

Title: The Nature of the Electronic Contract

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Abstract

Trade is one of the most responsive sectors to technological advancement and the most extensive in the use of modern and sophisticated technologies. These technologies constitute a central axis of commercial transformation, resulting in a profound change in the behavior of traders and in the rules of commercial transactions. A new type of trade has emerged, known as electronic commerce, which has been facilitated by the social network and provided with its own means that are compatible with its nature. This network has become an extraordinary national and international virtual market, due to the effective and beneficial nature of electronic commerce, which shortens time and saves costs. Among the tools of electronic commerce are contracts concluded remotely via electronic media, known as electronic contracts, with the parties being the consumer and the electronic intermediary.

Keywords: Electronic contract - Consent - Contract formation - Electronic commerce

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Introduction:

The world has witnessed tremendous development in scientific and technological progress, especially in the fields of communication and information technology, which has cast its shadow and effects on all aspects of life and the relationships between individuals and countries. Modern means of communication, such as the internet, have become indispensable tools, as evidenced by their increasing use in various transactions conducted through electronic contracts.

The electronic contract is currently the prevailing means, as it connects contracting parties worldwide in a matter of seconds. Through it, offers and acceptances can be exchanged, and the subject matter of the contract can be reviewed, regardless of the geographical boundaries of countries.

One of the most significant advantages resulting from the use of electronic contracting is the reduction of time and expenses, as well as avoiding the hassle of travel and movement. All that a contractor needs is a computer connected to the internet or a mobile phone with an internet-enabled SIM card.

This development has reflected on the traditional method of contracting, as contracting has become electronic. Society has shifted from a paper-based society, relying on tangible physical items, to an electronic society based on intangibility. Transactions are completed in a digital electronic environment that does not recognize spatial concentration, leading to the emergence of new concepts such as electronic payment, electronic delivery, electronic signatures, electronic documents, electronic arbitration, and other concepts related to the electronic contract.

Problem Statement:

- What is electronic contracting?

To answer this question, the division is as follows:

Chapter One: The Nature of the Electronic Contract**Section One: General Provisions of the Electronic Contract**

- **Subsection One:** Juristic Definition of the Electronic Contract

- **Subsection Two:** Legislative Definition of the Electronic Contract

- **Subsection Three:** Parties to the Electronic Contract

Section Two: Characteristics of the Electronic Contract

- **Subsection One:** Special Rules for Concluding the Electronic Contract

- **Subsection Two:** Characteristics of the Electronic Contract in Terms of Effects

Chapter One: The Nature of the Electronic Contract

The world has witnessed significant development in the fields of technology, information, and communication, especially in the methods of concluding contracts through electronic means. It has become necessary to direct studies towards the stage of contract formation, which is conducted through electronic means within what is known as electronic contracting.

The electronic system for electronic contracting occupies a distinguished position, especially for countries that have enacted laws regulating electronic transactions and exchanges. However, the distinction lies in the use of technology in transmitting contracting data within an electronic environment linked to multiple communication means. Consent at this stage is achieved through studying the electronic offer, which seeks to present it accurately along with all related matters. Therefore, the importance of studying this aspect arises from the effects of technological advancement.

The electronic contract is considered one of the modern contracts that the internet has produced. It has become the prevalent form for civil and commercial transactions, particularly in electronic dealings witnessed in electronic commerce contracts, especially in recent times. Consequently, the electronic contract is characterized by a certain uniqueness and distinction from traditional contracts.

Therefore, we have divided this chapter into two sections. In the first section, we addressed the general provisions of the electronic contract, while in the second section, we dedicated it to the characteristics that distinguish the electronic contract.

Section One: General Provisions of the Electronic Contract

The electronic contract includes a set of provisions that have led many jurists to differ in its definition, considering that it is concluded in an electronic environment. This has prompted the Algerian legislator to establish a definition for this contract to put an end to these definitions, in addition to determining its parties, which differ from those witnessed in traditional contracts.

Therefore, in this section, we addressed the definition of the electronic contract (Subsection One), then the characteristics that distinguish the electronic contract (Subsection Two), and finally its parties (Subsection Three).

Subsection One: Juristic Definition of the Electronic Contract

The electronic contract has been defined as: "An agreement between the parties to the contract through the meeting of the offer and acceptance using an information network, whether in the meeting of the wills, contractual negotiations, signing, or any part of its formation, whether this act occurs in the presence of the parties in the contract assembly or through meeting via computer screens or audio or visual electronic means."

It has also been defined as: "The contract in which the offers of goods and services are exchanged, expressed through various technological means, especially the international information network, by individuals located in one or more countries, with acceptance that can be expressed through the same means, thereby completing the contract."

Additionally, it has been defined as: "The contract concluded by an electronic means with the intention of creating contractual obligations."

From the above definitions, it is evident that the electronic contract occurs between its parties via electronic means, attempting to encompass all possible methods through which it can be concluded. It does not limit this to a single method and even addresses the preliminary operations that precede the final conclusion of this type of contract, such as negotiations, which are no less significant than the electronic contract itself.

The electronically concluded contract has also been defined as: "An agreement in which the offer and acceptance meet on an international commu-

nication network remotely, using an audio or visual means that allows interaction between the offeror and the offeree."

It is evident from this definition that it links the concept of the electronic contract to a specific means of communication, namely the international network "the Internet only", which contradicts the concept of various communication technologies. While remote communication technologies are developing rapidly and outpacing the legal framework regulating electronic transactions, it also stipulates that the means of remote contracting must be audio-visual means, even though in many cases, obligations are concluded or arranged without the need for audio communication. French jurisprudence should have left the field open without specifying the method or means necessary to conclude the electronic contract.

Second Branch: Legislative Definition of the Electronic Contract

The definitions of the electronic contract vary in international charters and European approaches, in addition to the definition established by the Algerian legislator, which highlighted the approach adopted in defining the electronic contract:

First: Definition of the Electronic Contract in International Charters and the European Approach

Definitions of the electronic contract vary between the definition contained in the UNCITRAL Model Law and the definition found in the European Directive, in addition to the legislation established by the Algerian legislator as follows:

1. Definition in the UNCITRAL Model Law:

The UNCITRAL Model Law on Electronic Commerce defines the electronically concluded contract in paragraph (b) of Article 2 as follows: "The term electronic interchange means the transfer of data from one computer to another using an agreed-upon standard for forming information." It is observed from this definition that the electronic contract consists of data exchange. That is, the aforementioned law addressed the means used to conclude it. By examining Article 2 of the UNCITRAL Law, it is clear that the Internet is not the only means for concluding contracts and electronic commerce. Other means, such as telex and fax machines, also participate.

2. Definition in the European Directive:

The electronic contract concluded remotely was defined by the European Directive as: "Any contract related to goods or services concluded between a supplier and a consumer through the organizational framework for distance selling or provision of services regulated by the supplier and carried out using one or more modern communication means until the contract is concluded." It is observed that the directive has defined distance contracts, which include in their concept electronic contracts. Accordingly, the electronic contract includes electronic orders for goods and services that can be delivered by conventional means such as mail or company agents (indirect electronic commerce), or by virtual delivery of products and services (direct electronic commerce) such as computer programs.

3. Foreign Laws :

The French legislator defined remote contracting as: "Its provisions apply to every sale or service performed using one or more remote communication means between a consumer and a professional without their simultaneous physical presence." This definition also focused on the means by which it is concluded, which relies on the Internet as an immaterial, i.e., virtual, space for this type of transaction.

In contrast, American law defines the commercial record, which is equivalent to the electronic contract concluded between the parties, as: "A contract or any other record that is created, generated, sent, transmitted, received, or stored by any electronic means."

Second: Definition of the Electronic Contract in Algerian Law:

The Algerian legislator did not address the definition of the electronic contract within the provisions of the Civil Code. Instead, it gave it a special status and defined it within the provisions of Law No. 18-05 dated May 10, 2018, relating to electronic commerce in the second paragraph of Article 6 thereof, as: "The contract, within the meaning of Law No. 04-02 dated 5 Jumada al-Awwal corresponding to June 23, 2004, which defines the rules applicable to commercial practices, is concluded remotely without the actual and simultane-

ous presence of its parties, exclusively using electronic communication technology."

It is observed from this definition that the Algerian legislator was influenced by the French legislator. However, this definition is considered valid for application whenever contracts related to commerce are concluded remotely and without the actual and simultaneous presence of its parties, and when concluded using electronic communication technology, it is considered an electronic contract.

It is worth noting that the legislator had a distinctive role in defining the electronic contract by not specifying the particular means used in electronic contracting. It suffices that the means be an electronic communication method. However, it is criticized for limiting the electronic contract to one type of contract, which is the commercial contract, whereas there are contracts that do not have a commercial nature but are considered commercial contracts.

Third Branch: Parties to the Electronic Contract

The parties to the electronic contract vary between the electronic consumer and the supplier, both of whom were mentioned by the legislator in the Electronic Commerce Law, and they are as follows:

First: The Electronic Consumer

The consumer was defined in Law No. 04/02 dated June 23, 2004, which sets the rules applicable to commercial practices, specifying the concept of the consumer in Article 3 thereof. Paragraph 2 of it states that the consumer is: "Any natural or legal person who acquires goods offered for sale or benefits from services offered, devoid of any professional character."

We note from this article that the Algerian legislator adopted the narrow concept of the consumer, considering him to be the person who acquires products and services for his personal needs and uses. Therefore, if the person's objective in acquisition is to meet professional needs, he is not considered a consumer but rather a professional or tradesman.

He is also defined in Article 03 of Law No. 09-03 dated February 25, 2009, concerning consumer protection and fraud prevention, as: "Any natural or legal person who acquires, for consideration or

free of charge, a good or service intended for final use to meet his personal needs or the needs of another person or an animal in his care."

It is clear from the content of this article that the Algerian legislator confirmed his adoption of the narrow definition of the consumer by limiting the concept of the consumer to the person who contracts for personal or family consumption. Therefore, a person who contracts for other purposes that are not personal or family, such as someone contracting for professional, artisanal, or commercial activity, is not considered a consumer and thus does not benefit from the protective rules provided in this law. By this definition, the legislator has spared jurisprudence and the judiciary the effort of searching for an appropriate definition of the consumer.

As for the definition of the electronic consumer, the Algerian legislator removed the ambiguity and vagueness regarding the definition of the electronic contract and the term electronic consumer. The electronic contract was defined in Article 06, Paragraph 02 of the Algerian Electronic Commerce Law as:

"The contract within the meaning of Law No. 04/02 dated 5 Jumada al-Awwal, 1425 corresponding to June 23, 2004, which defines the rules applicable to commercial practices and is concluded remotely without the actual and simultaneous presence of its parties, exclusively through the use of electronic communication technology."

As for the term "electronic consumer," it was defined in Article 06, Paragraph 03 of the same aforementioned law as follows:

"Electronic consumer: any natural or legal person who acquires, for consideration or free of charge, a good or service via electronic communications from the electronic supplier for final use."

It is evident from this article that the Algerian legislator adopted the same definition for the ordinary consumer as for the electronic consumer, which is found in Article 03 of Law 09-03 on consumer protection and fraud suppression, as well as in Article 03 of Law 04-02 defining the rules applicable to commercial practices. The only difference between the two is that the latter contracts electronically.

Second: The Electronic Supplier

The intervening party is the second party in the consumer contract. He may be a producer, distributor, service provider, wholesaler, or retailer, who is involved in the process of offering products for consumption, which includes all stages from initial creation to the final display of the product.

He was defined in Article 03, Paragraph 01 of Law No. 04-02 dated June 23, 2004, which defines the rules applicable to commercial practices, using the term "economic agent," meaning: "Any producer, trader, artisan, or service provider, whatever his legal status, who carries out his activity within the normal professional framework or for the purpose for which he was established."

The legislator also defined the intervener under Article 03, Paragraph 01 of Law No. 09-03 on consumer protection and fraud suppression as:

"Any natural or legal person involved in the process of offering products for consumption."

Unlike the consumer, the professional is the person who acts for his professional needs. He buys goods to resell them and also buys machinery and tools necessary to run his business in the best manner and offers services to consumers.

The Algerian legislator also defined the electronic supplier in Article 05, Paragraph 04 of the Electronic Commerce Law as:

"Any natural or legal person who markets or proposes to supply goods or services via electronic communications."

Second Requirement: Characteristics of the Electronic Contract

From the definitions mentioned for the electronic contract, we deduce that it shares a number of characteristics with other known classical contracts, and also possesses a set of characteristics that distinguish it from other types of contracts, which will be addressed in this section.

Accordingly, in this section, we will focus on the characteristics of the electronic contract in terms of conclusion, then address its characteristics in terms of effects as follows:

First Branch: Specific Rules for Concluding the Electronic Contract

The electronic contract, in terms of formation, is characterized by a set of features that distinguish it

from the general rules of contracting in terms of its conclusion. These features are as follows:

First: The electronic contract relies on an electronic medium for its conclusion

The most important characteristic that distinguishes the electronic contract from other contracts is that it is concluded through an electronic means. The means by which the contract is concluded is what gives it this form. These means are usually computer systems connected to various communication networks (wired and wireless). It is concluded on a virtual electronic medium via modern means of communication, without the physical presence of the contracting parties, as consent is exchanged between the parties in a virtual environment without a real session of contract.

The traditional concept of contracting has added new dimensions, as it is concluded remotely via electronic means over the Internet. This is one of the most important aspects of the electronic contract's specificity, as it is the basis of the contract. The electronic contract differs from the traditional contract in terms of the method of conclusion and the use of an electronic medium instead of writing. Although the electronic contract is considered a type of remote contracting, the novelty of this kind of contracting—relying on electronic means to draft the contract—leads to the conclusion that the electronic contract has introduced new dimensions to the traditional concept of remote contracting.

Second: The electronic contract is part of international electronic commerce contracts

The electronic contract is considered one of the modern forms of contracts concluded over the Internet or the web. It can be signed and executed without the need for the parties to be in the same place. It usually transcends the borders of a single country and becomes so when it crosses national borders—for example, when transactions occur between parties located in and belonging to different countries, such as one party residing in one country, the supplier in another country, and the data processing and input technology company in a third country. Thus, it is described as an international contract.

Electronic commerce (E-COMMERCE) is the field in which the electronic contract particularly appears, as the electronic contract is the most

important tool in this type of commerce. This has led some jurists to use the term electronic commerce interchangeably with electronic contracts. What is meant by electronic commerce is not the trade of electronic devices, but rather the commercial transactions and relationships carried out between parties using electronic devices and means such as the Internet. It has been defined by some as: "The totality of electronic exchanges related to commercial activities and pertaining to goods and services through data transfer over the Internet and similar technical systems."

Therefore, the electronic contract is characterized by a commercial nature, and is often referred to as the electronic commerce contract, due to the dominant reality that commercial sales constitute the majority of electronic contracts concluded over the information network. However, it can also be concluded between ordinary individuals, and it may relate to services and benefits in the form of lease or contracting. But most often, the supplier of goods is at least a merchant, i.e., possesses a commercial status.

Second Branch: Characteristics of the Electronic Contract in Terms of Effects

The characteristics of the electronic contract in terms of effects are as follows:

First: The electronic contract has a special nature in execution

The electronic contract is distinguished in terms of its execution from traditional contracts in that it is concluded and executed via the Internet. Some products can be delivered electronically, the best example being software programs and books.

Second: The electronic contract has a special nature in fulfillment

The same applies to its fulfillment. In the field of electronic sales, payment is made using electronic money, which comes in various forms such as: magnetic plastic cards, electronic networks, electronic commercial papers, and newly created currencies, which are all electronic—unlike traditional contracts, where fulfillment involves regular physical money.

Third: Specific rules for proving the electronic contract

As for its proof, it is done in a special way due to the nature of the transactions and services available on the Internet, which has created a new type of writing and signature that is done in an electronic manner and differs from what is known in traditional contracts.

Conclusion:

In this research, we addressed the subject of the legal framework of the electronic contract, which was studied through a comparative analysis. Through this study, we attempted to apply general rules, whether in the theory of contract, the theory of evidence, or the theory of conflict of laws, and we found that these rules do not align with the nature of the electronic contract. This is due to the inadequacy of these rules to absorb electronic concepts, as well as the constant and ongoing development that occurs in electronic transactions.

Despite the efforts made by jurisprudence, judiciary, and legislation to regulate electronic transactions, they are still insufficient in covering all legal aspects related to them.

From this standpoint, in the conclusion of this study, we record the most important results related to the subject of the research as follows:

• Results:

- The electronic contract is distinguished by the means through which it is concluded, as it is done via an electronic means, which places us before a notional rather than an actual contract session. It can be a contract of adhesion or a consensual contract depending on the circumstances of each contract and the means used.
- Since the electronic contract is mostly consensual, it goes through a negotiation phase during its conclusion, which is the stage where the contract details are discussed. After that comes the contract formation phase, which is the stage in which the contract must contain the legally stipulated elements to be considered valid.
- The element of consent in electronic contracts is subject to the same provisions found in the general rules of traditional contracts, but it differs in the method of expression, which takes place in a digital electronic environment.

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 3. The UNCITRAL Model Law did not correctly define the electronic contract. Accordingly, the contract concluded electronically, according to it, is the contract in which will is expressed between the contracting parties using the means specified in paragraphs A/B of Article 2 of the aforementioned law. These means can be generally summarized as follows:
 - Transferring information from one computer to another.
 - Transmitting electronic messages using general or standardized rules.
 - Electronic transmission of texts using the Internet or other technologies such as fax and telex.
 4. The UNCITRAL Law referred to these means when defining the data message in Article 2-a: "...by electronic, optical, or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex, or telecopy." Thus, this text referred to some less advanced reporting technologies, such as telecopy or telex, and more modern technologies such as electronic data interchange and email, thereby leaving the field open to any new technologies that may emerge for delivering the data message. Refer to www.uncitral.org
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