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INVESTIGATING THE PERFORMANCE VALIDITY OF COMPUTER AS THE ELECTRONIC REPRESENTATIVE

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ABSTRACT

In line with unifying Iran's law with the cyberspace, the present study aims at investigating the computer's legal performance in producing, sending, receiving, storing and/or processing the data message. Although there exists no discrepancy between the 1996 model law contents of electronic commerce in UNCITRAL and the 2005 Convention on the use of electronic communication in International contracts with Iran's domestic Electronic Commerce Law regarding the legal performance of computer, the computer performance is experiencing challenging conditions in such a manner that until before the attribution of data message, it has been exclusively following the lead of the general international law and not a trace of law contradiction has been detected but an essential challenge has occurred in the electronic contracts resulting from the computer performance after the attribution of data message. That is because the emergence of conflict in the international electronic contracts is a sure thing. The appropriate solution for the removal of the extant challenges and gaps in Iran's electronic commerce law is to be sought in joining the convention on the use of electronic communication in the international contracts as specified by UNCITRAL in 2005. Iran's electronic commerce law, as well, can be enforced for the domestic electronic contracts.

Keywords: Computer System, Legal Performance, Data Message, Attribution, Contract

INTRODUCTION

Nowadays, parallel to the implementation of the ideal objectives specified in chapter nine of UN charter regarding the international social and economical cooperation for IT progresses and advancements in all of the countries, it is necessary to offer scientific researches for solving the problems and ambiguities pertaining to the installation and application of computer systems (Sabri, 2003, p.72). In line with this, UNCITRAL, in its codification and introduction of model laws and conventions to make the electronic transactions effective and credible and also to offer proper patterns for legislation in domestic laws of the other countries has put considerable efforts into electronic law development.

Considering different perspectives is of a particular importance in analyzing computer systems in various legal systems in novel researches on the law (Shiravi, 2008, p.56). Our goal in performing the present descriptive-analytical research is to identify the distinctions and similarities of the rules and regulations pertaining to computer systems' performance in various legal systems so as to examine how the legal performance of the computer has been and what conditions govern it in each of the studied legal systems. We are seeking to figure it out whether

there is any challenge in the computer legal performance or not and how the challenges, if any, can be resolved?

There are numerous researches performed in the international law for justifying the legal performance of computer as the electronic representative in signing contracts via the websites and elaborating the validity of the contracts signed in this way. Theories like compromise in the specificity of the intention for every contract, the unilateral obligation, adoption of objective perspectives in justifying the intention for signing a contract by an electronic representative, electronic representative as the legal person, electronic representative as the real person and as the representative possessing the website, electronic representative as the website agent having no legal personality and as the slave or the same slavery theory have all been offered in justifying the personality, performance and the effects of electronic representatives (Brefield, 2005, p.121; Chopra, 2000, p.20; Miguel, 2000, p.307).

The common result of the conducted research was that the expressed and the default joint volitions of the real persons take place in two stages via the computer (Gholizadeh, 2000, p.45). The first stage includes the entire virtual actions taken in line with generation, dispatch, reception and storage of the data message that are not attributed to any other individuals. In the first stage, the computer's legal performance is devoid of any legal effects. Therefore, the regulation contradictions, as well, cannot take place in this stage. But, the second stage of the computer legal performance, i.e. after attribution of data message, the regulation conflicts arise. The current research paper tries to suggest an appropriate solution for preventing the emergence of regulation conflicts in the second stage of the legal performance. Now, in the continuation of the discussion, we deal with putting forth the data and information and analyzing each of the abovementioned stages in the upcoming sections:

Criticizing the Various Perspectives in Analyzing the Computer's Legal Performance:

- ***Computer's Legal Performance Analysis before Attributions to Legal and Real Persons:***

Until before the attribution of data messages, the virtual legal actions do not obey the general rules because in this stage the data messages are merely digital-electronic signals offered in an applicable form of algorithms or hierarchical branches of the calculated and logical data. Programming is carried out based on the formation of these algorithms in a computer (Mitchew, 2014, p.110). It is corresponding to these same programs that the individuals' decisions are transferred to one another in complicated states (Fayzi Chakap, 2004, p.76). Algorithms act like human brain's nerve cells and communicate various forms of messages for getting different orders done. The task is carried out by special and technical software and hardware techniques. All these interventions, though featuring technical traits, are qualified by the rules and regulations in terms of the importance of the issue that are modeled following the sample rules of the international law (Corper, 2001, p.13).

Unattributed data messages are more like a signature-less writing that is not owned or addressed at any specific person or, in other words, it is as the internal imaginations and thoughts of real persons that have no particular stance or position in the emergence of contracts or agreements as required to be in common law and in legal world. However, they exist in the bottom of the issues and are the preps to an emergence. That is because it is the emergence of volition and attribution that play the decisive and final roles in the creation of contracts or agreements. Therefore, the mere existence of an internal volition does not suffice the formation of contracts but they are deemed necessary (Andrade, 2007, p.204). Data message, as well, is an unbound



issue that has not been suspended on any certain individual unless it is attributed because it is not clear who has created it. Such a data message is considered as nothing in the legal world (Fayzi Chakap, 2004, p. 45). So, a signature-less and unattributed data message does not hold anyone liable quite the same way that an unsigned writing does not hold anyone responsible or accountable. Resultantly, according to the position that data message (a piece of document with an original signature) enjoys in the domestic and international law, it is only processed in compliance to a piece of writing, a certain utterance or some sort of reference in Iran's traditional law and it is also envisioned as a means of expressing volition. Traditionally and commonly, the utterances, references and writings have been the tools of expressing the volitions by the real persons and were served as methods of demonstrating one's volition rather than specifying the volition expression (Ghasemzadeh, 2006, p.10).

- ***Analyzing the Computer's Legal Performance after Real or Legal Persons' Attributions:***

When a message data is attributed to a real or legal person, it will be transformed to a real legal action that is accompanied by different outcomes and effects under various domestic and international commercial and noncommercial circumstances. That is because, despite being influenced by the conventions and the international model law, domestic statutory provisions or international private law (rules contradiction) interfere in their interpretation depending on the domestic or international conditions and expediencies (Gholizadeh, 2007, p.54). Generally, the creation of legal relationships in the internet environment, especially in regard of signing contracts and in line with the principles of volition domination and freedom of contracts, does not obey any specific forms or formalities as long as it is not against other rules and the stated wills of the parties (Rawls, 2000, p.22; Jennifer E. Hill, 2006, p.35).

- ✓ ***The Legal Position of Computer's Performance After Attribution in Iran's Law:***

To validate the computer's legal performance after its being attributed to other persons, the Article (30) of Iran's Electronic Commerce Law can be the base of documentation. This statutory provision stipulates that "after attribution, the legal effects, confirmation of reception and the time and place of dispatching and receiving the data message, as specified in chapters two to four of the law, as well as the data message contents obeys the general regulations". Corresponding to the Article (18) of Iran's Electronic Commerce law, the data message is attributed to the originator in the following cases: 1) if it is dispatched by an originator and/or by another person who has been allowed to do so; 2) if it is sent by a programmed information system or via an automatic operation scheduled by the originator. It is stated in the Article (19) of the same law that "the addressee has the right to consider the data message that is sent based on one of the following conditions as dispatched and therefore take necessary measures accordingly according to such an assumption: 1) a method has been previously introduced by or agreed with the originator that makes it clear that the data message is the same one dispatched by the originator; 2) the data message received by the addressee is originated from the interventions of an individual whose relation with the originator or his representatives has made the aforementioned person have access to a method used by the originator and hence realize the data message as his own message". In such a case, the addressee has the right to consider it sent by the originator and act correspondingly according to such a presumption. Based on Article (20) of Iran's Electronic Commerce Law, "the article (19) does not incorporate the cases indicating the delivery of the message sent by persons other than the originator or sent by mistake". It is asserted in Article (21) of the law that "every data message is to be recounted a



separate and independent one unless it has been made evident that the data message is a newer version of the original data message". According to the Act (9) of Iran's Constitution and based on Articles 10, 975 and 217 of Iran's civil law, the computer's performance direction should be a legitimate one. The computer should not be designed and programmed for performing illegal operations and unlawful processes against the public order and virtuous moralities.

Computer is enumerated as an incapacitated individual and it is not an independent person. It is expressed in Article (213) of Iran's civil law that "any transaction by an incapacitated person is devoid of any effect". This legal article means that "the transactions by the incapacitated persons can take effect in case they are under the control or in compliance with the decisions and the discretions and the final certification of their guardians or custodians". As for the computer, as well, the criteria have been unified and the same conclusion has been reached that the computer performance in generating, sending, receiving, storing or processing data message, both before attribution to legal or real person or afterwards, is authentic in case it is under the control of website owner. Computer is also considered somehow as an incapacitated individual in its virtual sense because, according to Paragraph (M) of the Article (2) of Iran's Electronic Commerce Law, computer does not possess an independent personality and it is under the control of the other real or legal persons. Generally, in discussions on attributing the interfering measures to the computer owner, all such intervening measures are attributed to the owner in case it is accompanied by the owner's prior or posterior certification otherwise the interfering individual's actions are invalid. Apparently, the performance similarity between the computer and the real interfering person is to the extent that the computer's performance can be considered as a sort of agency or officious intermeddling in its virtual sense. This is a sort of agency whose actions takes effect and becomes original with the permission and certification granted by the website owner otherwise the virtual legal actions of a computer are rendered invalid.

✓ *The Legal Position of Computer's Performance After Attribution in International Law:*

Concerning the commercial activities, it is stated with an extensive interpretation in the footnote to the Article (1) of the electronic commerce model law that "there are issues that stem from relations more of a commercial nature, whether they are conventional or nonconventional. The relations featuring a commercial nature encompass but not limited to the followings: every commercial transaction for the preparation or exchange of goods or services, distributional agreements, agency or commercial representativeness, commissioning work, leasing, factory manufacturing, engineering counseling, license issuance, investment, financial affairs, banking, insurance, agreements pertinent to the exploitation or assignment, participation and other forms of commercial or industrial joint ventures, goods or passengers' transportation by air, sea, railroad or road". It is true that the noncommercial transactions stay outside the inclusion circle of this model law's enforcement, the states can expand the scope of the model law's enforcement to be used for the electronic commerce in noncommercial activities, as well, as a specimen for transactions between electronic commerce users and the public qualified authorities. Regarding the consumers' transactions, the model law has not excluded such types of transactions from its inclusion circle and since certain rules are likely to be enacted by some countries for supporting the consumers, the domestic rules that are preferred over the model law's regulations are not envisaged as obliterating the rules that are approved to protect the consumers. In this regard, it is up to the governing rules to determine which individuals or institutions are generally intended



by the term consumer (Alsan, 2005, p.189). Paragraph (1) of the Article (4) of the aforesaid law points to the principle of the parties' independence and freedom in signing contract that is generally accepted in the majority of the legal system and it is stated that "the regulations pertaining to the third part can be changed upon reaching an agreement between the parties involved in generating, dispatching, receiving, storing or processing the data messages in any other method except for what has been stipulated in another form". The reason why the principle of 'parties' independence' has been inserted in the model law is that the legal barriers are predominantly expressed in the area of contracts signed in electronic spaces and this important principle of contract rights has been included due to the same reason. But, this legal article only prescribes the possibility of changing the third part's regulations within the framework of an agreement reached by the parties and it pertains to the communications via data messages and there is not made any talks of cases like formation of contracts and changing the entire model law's regulations has been rendered impossible (Reza'ei, 1999, p.34). The reason behind such a prescription is that the second part speaks of the conditions required for the validation of such constraints as the documents being in written form, endorsed and original and these are the issues that are enumerated as imperative rules in the domestic regulations for such reasons as preservation of public order (Zuyeh Linan, 2009, p.21). However, the model law respects in Paragraph (2) of the Article (4) the parties' rights for correcting the legal regulations specified in the second part via an agreement reached by the parties. Thus, if the parties are granted full authority so as to digress from the specifications of this part of the model law through reaching an agreement, the model law's efforts for resolving the legal barriers in electronic transactions are rendered fruitless (Akhlaghi, 2011, p.54). Of course, this does not mean that the model law recommends the governments to enact stricter conditions. Computer's legal action, post-attribution, becomes part of the real or legal persons' legal action. Drawing on the Article (30) of Iran's Electronic Commerce Law, computer's legal action follows the general regulations and, in the meanwhile, it will be in accordance with the Article (190) of Iran's civil law regarding the essential conditions required for the authentication of the transactions (Fayzi Chakap, 2004, p.55). These documents and reasoning correspond to the Article (3) of Electronic Communication convention, on the parties' domination of volition, Article (11), stipulating calling for obligation requirements, Paragraph (H), on the business place, Article (6), on the parties' location, Article (10), on the time and place of sending and receiving the electronic communications, Article (9), on the requirements pertaining to the contracts' forms, Article (12), on the use of automatic texting system for the formation of contracts, and the Article (13) on the existence of contractual conditions.

Emergence of Challenge in Computer's Legal Performance in Iran's Law:

Explanations are needed regarding the computer's legal performance outcomes, after attribution of the data message to real or legal persons, when leading to the creation of an electronic contract. There is no conflict in case that the electronic contract is of a domestic nature and the general domestic regulations of the contractual rights govern it. In case of the regulation conflict occurrence in transnational lawsuits pertaining to the electronic contracts, it has to be mentioned that the primary source of conflict is Iran's joining of the groups having written laws. The legal article pertaining to Iran's regulation conflict is Article (968) of the civil law that knows a contract obedient to the laws of the place where it is signed. But, this statutory provision is practically made infeasible in the international commerce arena. Two persons are quite likely



to meet one another in a country and sign a contract while having no intention to accept the domination of that country's law. Moreover, powerful countries, possessing technology and making a lot of money through producing technology, though having devised interesting regulations in support of their own merchants enact regulations the majority of which safeguards the interests of themselves. Even though Iranian merchants sign contracts in Iran with a country possessing technology and leave blank the governing regulation part, they practically gain no benefit in doing so because the foreign courts realize the local rules of the contract-signing place as governing the contract in case problems arise. Thus, leaving unselected the governing rule is not to the benefit of the Iranian party.

Offering a Solution for Preventing the Emergence of Challenge in Computer's Legal Performance:

The solution that can be offered is not practically a legal solution alone. Efforts should be made to strengthen and render more dynamic the country's economy so as to appear powerful in the contracts. Until such an important issue is actualized, it is better to identify the laws of an unbiased and impartial country and announce it as governing the international contracts so the merchants can be better helped in their accomplishment of transactions and commerce. Or, the electronic contract safety can be guaranteed via establishing in-contract stipulations so that we can avoid signing electronic contracts in worries and ignorance of not knowing what to do when problems come about. The regulation conflicts originally stem from the "spatial proximity principle". Based thereupon, the law governing the form and the nature of contractual claims is the law that is most closely spatially related to the contract of dispute. This principle has been manifested in regulation conflict cases as an example called "contract-signing location rules' predominance", "contract implementation location regulations' predominance" and "contract drafting location rules' predominance". The material manifestations are the factors of spatial relationships the necessity for the recognition and enforcement of which is the determination of a place for relying on these examples. But, in virtual space that there is no such a thing as real location, how can the law governing the form and the nature of the electronic contracts be determined through the communication factors? Essentially, what law governs the form and the nature of these contracts? As it was mentioned, if an electronic contract is deemed as being of a domestic nature, Article (968) of Iran's civil law is the proper criterion for the determination of the predominant law. But, according to the characteristics of the electronic contracts such as the absence of boundaries and also because no such a thing is possible as the delimitation of the boundaries, the truth is that we will encounter an essential challenge in specifying an appropriate law for a really international electronic contract. So, where should be a solution sought? It seems that the existent legal gaps regarding the international electronic contracts can be filled with Islamic Republic of Iran's joining to the Electronic Communication Convention and then the convention will rule the contracts. Iran's Electronic commerce law can then be enforced on the domestic electronic contracts.

CONCLUSION:

Concerning the legal performance validity of the computer as the electronic representative of the real or legal persons, there is no discrepancy amongst the contents of the electronic trade



model law and the convention on the use of electronic communication with Iran's electronic commerce law. The aforementioned convention has been originated from a common source, to wit the model law contents of electronic commerce in UNCITRAL. Computer is commonly seen as an electronic tool in Iran's law and in international law and its performance is devoid of any legal effect unless the data messages produced are attributed to real persons.

Generally, no conflict arises between the domestic and international regulations before the attribution of data message in regard of the nature and the performance of the computer. But, essential challenges come about after the attribution of data message to real or legal persons when electronic contracts are concluded in such a manner that explanations are required to be made concerning the electronic contracts. So, no conflict occurs in envisioning an electronic contract as domestic and the domestic general regulations of the contract rights govern the electronic contracts, as well. But, when a contract is considered an international electronic agreement, the regulation conflicts will definitely happen. Although resorting to the conflict resolution regulations specified in the international law can be a solution, the more appropriate solution for Iran's law and the law of any country faced with such regulation conflicts in actual computer performance lies in recommending these countries to join the convention on the use of electronic communications in international contracts. It is in this case that the country's legal gaps in regard of the international electronic contracts will be bridged and the convention will rule these contracts. Iran's law is evidently no exception to the issue. Although Iran's electronic commerce law regarding the domestic electronic contracts acts as the criterion of action, Iran's joining of the abovementioned convention will be a very appropriate solution for preventing the emergence of challenges in computer's legal performance.



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