

The Civil Liability of the Electronic Agent

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Abstract

This study focuses on the civil liability of the electronic agent, which may arise from damages caused by security devices. These damages may be attributable to a defect in the product or a complaint arising from user error. The study provides a detailed account of the foundations of this liability, which consists of fault, damage, and the causal relationship between the fault and the damage.

Keywords: *electronic agent, agency, electronic commerce, contracting party, liability*

La responsabilité civile de l'agent électronique

Résumé

Cette étude se concentre sur la responsabilité civile de l'agent électronique, qui peut découler des dommages causés par les dispositifs de sécurité. Ces dommages peuvent être imputables à un défaut du produit ou à une plainte résultant d'une erreur de l'utilisateur. L'étude détaille les fondements de cette responsabilité, à savoir la faute, le dommage et le lien de causalité entre la faute et le dommage.

Mots-clés : *agent électronique, agence, commerce électronique, partie contractante, responsabilité*

Introduction

The will of the electronic agent may substitute for the will of the contracting party; nevertheless, the effects of the act, whether rights or obligations, are directly attributed to the principal. The agent does not generate its own will or authority independently; rather, these are established by the principal. The principal may be absolved of liability if it is demonstrated that the electronic agent does not operate under the principal's control or if it is proven that the fault does not originate from the electronic agent but rather from an external cause beyond the principal's will. Suppose the electronic agent commits an error or mistake resulting from a defect in the computer's programming, which induces a third party to enter into a contract. In that case, the third party may seek annulment of the contract by bringing an action for nullity against the principal, as the latter is considered the original party to the contract.

Furthermore, the third party may claim compensation from the principal for any damages sustained. Ultimately, recourse may be sought against the originator of the computer program, who is deemed liable for any programming errors. In all cases, the principal's liability does not arise unless the liability of the electronic agent is first established. If the damage suffered by the third party does not result from the electronic agent's fault but from an external cause, the third party has no right of recourse against the principal. In this context, the National Conference of Commissioners on Uniform State Laws committee drafted this law, distinguishing between the electronic device and the electronic agent. (Khalid Mamdouh Ibrahim, 2011, 51.)

This distinction aims to exempt the principal from liability that may arise in the event of a computer-related error. If the pre-programmed computer is regarded merely as an electronic device, the principal is not liable for errors committed by the computer. However, if the computer is considered an electronic agent that has been pre-programmed to conduct electronic transactions, the principal is legally responsible for the mistakes of the electronic agent.

A person contracting with the electronic agent will be subject to the effects of the contract unless it is proven that he or she was unaware or could not reasonably have known that the contracting party was, in fact, an electronic agent. This is reflected in the Dubai Electronic Transactions Management Law, which stipulates that for an electronic contract between an electronic agent and a natural person, the latter must know, or be presumed to know, that the transaction will be concluded with an electronic agent. The law states: "A contract is concluded between an automated electronic information system and a natural person if the latter knows, or is presumed to know, that such a system will undertake the task of concluding and executing the contract."

Accordingly, the electronic agent's liability arises when an error in programming the computer or system harms the other party. In such cases, liability is assigned to the party responsible for the error and causing the damage, provided a causal relationship between the fault and the damage can be established.

Problem Statement

The problem addressed in this chapter concerns the complexity of establishing liability when dealing with an elec-

tronic agent and the difficulty of holding the party responsible for the damages accountable. In order to answer this problem, the following steps have been adopted:

- **First Section:** Definition and Effects of the Electronic Agency Contract
 - **First Requirement:** Definition of the Electronic Agency Contract
 - **Second Requirement:** Effects of the Electronic Agency between the Contracting Parties and Third Parties
- **Second Section:** Elements of the Liability of the Electronic Agent
 - **First Requirement:** The Element of Fault
 - **Second Requirement:** The Element of Damage and Its Causal Relationship

1. Definition of the Electronic Agency Contract

An agency contract is an agreement by which the agent undertakes to perform a legal act on behalf of the principal. It is, in essence, a contract based on mutual consent; it becomes a formal contract if the legal act constituting the subject of the agency is itself a formal act.

Among the characteristics of the agency contract is that it may be a negotiation contract if remuneration is stipulated explicitly or implicitly, and it is also a binding contract. The principal is always obliged to reimburse the agent for expenses incurred in performing the agency and to compensate him for any damage suffered.

Linguistically, agency (*wakālah*) is defined as protection and guarantee. This meaning has evolved through the development of the agency contract to the extent that it now

signifies one person representing another and being assigned to act on their behalf in concluding transactions and carrying out tasks.

Therefore, I shall discuss the electronic agency contract and its effects in the first requirement. In contrast, the second requirement will address the effects of the electronic agency between the contracting parties and third parties.

1.1. Definition and Effects of the Electronic Agency Contract

Legislation concerning electronic commerce has differed in its definition of the electronic agent. The Canadian Uniform Electronic Commerce Act of 1999 defines the electronic agent as: "A computer program, electronic or other means that is created to initiate an action or respond to electronic records or perform functions, in whole or in part, without review or intervention by an individual." (Jamil Abdul-Baqi, 2004, 13) This definition closely resembles that provided by the Uniform Commercial Code of the United States in its second article and the Uniform Electronic Transactions Act in Article 6(2) of Section 401. The electronic agent is: "A computer program, electronic, or other means created to initiate an action or respond to electronic records or perform functions, in whole or in part, without review or intervention by an individual." This definition of the electronic agent appears to align with the previous definition, particularly in describing the electronic agent as a computer program. The law defines a computer program as: "A set of instructions or directives used, directly or indirectly, in processing information to achieve a specific result." Moreover, the law defines the term "electronic" as: "Electrical, magnetic, optical,

electromagnetic, or any other form of technology with similar capabilities." (Adel Abu Hasheema, Mahmoud, *Contracts for Electronic Information Services in Private International Law*, 1st ed. (Cairo: Dar Al-Nahda Al-Arabiya, 2004), 132)) According to the provisions of Article 699 of the Egyptian Civil Code, any actions undertaken by the agent within the scope of their authorisation are carried out on behalf of the principal. Therefore, whether the agent performs an act of disposition or management, legal proceedings may not be brought against the agent regarding such acts; instead, any claim must be directed against the principal. In this context, as evidenced by the documents, the essence of the dispute between the appellant and the first respondent centres on whether the sale was concluded for the principal's benefit. Since the execution of this transaction is for the account of the principal, any legal action arising therefrom should be brought against the latter. The contested judgment, in ruling otherwise by rejecting the plea of lack of standing raised by the appellant because the action was brought against the wrong party and by establishing the contract at issue on the basis that the agent was authorised to conclude and sign it under the agency agreement has erred in its application of the law. (Ali Haidar, 2003, 6)

The electronic agent is a special software programme characterised by autonomy in executing tasks. (S. Weitting and E. Zehedner,) Various names are known for this programme; however, the most common term is "Electronic Agent." Although "electronic agent" is widely used, scholars have not agreed upon a precise definition, making it difficult to reach a unified definition.

Jurisprudential definitions have contributed significantly to adopting legislative frameworks governing electronic agent programs' operation. Among these definitions are the

following: According to some scholars, the electronic agent is “a programme that knows how to perform actions that are suitable for the user.” Other scholars focus on the objective or function performed by the electronic agent. For example, one technician at IBM defined it as “a programme that assists people in carrying out tasks on their behalf.” It is also defined as “anything that can operate within its environment through sensors and interact with that environment via effectors.”

Some prefer to focus on the characteristics that distinguish this programme from others, which is why it is called an "electronic agent." Among the definitions advanced in this regard is that the electronic agent is "a programme or a physical component of a computer, whether hardware or software, characterised by four features: autonomy, social ability, reactivity, and proactiveness."¹

Certain scholars include a further set of characteristics in addition to the aforementioned definition: adaptability, personalisation according to the user's profile, collaboration, and goal-orientedness.²

Others tend to define the electronic agent as a computer program that responds, wholly or partially, to data messages without the intervention of a natural person each time the system acts or responds. It serves as an intermediary in electronic transactions, performing functions analogous to those of a traditional agent represented by a legal person, whether

¹ M. Wooldridge and N. Jennings

² “Intelligent Agents,” EGAL-94 Workshop on Agent Theories, Architectures, and Languages, Berlin, 1995.

a natural or juridical person. This is reflected in its execution of lawful and specific acts on behalf of the principal.

For the Algerian legislator, commercial agency contracts are defined in Article 34 of the Commercial Code as "an agreement by which a person customarily undertakes to prepare or conclude sales, disputes, and generally all commercial transactions in the name and on behalf of a merchant and to conduct commercial operations on his own account, but without being bound by an employment contract."¹

Moreover, Article 571 of the Civil Code defines agency as "a contract by which a person assigns another to carry out everything on behalf of and in the name of the principal."²

It is worth noting that the Algerian legislator did not address the electronic agent in Law No. 18 on Electronic Commerce but limited himself to defining only the electronic supplier and consumer.

1.2. The Effects of the Electronic Agency between the Contracting Parties and Third Parties

After their amendment, the conclusion of electronic contracts validates those executed by the electronic agent and attributes the results to the party utilising the agent.³

Since the liability of the electronic agent requires further clarification, we have chosen to address the element of fault as the basis for establishing liability, the element of damage resulting from this fault, and the causal relationship between them. This will be referred to as follows:

¹ Article 34 of Algerian Commercial Code No. 75/59.

² Article 571 of the Algerian Civil Code.

³ L. J. Danial, "Electronic Contracting under the 2003 Revisions to Article 2 of the Uniform Commercial Code: Clarification or Choice?"

1.3. The Element of Fault

There are mutual obligations between the user and the intermediary, including:

The duty of disclosure: The duty of disclosure is considered the most important aspect during the negotiation phase, which involves a series of discussions, the exchange of viewpoints, and the exertion of various efforts by both parties. Negotiators are thus obliged, as a result, to provide the other party with all available information relating to the subject of the contract. This is achieved by disclosing information during the negotiation phase. Under Algerian civil law, Article 86(2) assigns this obligation to...

2. Elements of the Liability of the Electronic Agent

These national laws, which address the actions managed by the electronic agent, are mirrored in the United States Uniform Electronic Transactions Act (UETA),¹ Which recognises the ability of the electronic agent to conclude and execute contracts independently on behalf of others and renders those on whose behalf the agent acts liable for its actions.

The same applies to the Uniform Computer Information Transactions Act (UCITA) of 1999, which, in Section 102, defines the electronic agent, and in Sections 107 and 112, affirms the validity of actions carried out by the electronic agent. Specifically, Section 107 stipulates that the person using the electronic agent is bound by the transactions performed by the agent, even if the user was unaware of the

¹ Uniform Electronic Transactions Act, enacted in 1999.

agent's actions or did not review the operations undertaken by the agent or their outcomes.

In addition to the aforementioned laws, the Uniform Commercial Code (UCC) on electronic commerce underwent significant amendments in 2003. The revised provisions included the requirement for the seller to enable the buyer to access comprehensive information regarding the goods. Furthermore, the buyer can withdraw from the contract after acceptance within a specific period determined by law. (Nidal Ismail Buraim, 2005), 58)

Due to the difficulty in aligning the wills of both parties, which may be expressed in a manner that is not directly conflicting, such that the offer is made by one contracting party and acceptance by the other follows after a lapse of time, there also arises the challenge of verifying the date of actions and documents, the prior preparation of evidence, and the determination of the place where acts are concluded and documents are executed. In the traditional legal sense, electronic contracting between the principal and the electronic agent occurs without a contract. The contracting process is done remotely, without the parties seeing each other or negotiating face to face, as in a conventional agency.

Liability arising from the breach of a legal obligation is a tortious liability, whereas liability arising from the breach of a contractual obligation is a contractual liability. Since the agency is a contract regulated by law, contractual liability is incurred by the party that fails to fulfil its obligations. Suppose the will of the electronic agent substitutes for the principal's will in contracting. In that case, the act's effects, whether rights or obligations, are nevertheless directly attributed to the principal. This is because the electronic agent

does not create its own will or authority; rather, these are established by the principal. The principal may be discharged from liability if it is proven that the electronic agent does not operate under the principal's control or if it is demonstrated that the fault is attributable to an external cause beyond the principal's will. Suppose the electronic agent commits an error or mistake due to a defect in the programming of the computer, which induces a third party to contract with it. In that case, the third party may seek to annul the contract by bringing an action for nullity against the principal, who is regarded as the original party to the contract. The third party may also claim compensation from the principal for damages suffered. The principal, in turn, may have recourse against the computer program designer, who is deemed responsible for the programming error. (Hisham Al-Ma'mun, 2006), 178)

In all cases, the principal's liability is not established unless the liability of the electronic agent is first established. If the damage suffered by the third party is not attributable to the fault of the electronic agent but rather to an external cause, the third party has no right of recourse against the principal.

Opinions have varied and multiplied regarding assessing fault that gives rise to liability. However, what is well established in both doctrine and jurisprudence is that fault in tortious liability consists of a person's breach of a legal obligation with awareness of that breach. This constitutes a deviation from the standard behaviour of a reasonable person. This obligation entails that an individual exercise caution and vigilance in their conduct to avoid causing harm to others. Should a person deviate from this required conduct and

be aware of such deviation, they are considered at fault and thus liable in tort.

Most scholars agree that fault is the breach of a legal obligation with the awareness that such breach may harm others. Fault in the context of electronic agency occurs when the agent deviates from the path prescribed for it. The fault is attributable to the person who created the programme, who, in this case, is held liable for the acts of their subordinate.

As for the mental element (awareness) of fault, liability is not based on capacity. For example, a minor lacking discernment, a person with insanity, an imbecile, or one who has lost self-control for a temporary reason such as intoxication, hypnosis, or sleep disorders, none of these can be deemed at fault, as they are unaware of their actions. In tortious liability, discernment is not equated with the capacity required for contracting; rather, discernment is the awareness element of fault, and without it, the wrongdoer cannot be considered at fault.

It should be noted that Algerian cassation law does not directly establish the general rule of contractual liability for the acts of others, as is the case for the general rule of tortious liability for others. However, a provision does exist that indirectly establishes the principle of liability for the acts of others, namely the second paragraph of Article 217. Furthermore, it is permissible to agree to exempt the liable party from any responsibility arising from the non-fulfilment of their civil obligations.

Ultimately, it is observed that the element of fault, as the basis of liability on the part of the electronic agent, consists of the breach of obligations arising between the user and the intermediary, such as the duty of disclosure. The negotiator

or the other party must be provided with all available information on the contract subject to disclosure during the negotiation phase. The act's effects, in terms of rights and obligations, are attributed directly to the principal, as the electronic agent does not create its own will or authority; rather, these are established by the principal. The latter may be discharged from liability by proving that the electronic agent operated beyond their control. Suppose the electronic agent commits an error or mistake due to a defect in the programming of the computer, which leads a third party to contract with it. In that case, the third party may seek the annulment of the contract by bringing an action for nullity against the principal, who is considered the original party to the contract.

The third party may also seek compensation from the principal for any damages suffered. In contrast, the principal, in turn, may have recourse against the computer program designer, who is deemed responsible for programming errors. In all cases, the principal's liability does not arise unless the liability of the electronic agent is first established.

3. The Element of Causation and Its Causal Relationship

Civil liability, like other forms of liability, arises when damage occurs due to the fault of one of the contracting parties. If liability is established about a third party, it is tortious; otherwise, it is a contractual liability. Contractual liability arises when one party fails to fulfil their obligations. In contrast, tortious liability is established when a person breaches the general duty imposed by law not to cause harm to others by committing a specific wrongful act that damages a third party.

Given that the electronic agent is merely a programmed communication tool operated by its user, all obligations attributed to it stem from pre-programmed contracts. Accordingly, the user's obligations are divided into general and specific obligations.

General obligations arise from the inherent nature of electronic intermediation, which imposes several requirements. These obligations include providing the technical capabilities and material resources necessary to deliver trading services, such as qualified technical staff and ensuring the validity of received orders.

Article 03 of Resolution No. 67 of 2007 (Tariq Al-Bakkush, 718) The Regulation of Online Trading requires that the intermediary possess the technical and administrative capabilities necessary to provide online trading services. Thus, the intermediary acting on behalf of the user must achieve a specific result rather than merely exercise due diligence. As such, the intermediary must provide all necessary trading resources, utilising all technological capabilities available through modern advancements.

Thus, the intermediary is liable for any damages sustained by the client if it is proven that the client's orders were not executed in the manner, quantity, or price specified by the client. The intermediary is also liable for any malfunction, interruption (except those attributable to the clearing house), or disruption in its information systems or databases under its direct management. In this respect, the electronic intermediary is deemed liable for damages suffered by the client due to the use of its systems. In all circumstances, the electronic intermediary must provide the necessary material resources for operation, including the equipment and sys-

tems for executing and safeguarding databases under its direct management.

Accordingly, the intermediary must exercise due diligence in selecting its personnel and bear the consequences of poor selection due to a lack of care. There are also certain specific obligations, such as:

Concluding an Online Trading Agreement:

The electronic intermediary must provide a draft of the agreement and present it to the client for approval before executing it. This agreement must include, at a minimum, the mandatory data and provisions that bind the electronic intermediary and are intended to alert the client to the risks associated with online trading. Such an agreement constitutes a contractual framework that safeguards the rights of both parties and delineates their reciprocal obligations.

Clarity of Drafting:

This obligation applies to the intermediary or seller. It is established that any ambiguous or vague legal act, statement, or term will be interpreted against the party responsible for the ambiguity. This issue frequently arises in contracts concluded remotely.

Duty to Advise and Guide:

The electronic intermediary must assist the client in selecting the most appropriate decision for their needs. There are also duties incumbent upon the client or user in order to avoid incurring liability:

Duty of Care and Caution:

Failure to exercise due care and caution results in the client's liability if such failure damages the agent employed by the user. Thus, liability is contractual about the user and tortious about third parties.

-Safeguarding the means of communication and paying the required fees.

-The client must safeguard the means of communication specified in the trading agreement with the intermediary.

-The obligations establish the causal link between fault and damage when breached. If these obligations are stipulated in the contract, the resulting fault is contractual, giving rise to contractual liability. The resulting liability is tortious if the breach pertains to a legal obligation. Various forms of liability may arise in electronic contracting on the Internet; however, such liability will be contractual if the core of the electronic transaction is a contract. (Tariq Al-Bakkush, 718)

The effects of the contract do not bind a natural person contracting with an electronic agent if it is proven that he or she was unaware, or could not reasonably have known, that the contracting party was an electronic agent. This principle is affirmed in the Dubai Electronic Transactions Law, which stipulates that, for an electronic contract to be concluded between an electronic agent and a natural person, the latter must be aware that the transaction will be entered into with an electronic agent. The law provides that "a contract is concluded between an automated electronic transaction system and a natural person if the latter is aware that such a system will undertake the task of concluding or executing the contract." (Muhammad Hussein Mansour, *op. cit.*, 76)

Conclusion

The breach of the obligations stipulated in the electronic contract, which forms the electronic agency contract, constitutes the basis of contractual liability between the user and the electronic agent. The causal relationship in the occurrence of damage is limited to the failure to observe the contractual obligations due to negligence, thereby giving rise to tortious liability.

References

- Hisham Al-Ma'mun. *Special Provisions on Electronics*. Alexandria: Mansha'at Dar Al-Ma'arif, 2006.
- Jamil Abdul-Baqi. *The Internet and the Law*. 1st ed. Cairo: Dar Al-Nahda Al-Arabiya, 2001.
- Muhammad Hussein Mansour. *Electronic Liability (Electronic Transactions)*. Alexandria: Mansha'at Dar Al-Ma'arif, 2007.
- Tariq Al-Bakkush. "Project Contribution on Electronic Intermediation," Conference on Electronic Transactions (Electronic Commerce).
- Witting, S., and Zeheder, E. "The Electronic Agent: A Legal Personality under German Law," available at www.leonline.net/publication.