

## The Duty to Read Online Contracts: A Consumer's Responsibility or Right?

واجب قراءة العقود المبرمة عبر الانترنت: مسؤولية أم حق للمستهلك؟

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### Abstract:

Consumers' awareness plays a fundamental role in determining their needs and understanding the content of their transactions. It is the consumers' responsibility to get personally informed about the contract they are about to conclude by reading all its clauses, especially when it comes to online transactions. However, the professional must, firstly, enable the e-consumer to read the contract by including concise, clear, and understandable terms, hence the need to consider reading online contracts as one of the consumer's rights.

**Keywords :** Legal duty, Presumption of reading, Enabling reading, Consumer's rights.

### الملخص:

يلعب وعي المستهلك دورا أساسيا في تحديد احتياجاته وفي فهم محتوى معاملاته. ويعد من مسؤولية المستهلك الاستعلام شخصيا عن العقد الذي سيقدم على إبرامه بالإحاطة بجميع بنوده، لا سيما عندما يتعلق الأمر بالمعاملات عبر الانترنت. إلا أنه، قبل ذلك، يقع على عاتق المحترف أولا مسؤولية تمكين المستهلك الإلكتروني من قراءة العقد من خلال تضمينه بنود مختصرة واضحة ومفهومة، ومنه ضرورة اعتبار قراءة العقود المبرمة عبر الانترنت حقا من حقوق المستهلك. الكلمات المفتاحية: واجب قانوني، قرينة القراءة، التمكين من القراءة، حقوق المستهلك.

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## Introduction:

In a consumer contract, the professional enters into a relationship directly related to his business with full access to information about the product or service. Conversely, the consumer enters into a relationship that is not related to his business. Less informed and less experienced, consumer's protection then becomes necessary.

On its website, the Algerian Ministry of Internal Trade and National Market Regulation sets 10 golden rules of the informed consumer in the consumer guide section ([bit.ly/42k3d3T](http://bit.ly/42k3d3T)), including, first and foremost, "1- Check labels and prices, always read your bills and your contract". The first golden rule for an informed consumer in Algeria is therefore: reading the contract.

The duty to inform often occupies an important place in legal researches and receives significant attention from jurists as one of the most fundamental pillars of good faith in contracts, particularly at the stage of formation. While, the doctrine often neglects the duty of the contracting party to read the contract.

This issue is accentuated in standard contracts such as online contracts where the terms and conditions are pre-drafted by the professional. E-consumer often signs the contract without even taking a quick glance at the clauses set out there.

Informed consent requires that each party inform the other about the contract and also inform themselves of the contents of their contract. Thus, informed consent of the e-consumer results from two complementary duties: the duty to inform on the part of the professional on the one hand, and the duty to read the contract on the part of the e-consumer on the other hand.

Legally, e-consumer who could have read the contract but did not, bears the consequences of complying with the unfavourable clauses to which he must submit. However, the 'simple' e-consumer has the right to a 'simple' contract. This involves obtaining clear, sufficient and precise information on the products and services and, at the same time, getting access to simple and understandable information to be able to take an informed decision about his online contract.

Hence appears a paradox between the responsibility of the e-consumer to read the contract, and his right to informed consent. A legal and practical question then arises as to the nature of the duty to read online contracts to determine whether it is a consumer's responsibility or right?

In this paper, we will adapt a descriptive analytic approach to determine the legal status of the duty to read under Algerian law in the first title and demonstrate to what extent the e-consumer has the possibility of reading his online contract, in the second title.

## 1. Legal status of the duty to read in Algerian law:

Under Algerian law, there is no legal duty for the e-consumer, or for the contracting party in general, to read the contract. But despite the absence of such a legal duty, the e-consumer is presumed to have read and understood the contract.

### 1.1- Absence of a legal duty to read in Algerian law:

A legal duty is the obligation for a physical or moral person, to behave in accordance with what is prescribed by law or to respect some legislative provisions ([bit.ly/42k3rrL](http://bit.ly/42k3rrL)). The Algerian legislator does not require persons to read and understand the contracts before accepting or signing them. Thus, in e-commerce a simple click on the acceptance button is sufficient to express the consumer's acceptance even if the latter has not actually read it. This issue is further compounded by the fact that most of online contracts concluded between

professionals and consumers are adhesion contracts. Algerian legislator made a reference in art. 6/2 of law n° 18-05 relating to electronic commerce to art. 3/ 4 of law n° 04-02 on the rules applicable to business practices in order to define e-contract as a contract which is drafted unilaterally and in advance by one of the parties and to which the other party adheres without a real possibility of modifying it. Therefore, the e-consumer cannot negotiate or modify the terms of the contract or even read it! In fact, the problem with reading online contracts is twofold for the Algerian e-consumer: on the one hand, the consumer probably does not read the contract before accepting it and on the other hand, even if the consumer reads the contract, he generally does not understand it.

Under Algerian civil code and according to will autonomy principle, a sign generally in use, or a conduct, can express a will, if it leaves no doubt as to the true intention of its author (art. 60 A.C.C). Acceptance, as well as offer, does not require a particular form to be expressed. It can be made by modern means of communication such as Internet and it may be verbally or in writing (Al-Aishi BIN ABDUL RAHMAN, 2017, p. 164). In this context, technical questions may arise, in particular whether clicking on an acceptance button presented on an electronic offer is sufficient to effectively express the buyer's intention, this acceptance being neither verbal nor written (Kamel MEHDAOUI, 2010, p. 20). And even though the assertion of reading by clicking seems to be a 'legal fiction', online contracts accepted by a click must also respect the fundamental principles of contract formation. The classic requirements of acceptance stipulated in Algerian civil code remain valid for electronic acceptance, in particular the requirement that the will expressed by the contracting party must necessarily be coherent with the offer (art. 66 A. C. C.).

Under Common law, there is a 'duty-to-read' doctrine in contract law, under which contracting parties have a duty to read and to understand the content of the contract. If the party signs a contract, he is deemed to have read and accepted the terms of the contract. Failure to read the contract does not vitiate consent, provided the contracting party has had the possibility to read the contract before signing it (Rukhsana Shaheen WARAICH, Muhammad FAYAZ, Hayyan ZAHID, 2022, p. 78).

In Algerian law, even if there is no legal provisions that impose expressly a duty to read the contract, the contracting parties are presumed to have read it. In fact, the duty to read in Algerian law exists as a presumption. The presumption of reading is quite strong, because even if an illiterate person signs a standard contract, he is presumed to have read it and will be bound by its terms. As a presumption, the duty to read is a means of shifting the burden of getting information to the passive party (Omri BEN-SHAHAR, 2009, p. 7), which is the consumer in online contracts.

### **1.2- Legal basis of the presumption of reading in Algerian law:**

The presumption of reading is the basis of the duty to read online contracts under Algerian law. Preventing the e-consumer from invoking his failure to read the contract aims to encourage the parties to adopt a responsible attitude towards their contracts. The presumption of reading could be based on the unforgivable error (1) or on the theory of appearance (2).

#### **a. The unforgivable error:**

Failure to read the contract may constitute an unforgivable error since it is a wrongful conduct. The qualification of an unforgivable error sometimes depends solely on the fact that the party who made error had a duty to inform himself, or even the ability to do so.

Legacy of Roman law, error, even relating to the substantial qualities of the object of the contract, cannot be usefully invoked when it is unforgivable, that is to say easy to avoid 'colloquially translated: the law does not protect fools' (Philippe MALAURIE et Laurent AYNES, 2001, p. 92). The unforgivable error is of such seriousness that the law withdraws its protection from the person who committed it. It is therefore a case of forfeiture of the right to invoke the benefit of nullity for negligence (François AMELI, 1997, p. 67).

French civil code states in art.1132 that error of law or fact, unless it is unforgivable, is a cause for nullity of the contract when it concerns the essential qualities of the service due or those of the co-contracting party. French law explicitly excludes the unforgivable error as a defect of consent. Error is generally used as a means to cancel the contract, but when the judge qualifies error as non-essential, the purpose is the stability of the contract. Contract stability here is often based on good faith ([bit.ly/441QO62](http://bit.ly/441QO62)).

According to Algerian law, the contracting party can ask for the cancellation of the contract if, at the time of the formation of the contract, this party committed an essential error (art. 81 A.C.C). Unlike French civil code, Algerian civil code did not provide for the unforgivable error.

But according to Algerian doctrine, an unforgivable error is an error that could have been avoided if the contracting party had taken a minimum of precautions, asked for information or read documents. If the error is the result of big negligence or imprudence, the party cannot benefit from legal protection and cannot demand the cancellation of the contract. Thus, if the contracting party makes such an error, his consent is vitiated, but he does not benefit from legal protection (Ali FILALI, 2010, p. 171).

Error should not be unforgivable, that is, it must not be an error that a reasonable person would not have made in the same circumstances. When assessing the unforgivable error, the courts and the doctrine take into account the age, mental state, experience and economic situation of the contracting part. Between the adoption of an abstract model but which takes into consideration external circumstances or rather a concrete personal model, the personal characteristics of the person who invokes error are taken into consideration, it would therefore not be the model of the reasonable person (Louise LANGEVIN, 2005, p. 372).

Thus, the unforgivable error is assessed in concreto, that is to say according to the personal capacities of the person, in particular his professional competence. Based on the personality of the person and his own skills. The more experienced, competent and qualified the person, the less he can demand the cancellation of the contract even if his consent is actually defective. Here appears the duty to be informed as a requirement for any contracting party, which constitutes a limit to the sanction of error on the substance (Jacques FLOUR, Jean-luc AUBERT, Eric SAVAUX, 2002, p. 145).

The e-consumer's failure to read the contract would therefore be qualified as unforgivable error since he could have easily avoided this error by simply reading his contract. Signing the contract without reading does not constitute grounds to cancel the contract ([bit.ly/4inHeO8](http://bit.ly/4inHeO8)), and the e-consumer will nevertheless be required to fulfill his contractual obligations.

#### **b. The theory of appearance:**

Another basis of the duty to read can be found in the theory of appearance as a means of justifying the validity of the contract even if it has not been read by the e-consumer.

The theory of appearance is a jurisprudential creation which aims to mitigate the severity of some principles. This theory is usually defined as a praetorian theory according to which

only appearance is sufficient to produce effects with regard to third parties who, as a result of a legitimate error, have ignored reality (David GANTSCHNIG, 2016, p. 149). This theory makes facts prevail over the law and allows legal effects to be given to a situation that is different from reality.

According to the theory of appearance, since law is a social and not a psychological phenomenon, and since the inner will exists only in the psychological world of the contracting party, the existence of the will in the external world requires that it be materialized by a physical appearance such that it can be perceived. This gives stability in contractual relationships and trust to persons (Abd El Razzaq Ahmed AL-SANHOURI, 2000. p. 192). Under the sole condition of the legitimate belief or good faith of the person invoking appearance, it is not possible to take sufficient account of the interest of the person who intends to rely on legal reality.

The theory of appearance, taken as a support for the contract, could then make it possible to strengthen the effectiveness of the concluded agreement. It aims to transform into true right what was only an appearance, provided that this appearance has assumed sufficient force to mislead third parties.

The Algerian legislator has provided several provisions based on the theory of appearance, such as for example article 111 A.C.C which states that when the terms of the contract are clear, we cannot deviate from them to seek, by way of interpretation, what was the intention of the parties. Here, clarity of terms means conformity between the apparent will and the common will of the contracting parties and the judge cannot deviate from the terms of the contract when interpreting it. In this case, the Algerian legislator takes into account the theory of appearance, and the judge will be prohibited from seeking the inner will if the wording of the contract was clear.

In online contracts, the theory of appearance aims to protect the interests of e-commerce to the detriment of individual interests, so that the e-consumer bears the consequences of not reading his contract. E-contract is a social phenomenon based on social interaction by electronic means, and electronic acceptance is the outward expression of the e-consumer. According to the theory of appearance, if the outward expression does not correspond to the inner will of the consumer, then it is the outward expression that counts because it is what created the contract.

## 2. The ability to read online contracts:

Enabling reading the contract results from the duty to inform. And despite the duty to read, the duty of the professional to inform the e-consumer remains the first requirement for informed consent. However, if the e-consumer is presumed to have read the contract he has accepted, this presumption first requires that the e-consumer is entitled to a simplified contract.

### 2.1- The duty to inform:

In return for his duty to read the contract, Algerian law guarantees the e-consumer his right to informed consent. Taking into account the unbalanced positions between the costumer and the professional, and in order to protect the consumer, the Algerian legislator has imposed on the professional a duty to provide essential information on products and services. The inequality of access to information between the consumer and the professional makes the duty to inform a primary duty in all online contracts.

The duty to inform can be defined as the duty by which a contracting party, even a non-professional, must communicate to his co-contracting party, even a professional, all the

information necessary for the conclusion of the contract, if his competence does not allow him to know about the thing sold (Ghada KARAM and Rawan ABOU NADER, 2023, p. 3). As a general duty, the duty to inform is imposed in all contracts, both traditional and electronic. It is present at all stages of the contractual relationship, from negotiation, formation, performance, and until the resolution of the contract.

Noting that the duty to inform means not only the obligation to provide information relevant to the other party, but also the duty on each party to inform itself, that is to say not only to receive this information but also to reasonably seek to obtain relevant information by its own mean (Daniel Alain DAGENAIS et Lavery, DE BILLY, 2003, p. 10).

The professional is required to inform the e-consumer whenever it is useful to him. Failure to comply with this duty incurs the professional's liability. However, the obligation to provide information requires that the professional himself be well informed in advance to be able to inform the e-consumer.

The duty to inform takes a completely different aspect in online contracts, due to the physical absence of the parties during its formation. Even if the e-contract retains the same legal function as the traditional contract, namely the duty of the parties to perform the obligations arising from it, it differs by its digital mode of formation. This may affect the consent of the e-consumer due to a possible lack of information on the nature and characteristics of the goods or services (Fateh KHLAF, 2021, p 140). In order to avoid any influence on the e-consumer consent, the Algerian legislator has prohibited the professional from including information that would be intended to guide his choices (art. 12 law 18-05).

For an effective protection against some products classified as dangerous, a duty to warn is imposed on the professional in order to alert the e-consumer and draw his attention to avoid use that may cause harm (Fairouz KAILA, 2024, p. 93). In this case, the contract must include an explicit warning, clearly written and visible to the e-consumer, in a different color, on the risks incurred by the product and on how to use it.

## **2.2- The consumer's right to simplified contract:**

Any contract must define clearly the rights and duties of each party in order to ensure a proper performance of the contract. In e-contracts, the Algerian legislator required the professional to provide a detailed offer in art. 11 law 18-05 on electronic commerce, stating that the e-supplier must present the electronic commercial offer in a visible, legible and understandable way. Law 18-05 added that the e-offer must include, and not be limited to, a long list of information stated in the same art. 11 (as for example: the e-supplier's tax identification number, physical and email addresses, and telephone number - the trade register number or professional craftsman card number - the nature, characteristics, and price of the goods or services offered, inclusive of all taxes - the availability of the goods or services - the terms, costs, and delivery times - the general terms and conditions of sale, including information relating to the protection of personal data - the commercial warranty and after-sales service conditions - the method of calculating the price, when it cannot be fixed in advance - the payment terms and procedures..etc.)

In addition to another list of information that must appear in the e-contract, set in art. 13 law 18-05 (as for example: detailed specifications of the goods or services - delivery terms and conditions - warranty and after-sales service conditions - conditions for terminating the electronic contract - payment terms and conditions - terms and conditions for returning the

product - terms and conditions for handling complaints - terms and conditions for pre-ordering, if applicable .etc.), under penalty of cancellation of the contract by the e-consumer in addition to compensation in case of damages (art. 14).

These lists are in the consumer's interest and constitute the expression of prior, complete, and informed consent of the e-consumer, there is no doubt about that. But the problem lies on the wording of this information in the online contract, namely the way by which it is presented to the consumer.

Algerian law does not require that contracts must be written clearly. Article 111/2 A.C.C. on the interpretation of contracts in cases of ambiguity, states that when there is a need for interpretation, we must seek the common intention of the parties and not the literal meaning of the terms. Taking into account the nature of the transaction, loyalty and trust that must exist between the contracting parties according to accepted business practices. This article proves that contracts can contain unclear clauses and may be subject to judicial review, later. This is why, professionals can easily include terms and expressions in their contracts that are not understandable to the simple e-consumer. As previously mentioned, the situation gets worse when it comes to adhesion contracts that cannot be negotiated or modified by the e-consumer. Especially since not all e-consumers demand a judicial review of the contract they accepted without being able to read it. Adhesion contracts can lead to abuses that legislators seek to suppress through a set of mandatory rules and through the control of abusive clauses with the exclusion of illegible or incomprehensible clauses (Michelle CUMYN et Eric FOKOU, 2022, p. 2).

Thus, the duty to read, or more precisely the presumption of reading, requires that the e-consumer was first able to read the contract. By accepting the contract, the e-consumer is deemed to have read the contract. Nevertheless, this presumption may be disregarded if it is proven that the professional did not make it possible for the e-consumer to read the contract. If the signed contract is ambiguous or requires further interpretation, signing does not imply acceptance (Charles L. Knapp, 2015, p. 1089). The professional has the duty to make the contract understandable for the e-consumer.

In case of unclear contract, as if the contract is too long, complex, difficult to read and to understand for the average person, the court may consider the liability to lie with the professional. Failure to translate the contract into a language that the e-consumer understands, or failure to receive a copy of the e-contract may also prevent consumer's consent (Michael A. BLASIE, 2024, p. 6).

Error (Art. 81 A.C.C) can be claimed by the e-consumer to demand the cancellation of the contract, in case of an essential error. If the professional has voluntarily concealed essential information misleading the e-consumer, the latter may request cancellation of the contract for fraud (Art. 86 A.C.C.).

## Conclusion:

Reading a contract implies that the contract must first be readable. A too long online contracts does not match the pace of digital marketing characterized by the speed of transactions. But and as if on purpose, "boring" and "useless" are the two main characteristics of almost all contracts concluded online. The use of voluminous texts with long expressions and overly legalistic terms can be interpreted for the simple e-consumer not to read the contract. In addition to undisclosed clauses containing subscriptions or even implicit sanctions.

The Algerian legislator does not require the e-consumer to read a contract before signing or accepting it, but presumes that the consumer has read and understood its content. And as we have seen in this article, presumption could be based on the unforgivable error or on the theory of appearance.

According to the principle of transparency and trust that must govern the relationship between professionals and consumers, information must be clear, accessible and authentic for the consumer. Not all e-consumers are jurists and they have the right to deal with easy-to-read contracts.

Enabling reading online contracts is an aspect of the duty to inform. By using long and complex contracts, the professional fails in his duty to inform. The duty to read becomes then the right to read. Short, clear and understandable contracts should be recognized as one of the fundamental consumer's rights.

A balanced responsibility between e-consumers and professionals would be set:

From the professional:

- A short summary highlighting the most important information such as price, termination conditions, guarantees and penalties.
- A clear warning with double validation for dangerous and sensitive clauses.
- Use of simple wording understandable for the simple consumer rather than specialised legal drafting.

From the e-consumer: education and awareness of digital rights.

Making online contracts accessible doesn't mean impoverishing their legal content, but rather making them readable, understandable, and binding. Advanced digital consumption is, above all, informed consumption protected by clear and loyal contracts.

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