

Consent in Cloud Computing Contracts: Some Legal Issues under the Jordanian Law

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Abstract

In the electronic era of globalization, the world has changed dramatically. Consequently, cloud computing has attracted considerable attention from many legal scholars. Although numerous legal issues arise when discussing cloud computing, this article describes and analyzes one of the most important elements in contract law. In order to obtain the desired service from the provider of the cloud, a contract has to be formed between the end-use customer and the provider. The service offered to the customer is based on an agreement reached between the two parties. The current paper highlights how mutual consent could be reached. In doing so, this paper will focus on the Jordanian approach on mutual assent in the case of electronic contracts in general and cloud computing contracts in particular. The authors reached to the conclusion that the current provisions of the Jordanian Civil Law are incapable in its current form to provide the maximum protection for online users.

Keywords: cloud computing; consent; European Union.

1. Introduction

In the past, people considered the *World Wide Web* to be the result of a technological revolution in the field of information technology that offered a method of connecting people globally. *Cloud computing* became popular when people began to consider the Internet from an economic perspective. Some companies find that cloud computing helps to reduce infrastructure maintenance and acquisition costs, and can facilitate better adaption to changing consumer behavior.¹ Others assert that cloud computing decreases the amount of necessary marketing time and assists in the process of “going green.” In fact, reducing carbon footprints is becoming increasingly relevant to the IT industry. Speeding up and increasing the use of cloud computing globally requires enhancing trust in the innovative technological revolution of cloud computing. The use of clouds is usually associated with terms and conditions to which the user must agree to obtain full access to a service. These terms and conditions are considered as standard term contracts in which the user retains no negotiating power.

Rather than deeply examining cloud computing from a technological paradigm, the authors of this article intend to highlight only one of the primary problematic issues associated with the common use of cloud computing. This paper focuses on trying to find to what extent is a cloud computing user will be bound to honour a list of terms that he might never have read under the Jordanian law

2. Cloud Computing: A Brief Definition

Various definitions and interpretations of cloud computing, i.e., the “cloud,” exist. Attempting to select a single comprehensive definition for cloud computing presents a difficult task, which has been described as being as difficult² “as attempting to capture a genuine cloud with one's hands.”³

¹European Commission, “The Future of Cloud Computing: Opportunities for European Cloud Computing Beyond 2010” Version 1.0, 14. Full text:

<<http://cordis.europa.eu/DDB315EB-9975-4D15-954D-43B33236005C/FinalDownload/DownloadId-57281B9FE52D04CA4E751DB37D58CD05/DDB315EB-9975-4D15-954D-43B33236005C/fp7/ict/ssai/docs/cloud-report-final.pdf>> (retrieved 26 January 2014).

²Calloway, T. “Cloud Computing, Click Wrap Agreement, and Limitation on Liability Clauses: A Perfect Storm” 11 *Duke Law And Technology Review* 163, 165.

As described by Seth,⁴ “[t]he term reflects technology in a cloud, in the air, that is not visible to the eye.” Despite this, some have attempted to define cloud computing. The European Commission (EC) defines cloud computing as “the storing, processing and use of data on remotely located computers accessed over the Internet.”⁵ Another definition, set by a report published by the EC, refers to cloud computing as “an elastic execution environment of resources involving multiple stakeholders and providing a metered service at multiple granularities for a specified level of quality (of service).”⁶

In short, and as defined by the Information Commissioner's Office (ICO),⁷ the cloud is “access to computing resources, on demand, via a network.”⁸ Discussing the cloud alongside the concept of the Internet can result in confusion. Therefore, to clarify, the latter term refers to the medium in which the cloud operates. In other words, the Internet makes information available to everyone everywhere, while cloud computing makes computer power itself available everywhere to everyone.⁹ Understanding cloud computing requires addressing the primary components of cloud computing, its different types, and the principal groups involved.

The EC deems the most important non-functional aspects of cloud computing to be elasticity, reliability, quality of service, agility, and adaptability, in addition to the availability of services and data. Since cloud computing requires no specific skills and only a small staff to manage, the cost of hiring qualified employees to manage the infrastructure and to develop the services offered by the cloud is relatively minute.¹⁰ In addition, cloud computing facilitates the distribution process of various IT products, as the cloud's distribution process is both simple and automated.¹¹

The use of cloud computing presents several obstacles, some of which affect the adoption of cloud computing,¹² while others affect growth,¹³ policy, and business obstacles.^{14,15} The following paragraphs highlight one of the legal challenges associated with the common use of cloud computing. This paper will primarily focus on reaching mutual consent when entering a cloud computing contractual relationship.

3. Cloud Computing Contracts: Legal Challenges

Numerous legal challenges¹⁶ are associated with the common use of cloud computing. A contract is a complex legal document both in its jurisprudential and practical foundation. Generally, contracts represent agreements of two or more persons who mutually express their will to create a legal relation between himself or herself. Contracts are primarily based on a person's “will” to enter a relationship in which both parties maintain rights and obligations. This “will” is derived from the fact that each person is free to enter any kind of contractual relationship unless the law prevents him or her from doing so.

³ibid.

⁴ Seth, K. “Computers, Internet And New Technology: A Comprehensive Work With A Special Focus On Developments In India Lexis Nexis” (2013) India, 525.

⁵European Commission Communication From The Commission To The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions ' Unleashing the Potential of Cloud Computing in Europe, COM (2012) 529 final, 2. Full text:

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0529:FIN:EN:PDF>> (retrieved 20 January 2014). 2.

⁶ European Commission (fn 1), 8.

⁷Hereafter, ICO < <http://ico.org.uk/>> (retrieved 15 January 2013).

⁸Information Commissioner's Office “Guidance on the use of cloud computing,” UK, version 1.1, 3. Full text

<http://ico.org.uk/for_organisations/data_protection/topic_guides/online/cloud_computing> (retrieved 15 January 2013).

⁹European Commission From The Commission To The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions ' Unleashing the Potential of Cloud Computing in Europe, COM (2012) 529 final, 2. Full text: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0529:FIN:EN:PDF>> (retrieved 20 January 2014). 2.

¹⁰ European Commission “Analysis of Cloud Best Practices and Pilot for The Public Sector” (2013) 51.

¹¹ ibid.

¹² These are usually linked to the availability, data lock-in, and data confidentiality and auditability.

¹³ These are usually linked to data transfer bottlenecks, performance unpredictability, scalable storage, issues in extensive disturbed systems, and scaling quickly.

¹⁴ These are linked to reputation fate-sharing and software licensing.

¹⁵ Armbrust, M. “A View of Cloud Computing” (2010)53 *Communication of the ACM* 50.54.

¹⁶ Such as the issue of privacy, liability, ownership of data, mutual consent , copyright issues and applicable law.

Many questions could arise concerning to what extent the customer would be bound by the terms and conditions presented to him/her if he had never read them. The answer to this question will not extend beyond the typical analysis of the click-wrap license agreement scenario.

3.1. Classifying cloud computing terms and conditions documents

In the case of cloud computing, similar to any contract for the supply of services, the contract between both parties, i.e., the provider and the customer, depends on the service offered and the requirements of the customer.¹⁷ Despite the fact that unusual circumstances can lead to the negotiation between parties of specialized cloud computing service contracts, most cloud computing contracts are classified as standard term contracts. In a typical scenario, the terms and conditions of these contracts are presented to the customer on a non-negotiable basis. In fact, the standardization of contracts is considered to be an industry-led process.¹⁸ The customer, in the case of a standard term contract, must accept the entirety of the terms and conditions as a single package in order to obtain access to the desired services. The provider typically requires the customer to check a certain box to verify that the customer agrees to the content of the terms and conditions offered by the provider.

The problem with these standard term contracts is two-fold. The problem of online consent is one,¹⁹ and the content of online contracts is another. The previously mentioned click-wrap license agreements present a list of terms to the customer. These terms and conditions vary, with some companies listing them in one long document, and others preferring to employ short documents. Generally, service providers vary when creating their terms and conditions, from relatively short to long, complex ones. According to a survey conducted by Bradshaw *et al.*,²⁰ the terms and conditions of a cloud computing²¹ service usually contain list of Terms of service,²² Service-level agreement,²³ Acceptable use²⁴; and Privacy policy²⁵ Considering the main sub-headings of the cloud computing agreement, the following section describes consent in the case of cloud computing.

3.2 Consent in the case of cloud computing contracts

No one method currently exists for electronic contracting. Click-wrap agreements are common when utilizing the Internet. Click-wrap license agreements are typically presented directly to the user's personal computer screen. The user is asked in a browser window to consent to certain terms. Some websites might ask the user to scroll through the entire text of the license before being allowed to proceed. In some other cases, the user may be referred via a hyperlink to another location on the Internet where the terms are hosted. The basis for validating these licenses is the ability of courts to reach the conclusion that the user had manifested his or her consent to the online terms presented to him directly or indirectly, by signaling such consent through his or her actions, e.g., through loading the required software.²⁶ The problem with click-wrap licenses arises from the common practice of Internet users. Evidence suggests, for various reasons, most users "do not read nor understand the terms and conditions."²⁷

¹⁷ Ismail, N. "Cursing the Cloud (or) Controlling the Cloud?" (2011) 27 *Computer Law and Security Review* 250, 411.

¹⁸ European Commission, Press release "Unleashing the potential of cloud computing in Europe—what is it and what does it mean for me?" MEMO/12/713- 27/09/2012. For full text: <http://europa.eu/rapid/press-release_MEMO-12-713_en.htm> (retrieved 20 January 2014).

¹⁹ See 3.2, p.

²⁰ Bradshaw, S. *et al.* Bradshaw, S. *et al.* "Contracts for Clouds: Comparison and Analysis of Terms and Conditions of Cloud Computing Services" (2001) 19 *International Journal of Law and Information Technology* 187, 192.

²¹ See, for example: Dropbox terms and conditions <<https://www.dropbox.com/privacy>> (retrieved 27 January 2014); and Flexiscale <<https://cp2.flexiscale.com/signup/>> (retrieved 27 January 2014).

²² The section in which the provider typically details the overall terms and conditions regulating the relationship between the provider and the customer

²³ The section in which the provider specifies the level of service offered to the customer, along with special terms regarding compensation;

²⁴ The section in which the provider delineates for the customer what actions are permitted when utilizing the service offered by the provider to the customer;

²⁵ The section in which the provider identifies in what way the provider will utilize the customer's personal information and how the provider will protect this information.

²⁶ In *SoftMan Products Company, LLC v. Adobe Systems Inc.; et al.* 171 F. Supp. 2d 1075 (C.D. Cal 2001), (shrink-wrap terms on software not consented to where defendant had not loaded the software).

²⁷ European Commission's expert group on cloud computing contracts 'unfair contract terms in cloud-computing service contracts: discussion paper' <http://ec.europa.eu/justice/contract/files/expert_groups/unfair_contract_terms_en.pdf> accessed 20 Sep 2016.

Accepting these terms with a click of mouse can potentially affect the legal rights of the customer in question. Since the terms and conditions are presented as part of a standard term contract, the provider of the service is expected to value his rights rather than protecting the rights of his or her customers by including terms which are "usually buried deep within the cloud provider's click-wrap agreement."²⁸ Since most cases related to cloud computing focus on issues that arise from the content of click-wrap agreements rather than the consent to these agreements, the authors of the current paper focus on case law and present issues related to click-wrap licenses in general.

The case of *Treiber & Straub, Inc. v. United Parcel Service*²⁹ is a direct application of relevant contract law rules. In this case, the plaintiff, a jeweler, wished to return a ring worth 105,000 USD Dollars to the manufacturer utilizing the service provided by the United Parcel Service (UPS). The plaintiff arranged to return the ring using the UPS website. The ring never reached its final destination, however, and the plaintiff sued the defendant for his loss. The court found that Treiber had entered into a contractual relationship with UPS to send the ring to its final destination when he had consented to their online terms. During the process of sending the shipment, Treiber had to click on an icon indicating that he accepted the terms and conditions set by UPS covering the transaction.³⁰ One of those terms specified that the defendant's insurance was not intended to cover items exceeding a value of more than 50,000 USD Dollars.³¹ Treiber had clicked the relevant icon, and arranged for the shipment to be sent. In this case, the court determined that the plaintiff had the duty to read before he clicked, and in spite of his failure to read the terms, he remained bound by them.³² This case exemplifies the concept that "one cannot accept a contract and then renege based on one's own failure to read it,"³³ especially since Treiber had adequate notice concerning the value covered by the insurance.³⁴ The courts clearly ruled that the contractual parties are bound by a duty to read and follow the terms and conditions if consent is given.

Courts, depending on the facts of each case, have often deemed click-wrap licenses valid and, therefore, enforceable, either in-part or in-full. In each case, they have examined the notice provided to the user, and determined whether or not he or she was allowed an opportunity to read the terms. When considering the validity of click-wrap licences, courts have typically applied a combination of rules obtained from the general principles of contract law together with case law precedents. For example, in *i. Lan systems, Inc. v. NetScout*,³⁵ the court attempted to fit the case of click-wrap licenses under the provisions of the Uniform Commercial Code (UCC). The court reached the decision that the UCC does not expressly govern software licenses, but that courts assume that the UCC provisions could be applied.³⁶ Subsequently, the courts decided that a contract could be formed by clicking on an icon that indicates consent. This is, from the court's perspective, for the same reasons that consent was accepted as implicit in *ProCD*.³⁷ One important point relating to the issue of consent in click-wrap licenses in general, and in the case of cloud computing in particular, is that the user should retain the right to review the content of the terms and then to accept or reject them. Delivering a notice regarding the existence of terms and conditions to the customer is insufficient, unless the latter is able to choose between accepting or rejecting them.³⁸ Furthermore, a website should allow a user to print and save these terms in order to reference them in the future.

²⁸ Calloway, T. (fn2), 164.

²⁹ 474 F.3d 379 (7th Cir. 2007).

³⁰ *Treiber & Straub, Inc. v. United Parcel Service* 474 F.3d 379 (7th Cir. 2007) 382.

³¹ *ibid* 382-283.

³² *ibid* 385. Also see Moringiello, J and Reynolds II, W 'Survey of the law of Cyberspace: Electronic Contracting Cases 2006-2007' (2007) 63 Bus. Law 219, 221-222; also *Bar-Ayal v Time Warner Cable, Inc* No. 03 CV 9905(KMW), 2006 WL 2990032 (S.D.N.Y. Oct. 16, 2006)

³³ *ibid* 385.

³⁴ *Treiber & Straub* (n30) 382, 383 & 385.

³⁵ 183 F Supp 2d 328, 46 UCC Rep. Serv. 2d 287, 106 A.L.R 5th 743 (D. Mass 2002).

³⁶ The court discussed whether the licence would be governed by §2-204 or 2-207, and, in so doing, it analyzed the case of *Step-Saver Data Sys., Inc. v. Wyse Tech* 939 F.2d 91 (3d Cir. 1991) and *ProCD v. Zeidenberg* 86 F.3d 1447 (7th Cir. 1996).

³⁷ *ProCD v. Zeidenberg* 86 F.3d 1447 (7th Cir. 1996).

³⁸ See art. 8 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/ECC, Directive 97/7/EC, 98/27/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practice Directive") OJL 149/22; also see The Consumer Protection from Unfair Trading Regulations 2008, 2008 SI No 1227; reg 7.

The second part is designed to address carefully the content of cloud computing contracts. As Hasan, *et al* rightly points out, most of the cloud computing providers more often rely on complex contracting terms for their own best interest. However, this practice works against the users, especially consumers in the field of e-commerce. To make matters worse for them, a large number of contracts are non-negotiable, which gives immunity to cloud computing providers from liability “for data integrity confidentiality, or service continuity” (Ref) Consequently, there has been concerted effort at various levels to build and establish legal basis in order to protect online consumers from unfair contractual terms.

3.4 The Approach of the UK and EU to Regulating Cloud Computing Contracts

The British Office of Fair Trading (OFT)³⁹ has published guidelines on *IT Consumer Contracts Made at a Distance*.⁴⁰ These provide guidance on how to comply with the Distance Selling and Unfair Terms in Consumer Contracts Regulations.⁴¹ These guidelines state that click-wrap terms should be presented to the user in a complete, clear, and readily accessible manner.⁴² Furthermore, they emphasize that those terms should comply with the Electronic Commerce Regulations (EC Directive), which require those terms to be provided in a manner that allows the user to store and reproduce them in the future.⁴³

The OFT guidelines address the situation in which the consumer must declare his or her consent to online terms by clicking on an “I Accept” icon. The guidelines introduce suggestions on how to present those terms to the user in a manner that would negate any argument presented by him or her that by clicking on that icon, he or she had “signed away [his] rights.”⁴⁴ These guidelines advise website developers to warn the user to read the terms before he or she places his or her order.⁴⁵ Furthermore, words utilized in drafting the terms should be easily understood and clearly presented. In addition, allowing the user to inquire about terms has been shown to be beneficial.⁴⁶

Although these guidelines may be helpful, they do not retain any legal binding effect. In other words, their value in the courtroom is not guaranteed, leaving the question open of how courts should deal with click-wrap licenses. However, the current authors contend that courts should consider whether or not the user has been provided with sufficient notice regarding the existence of the online terms. In addition, the courts should consider the circumstances surrounding each case.

Considering and reviewing case law precedent concerning consent is vital in the case of cloud computing contracts. However, since cloud computing is relatively new, the authors of the current paper could locate only a limited number of cases in the extant literature. The majority of these cases relate to copyright infringement⁴⁷ or unauthorized “scraping” of information from the cloud.⁴⁸ In addition, courts have examined cases related to privacy rights⁴⁹ and personal information of the customer.⁵⁰ In fact, no cases could be found in relation to mutual consent in cloud computing. Thus, case law in relation to click-wrap agreements will be applied in addition to the principles of contract law. The EU maintains a distinctive approach toward cloud computing. Its work toward promoting cloud computing is part of the *Europe 2020 Strategy*. Cloud computing falls under one of the seven flagship initiatives of the *Digital Agenda for Europe*.⁵¹

³⁹ Hereafter, OFT.

⁴⁰OFT “IT Consumer Contracts Made at A Distance – Guidance on compliance with the Distance Selling and Unfair Terms in Consumer Contracts Regulations” (OFT 672/2005).
<http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft672.pdf> (retrieved 26 November 2007).

⁴¹These guidelines could be considered an unofficial explanation to the Directive on Distance Selling by presenting practical examples that are helpful to bear in mind when conducting business at a distance, including e-contracts.

⁴² OFT (n40) 16 [3.12].

⁴³ *ibid* 17[3.14].

⁴⁴ *ibid* 20[3.26].

⁴⁵ *ibid* 16[3.27].

⁴⁶ *ibid* 16-17 [3.25-3.27].

⁴⁷See, for example, *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *Arista Records, Llc v. Usenet.Com, Inc.* 633 F.Supp.2d 124 (2009).

⁴⁸See, for example, *Craigslist, Inc. v. Naturemarket, Inc.* 694 F. Supp. 2d 1039(N.D. Cal 2010) and *Barclays Capital, Inc. v. theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y 2010).

⁴⁹See, for example, *City Of Ontario v. Quon* 130 s.Ct. 2619 (2010).

⁵⁰See, for example, *Part City Corp. v. Superior Court of San Diego County*, 86 Cal. Rptr 3d 721 (2008).

⁵¹For more on the Digital Agenda for Europe, see: <<http://ec.europa.eu/digital-agenda/>> (retrieved 26 January 2014).

According to the EC, "[t]he overall aim of the Digital Agenda is to deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast Internet and interoperable applications."⁵² In this context, the EU believes that it retains an obligation to "develop an EU-wide strategy on 'cloud computing,' notably for government and science."⁵³

In 2012, the EC adopted a strategy for *unleashing the potential of cloud computing in Europe*,⁵⁴ and cloud computing is at the center of this strategy. This new strategy aims to speed up and increase the use of cloud computing across the economy.⁵⁵ This strategy comprises three broad areas: 1) introducing safe and fair contract terms and conditions; 2) successfully navigating standards; and 3) establishing a European cloud partnership.⁵⁶ The EU intends to institute a legal framework related to cloud computing. This framework will cover issues related to:

- Data protection;
- Privacy;
- Laws and other regulations that concern the deployment of cloud computing in public and private organizations;
- Issues related to users' rights.⁵⁷

After adopting the abovementioned strategy, the EC set up a working group on safe and fair terms for cloud computing.⁵⁸ This group will work toward identifying "the best practices for addressing the concerns of consumers and small companies who are often reluctant to purchase cloud computing services because contracts are unclear."⁵⁹ Introducing model contract terms for cloud computing can help to facilitate contractual agreements between cloud computing service providers and consumers and small firms.⁶⁰ The EU strategy for cloud computing, if achieved, will introduce "better standards, safer contracts and more clouds in the public and private sector."⁶¹

The EC "Directive on Electronic Commerce,"⁶² lists certain information to be presented by service providers clearly, comprehensibly, and unambiguously prior to the order being placed by the recipient of the service. These steps include, e.g., "the different technical steps to follow to conclude the contract."⁶³ In addition, the Directive asserts that the contract terms and general conditions provided to the recipient must be made available in a way that allows him or her to store and reproduce them.⁶⁴ It is asserted that this will allow the online user sufficient time to review the terms before he or she consents to them. This technique will also enable him or her to review the terms in the future whenever he or she wants to check a specific point regarding the work. Despite the efforts in promoting cloud computing and the IT industry in this field, the authors of the current paper could find nothing in the extant literature regarding consent in the case of cloud computing contracts.

⁵² European Commission, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Digital Agenda For Europe" Com(2010)245 Final/2, [1] for full text, see: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245R%2801%29:EN:NOT>> (retrieved 29 Jan 2014).

⁵³ European Commission, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions "A Digital Agenda For Europe" Com(2010)245 Final/2, [2.5.1]. for full text, see: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245R%2801%29:EN:NOT>> (retrieved 29 January 2014).

⁵⁴ European Commission (fn5).

⁵⁵ EC – press release "Digital Agenda: New strategy to drive European business and government productivity via cloud computing" IP/12/1025 date 7/09/2012. Full text: <http://europa.eu/rapid/press-release_IP-12-1025_en.htm> (retrieved 20 January 2013).

⁵⁶ European Commission (fn5), 10.

⁵⁷ European Commission (fn10) 47.

⁵⁸ European Commission "European Commission Takes Another Leap To Boost Cloud Computing," Press release - IP/13/990 28/10/2013. Full text: <http://europa.eu/rapid/press-release_IP-13-990_en.htm> (retrieved 20 January 2014).

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Digital Agenda for Europe "About cloud computing" <<http://ec.europa.eu/digital-agenda/en/about-cloud-computing>> also see: European Commission "European Cloud Computing Strategy," <<http://ec.europa.eu/digital-agenda/en/european-cloud-computing-strategy#safe-and-fair-contract-terms-and-conditions>> (retrieved 20 January 2014).

⁶² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market ("Directive on electronic commerce") Official Journal L 178, 17/07/2000 P. 0001 – 0016.

⁶³ Art 10(1).

⁶⁴ Art 10(3).

Therefore, the traditional contract law terms will be applied. Focusing on introducing standard term contracts by the EU working group will solve a portion of the legal issues. However, legal awareness must be raised among customers regarding the importance of reading and understanding the terms and conditions of these contracts, rather than clicking the “I Accept” icon without having read the content of the terms and conditions that exist behind the hyperlink hosting them.

3.5 The Jordanian approach to Regulating Cloud Computing Contracts

Jordan has enacted a specific law on electronic transactions,⁶⁵ cloud computer contracts are a new phenomenon that has not been regulated by any specific laws or regulations, such contracts are governed by the ‘classic contract theory in the Jordanian civil law’.⁶⁶ Therefore, issues related to the formation of contracts and other defects affecting consent will be governed by the Jordanian Civil Code.⁶⁷

According to article 167, a valid contract '[t]he contract which is basically and descriptively lawful by being made by capable persons, relating to an object that can be subject to its provisions, having an existing, valid and lawful purpose, having correct descriptions and is not subject to a vitiating conditions.'

As mentioned earlier, it is most likely that the online user will continue to enter into an online cloud contract with a provider for receiving service without having read or even considered reading the terms and conditions before clicking his way through to the virtual world. Again, almost certain that once the user starts using the space on the cloud, he might get back to the provider of the service with his questions and enquires only if he faces some real obstacles.

Only then, he will find out how his click on the ‘I Accept’ icon- or any similar icons when he created his account has landed him in a situation where he has to deal with un-wanted answers to his questions between the terms and conditions that govern the use of the service offered by the cloud provider. Applying the provisions of the Jordanian Civil code to the above scenario, it can be stated that even if the online user resorts to the option of making a request to rescind the whole contractual relationship on the grounds that there was no mutual consent on the terms and conditions set by the provider, it will not prove to be a practical solution for the user since the law made it clear that ‘the expression of the will shall be by word, writing, the customary sign even from a person who is not dumb, the actual exchange denoting consent and by any other behavior which in the circumstances leaves no doubt of its indication of consent.’⁶⁸

Considering the foreign case law, and in the light of the relevant articles of the Jordanian Civil Code mentioned earlier, the authors conclude that it is most likely that the online user will find that the Jordanian courts will reach the conclusion that a contract has been formed and mutual consent has been reached by a click of the mouse of a computer in spite of the fact that the user might never have read the terms and conditions of cloud computing contract.

In trying to reach a balance between the rights of the user (who clicked his way through without reading the terms and conditions), on one hand, and the rights of the provider of the service on the other, it is fair enough to say that cloud computing contracts can be considered as standard terms of the contracts, where the user has no or limited space for negotiations. On the other hand, even if the user might never have read the terms and conditions, the law might indeed stand alongside him by limiting the enforceability of some of the terms.

The Jordanian Civil Law includes what is known as adhesion contracts in article 104 by stating that “[a] acceptance in adhesion contracts shall be limited to mere acceptance of predetermined conditions made by the offer or who does not agree to a discussion thereof.” At this point, if the court finds that an adhesion contract contains unfair terms, it has the right to “amend those terms or exempt the adhering party from them in accordance with the prescriptions of equity, and every agreement to a contrary effect shall be void”.⁶⁹ In this context, however, the question that might rise is whether cloud computing contracts can be considered as adhesion contracts according to the Jordanian civil law. In the online world, cloud computing contracts are more likely to be considered as standard contracts rather than adhesion contracts.

⁶⁵ Electronic Transaction Act n 15 for 2015.

⁶⁶ The Jordanian Civil Law n43 for 1976.

⁶⁷ *ibid* art 87-156.

⁶⁸ art 92.

⁶⁹ art 204.

Since the latter should be related to a public service which is offered by limited providers of that service such as contracts made with companies that provide electricity and water maintenance in the area. In this case, the consumer will have no other option but to sign the contract with such companies. Otherwise, he will never get the service or goods that he requires. As for standard terms of the contracts, there are agreements that employ “standardized, non-negotiated provisions, usually in preprinted forms”.⁷⁰ Such contracts are widely used in business these days as it is easier to create both offline and online contracts with consumers. Such contracts can be found in banks, insurance companies, labor contracts and many other types of contractual relationship one might enter into. Such relationships can be created in various sectors of the society where one can look for the best benefit before takes a decision to sign the contract.

In cloud computing contracts, a typical user will look for a provider who is willing to offer him the best space capacity to upload and save data and at the same time give guarantee for privacy of such data. The Jordanian Civil Law considers such contracts “as acceptable and it is up to the court to decide whether a term or condition in the contract is fair and enforceable or not” (Ref). Up to this point, the user still needed legal protection. Therefore, the Jordanian legislators drafted the Consumer Protection Law in 2013.⁷¹ One of the objectives which the law aims to achieve is to identify the rights of the consumer in clear lines and protect him from unfair terms provided in the standard contracts formulated by the provider of the service or goods.

It is worthwhile to note that the draft requires the law to be drafted in Arabic language and necessary terms of their offer must be set up for the consumer. In case unfair contractual terms are applied in any agreements, the draft gives the court- the right to consider such terms as void or amend them or give the consumer the benefit of availing exemption. It may be noted here that such benefits are allowed only upon the request of the victim or the ministry or the Consumer Assembly established by this draft law.⁷² The draft also considers the case where terms might be considered as unfair, such terms for example, fails, or limits the obligations or responsibilities of the provider against what is prescribed in the draft or any other legislation in force. They are also considered as unfair if they include a waiver of rights of the consumer set by the draft or any other legislation in force.⁷³

Since the above is only a draft of law, and is not yet accepted in its final version and published in the Official Gazette, courts in Jordan will find themselves applying the general provisions of the Jordanian civil law on the terms and conditions of cloud computing contracts, leaving it up to the courts to look deep in the content of terms and conditions and decide whether such terms are considered as fair or not.

4. Conclusion

Regulating how and what contracts are formed, as well as precisely specifying the obligations and rights of both the service provider and customer, is essential. The online user must be made aware that clicking on a relevant icon will form a binding contract. This means that the online click-wrap agreement will bind the user, regardless of his or her failure to read the terms and conditions. Moreover, these terms and conditions of cloud contracts must be presented to the customer in advance. Introducing these terms and conditions to the customer places a direct obligation on the provider to bring them to the attention of the user in a way that allows him or her to read, save, and store these terms, enabling future review. Another obligation of the provider of these terms and conditions is to bring to the attention of the online user any changes to the terms and conditions in the same way that the terms and conditions were initially presented.

Without doubt, there is a need to consider passing the draft of the Jordanian Consumer Protection Act and publish it in the official gazette, as until this point the Jordanian courts will have to apply the general provisions of the general theory of contract to relevant issues related to the mutual consent that could be found in the law in the case of cloud computing contracts. Having said that, these general rules could not be helpful in protecting the online consumer in some cases and need specific rules and provisions which are specifically designed to deal with fairness in standard terms of contracts.

⁷⁰What are standard form contracts? < <http://www.faircontracts.org/what-are-standard-form-contracts>> accessed 20 sep 20156.

⁷¹ The draft is not espically drafted for cloud computing contracts, nevertheless, it is helpful in protecting the online user in the case of cloud computing contracts.

⁷²The draft of the Consumer protection act 2013 , art 21

⁷³ For full list of unfair contractual terms see art 22(b).

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