

# Adhesion in E-commerce Contracts and its Impact on Consumer Protection in Algerian Law

الإذعان في عقود التجارة الإلكترونية وانعكاسه على حماية المستهلك في القانون الجزائري

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## الملخص:

إن تكييف عقود التجارة الإلكترونية كعقود إذعان قد يبدو غير عادل بالنسبة للمستهلك الإلكتروني الذي لا يملك إمكانية مناقشة عقد قائم على قاعدة 'القبول أو الرفض'. إلا أن طبيعة العلاقة التي تربط المستهلك بالمهني، لاسيما في الفضاء الرقمي، قد تفرض على المشرع الجزائري تكييف عقود التجارة الإلكترونية كعقود إذعان، ومنه استفادة المستهلك الإلكتروني من الحماية المقرر للطرف المذعن طبقا للقواعد العامة، إضافة إلى نظام الحماية القانونية الخاص بالمستهلك الإلكتروني. سيما وأن إضفاء طابع المساومة على عقود التجارة الإلكترونية يعتبر من قبيل المغامرة بمصالح مستهلك غير قادر على مناقشة بنود العقد، سواء من الناحية المعرفية أو الاقتصادية.

**الكلمات المفتاحية:** عقد الإذعان، حماية المستهلك، الشروط التعسفية، حق العدول.

## Abstract:

The qualification of e-commerce contracts as adhesion contracts may seem unfair to the e-consumer who does not have the possibility to negotiate a 'take it or leave it' contract. However, the nature of the relationship between the consumer and the professional, particularly in the digital space, may lead the Algerian legislator to adapt the qualification of adhesion contracts to e-commerce contracts. The e-consumer will then be able to benefit from the protection intended for the adhering party in general rules in addition to the e-consumer legal protection system. Especially since qualifying e-commerce contracts as negotiable is a bet on the interests of a consumer unable to discuss the terms of the contract, whether from a cognitive or economic point of view.

**Key words:** Adhesion contract, Consumer protection, Unfair terms, The right to withdraw.

**Adhesion in E-commerce Contracts and its Impact on Consumer Protection under  
Algerian Law  
Boulmerka Amina**

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**INTRODUCTION:**

"*Unbalanced contracts*", this is the main description that all jurists give to adhesion contracts. Highly criticized by the doctrine since their gradual appearance in the field of general contract theory, adhesion contracts nevertheless constitute a factual reality. These contracts are usually made in a uniform way to apply to a large number of people, making them ideal for the digital world.

In consumer contracts, and since the professional's objective is to make the greatest possible profit in the shortest time, most of contracts concluded with the consumer are adhesion contracts prepared in advance by the professional. And by inserting conditions in their favor, described as unfair, professionals cause an additional imbalance in this type of contract.

The qualification of e-commerce contracts as adhesion contracts in Algerian law remains a controversial issue in the Algerian doctrine, particularly after the definition of the e-contract given by the Algerian legislator in law n° 18-05 relating to electronic commerce<sup>1</sup>.

But while it can be admitted that electronic contracts concluded between professionals may be negotiable due to the equal position of the contracting parties who can freely discuss their contracts according to their own interests, e-commerce contracts concluded with the e-consumer are for the most part non-negotiable<sup>2</sup>. His absolute need to acquire the products and services forces the e-consumer to accept the contract without discussion.

In this paper, we will focus on the relationship between the professional and the e-consumer to discuss the possibility that qualifying e-commerce contracts as adhesion contracts could be beneficial for the e-consumer, due to the protection that the Algerian legislator entrusts to the adhering party. Especially since the e-consumer does not have a real ability to discuss the contract with the professional, neither on the cognitive level, nor on the economic level. Taking into account the position of the e-consumer as a weak party, who must be surrounded by reinforced legal protection as a consumer, in addition to the traditional protection according to the general contract theory.

This leads us to wonder whether the qualification of e-commerce contracts as adhesion contracts is the best means of protection for the e-consumer under Algerian law ?

To answer this question, we will adopt a descriptive approach to define the characteristics of adhesion contracts. We will also adopt an analytical approach to discuss the applicability of adhesion contracts to e-commerce contracts and the protection that results from it.

Our research will be divided into two parts:

**Chapter I: The qualification of e-commerce contracts as adhesion contracts.**

**Section 1:** Characteristics of adhesion contract.

**Section 2:** Qualification of e-commerce contracts under law n° 18-05.

**Chapter II: Aspects of e-consumer protection as an adhering party.**

**Section 1:** Protection arising from general rules.

**Section 2:** Protection arising from special texts.

## **1. The qualification of e-commerce contracts as adhesion contracts:**

The qualification of e-commerce contracts as adhesion contracts allows the judge interference, which constitutes a violation of will autonomy principle. This is why it is important to clarify the characteristics of adhesion contracts, then make sure that these characteristics are present in the e-commerce contracts according to law n° 18-05.

### **1.1. Characteristics of adhesion contract:**

It should be reminded that adhesion in contracts was a well-known form of consent in Roman law, but the concept of adhesion contract appeared for the first time in 1901, in the pages of the work written by Raymond Saleilles "*On the Declaration of Will: A Contribution to the Study of the Legal Act in the German Civil Code (Art. 116 to 144)*"<sup>3</sup>. Raymond Saleilles defined adhesion contracts as conventions in which: "there is exclusive predominance of a will, acting as a unilateral will, which dictates its law, no longer to an individual, but to an indeterminate community, and which already commits itself, in advance, unilaterally, except for the adhesion of those who wish to accept the law of the contract"<sup>4</sup>.

Article 70 of Algerian civil code<sup>5</sup> states that acceptance in an adhesion contract occurs by submitting to the established conditions set by the offeror, without allowing discussion.

From this article, it is clear that even if the Algerian legislator did not give a legal definition of what constitutes an adhesion contract in Algerian law, he gave the main characteristics which must strictly appear in any contractual relationship in order to be qualified as an adhesion contract under Algerian law. Which are: a set of conditions already drafted by the offeror and prohibited discussion of the conditions.

Contrary to the Algerian legislator, French legislator made sure to define adhesion contract since it determines the scope of its application. This type of contract was defined in French civil code for the first time in the 2016 reform as one whose general conditions, removed from negotiation, are determined in advance by one of the parties<sup>6</sup>. The 2016 version limited the scope of adhesion contracts to contracts that include general conditions, which means conditions intended to apply to a large number of persons or contracts.

In 2018, French legislator gave a new definition of adhesion contract in article 1110/2 French C.C. according to which: "*Adhesion contract is one that includes a set of non-negotiable clauses, determined in advance by one of the parties*"<sup>7</sup>. The new French reform of 2018 broadened the scope of adhesion contracts from "general conditions" to a set of non-negotiable clauses<sup>8</sup>. Thus, the simple fact of being able, or not, to negotiate the pre-determined clauses will allow it to be qualified either as a negotiable contract or as an adhesion contract in French law.

Algerian doctrine defines adhesion contract as a contract in which one contracting party dictates his terms to the other party, who has no choice but to accept or reject the contract<sup>9</sup>. Thus, for a contract to be qualified as an adhesion contract and therefore subject to judicial review in Algerian law, two characteristics must be present: a unilateral pre-determination of the clauses and the lack of negotiation.

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law**

### **Boulmerka Amina**

---

The unilateral pre-determination of the clauses is the first basis that creates the unequal balance of powers between the parties in adhesion contracts. The unilateral pre-determination of the content in a contract express a financial domination and an economic control practiced by one party over the other. This control was traditionally due to a real or legal monopoly of goods or services exercised by the powerful party<sup>10</sup>. There is a contractual monopoly, held by the party whose will is dominant. This allows that party to insert clauses into the contract that will be to his advantage and to the detriment of the other contracting parties<sup>11</sup>, which often creates arbitrary content<sup>12</sup>.

The second characteristic of adhesion contracts is the absence of negotiation. The inability to negotiate the clauses is the main way to qualify a contact as adhesion. Adhesion contract is not the result of free negotiations and bargaining but of a total submission to the pre-drafted terms of dominating party.

However, the fact that the contracting party does not exercise his right to participate in the creation of the content of the contract 'with a contractual freedom' does not constitute in itself an abuse<sup>13</sup>. The biggest issue with this type of contract was to know whether 'freedom to contract' can justify 'freedom to adhere'. In fact, adhesion contract already constitutes in itself a limit to the principle of contractual freedom. Thus, the adhering party who has 'freely' adhered to the conditions previously drafted by the offeror cannot then demand the nullity of the contract by claiming contractual freedom. Adhesion contract, like any other contract, requires an offer and an acceptance, and the party remains free to accept or refuse the conclusion of the contract.

### **1.2. Qualification of e-commerce contracts under law n° 18-05:**

E-commerce contracts are mostly free of negotiation. The content of these contracts is generally a set of standardized documents, unilaterally established by professionals and submitted for the consumer's adhesion, without any possible modification<sup>14</sup>.

Art. 6/2 of law n°. 18-05 relating to electronic commerce defines an electronic contract as "a contract within the meaning of law n°. 04-02 of 5 Jomada El Oula 1425 corresponding to June 23, 2004 establishing the rules applicable to business practices, concluded remotely without the simultaneous physical presence of the parties by the exclusive use of an electronic communication technique".

In this article, the Algerian legislator referred to law 04-02 on the rules applicable to business practices, amended and supplemented<sup>15</sup>, to define the e-contract. In turn, art. 3/ 4 of law n°. 04-02 defines the contract, in the sense of the cited law, as "any agreement or convention, having as object the sale of a good or the provision of a service, drafted unilaterally and in advance by one of the parties to the agreement and to which the other party adheres without a real possibility of modifying it".

So, to be considered an electronic contract in Algerian law, the contract must meet a set of conditions mentioned in art. 3/4 of law n° 04-02 in addition to the conditions mentioned in art. 6/2 of law n°18-05, which are:

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law**

### **Boulmerka Amina**

---

1. The contract must have as object the sale of a good or the provision of a service;
2. The contract must be drafted unilaterally and in advance by one party;
3. The other party must adhere to the contract without a real possibility of modifying it;
4. The contract must be formed remotely without the simultaneous physical presence of the parties;
5. The contract must be concluded by the exclusive use of an electronic communication technique.

From these conditions, we can notice that the Algerian legislator does not hide his qualification of e-commerce contracts as adhesion contracts. The necessity of a pre-drafted contract by one of the parties with total submission of the other party without the possibility of modification are the main characteristics of adhesion contracts in Algerian law. Thus, if a contract for the sale of goods or services takes the form of an adhesion contract within the meaning of art. 3/4 of law 04-02, it would be considered an electronic contract under Algerian law if it is concluded using electronic means.

It should also be noted that e-commerce contracts are no longer linked to the idea of monopoly that dominated the traditional concept of adhesion contracts. The e-commerce field has many traders and varied products with intense competition. Today, the consumer has the opportunity to choose his contracting party, but he still remains ignorant of the dangers and defects of the product, hence his weak contractual position <sup>16</sup>.

It is nevertheless worth highlighting the confusion in the interpretation or more precisely the mistranslation of article 3/4 of law 04-02 from French into Arabic, which may lead one to believe that electronic contracts can be qualified as negotiable contracts under Algerian law.

The French text, which is the original text and the first reference in the event of a discrepancy between the French and the Arabic text, states '*... auquell'autrepartieadhère sans possibilitéréelle de le modifier*'.

While, the Arabic text states:

مع إذعان الطرف الآخر بحيث لا يمكن هذا الأخير إحداث تغيير حقيقي فيه...

According to the French text, the contract according to law 04-02 is when the party adhere to the contract without a real possibility to modify the contract. Here, the adhering party does not have a real possibility, that is to say a real opportunity to modify the contract. The legislator has prohibited the adherent from modifying the contract. This prohibition gives the agreement the qualification of an adhesion contract because the prohibition on modification is a prohibition on negotiation.

While, the Arabic text lets understand that the adhering party has the possibility to make a change in the content of the contract, but this change should not be real (important) to be qualified as a contract according to law 04-02. Which means that the adhering party already has a possibility to negotiate, but after the negotiation the change of the content should not be

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law** **Boulmerka Amina**

---

real to be qualified as a contract according to the cited law. Which makes from the electronic contract a negotiable contract according to article 6/2 of law No. 18-05.

The French version of article 3 /4 of law 04-02 talks about the absence of a real possibility to negotiate and not about the absence of a real change after negotiation.

The impossibility to negotiate in adhesion contracts should not be confused with the failure of negotiation. The absence of negotiation must lie in the 'impossibility' of negotiating the terms and conditions of the contract and not simply in the fact that there was no negotiation. A distinction must be made between the situation where one of the parties accepts the terms of the contract proposed to him because they suit him perfectly, and the situation where a party has no choice but to accept the contract exactly as proposed. The party with a negotiating advantage leaves the other party with no choice but to accept or reject the contract, 'take it or leave it'<sup>17</sup>.

In our opinion, the exact translation of the French text into Arabic is :

بحيث لا يملك هذا الأخير إمكانية تعديله...

### **2. Aspects of e-consumer protection as an adhering party:**

Qualifying e-commerce contracts as adhesion contracts allows the e-consumer, to benefit from the protection that the Algerian legislator entrusts to the adhering party in all adhesion contracts according to general rules, in addition to the protection granted to the e-consumer in the special texts.

#### **2.1. Protection arising from general rules:**

This protection is granted by the Algerian legislator to all adhering parties in all adhesion contracts in the Algerian Civil Code:

- The e-consumer, like any adhering party in any adhesion contract benefits from a judicial review provided for in art. 110 A.C.C. If the contract is formed by adhesion and contains unfair terms, the judge may modify these clauses or exempt the adhering party from them, in accordance with the rules of equity.

Judicial review in this situation is an aspect of contractual justice by which the judge is allowed to interfere to restore the balance in adhesion contracts, either by modifying unfair terms or by disabling them completely.

This judicial review is a matter of public order. In order to prevent professionals from including in their contracts a clause by which they exclude the interference of the judge to modify or cancel conditions that he considers arbitrary, the legislator has stipulated the nullity of any agreement or condition in this regard<sup>18</sup>.

This protection is limited to adhesion contracts. The consumer in negotiation contracts does not benefit from this judicial revision and must submit to the principle of will autonomy, according to which the contract is the law of the parties<sup>19</sup>. And even if this contract is concluded by electronic means, it is not qualified as an electronic contract according to art. 6/2 of law 18-05 due to non-compliance with the five aforementioned conditions.

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law**

### **Boulmerka Amina**

---

- Doubt is interpreted in favor of the e-consumer. Another aspect of the advantages enjoyed by the e-consumer due to the qualification of his contract as an adhesion contract is found in art. 112/2 A.C.C.

The stronger party in adhesion contracts (which is the professional in e-commerce contracts) assumes responsibility for doubtful clauses, because they have been unilaterally pre-drafted by him and imposed on the consumer<sup>20</sup>. Thus, it can be said that the Algerian legislator has provided for an indirect means to deal with unfair terms in adhesion contracts<sup>21</sup>. The interpretation of ambiguous clauses in e-commerce contracts must not prejudice the e-consumer whether he is a creditor or a debtor.

Let us recall that the judge must refrain from interpreting the contract if the clauses are clear. For article 112/2 A.C.C to be applied, the clauses set by the professional must be ambiguous. So, if the terms of the contract are clear, the adhering party (the e-consumer) does not benefit from this protection<sup>22</sup>.

- In another context, the penalty clause may be set in both negotiable and adhesion contracts. But due to the impossibility of negotiation in e-commerce contracts, the professional may fix a penalty clause in the pre-drafted contract and the e-consumer must agree on the amount of the penalty without discussion as an adhering party.

The penalty clause is an agreement by which the contracting parties estimate in advance the compensation that the creditor is entitled to, if the debtor does not fulfill his obligation or if he is late to fulfill it<sup>23</sup>. In e-commerce contracts, the e-consumer can benefit from a judicial review in the event of an excessive clause as mentioned in art. 184/2 A.C.C. according to which, the judge may reduce the amount of an abusive clause if the e-consumer establishes that it is excessively exaggerated or that the principal obligation has been partially fulfilled. Furthermore, and as the penalty clause in Algerian law requires the damage to be triggered, the amount of the penalty fixed by the professional is not due if the e-consumer establishes that the professional has no prejudice<sup>24</sup>.

### **2.2. Protection arising from special texts:**

In addition to the protection enjoyed by the e-consumer as an adhering party under the general rules, he also benefits from a protection specifically intended for the e-consumer<sup>25</sup>:

- The consumer protection against unfair terms is the first and main purpose of the entire consumer protection system. And protecting e-consumer from unfair terms is another proof that e-commerce contracts are adhesion contracts in Algerian law.

The Algerian legislator has established a black list of what should be considered abusive clauses in law 04-02 and executive decree 06-306. Which means a set of conditions prohibited by force of law, and both professionals and judges must comply with because of their illegality. The judge has no choice but to cancel them<sup>26</sup>.

Art. 3/5 of law 04-02 defines unfair terms as any clause or condition which, alone or combined with one or more other clauses or conditions, creates a manifest imbalance between the rights and obligations of the seller and the consumer, and art. 29 of law 04-02<sup>27</sup> cited, as example, a number of clauses considered abusive by law.

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law**

### **Boulmerka Amina**

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In addition, in Executive Decree n°06-306 on establishing the essential elements of contracts concluded between economic agents and consumers and the clauses considered abusive<sup>28</sup>, the Algerian legislator set another prohibited list of unfair terms in chapter II art.5<sup>29</sup>.

- The duty to inform is one of the most important aspects of e-consumer protection in Algerian law. The duty to inform applies to all contracts, whether they are adhesion or negotiable contracts. However, this duty is reinforced in e-commerce contracts due to the imbalanced position of the contracting parties and also due to the physical absence of the e-consumer at the time of conclusion of the contract. The consumer must be clearly informed about the products and services he wants to purchase.

The Algerian legislator imposed on the seller a duty to inform the consumer in law 04-02 Chapter I on 'Information on prices, tariffs and conditions of sale' of Title II on 'transparency of commercial practices'. In law 18-05 art. 13, and for an informed e-consumer, the Algerian legislator imposed on the e-supplier the duty to include in the electronic contract information on goods and services, delivery conditions, warranty and after-sales service, termination of the e-contract, and other information.

- Another protection can be found in the right to withdraw guaranteed by the Algerian legislator to the e-consumer, in law n°. 18-09 amending and supplementing law n°. 09-03 of February 25, 2009 relating to consumer protection and the repression of fraud<sup>30</sup>. In fact, the right to withdraw is another aspect of the protection of the e-consumer as an adhering party who has no possibility to negotiate the pre-drafted clauses of his electronic contract. This is why the Algerian legislator granted the e-consumer a relatively "new" right allowing him to withdraw from the electronic transaction if he considers unfavorable to his interests. In addition, the electronic contract was concluded without physical examination of the product by the e-consumer, but only remotely via the digital screen<sup>31</sup>.

The Algerian legislator defines the right to withdraw in art. 19/2 of law 18-09 as the consumer's right to rescind, without reason, from the purchase of a product. According to the right to withdraw, the e-consumer has the right to cancel the purchase of a product in accordance with the conditions of the contract without having to pay additional costs<sup>32</sup>. The right to withdraw is a matter of public order, the consumer does not have the right to waive it in advance and cannot be restricted in any way<sup>33</sup>.

We can notice here that the expression "without reason" used in art. 19/2 law 18-09 gives the impression that the right to withdraw is absolute, however, the exercise of this right by the e-consumer should not constitute an abuse. Some of the business world argued that in case of withdraw, the consumer must pay the withdrawal costs as well as the transport costs in order to prevent abuse and excesses.

### **Conclusion:**

Empirical observations indicate that most e-consumers accept terms without reading them, which weakens their contractual awareness. This is the sad reality of many consumers in Algeria and it is getting worse in the virtual space. The e-consumer usually validates the terms

## **Adhesion in E-commerce Contracts and its Impact on Consumer Protection under Algerian Law**

**Boulmerka Amina**

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and conditions of the site or platform with a simple click without even understanding the content of the contract.

In this sense, the qualification of e-commerce contracts as adhesion contracts is a factual reality that has been imposed on the Algerian legislator due to the specificity of the relationship between the professional and the consumer especially in the digital field.

The qualification of the e-contract as a negotiable contract requires a very high intellectual and educational level on the part of the e-consumer to be able to conclude a relatively “balanced contract”, apart from financial equality of the parties. Something which is unfortunately lacking among the majority of Algerian consumers.

And although adhesion contracts seem to infringe the principle of contractual freedom, they actually grant the e-consumer more legal protection and rights than negotiable contracts grant to their parties. Judicial review of the contract is not always allowed in negotiable contracts, as it constitutes in itself a violation of the principle of will autonomy. And as it has been show in this paper, the e-consumer as an adhering party can benefit from a double protection arising from the general principles of the Algerian Civil Code, in addition to a particular protection for the e-consumer in special texts.

We recall here the mistranslation, in the definition of the e-contract, between the French and the Arabic version of article 3/4 law 04-02, which can lead some authors to qualify e-commerce contracts as negotiable contracts under Algerian law.

Adhesion in e-commerce contracts may be, to a certain limit, a legal strategy for consumer protection under Algerian law. However, this protection does not guarantee optimal protection to the e-consumer .To rebalance the relationship between professionals and consumers, we suggest:

- Explicitly codifying unfair terms in special laws (such aslaw 04-02 and law 09-03).
- Adding a clear rule in special texts for interpreting ambiguous clauses for the benefit of consumers.
- Establishing a civil penalty for the inclusion of unfair terms.
- Strengthening the role of consumer associations by providing financial and legal support.
- Training and raising awareness among consumers and professionals on the consequences of unfair terms.

**Adhesion in E-commerce Contracts and its Impact on Consumer Protection under  
Algerian Law  
Boulmerka Amina**

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**Adhesion in E-commerce Contracts and its Impact on Consumer Protection under  
Algerian Law  
Boulmerka Amina**

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