (14/1), Dir. 2008/48 / EC of the European Parliament and of the Council of 23 April 2,008 on credit Agreements for Consumers and Repealing Council Direction 87/102 / EEC, OJ. L 133, 22/05/2008 P. 0066 – 0092. Available at: http://eur-Lex.europa.eu/LexUriServ/LexUriServ.do?uri = CELEX: 32002L0065: EN: HTML . (22 Feb. in 2013).
303) Art. (9/1), dir. 2011/83 / EU, on consumer rights, Prev.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

withdrawal and necessary procedures needed for its practice and forms. However, for the basic mentioned period in the guidance which is fourteen days to practice the right of withdrawal, this time the interest of the consumer has been taken into account. In this respect one should recognize that the cooling-off period should be long enough for the consumer to be able to make use of the right to withdraw in due time when cross-border contracting"[304].

We believe that the reason of deviation by the legislators from a period of "seven days" whether in French consumption law or in modern European directives, is that they found that this period insufficient to protect the consumer; because he/she cannot during this short period ascertain the quality of the goods or services especially if distance contracting. Therefore, the legislature saw to extend the consumers' right with a period of an additional seven days to enable the consumer to evaluate the goods (sales) and trust in his choice.

Furthermore, over the past few years, most directives that preceded the guidance directing consumer rights No. 83/2011, assumed that the period of fourteen days is ideal to practice the right to withdraw. So it is not surprising that the new directive CRD has adopted such a time frame of withdrawal right"[305].

Although some believe that it is not easy to determine the ideal time to exercise of the right of withdrawal .But this period should belong enough to be effective as the consumer in some contracts may need to receive in dependent advice from experienced people during this period ,in addition to the information provided by the professional"[306].

Also it should be long enough to have and effect. The period of fourteen

---

304) Andreia - Roxana Macsim, Ibid., p.40.
305) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ibid., p.10.
306) Marco BM Loos, Ibid., p.9,10.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

calendar days opted for in the Distance Marketing of Financial Services Directive and in the Consumer Credit Directive seems long enough to at least receive timely preliminary advice, provided that the consumer undertakes to obtain advice without too much hesitation. The period of thirty calendar days accepted for life assurance contracts, on the other hand, seems unreasonably on"[307]. While others consider that the granted period by the legislator to the consumer to exercise the right to with draw in is not verified and unclear "[308]because the conclusion of the contract is longer than necessary and the legal period to withdraw in would therefore be expired.

5.3.1.1.5 Time of withdrawal in some Arab countries:

Both the Lebanese legislator and Tunisian legislator agreed on a period of "ten days" during which the consumer may exercise the right of withdrawal during which was confirmed by the Lebanese legislator in Article 55 of specified Chapter X to the conducted processes by a professional remotely or in the place of residence of the consumer of Consumer Protection Law No. (13068/2004).

This is also confirmed by the Tunisian legislator in Chapter 30 of the Law No. 83/2002 concerning exchanges and electronic commerce.

In the same context, the position of each legislature disagreed about the duration of the contract in withdrawal, opinions varied about this period between businessmen and some trading businessmen and between consumer protection organizations. The business side sees that a uniform period of two weeks would be too long and that too long a period would open the opportunity for consumers to abuse their cooling-off period. Moreover, in such a case the period during which the consumer would have to ensure that the goods remain as new would equally be prolonged. Conversely, consumer organizations often argued that the existing cooling-off periods are too short

307) Andreia - Roxana Macsim, Ibid., p.39.
308) Ahmed Saeed Zqird, Ibid., p.21.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

and some argued for even longer periods than two weeks for 'complicated' contracts such as timeshare agreements"[309].

5.3.1.2 Starting of validity for period of Withdrawal

It can be seen from the previous offer for the period of right of withdrawal that most of the legislations differed regarding specifying this period, and in return these legislations agreed to determine the **Starting of validity for period of Withdrawal**, with the validity of this period for the commodity starting from the date of its receipt, and for the service from the date of concluding contract. Note that each legislature had some additional provisions, with the exception of the Egyptian legislature who has not added anything to the beginning of the account of this period, whether in e-commerce law project or in the Consumer Protection Act No. 67 of 2006 as well as the Regulations for the latter.
But for the French legislature, they added the model contract for e-commerce to start the validity of the service. It is possible to consider the service effective from the day of concluding the contract or from the delivery of a letter of confirmation by e -letter and acknowledgment of the consumer with his receipt.

Also, the French legislature added regarding the start of the period validity previously in the third paragraph from the article (121/20) from the French consumer law with its amended text decree that it extends the period of exercise of the right of withdrawal to three months. If it has been presented this information within three months from the date of receipt of the goods deposits or accepting the offer for the service, calculating the term of withdrawal starts of this date [310].

This begins the account of this period of the date in which the consumer gets in

309) Marco BM Loos, Ibid., p.4.
310) D. 2001, N 30, p.2490.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

formation which is required for the law the professional to provide.

Also added in the text of Article (121/21) of consumer Law No. 344/2014, as in the case of the presence of several articles in the deferred implementation contract or if there were many goods by their nature to be delivered in stages, the validity period shall enter into force on the full possession of the goods by the consumer"[311].

As for the entry into force for withdrawal in European directions, it was agreed upon in the text of Article 6.1 of the European Directive No. 7/97 with the text of Article (121/20) of the Excise Act French Law revised by Decree No. 741/2001 paragraph 1&3, in that if the supplier has failed to fulfill its obligations set forth in Article V of this Directive, it shall be the period of three months, starting in the case of goods received on the part of the consumer, and in the case of services on conclusion of the contract.
As for the text of the article (9/2) of the European Directive No. 83/2011 on the rights of the consumer, it has added some details that were not mentioned in previous guidance for the entry into force of this period, which is itself is emphasized by the text of Article (121/21) of the Act No. consumption 344/2014, where he confirmed that the time period for exercising the right to withdraw is fourteen days, and shall be enforced in this period in the following cases:
A . In the case of service contracts on conclusion of the contract.
B . In the case of contracted goods on physical possessions of the consumer. If the goods were multiplied by their nature and received in stages, this period shall be valid when the consumer is in full possession of the commodity.

Here note that the valid duration was not clear when goods were delivered in batches. The start of the validity period will be calculated after each payment

311) Art. (121/21), Mod. par L. n ° 2014-344 du 17 mars 2014, pr□c., Art. 9.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

period or after the first or last batch"[312].This issue, unlike previous articles on the same matter, is dealt with in the mentioned text of article (9/2 / b).

All directives that have introduced a right to withdraw include such an obligation for the trader to inform the consumer of their right to withdraw.

The cooling-off period starts when the contract is concluded and the consumer has received written notice from the trader of his/her right of withdrawal Therefore, the cooling-off period does not start before the consumer is informed of his/her right to withdraw. Failure to inform the consumer of their right to withdraw thus implies that the cooling-off period never started and therefore does not end. As a consequence, the consumer may withdraw from the contract, if need be, even years after the contract was conclude"[313],in the sense that this period may extend indefinitely"[314] This in turn enables the possibility of arbitrary use of the consumer' s right; Because the cooling-off period would not start to run before the consumer is informed of his/her right to withdraw even if the consumer already knows of their right to do so[315].

However if the professional can prevent or prolong the period before making a commitment then the principle of abusing the right does not apply"[316].
It is also worth mentioning that it is arbitrary on the part of the consumer to use their right to withdraw and return the product because they have access to the same commodity at a better price elsewhere, or even reconsidered after having been unsatisfied with the way in which the contract carried out "[317].

312) Marco BM Loos, Ibid., p.11.
313) Ibid., p.10.
314) Ibid., p.14.
315) Ibid., p.16.
316) Ibid., p.17.
317) Ibid., p.15.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Finally, the question remains whether the time required to exercise the right to withdraw is the duration of the fall or statute of the limitations period?

Jurisprudence regards this period to exercise the right of return as the duration of the fall and not a statute of limitations period. Therefore this period is not affected if it' s extension took place on the last day of an official holiday"[318].

It was confirmed by the French legislator in the last paragraph in the text of Article (121/20) of the Excise Act amended in the French Decree No. 741/2001, that "at the end of a period of seven days, one day or on a holiday or vacation, the period can be extended to the next working day".

Some of the jurisprudence agrees that the right to return is purely voluntary, which is inconsistent with the theory of limitations where one can back out with personal rights. If personal rights are obsolete then a natural commitment occurs which can become a civil obligation. However if one has the option to get back into the contract at any time then there will be no natural commitment"[319].

318) Mohammed El Morsi Zahrah, Ibid., p.106.
319) Ibrahim Dessouki abu elil, Withdrawal from the contract to protect the satisfaction, Ibid., p.124.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

5.3.2 The scope to exercise the right to withdraw from a contract

The justification for the exclusion of some cases from the scope of the right of the consumer to withdraw is that the consumer has the right to authorize the return in such cases as may lead to getting the commodity without paying for them. For example,
Consumers can easily read newspapers, magazines and copies of computer programs prior to their return"[320].

There are two types of contracts that are excluded from the application of the right to return, the first type comes under an agreement of the parties in the contract, and the second type is based on a legal text, which will be divided into two consecutive sections.

5.3.2.1 Contracts are excluded from the application of the right to withdraw based on the agreement of the Parties involved in the contract

This is intended to refer to these contracts in which optional return depends on the will of the parties in the contract, if the parties are agreed to make the contracts, the contracts are excluded from the exercise of the right of return, as well as or vice versa.
As per the adoption of the European Directive No. 7/97 for a distant contract, the contracts are excluded from the application of the right of return based on agreement of the parties in Article (6-3), and the French legislature transferred these contracts by quoting verbatim text of the article (121/20/2) of Excise Act as amended by Decree No. 741/2001, and these

320) Mohammed El Morsi Zahrah, Ibid., p.92.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

contracts have been identified as follows:

(1) The provision of services, if the performance of the service agreement with the consumer ends before the end of the period to exercise this right.
(2) The supply of goods or services that rely on price fluctuations in the financial market which can not be controlled by a professional.
(3) Supply of goods manufactured according to specifications set by the consumer whose character is clear, and by their very nature the goods cannot be refunded, subject to damage or expire.
(4) Audio or video recording or computer software in which seals have been broken by the consumer.
(5) Supply of newspapers or periodicals.
(6) Gaming and lottery services.

5.3.2.2 Contracts are excluded from the application of the right to withdraw based on a legal text

There is no provision in the Consumer Protection Act No. 67 of 2006 where the terms of exceptions are listed in the rights of the consumer to return. Unlike the French legislature who confirmed several exceptions to exercise the right to refer, in the article (121/21/8) of Law No. 344/2014 French consumer law"[321],and identified as follows:

(1) Contracts for the provision of services which have been fully implemented by the end of the period of withdrawal, and acknowledge that the consumer will lose his/her right to consult in the event of implementation.
(2) Contracts for the provision of goods or services that depend on fluctuations in market prices that occur during the period of withdrawal for the professional and can not be controlled.

321) Art. (121/21/8) , Cr □□ par L. n ° 2014-344 du 17 mars 2014, pr □ c., art.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

(3) Contracts for the supply of products made according to the specifications set by the consumer.
(4) The supply of goods that are susceptible to damage or expire quickly.
(5) The consumer returns goods that were broken or did not fit after they were returned.
(6) The consumer returns goods that are combined with other elements and cannot be resold.
(7) The supply of alcoholic beverages that are agreed upon at the time of conclusion of the contract price and cannot be delivered after the lapse of thirty days, with actual values depending on price fluctuations in the market for professionals that can' t be controlled.
(8) Contracts are based on consumer demands, and visits to the supplier for the purpose of carrying out maintenance repairs, or to provide spare parts required in the implementation of maintenance work are ceased.
(9) The supply of sound recordings or video recordings or computer software of which the seal was broken by the consumer.
(10) Supply of newspapers or periodicals with the exception of subscription contracts for the supply of such publications.
(11) Contracts at auction.
(12) Car rental services and catering services and hosting services and those associated with leisure activities and entertainment that must be submitted at a date or a specific period.
(13) Contracts for the supply of digital content is not supplied on a tangible medium, and if performance has began with the consent of the consumer prior to approval, he/she would lose the right to return.

These are the same exceptions approved by the European legislature in Article XVI of Directive No. 83/2011, issued on the rights of the consumer.
In the context of the interpretation of the Article (11)(121/21/8) of Law No. 344/2014 from the French consumer law, which is related to contracts in auctions raised another question as to whether products sold through the

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

eBay site (e bay), a site that enables individuals and companies to buy and sell new or used products online in accordance with the highest bid, is or isn't a public auction as described in (121/21/8) of Law No. 344/2014 French consumption and article (16 / k) of the direct consumer rights"[322].

It is worth mentioning that this question arose on the occasion of a ruling by one of the German courts"[323] on November 3, 2004, given that consumer protection requires a narrow interpretation of the concept of the consumer with the exception of the right of return as a tool granted to protect the consumer. The court decided that the consumer who contracted goods on online auctions can experience the same risks as a consumer who purchases goods online. On the contrary, the French eBay site (eBay.fr) prevents exercising the right to withdraw in contracts associated with the auction, except in extraordinary circumstances such as consumer fraud"[324]. It is generally agreed that the opinion favoring the extension of the right to withdraw from sales that take place in online auctions is the most reasonable as these sites serve as a link between the consumer and professional"[325], and additionally because of the abundance of these sites at this time.

322) Sandrine Rouja, Quel droit de Retraction sur le site Internet de vente aux Ench□res eBay edite sur le site Juriscom.net le 08/11/2004, available at: Http://www.juriscom.net/actu/visu.php?ID=597. (16 Nov. 2012).
323) Sandrine Rouja, Ibid.
324) Ibid.
325) Ibid.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5.3.3 The implications of the exercise of the right of withdrawal from a contract

According to the article (121/21/7) of Law No. 344/2014 of consumer law, exercising the right to withdraw ends the obligations of each party. The same was confirmed in the text of Article XII of the Directive 83/2011. This means the termination of the contractual relationship between the professional and the consumer and the consequent obligations of each.

Below this topic is addressed as following:
5.3.3.1. The professional's obligation to return the money paid by the consumer.
5.3.3.2. The consumer bearing direct cost of withdrawn goods.
5.3.3.3 The expiration of all contracts dependent upon the first contract.

5.3.3.1. The professional's commitment to return the money to the consumer

The most important implication of practicing the right of withdrawal is a commitment by the professional to return the money that they may have taken from the consumer. It is what has been emphasized in the text of the article (121/21/4) of Law No. 344/2014 French consumer law, which stressed the professional's obligation to compensate the consumer the total amount paid, including delivery charges without undue delay in no later than fourteen days from the date the consumer informed him of his decision to withdraw"[326].
This has been affirmed by the European legislature on this commitment in

326) Art. (121/21/4), cr □□ par L. n ° 2014-344 du 17 mars 2014, pr □ c., art. 9.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

the text of Article (6/2) of Directive No. 7/97, where the text states that "If exercising the right to withdraw on the part of the consumers, according to this article, the professional is obliged to pay the sums paid by the consumer at no extra cost". Confirmed also in the text of Article (13/1) of Directive No. 83/2011, is that "the professional should repay all costs received from the consumer, including, where appropriate, the costs of delivery, without undue delay. In any event, no later than 14 days from the day on which the professional knows where to refer the determination of the consumer in the contract or any day on which the consumer gives notice for terminating of the contract.

As is clear from the text in article (121/21/4) of Law No. 344/2014 of the French consumer law and the text in Article (13/1) of the new directive, all of which adhere to professional payments reimbursed to the consumer and comprehensive "delivery costs" for any delivered goods. Knowledge of this has stirred considerable controversy regarding the interpretation by the European Court of Justice because Article VI of the Directive No. 7/97 was not referred to explicitly.
However, the European Court of Justice acknowledged in its judgment dated 15 April 2010 that it must be interpreted in the text of Article six (paragraph) one and two in the directive No. 7/97 that it excludes national legislation which allows the professional under the contract to make the consumer bear the costs of delivery of goods in the case of the latter exercising the right to return.

In the interpretation of this decision, the Court explained that these costs are inconsistent with the objectives of Article six of the Directive. In addition to this, it may deprive the consumer from exercising the right to withdraw. This is in addition to the lack of balance in the division of risk between the parties of the contract by the consumer bearing all costs relating to the transfer of goods"[327], as will be explained further in section II of this topic.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

The method of refunding used by the professional is discussed in the text of the article (121/21/4) of the new consumer law, where it states that it should be the same method of payment used by the consumer at the beginning of the contract, unless the consumer expressively uses other means of payment, provided this doesn't cause additional costs to the professional. Additional costs may also be demanded if the consumer choses an express delivery method which is more expensive than the delivery method proposed by the professional"[328].This was also confirmed in the text of Article(13/1)of the Directive of consumer rights CRD.

However, the European legislature did not mention in the text of Article (13/1) of the Directive anything about the professional's responsibility to inform the consumer of their right to demand an immediate cash repayment "[329] and that it is possible not to pay for long periods or to not pay at all. The text from the third paragraph of Article (121/21/4) of Law No. 344/2014 of the French consumer law assumes an interest rate for delays in payment to be paid to the consumer, however acknowledged that the date of payment may not exceed ten days from the expiration of a period of fourteen days stipulated in the first paragraph of this article, which then imposes a 5% increase if the delay is between ten and twenty days, a 10% increase if the delay is between twenty and thirty days, a 20% increase if the delay is between thirty and sixty days, and a 50% increase if the delay is between sixty and ninety days"[330].Note that the text of the article(121/20/1)of Decree No.741/2001 had stated that the amount due shall bear interest but did not specify the interest rate.

---

327) ECJ. Case C-511/08,(Fourth Chamber),15 April 2,010, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0511:EN:HTML (12 May, 2013).
328) Art. (121/21/4), cr □□ par L. n ° 2014-344 du 17 mars 2014, pre c. , Art . 9
329) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ibid., p.12.
330) Art. (121/21/4), cr □□ par L. n ° 2014-344 du 17 mars 2014 prec., art. 9.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The legislature in the European Directive No. 83/2011, as apart from the first paragraph of Article XIII of this Directive, the professional shall not bear any additional costs if the consumer expressively chose a delivery method that is more expensive than the standard way provided by the professional "[331] meaning the consumer must bear these additional costs as a result of his choice.

The legislator added a sentence to the exceptional guidance CRD regarding the obligation of the professional to withdraw in the case the contract is outside the headquarters of the professional. This is the case for contracts in which the delivery of goods in the consumer's home is the moment of conclusion of the contract. In this case, it must be the professional at their own expense who retrieves or collects goods from the home of the consumer, regardless of whether these goods by their nature cannot be refunded by the consumer, including heavy or large items such as living rooms or some electrical appliances"[332].

The question here is about the time needed for the professional to return the customers money?

The Egyptian legislature did not specify in Article VIII of the Consumer Protection Act any period during which the professional is required to refund the consumer. While a CKD French legislature in Article (121/21/4) mentioned that there should be no delay in payment without any justification and shall not exceed a period of fourteen days from the date of informing the consumer of a professional in their decision to go back and impose interest rates on delayed payments by the professional, with a notice that the time period before was thirty days and during that period, the professional was required to refund the amount paid within a period that shall be valid from the date of exercising the right to withdraw"[333].

---

331) Art. (13/2), dir. 2011/83 / EU. Ibid.
332) Joasia A.Luzak –Vanessa Mak, Ibid., p.12.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

This is reversed by the legislature certainly at the best interest of the consumer not to have to wait for a considerable period to be refunded as was the case in the text of the last paragraph of Article (6-2) of Directive No. 7/97 which committed the professional to refund as soon as possible and in any event within thirty days.

The European legislature amended this term in the text of Article (13/1) of Directive No. 83/2011 of consumer rights stating that refunds should be received by the consumer no later than fourteen days from the date of receipt of notice of termination by the consumer. Certainly this period is the duration for ending of the contract and not a statute of limitations period, where this nature derives from the nature of the time needed to exercise the right to refer"[334].

5.3.3.2 The consumer bearing costs of withdrawn goods

The main reason for the consumer bearing the direct costs of the withdrawn goods is that the consumer is the one who made the decision to withdraw from the contract and then bear the consequences of it, including the expenses of the Post commodity to the professional; because the latter was not credited with any default in order to bear these expenses"[335].

Consequently, if the consumer decides to return the product for example due to non-compliance to specifications or failures to deliver on time, then the professional bears the expenses incurred by the consumer to return as well as the corresponding payment to the consumer keeping the consumer's right to compensation for reparation in accordance with the general rules of liability in the contract policy"[336]. Below is an explanation of the position of each legislature to this effect and the position of the judiciary.

---

333) Art. (121/20/1), Ord. n 2001-741 du 23 aoet 2001,Ibid.
334) Mohammed Elmorsi Zahra , Ibid., p.93.
335) Ibid., p.94.
336) Ibid.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

First: legislative and judicial status

The Egyptian legislature did not discuss this effect in Law No. 67 of 2006, while the French legislator emphasized in the text of Article (121/20) of the Excise Act amended the French Decree No. 741/2001, that the consumer can exercise the right of withdrawal, without giving any reasons or incurring any sanctions except for the cost of return. The same was confirmed by the French legislator in the text of the article (121/21/3) of Law No. 344/2014 of consumer law, where the consumer decided to bear only the direct cost for withdrawing the goods unless accepted by the professional to be borne by themselves or failure to inform the consumer to bear these costs. However in the contracts that are entered into outside the premises of the trader or professional where goods are delivered at the headquarters of the consumer, then the professional recovers the goods at his/her own expense if, by their nature, they cannot be returned by the consumer"[337].

It can be seen from the text that several details are not contained in the text of Article (121/20) of the Excise Act amended the French Decree No. 741/2001, are:

(1) The legislature has put a maximum limit for the date that the consumer should return the goods back to the professional, no later than fourteen days, according to the text in question.

(2) The consumer bears the direct costs for returning the goods which are related to the agreement of the parties, "the consumer and professional", the professional has agreed to bear the costs, the consumer may be aware it is not binding that the professional will bear these costs.

(3) The nature of the commodity in some cases may require from the professional accelerated recovery without waiting for a response from the consumer. For example, they are susceptible to damage or loss of authority.

337) deuxi □ me alin □ a: < Art. (121/21/3), cr □□ par L. n ° 2014-344 du 17 mars 2014, prec., art. 9.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

As for the European legislature, they have mentioned this consequence in the effects of the right to withdraw in more than one directive. According to Article 6.1 of the Directive No. 7/97, to bear the direct cost of withdrawing goods is the only responsibility of the consumer for exercising the right to withdraw. The legislature repeated the same phrase in the text of the article (6-2) of the same direction, which expresses the legislature's confirmation.
As for the direction of consumer rights No. 83/2011, it has been allocated in Article XIV to talk about the obligations of the consumer in the event of withdrawal. Namely:
"If only the professional displays commodity by themselves then the responsibility should be on the consumer to send the goods or deliver them or a person appointed by the latter to receive the goods, without undue delay, and in any case no later than fourteen days from the day on which the decision was taken to withdraw from the contract.
The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them. In the case of off-premises contracts where the goods have been delivered to the consumer' s home at the time of the conclusion of the contract, the trader shall at their own expense collect the goods if, by their nature, those goods cannot normally be returned by post "[338].

On the contrary, the side of jurisprudence sees that the right to refer may only be effective if the consumer, when exercising this right, does not bear the cost of sending goods to the professional"[339] especially if the consumer always wishes to avoid these costs"[340].
It was confirmed by a preliminary ruling concerning the interpretation of Article 6 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

---

338) Art. (14/1), dir. 2011/83 / EU.
339) Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ibid., p.13.
340) Marco BM Loos, Ibid., p.23.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

The reference has been made in the course of proceedings between Ms Messner, a consumer, and Firma Stefan Kreger ('Stefan Kreger'), a company which operates an internet-based mail-order business, concerning reimbursement of the sum of EUR 278 following the rescission of a distance contract where the court decided that the right of the consumer to have the opportunity to look at the goods and test them without fear needs to compensate for this career opportunity granted when the consumer decided to return to the contract Community legislation"[341].

Second: use of goods during the cooling-off period

The right of withdrawal is meant to at least enable the consumer to assess the qualities of the goods offered and the consumer must be allowed to test the goods to a certain extent"[342].Although this achieves the benefit for the consumer, it carries some negative effects if a consumer uses the goods during the cooling-off period as it may lead to the depreciation of the goods' value. This is of ten perceived as the main reason why traders would not be willing to grant the right of withdraw alto consumers if it were not a mandatory instrument in European consumer law. Unfortunately ,if traders are forced to provide consumers with the right to withdraw, they are likely to compensate their losses by raising the goods' prices in expectation of consumers exercising their right of withdrawal. However, current European data suggest that not many consumers are using their right of withdrawal. This could result in contracts being less efficient ,if the goods' prices reflect the traders' expectation that the right of withdrawal maybe used, and consumers do not act thereupon. Therefore the consumers' attitude to the mandatory right of withdrawal maybe negative if it unnecessarily leads to the in crease of some consumer goods prices"[343].Also the use of goods during

341) ECJ. Case C-489/07., Pia Messner v Firma Stefan Kreger., European Court reports 2009 P. I-07315, (First Chamber)of 3 Sept. 2009. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0489:EN:NOT (1 May 2013).

342) Marco BM Loos, Ibid., p.23.

343) Joasia A. Luzak, to withdraw or not to withdraw, Ibid., p.27.

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

cooling-off period could render the goods second-hand"[344].

Will Consumers be responsible for the decline in value of the commodity resulting from its use within a withdrawal?

Article (121/21/3) of Law No. 344/2014 French consumer law answered this question where the consumer has decided not to carry the responsibility in the case of decreased value of the commodity resulting from their use in order to determine the nature and characteristics, provided that the professional informs the consumer of their right to consult the text of Article 121/17 of the Act[345].

On the contrary, the text of Article(14/2)of Directive No. 83/2011 consumer right states that "the consumer must be held responsible for any decrease in the value of goods output for use in order to determine its nature and characteristics. The exception to that add-on in the above-mentioned article is the failure of the professional to inform the consumer with information about the existence of the right to consult and the conditions of performance. In this case, the consumer would not be responsible for any decline in the value of goods when they are returned.

In this regard, the directive of the European Court of Justice with the text of Article (14/2) of Directive consumer rights CRD agreed with the text of the article (121/21/3) consumption of the new French law, where the Court confirmed in its judgment dated September 3,2009, that it must be interpreted in the text of Article six (paragraph)one and two in the directive of distance contract No.7/97,as precluding the rule of national law which provides generally that, in the case of a consumer with drawing from the contract within the time limit, a professional can claim compensation for the value of the use of consumer goods obtained by the consumer under the contract made by electronic means.

---

344) Marco BM Loos, Ibid., p.23.
345) Art. (121/21/3), creepar L. n 2014-344 du 17 mars 2014, prec., art.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

In explanation, the Court indicated that to obtain compensation from the consumer as a result of the use of the product, is clearly contrary to the wording of Article (6-1) and (6-2) of the Directive . In particular, depriving the consumer of a chance to become acquainted with the goods contracted independently during the granted reflection period granted can consequently weaken the effectiveness of the right to refer to that in the contract. The court added an exception to this being that if these provisions do not preclude a claim the consumer to pay compensation for the use of goods and take advantage of them in a manner inconsistent with the principles of civil law such as the principle of good faith or unjust enrichment, and provided it is not adversely affected by the purpose of the direction in question, and in particular the efficiency and effectiveness of the right to return.

This means that the right to use the goods during the cooling-off period is limited by the use in accordance with good faith. This suggests that the consumer may use the goods only for a period and in the scope necessary to establish whether the goods fulfil expectations and whether the consumer intends to keep them, or in other words "handling of the goods. necessary to establish their nature, characteristics and functioning" [346].

346)Joasia A. Luzak -Vanessa Mak, the consumer rights direction, Ipid., p.13.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5.3.3.3 The expiration of all dependent contracts

The expiration of all contracts subsidiary to the original contract is the third and final impact of the effects of the right to withdraw in the contract, as stressed the e-text of the second paragraph of Article (121/21/7) of Law No. 344/2014 of consumption, which provides the right to withdraw in distant electronic contracts, ending any subcontracts or subordinate contracts automatically, without incurring the additional cost of the consumer other than those set forth in the materials (121/21/3) and (121/21/5) of this law[347].

The same was confirmed by the text of Article XV of Directive No. 83/2011, which affirmed in the text of the first paragraph of the same article that:

"if the consumer has exercised his/her right of withdrawal in the distant contract according to Articles 9 to 14 of this directive, then it shall automatically terminate any dependent contracts without any costs borne by the consumer except that which is stipulated in Article (13/2) and Article (14) of this directive. The second paragraph of the same article states that Member States should develop detailed rules on contracts, as well as the text of the model contract for the French e-commerce in the case of reverse end credit contracts without penalty, which was also confirmed by the text of Article (6/4) of directive No. 7/97.

This means the ending all contracts related to the original contract, which was concluded between the consumer and professional whether it was linked to it directly or indirectly.

347)le deuxieme alinea Art. (121/21/7), cree par L. n ° 2014 du 17 mars -344 two thousand and fourteen, Ibid., art.9.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

6. Conclusions and recommendations

This study discusses the definition of the consumer in E-Commerce Contracts as well as the concept of E-Commerce, with reference to a number of recent judicial opinions to determine the Consumer protection Act's scope of application. and thus determine the beneficiary of the protection afforded by this law. The study also analyses the widely used E-signature and the arbitrary clauses of E-commerce contract clauses, which are supplied by the professional or the stronger party in contracts concluded where one party is a weaker non-professional compared the stronger professional, as well as referring to a number of recent judicial opinions to determine the legal basis of the consumer's right to withdraw in distance and off-premises contracts, and the extent at which the required conditions to exercise the right to withdraw might restrict the options of the consumer.

This study compares applicable European, French and Egyptian laws and analyzes the directives contained in the text of comparable regulations to help clarify the respective policies behind them and to assess their effects on the consumer and other parties involved in the contract.

<u>The study has come to the following conclusions:</u>

1. Judicial opinions were divided over the concept of the consumer and split into two sides; the first adopted a narrow approach to the concept of the consumer. According to this view; the consumer is he/she who enters into legal actions to satisfy or fulfill his/her personal or family needs and not for professional or trade purposes. The second and predominantly modern judicial view adopted a wider approach to the consumer' s concept arguing that the consumer is classified not only as those who wish fulfill personal or

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

family needs but also those who wish to satisfy professional needs. Supporters of this view find support in article No. 35 of the French law No. 23/7

The modern view to adopt a wider approach of the consumer' s concept to extend the protection over the professional/trader who contracts outside of his/her field of specialization is more widely agreed upon.

2. The Egyptian, French and European legislators all adopted a narrow approach to the consumer's concept, such that the professional who contracts outside of their area of specialization and the juridical person, emerge out of the protection limits provided by the consumer protection law because they do not match the given criteria.

3. Most of the European directives agreed on a single definition for the consumer which is the definition included in the last directive issued regarding the consumer which is the directive No. 83/2011 where the consumer was defined to be any natural person in the contract covered by this directive and acting for purposes which are outside his/her trade, business, craft or profession. The professional was also defined in this directive to be any normal or juridical person, irrespective of whether privately or publicly owned, who is acting, including any other person acting in his/her name or behalf, for purposes relating to trade, business, craft or profession in relation to contracts covered by this directive"

4. Despite criticisms of the Egyptian legislator' s position which fully acknowledged E-Commerce, this study finds that many of the legislations issued to regulate the constitutions of E-Commerce laws and E-Transactions did not include any definition of E-Commerce although the very aim of issuing them was to organize its constitution.

5. The electronic signature has become widely used in financial transactions and trade. Unlike the ordinary handwritten signature, it is a combination of

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

symbols calculated by a computer program that uses a secret key exclusive to the signatory used to guarantee the safety of data. After this study, the following points regarding the electronic signature will be proved:

- Despite the electronic signature differing from the traditional signature, it is capable of providing the same functions in identifying the signatory and the authenticity of the contract.
- The electronic signature is a prerequisite to ensure the reliability of e-commerce transactions and is the foundation upon which electronic documents are exchanged between online traders, playing an important role in increasing security and trust among dealers.
- The electronic signature can enjoy the same legal status as that of the hand-written signature as a result of various legislations granted to provide a legal binding force between the electronic signature and the signatory.

6. The emergence of compliance contracts was one of the most important reasons leading to the creation of arbitrary clauses. Jurists defined the compliance contract as "a contract in which one of the parties submits and complies with conditions set by the other party without being allowed to discuss them, relating to commodities or essential services which are subject to legal or actual monopoly or where competition is very limited in the relevant field. This means that the connection between a compliance contract and a commodity or essential service is considered as important a priority to the consumer as water, electricity or gas.

7. In a compliance contract, one of the two parties must be in a strong financial position as a result of enjoying legal or actual monopoly which emphasizes its superiority and ensures it continuity.

8. The acceptance in compliance contacts is directed generally and permanently to unspecified/anonymous individuals for unlimited periods of time, and usually issued in a stereotypical form by using sophisticated

Collection @ chosun

조선대학교 CHOSUN UNIVERSITY

language that is hard to comprehend by the consumer. It usually also contains many conditions that all point in favor of the dominant party and the consumer is to accept them all or refuse them.

9. In practical terms, one cannot discuss arbitrary clauses in the contract without assuming the inequality between the parties of the contractual relationship which can result in the imposition of the stronger party over the weaker one. These are seen as conditions which serve the interests of the stronger party free of charge, so if there is no stronger party in the contract then there will be no arbitrary clauses.

10. The arbitrary clause is also an unacceptable condition which provides the professional with an advantage over the consumer

11. The basic rationale for having the right to withdraw in distance contracts is due to the vulnerability of the consumer especially as the consumer does not see the goods when making the distance contract. If one considers the risks involved in the process of consumer production and the risks facing the consumer during consumer relations, then the reason for the legislation to find a way to protect the consumer in consumer relations through the internet becomes clear, as the need for the withdrawal right is meant to protect the consumer from making rash decisions as well as against aggressive commercial practices. As a result this takes away cross-border trade barriers, and encourages the consumer to use the Internet in the procurement process

A. The right to withdraw abolishes the contract retrospectively to the day on which the contract was concluded.

B. The consumer has not ordered the product in the online shop. That means that the consumer must return the product at his/her own expense to

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

the trader and the trader must refund the total price of the product within 30 days at the latest. The total sum paid by the consumer includes the purchase price and the cost of the original delivery to the consumer, according to the judgment C-511/08 of the European Court of Justice Communities.

C. The right to withdraw is a compensating tool for not being able to physically check and try the product before purchasing it. Finally, the study shows that there is a need for additional legislations in Egyptian law to resolve many problems that the research uncovers manifesting a general lack of governmental interest in consumer protection. This deficiency in Egyptian law is in contrast to the more progressive legal instruments authorized under French law after the issuance of the new French law of consumption No. 344/2014. In conclusion, the study recommends that Egyptian legislators rectify this shortcoming and modify the text of Egypt' s Consumer Protection Act to balance the consumer's interest with the interests of other contracting parties.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

7. References

1) Mohamed Al Morsi Zahraa, Civil Protection of the E-Commere,2008 .

2) Mohamed Saad Khalifa, The Problems of Selling Through the Internet, 2004.

3) Hassan Abdul Basset Gemiey, Spcial Protection for the Satisfaction of the Consumers in the E-Commerce Contracts, 1996.

4) Nabil Mohamed Sobh, Consumer Protection in the Electronic Transactions, 2005.

5) Kilani Abdulradi Mahmoud, the Consumer's Concept as a base to specify the Limits of French Consumption Legalization's Application, 2005.

6) Youssif Shendi, The legal Concept of the consumer, analytical comparative study, 2010.

7) Alsayed Mohamed Alsayed Omran, Consumer's Protection during forming the contract, a comparative study, 1986.

8) Omar Mohamed Abdulbaki, Contractual Protection of the Consumer, a coparative study, 2004.

9) Jean Galais - Auloy, Linfluence du droit de la consommation sur le droit civil des contrats, 1994.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

10) Kawthar Saeed Adnan Khaled, Protection of the E-Consumer, Ph.D. Thesis, 2010.

11) Khaled Mamdouh Ibrahim, Consumer's Protection in the E-Contract, 2008.

12) Hamad Allah Mohamed Hamad Allah, Protecting the Consumer against the Abusive Conditions in the Consumption's Contract, 1997.

13) Mohamed Shoukry Srour, E-Commerce and the Means of Consumer Protection, a research presented to the Legal and Security Aspects of the Electronic Transaction, 2003.

14) Osama Ahmed Badr, Consumer Protection in the E-Contracting, a Comparative Study, 2005.

15) Ayman Saad Slime, The Abusive Conditions in the Contracts, a Comparative Study, 2011.

16) Lucas Bergkamp and Serge Clerckx, Hunton & Williams, Electronic Commerce in Europe, Christine Riefa, The reform of electronic consumer contracts in Europe, towards an effective legal framework. Lex Electronica, 2000.

17) Christine Riefa, The reform of electronic consumer contracts in Europe, 2009.

18) Jean-Raymond Fayat, frederik nevejan and Fredrik. Nordquist, Consumer confidence in Ecommerce, 2001.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

19) Hisham Tahat, factors affecting E-Commerce contract law, 2005.

20) Faysal Mohamed Mohamed Kamal, the legal protection for the E-Commerce Contracts, a Ph.D. thesis, 2008.

21) Khaled Mamdouh Ibrahim, Concluding the E-Contract, 2006.

22) Mohammed Zaheeruddin. Evidentiary Value of Electronic Transactions, the electronic transactions conferece in U.A.E, 2009.

23) Iman Mamoun Ahmed Soliman, concluding the E-contract and proving it, the legal aspects of the E-Commerce's Contract, 2008.

24) Hassan El Hifny, The electronic trade in the Arab world.

25) Yee Fen Lim B.Sc, Digital Signature, Certification Authorities and the Law,2002.

26) Ali Said Kassiem, some legal sides for the electronic signature, 2002.

27) Maitre Valerie Sedallian, Preuve et signature electroniqu, 2000 .

28) Ibrahiem eldessuqui abou ellile- legalizing of the e-commerce transactions, 2003.

29) Osama Abdul Aziz Ruby the proofing of the electronic signature in evidencing, 2009.

30) Nazzal M. Kisswani, Anas A. AL Bakri, Regulating the Use Of Electronic signatures Given The Changing Face Of Contracts, 2010.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

31) Tamir Mohamed soliman eldemiatti-proving the e-commerce transactions through the internet - comparative study,2009.

32) Virginie Etienne, le development de la signature electronique,2011.

33) Julien Esnault, la signature electronique, annee, 2003.

34) Ayman saad selim / the electronic signature - comparative study,2004.

35) Mohamed ahmed Mohamed nour gestinia - the extent of proving the electronic signature in the electronic trade contracting- PHD thesis, 2005.

36) Maitre Cyril rojinsky signature electronique" le decret et la loi devront etre completes articles, 2001.

37) Ayman Saad Slime, Abusive Clauses of Contracts, comparative study, 2011.

38) Hamad Allah Mohamed Hamad Allah , Consumer Protection in Facing the Abusive Clauses and Conditions in the Consumption Contracts, 1997.

39) Mohamed Ibrahim Bindary, Protecting the Consumer in the Compliance Contract, 1998.

40) Atef Abdulhamid Hassan, Consumer' s Civil Protection against the Abusive Clauses, 1996.

41) Abdulmonim Farag El Sadah, the Compliance Contracts in the Egyptian Law, Jurisprudence and Legal Comparative Study, Ph.D. Thesis, Faculty of Law, 1946.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

42) Luc Audet, Le Contrat Dadhesion Caracteristiques et consequences Juridiques.

43) Brigitte Lefebvre, Le Contrat D' adhesion, La Revue du Notariat, Montreal, 2003.

44) Abudlhaq Himish, Eclectronic Consumer Protection, a Research Presented in the Electronic Banking Works Between the Sharia' and Law, Chamber of Commerce and Industry, 2003.

45) Abdulfatah Bayoumi Hegazi, The Legal E-Commerce Protection System, 2001.

46) Omar Mohamed Abdul Baki, the Contractual Protection of the Consumer, a Comparative study between the Shariat and the law, 2004.

47) Ruth Atkins, Unfair Terms in Computer Contracts, 2005.

48) Saeed Saad Abdulsalam, The Contractual Balance in the Compliance Contracts, a Comparative Jurisprudence Study, 1998.

49) Annalies Azzopardi, The contribution of Eu Directives to The Objective of Consumer Protection, 2012.

50) Omri Ben-Shahar and Eric A. Posner, The Right to Withdraw in Contract Law, 2010.

51) Ibrahim Dessouki abu elil, withdrawal from the contract to protect the satisfaction, 1985.

52) Marco BM Loos, Rights of Withdrawal, CSECL, 2009.

53) Horst eidenm eller , Why Withdrawal Rights, 2011.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

54) Joasia A. Luzak –Vanessa Mak, the consumer rights direction, 2013.

55) Joasia A. Luzak, to withdraw or not to withdraw? evaluation of the mandatory right of withdrawal in distance selling consumer contracts taking, into account its effects on Behavioral Consumers, 2013.

56) Youseph Shendi, The impact of the consumer's choice to withdraw from the contract to determine the moment of making the contract, 2010.

57) Khaled Mamdouh Ibrahim, consumer protection in the e-contracts.

58) Ahmed Saeed Zqird, the buyer's right to reconsider the sales contracts through TV, 1995.

59) Andreia – Roxana Macsim, The New Consumer Rights Direction, The Maximum Harmonisation A Comparative Law And Economics Analysis Of Effects On Consumers And Businesses. The case of the cooling-off period from online contracts, 2012.

Websites:

1) http://www.alealaw.com/16845-topic (25.june.2012).

2) http://master.scienccespo.ft/droit/site/master.sciencepo.fr.droit/files/users audeepsteinvuln%C3%A9rabi.lit%C3%A0%20droit%20la%consommation.pdf.(25,Jan.2012).

3) http://eur-lex.europa.eu/LexUriServ/LexUniiServ.do?uri=O.J:L:2011:304:0064:01:En:HTML(23.Dec.2011).

4) http://eur-lex.europa.eu/LexUriServ/LexUniiServ.do?uri=O.J:L:2011:304:0064:01:En:HTML(1.Jan.2012).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

5) http://questions.assemblee-nationale.fr/q12/12-54125E.htm. (29.May.2012).

6) http:/charlesd.monjournalweb.com/contenus-b1/la-definition-du-consommateur-b1-p7.htm (19.April.2012).

7) http://www.jurismuga.org/html2pdf/pdf/21052012140350.pdf(28.july.2012).

8) http:www.clauses-abusives.fr/juris/ccass050315f.htm. (30.Jan.2013).

9) http://www.casydroit.fr/jurisrudence/lere-chambre-civile-2-avril-2009-LA-COUR-DE-ASSATOPM-PREMIERE-CHAMBRE-CIVILE-A-RENDU-1-arr/C122164 (3.june.2013).

10) http://www.hunton.com/files//publication/8a4273b0-5c0e-4e2b-a1d6-20a120adef70/presentatio/publication/attachment/2fba156f-7524-4260-bfbb-a4a8cdc49074/electronic_contracting.pdf(11.Mar.2012).

11) http://www.lex=electronica-org/docs/articles_244.pdf (12.Oct. 2011).

12) http://www.bileta.ac.uk/content/files/conference%20papers/2001/Consumer%20Confidene%20in%20E-Commerce.pdf (27.Feb. 2012).

13) http://www.oft.gov.uk/shared_oft/consultations/eprotection/OFT1252.pdf. (4.sep. 2011).

14) http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&fastPos=2&fastReqId=566190513&categorieLien=id&oldAction=rechTexte. (20.Nov. 2012)

15) http://www.legislation.gov.uk/uksi/2000/2334/pdfs/uksi_2002334_en.pdf (20.May.2012)

16) http://www.bileta.ac.uk/document%20Library/1/Factors%20Affecting%20E-%20Commerce%20Contract%20Law/pd. (21.Jan. 2012).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

17) http :// Murdoch .edu,au/elaw/issues/v9n3/lim 03nf.html(29.April.2013).

18) http//eur-lex. Europe .eu /Lex uriserv/;exuriserv.de?uri"= 3 1999l0093:en: HTML.(20.Jan.2012).

19) http "///www.a;elexalaw.com/t6845-topic (27.Mar.2012).

20) //www. Legifrance . gouv.fr/affichtexte . de ?cid texte-=legitext000005630796(l8.Des.2012).

21) http://www.businessandeconomics.mq.edu.au/our_departments/accounting_and_corporate_governance/docs/publications/past_editions/volume_7/04 Kisswani.pdf(8.April.2013)

22) http //www.law,upenn,edu/bll/ archives /ulc/ecom uetaq final .pdf (5 Mar.2012)

23) http://www.signelec.com.le21juillet2003/ (5.Feb.2012).

24) http :/www/juriscom.net /pro82/ce20010419.htm (11.Jan.2013).

25) http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&fastPos=2&fastReqId=566190513&categorieLien=id&oldAction=rechTexte (20.Mar.2012)

26) http://eur-lex.europa.eu/LexUriServ/LexUriSery.do/uri=CELEX-31993L:en:HTML
http//www.droitdespme.com/documents/contract-adhesion.pdf (18.june.2012).

27) http://www.easydroit.fr/jurisprudence/Cour-de-Cassation-Chamber-civile-1-du-4-mai-1999-97-14-187-Publie-au-bulletin/C40482/ (13.April.2014).

28) http://bileta.ac.uk/content/files/conference%20papers/2005/Unfair%20terms?20in%Computer%20Contracts.pdf. (29.Mar.2012).

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

29) http://www.alexalaw.com/t6845-topic. (27.May.2012).

30) http://www.courdecassation.fr/publications_26/rapport_annuel_36/raport_2006_2284/quatrieme_partie_jurisprudene_cour_2293/ativites_economiques_commercials_financieres_2307/protetion_consommateurs_10031.html (13.JULY.2014).

31) http://curia.europa.eu/juris/celex.js/celex=62008CJ0243&lang1=en&type=NOT&ancre. (9.June.2013).

32) http://curia.europa.eu/juris/celex.jsf/celex=62002CJ0237&Iang1=en&type=NOT&ancre.(29.MAY.2013).

33) http://curia.europa.eu/juris/celex.jst/celex=62008CJ0137&Iangle=en&en&type=NOT&ancre. (10.June.2013)

34) http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/ice_uploads/pdf/issue2/6b-2012.pdf (23.May.2013)

35) http://home.uchicago.edu/omri/pdf/articles/Right_To_Withdraw.pdf (3.Mar.2011)

36) http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1,350,224. (8.April .2013).

37) http://www.degruyter.com/view/j/ercl.2011.7.issue-1/ercl.2011.1/ercl.2011.1.xml(10.Feb.2013).

38) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192603 (7.Mar. 2013).

39) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243645. (24.N2013).

40) http://www.alexalaw.com/t6845-topic. (18.April.2012)

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

41) http://pure.au.dk/portal-asb-student/files/44659752/Thesis.pdf (6.April.2013)

42) http://www.alexalaw.com/t6845-topic(25.June.2012)

43) http: // Eur- lex. europa. eu / LexUriServ / LexUriServ.do? uri = CELEX: 31985L0577: EN: HTML. (12.Jan.2012).

44) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:en:HTML . (18.Nov.2011)

45) http://eur-Lex.europa.eu/LexUriServ/LexUriServ.do?uri = CELEX: 32002L0065: EN: HTML . (22.Feb.2012).

46) http://eur-Lex.europa.eu/LexUriServ/LexUriServ.do?uri = CELEX: 32002L0065: EN: HTML . (22.Feb.2013).

47) Http://www.juriscom.net/actu/visu.php?ID=597. (L V. 16 Nov. 2012).

48) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0511:EN:HTML . (12.May.2013).

49) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0489:EN:NOT , (11.feb.2013)

Laws:

1) The France Civil Law.

2) Consumer law of France.

3) Consumer law of Egypt.

4) The Egyptian Civil Law .

5) The Electronic Signature Law of Egypt.

6) The Omani law of electronic transactions.

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

7) The Saudi law of electronic transactions .

8) The Qatari Law of trade and electronic transactions.

9) The Palestinian law of electronic transactions.

10) The UAE Law of transactions and e-commerce.

11) UNCITRAL Law of Electronic Signatures.

12) European Directive .

13) EC Of The European Parliament And The Council Of The European .

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

Abstract

A Comparative Study on Consumer Protection in E-commerce Transactions

Yehya Hossen Ali
Advisor: Kwon Sang Ro
College of law, Chosun University

Modern legislations now focus on consumer protection in E-commerce as consumers generally represent the weaker party of the contract. Although general laws of the civil legislation did not provide adequate protection to the consumer, recent legislations have come up with more means of consumer protection in both pre and post contracting stages. Ideas surrounding consumer protection have existed for a long time but there has been no legal agreement or consensus regarding the definition of the consumer.

This study is divided into four chapters with the first chapter dedicated to discussing the definitions of the consumer and concept of E-contracts on a legislative and judicial level according to the Egyptian and French laws as well as the European Directives. This chapter will also touch upon the E-Commerce Concept and how it is linked to specifying the definition of the consumer.

The second chapter discusses the electronic signature in E-commerce transactions and the growing importance of E-signatures in replacing hand written signatures in terms of documentation and authentication in E-commerce transactions. This chapter will deal with the concept of the electronic signature and the extent of proving its authenticity, as well as the

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

documentation of the electronic signature with an outline of the role authentication agencies have to play. It will also discuss the varying forms and conditions of the electronic signature in light of international efforts and comparative legislations. Comparisons are also made in the Egyptian and French legislations as well as a number of European directives and legislations.

The third chapter discusses the arbitrary clauses of E-commerce contracts supplied by the professional or the stronger party in contracts concluded where one party is a weaker non-professional compared the stronger professional, with aims of realizing the interests of the non-professional at the expense of the other party. Compliance Contracts include arbitrary clauses and the emergence of compliance contracts was one of the most important reasons leading to the creation the arbitrary clauses. As a number of researchers have claimed it is the fertile field on which arbitrary clauses appear.

This chapter explains the meaning and features of the compliance contract briefly, then goes on to explain to what extent E-Commerce Contracts along with compliance contracts can be considered by the consumer. It also analyses the meaning of arbitrary clauses and its invalidity. Finally, the study will present the constitutions of arbitrary clauses in E-Commerce contracts and how to resist them.

The fourth chapter discusses the consumer's right to withdraw from E-contracts and explains the legal nature and concept of withdrawing from contracts as well as the extent of its binding force impact on the contract. This chapter will also discuss online distance or off-premises contracts which have now become one of the most internationally widespread forms of legal agreements. The vast development and progress of modern means of communication has contributed to the increased use of these types of contracts, which has in turn widened the scope of issues connected to their

Collection @ chosun

조선대학교
CHOSUN UNIVERSITY

usage, such as the consumer's right to withdraw, the legal nature of such agreements and their binding force, and post-contract rights of retreat and its implications.

This study compares applicable European, French and Egyptian laws and analyzes the directives contained in the text of comparable regulations to help clarify the respective policies behind them and to assess their effects on the consumer and the other contracting party. Following this, court opinions and other judicial trends will be reviewed with respect to many issues that have been brought up in this research. Particular attention will also be paid to Arab laws and articles which serve to regulate electronic transactions.

Collection @ chosun