

	Science, Education and Innovations in the Context of Modern Problems Issue 12, Vol. 8, 2025	
	<b>RESEARCH ARTICLE</b> 	
	<h1>The Specificity of the Electronic Arbitration Agreement in Resolving E-Commerce Disputes</h1>	
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<b>Issue web link</b>	<a href="https://imcra-az.org/archive/387-science-education-and-innovations-in-the-context-of-modern-problems-issue-12-vol-8-2025.html">https://imcra-az.org/archive/387-science-education-and-innovations-in-the-context-of-modern-problems-issue-12-vol-8-2025.html</a>	
<b>Keywords</b>	Electronic mediation, Electronic conciliation, Electronic settlement	
<b>Abstract</b> <p>Electronic arbitration is considered a modern procedure for dispute resolution, indeed a procedure more modern compared to commercial arbitration, given that all its procedures are conducted through modern electronic communication means. This procedure is characterized by a set of features that distinguish it from other methods of dispute resolution such as electronic conciliation, electronic mediation, and electronic settlement, even when compared to ordinary commercial arbitration, as it keeps pace with modern technical and technological developments. The electronic arbitration agreement is the fundamental pillar of electronic arbitration, as it forms the basis for initiating and conducting this process. As an agreement, like other contracts, the electronic arbitration agreement requires the fulfillment of a set of conditions and essential elements for the arbitration process to take place. Additionally, it produces substantive effects (the principles of binding force and independence of the electronic arbitration agreement) and procedural effects (the positive and negative impact of the electronic arbitration agreement) if it is validly concluded.</p>		
<b>Citation</b> Youcef T. (2025). The Specificity of the Electronic Arbitration Agreement in Resolving E-Commerce Disputes. <i>Science, Education and Innovations in the Context of Modern Problems</i> , 8(12), 1669-1675. <a href="https://doi.org/10.56334/sei/8.12.141">https://doi.org/10.56334/sei/8.12.141</a>		
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Received: 12.03.2025	Accepted: 15.09.2025	Published: 11.12.2025 (available online)

**Introduction:**

Electronic arbitration is considered a modern procedure for dispute resolution, indeed a procedure more modern compared to commercial arbitration, given that all its procedures are conducted through modern electronic communication means. It is distinguished by a set of features that differentiate it from other dispute resolution methods such as electronic conciliation, electronic mediation, and electronic settlement, even compared to ordinary commercial arbitration, as it keeps pace with modern technical and technological developments.

Recently, both ordinary and electronic arbitration have witnessed wide and significant proliferation due to the advantages they offer, such as flexibility, speed, and the saving of time, effort, and money. Resorting to arbitration has become more frequent for resolving disputes than resorting to ordinary courts, even though it is an exceptional path for dispute resolution, as the general principle is to resort to national courts. Arbitration is initiated based on an agreement between the parties to the dispute or relationship, known as the "arbitration agreement." This agreement is the foundation of the arbitration process; with its existence, arbitration exists, and without it, arbitration cases.

The arbitration agreement is not a simple term known to everyone; rather, it is a concept that requires study to understand its essence. It has its own definition, forms, conditions for existence, and effects that arise upon its establishment.

**Research Question:**

What is the specificity of the electronic arbitration agreement in resolving e-commerce disputes?

This research paper seeks to answer the posed question by addressing the concept of the electronic arbitration agreement (First Section), then the organization of the electronic arbitration agreement (Second Section).

### **Section One: The Concept of the Electronic Arbitration Agreement**

The arbitration agreement occupies an important place in the arbitration system; it is the essence of the arbitration process, based primarily on the will of the parties to the dispute or contractual relationship. Given this importance, it has received considerable attention from both jurisprudence and the law, which regulates it according to its significance. Therefore, it is necessary to define it and mention its forms.

#### **Subsection One: Definition of the Electronic Arbitration Agreement**

Electronic arbitration differs from ordinary arbitration only in the means by which it is conducted. Likewise, the electronic arbitration agreement does not differ from the ordinary arbitration agreement. Therefore, the discussion will first focus on defining the electronic arbitration agreement and then its forms.

**1. Jurisprudential Definition of the Electronic Arbitration Agreement.** The arbitration agreement is defined as a contract whereby the parties agree on arbitrators instead of submitting the dispute to state courts. It is also defined as the legal act through which the parties agree to resolve an existing or potential dispute by arbitration, granting the arbitrator authority to decide it with binding force, while the state courts are not competent to adjudicate it. More extensively, the arbitration agreement is a legal act in written form, specifying the subject of the dispute, the names of the arbitrators, and the location of the arbitration procedures. It may also define the law to be applied by the arbitrators and is usually concluded after the dispute arises.

The arbitration agreement is also defined as an agreement in which the parties commit that disputes between them or potential disputes will be resolved through arbitration, particularly when these disputes concern international trade interests. Some define it as a form of private justice that usually originates from an agreement, rendering state courts incompetent, granting the arbitrator the authority to decide with binding force. This agreement governs the arbitration process from selecting the arbitrator to the extent to which the award can be challenged, including the rules applied by the arbitrator, whether substantive or procedural, and the scope of the arbitrator's duties.

#### **2. Legal Definition of the Electronic Arbitration Agreement**

- **According to the 1958 New York Convention:** Article 2, paragraph 1 defines the arbitration agreement as: "Each contracting state recognizes the written agreement whereby the parties undertake to submit to arbitration all or some of the disputes arising or which may arise between them concerning a subject matter capable of settlement by arbitration."

- **According to the UNCITRAL Model Law:** Article 7 of the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) defines the arbitration agreement as:

"An agreement by the parties to submit to arbitration all or part of disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not."

- **According to Egyptian Law:** Article 10, paragraph 1 of Egyptian Arbitration Law No. 27-94 defines the arbitration agreement as:

"An agreement between the parties to resort to arbitration to resolve potential or existing disputes, which must be in writing. It may specify the subject of the dispute, the place and procedures of arbitration, the names of the arbitrators, and the applicable law."

- **According to Algerian Law:** The Algerian legislator did not provide a detailed definition of the arbitration agreement but referred to it in Article 1011 of the Code of Civil and Administrative Procedures:

"The arbitration agreement is the agreement by which the parties accept to submit a pre-existing dispute to arbitration."

Thus, the Algerian legislator limited itself to mentioning only one form of the arbitration agreement, the arbitration commitment, without defining the arbitration agreement in its entirety.

#### **Subsection Two: Forms of the Electronic Arbitration Agreement**

The term "arbitration agreement" is the most commonly used, if not the only, term indicating this act or contract. In practice, however, the arbitration agreement has two forms: the arbitration clause and the arbitration commitment.

##### **1. The Arbitration Clause**

The arbitration clause is the agreement between the parties to submit any dispute that may arise from interpreting or executing the contract to arbitration, excluding submission to the courts. This definition aligns with most legislations, whether Arab or foreign.

The arbitration clause is agreed upon before the dispute arises and is included as a clause within the contract, or it can be included in a separate agreement prior to any dispute. The critical factor is the moment of agreement: if it occurs before the appearance of the dispute, it constitutes an arbitration clause. Its inclusion in the original contract or separately does not affect its validity.

##### **2. The Arbitration Commitment**

The arbitration commitment is the agreement made by the parties to submit an existing dispute to arbitration for resolution.

The Algerian legislator defined it in Article 1011 of the Code of Civil and Administrative Procedures: "The arbitration agreement is the agreement by which the parties accept to submit a pre-existing dispute to arbitration."

This shows that the term "arbitration agreement" is used in Algerian law to indicate an arbitration commitment. The arbitration commitment is concluded after the dispute arises, unlike the arbitration clause, which is established before a dispute, making the commitment separate from the original contract. The commitment typically organizes all arbitration requirements, including forming the arbitral tribunal, selecting procedures, and determining applicable law.

Article 1012 of the Algerian Code specifies the necessary elements under penalty of nullity, including the subject of the dispute, names of arbitrators, or methods of their appointment.

The arbitration commitment is usually concluded before filing a case in court but may also be concluded afterward, at any stage of the proceedings, as long as no final judgment has been issued. Once a final judgment is rendered, the dispute is legally terminated, and no arbitration commitment may be concluded regarding it.

This form does not present issues for electronic arbitration, as it can be conducted electronically, whether as a clause or a commitment, as commonly practiced worldwide.

### **Section Two: Organization of the Electronic Arbitration Agreement**

The arbitration agreement, whether in the form of a clause or a commitment, remains a contract. A contract, as known, requires conditions for its formation and legal effect, which include substantive conditions and formal conditions.

**Subsection One: Substantive Conditions of the Electronic Arbitration Agreement.** The substantive conditions for any arbitration agreement, and for any contract in general, include consent, subject matter, and cause.

#### **1. Consent**

Consent is provided for in Article 59 of the Algerian Civil Code:

"A contract is concluded once the parties exchange mutual expressions of their consent, without prejudice to legal provisions."

Consent or agreement is the expression of the parties' will, manifested in offer and acceptance, their alignment, and intent to create a legal effect. In the case of arbitration, this consent represents the agreement to resort to arbitration to resolve the dispute, whether current or potential. Consent must come from fully capable and legally competent individuals.

For electronic arbitration, conducted via electronic means such as the Internet, consent is expressed electronically: the offer is made and the acceptance received through these means.

#### **1- Electronic Offer:**

The electronic offer has appeared in several instances. It was defined in Article 11, paragraph 1 of the UN Model Law on Electronic Commerce issued on December 16, 1996, and in the UNCITRAL Law as follows: "In the context of contract formation, unless the parties have agreed otherwise, a data message may be used to express an offer and acceptance of an offer, and the use of a data message in forming a contract does not affect the validity or enforceability of the contract solely because of the use of a data message for that purpose." Article 03/02 of the Model Electronic Transactions Contract project, annexed to the UN Model Law, states: "A message constitutes an offer if it contains an offer to conclude a contract sent to one person or specified persons if they are sufficiently identified and indicates the sender's intention to be bound in case of acceptance. A message generally available electronically does not constitute an offer unless otherwise indicated."

From the above, it can be said that the offer is the expression of the will of the person wishing to contract remotely, carried out through an international communications network by audible, written, or visual means. It includes all elements necessary to conclude the contract, allowing the recipient to accept the contract directly. The electronic offer may be a specific offer directed to certain persons through email technology, which allows the exchange of traditional offers via data messages, or a general offer directed to unspecified persons through commercial websites on the Internet.

#### **2- Electronic Acceptance:**

Acceptance is defined as: "An expression of the will of the other party who received the offer, directed to the offeror, to inform them of their agreement to the offer." This means responding with agreement to the offer, and by adding it to the offer, the contract is formed. Electronic acceptance does not deviate from this definition except that it occurs through electronic means via the Internet; it is remote acceptance. Therefore, it is not subject to the same rules and provisions that govern traditional acceptance, although it has some peculiarities due to its electronic nature.

There are general conditions that must be met in traditional acceptance, as it is subject to the general conditions required in any expression of will. It must be definitive, specific, produce legal effects, issued while the offer is valid, and match the offer. Electronic acceptance does not need to be in a particular form or position; it may be issued via

electronic means or through traditional acceptance methods, unless the offeror requires acceptance in a specific form.

Electronic acceptance can be expressed in several ways, including writing indicating consent, using an electronic signature via email, or orally through a chat room.

### **Second: Subject Matter**

The subject matter is the second and essential element of any contract. The subject of a contract is the legal transaction that the parties agree to achieve. In the arbitration agreement, the subject matter is the substantive relationship intended to be resolved through arbitration.

For the subject matter of the contract to be valid, it must meet several conditions: it must exist or be capable of existence, actual or potential, specific or capable of specification, and lawful.

The same applies to the subject matter in the arbitration agreement; it must exist or be capable of existence, specific or capable of specification, and lawful. The only difference in the arbitration agreement lies in the legality condition, which requires that the subject of the agreement be lawful in terms of persons and in terms of the matter, known as "personal capacity" and "subject matter capacity."

#### **A- Personal Capacity for Arbitration:**

Personal capacity for arbitration refers to the ability and legal competence of a person to resort to arbitration to resolve a specific dispute. As previously mentioned in the element of consent, the person must have full legal capacity and sound will to conclude an arbitration agreement. This alone is not sufficient. The law, through Article 1006 of the Code of Civil and Administrative Procedures, specifies which persons may resort to arbitration.

For natural persons, the law does not exclude any category but allows all natural persons to resort to arbitration in rights over which they have full disposal.

For legal persons, the legislator specifically mentioned public legal entities and limited the subjects or relationships that may resort to arbitration to international economic relations and public contracts.

#### **B- Subject Matter Capacity for Arbitration:**

Subject matter capacity for arbitration refers to the permissibility of the subject of arbitration or dispute to be resolved through arbitration. This means not all subjects or disputes can be arbitrated; some matters must remain under ordinary court jurisdiction. This is confirmed by Article 1006 of the Code, paragraph 2, which prohibits arbitration in matters related to public order or the status and capacity of persons.

Article 1006 of the Code states: "...."

The public order referred to here is international public order, not domestic, to ensure greater effectiveness of the arbitration agreement, making it capable of resolving multiple disputes, even if some are non-arbitrable under domestic public order concepts.

### **Third: Cause**

The element of cause does not present any difficulty, unlike consent and subject matter, which have some peculiarities in the arbitration agreement in general and electronic arbitration in particular. The cause in a contract must always be lawful. In the arbitration agreement, the cause is always lawful and consists of the parties' will to exclude submission of the dispute to the courts and delegate the matter to the arbitral tribunal, which does not require further discussion.

#### **Subsection Two: Formal Requirements of the Electronic Arbitration Agreement**

In addition to the substantive elements of consent, subject matter, and cause, a formal element is required for the arbitration agreement to be valid, which is writing.

There are many differences among legislations regarding the writing requirement. Some require it as a condition of the arbitration agreement, while others do not. Some consider it an essential element for formation, while others consider it only for evidence.

Legislations that do not require writing include the French legislation, which through the 2011 amendment to the Civil Procedure Code, made writing non-mandatory even for evidence, allowing it to be in any form. The 1961 Geneva Convention on International Arbitration was more liberal, leaving freedom to parties and member states, recognizing both written and unwritten agreements depending on state practice. Anglo-Saxon countries also do not require writing due to their simplicity and informality.

Legislations that require writing include the UAE, through Article 203/2 of the Civil Transactions Law, which requires writing for evidence but not for formation. The Egyptian legislator, in Article 12 of the Egyptian Arbitration Law, requires writing for formation, otherwise the agreement is void. The Algerian legislator requires writing for both formation and evidence, as stipulated in Articles 1040 and 1052 of the Civil and Administrative Procedures Code, which require submitting the arbitration agreement or a copy when requesting recognition of the award.

Traditional writing was on paper, but with technological advancement, modern forms such as fax, telex, microfilms, computer outputs, magnetic tapes, email, and chat programs have emerged, necessitating an expanded understanding of writing to accommodate the information and communication revolution.

Writing is not judged by the medium used but by its function in providing evidence of the legal act and determining its content, allowing parties to refer back in case of dispute. Therefore, writing on an electronic medium is valid as long as it achieves its purpose, with data preserved electronically for reference without alteration.

This is confirmed in the 1985 UNCITRAL Model Law on International Commercial Arbitration, amended in 2006: "The writing requirement is satisfied in any document signed by the parties or by exchange of telexes, telegrams, or other wired or wireless communications, provided it records the agreement (such as CDs, magnetic tapes, electronically, or by email)." Modern legislations explicitly recognize electronic writing in arbitration clauses, equating electronic writing with handwritten writing. Examples include the 1997 German Arbitration Law, the 1987 Swiss Private International Law, and Article 12 of the Egyptian Arbitration Law.

### **Subsection Three: Effects of the Electronic Arbitration Agreement**

If the arbitration agreement is validly concluded and fulfills its conditions, it produces two main effects: the positive effect and the negative effect.

#### **1- Positive Effect of the Arbitration Agreement:**

##### **Positive Effect of the Arbitration Agreement:**

The positive effect of the arbitration agreement lies in obligating both parties to resort to arbitration to resolve the dispute covered by the agreement and in requiring them to recognize the arbitral award issued regarding this dispute as long as it meets the legally specified conditions.

If the parties agree to resort to arbitration to settle a specific dispute between them, the agreement is binding on each of them with all its conditions, and they must comply with the decision issued by the arbitral tribunal regarding this dispute. Their decision is considered as if issued by the competent court for the dispute, provided it is given enforceable status to allow for compulsory execution.

It should be noted that arbitrators are obliged to adhere to the dispute submitted to them or agreed upon by the parties. Therefore, they may not exceed this scope in their arbitral award; otherwise, it would be subject to challenge. They also may not involve persons or parties not related to the arbitration agreement, following the principle of the relativity of contract effects, as only the parties to the arbitration are affected.

##### **Negative Effect of the Arbitration Agreement:**

The negative effect of the arbitration agreement is the exclusion of the judiciary from examining the dispute agreed to be submitted to arbitration. The arbitration agreement creates a mutual negative obligation on the parties to refrain from resorting to the courts. This obligation is voluntary, created by the parties' joint will. If one party violates this obligation and submits the case to the courts, the other party can invoke the existence of the arbitration agreement before the court.

Since the negative obligation not to resort to the courts arises from an agreement between the parties, they may, by mutual consent, release themselves from it and resort to the ordinary courts regarding the dispute agreed to be settled through arbitration.

This principle is adopted by most legislations, including the new Swiss Private International Arbitration Law of 1987, as well as French, Spanish, Egyptian, and Algerian laws, the latter in Article 1045 of the Civil and Administrative Procedures Code.

Nevertheless, the negative effect of the arbitration agreement and the exclusion of the courts from the dispute is not absolute. The exclusion is relative, as there are cases where recourse to the courts is possible, as stipulated in Articles 1041, 1046, and 1048 of the Civil and Administrative Procedures Code, including:

- In case of an issue regarding the composition of the arbitral tribunal (Article 1041).
- The judge's jurisdiction regarding interim measures and precautionary measures (Article 1046).
- Matters related to presenting evidence and extending the arbitral tribunal's mandate (Article 1048).
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#### **Conclusion:**

This research paper has shown that the electronic arbitration agreement is a legal act issued by two wills to create an obligation on the parties to submit any dispute arising between them to arbitration. This agreement is concluded via the Internet, which has specific characteristics, requiring consideration of the applicable provisions. For it to produce its legal effects, it must satisfy general substantive conditions, including capacity, consent, subject matter, and cause, and specific formal conditions required by the nature of arbitration in general and electronic arbitration in particular, so that the dispute is referred to an electronic arbitral tribunal without either party resorting to the national courts.

Accordingly, the following recommendations can be made:

- Ensuring an Internet network capable of hosting such communications.

- Providing a secure electronic system that guarantees the confidentiality of deliberations and can preserve transactions quickly.
- Finally, although the Algerian legislator has kept pace with technological developments by enacting electronic legal provisions, including Law No. 15-04 on electronic signatures and Executive Decree No. 16-134 regarding electronic signatures and certification, and Law No. 18-05 on electronic commerce, it has neglected to regulate the subject of electronic arbitration, considering it as one of the alternative electronic means of resolving electronic disputes.

### Ethical Considerations

This study is based on doctrinal legal analysis and the examination of legislation, jurisprudence, and academic literature related to electronic arbitration and electronic dispute resolution. It does not involve human participants, personal data, interviews, or surveys. Consequently, ethical approval and informed consent are not required. The research was conducted in accordance with internationally accepted principles of academic integrity, objectivity, and proper citation of legal sources.

### Acknowledgements

The author wishes to express sincere appreciation to the Faculty of Law and Political Science at the University of May 8th, 1945 – Guelma, for providing an academic environment that supports legal research and scholarly inquiry. Any views expressed in this article are solely those of the author.

### Funding

This research did not receive any specific grant from public, commercial, or not-for-profit funding agencies. The study was carried out as part of the author's independent academic research activities.

### Conflict of Interest

The author declares that there is no conflict of interest regarding the publication of this article. The research was conducted independently, without any financial, institutional, or personal relationships that could have influenced the content or conclusions of the study.

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