

## The electronic contract between the legal procedure for convening and proof

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**Abstract---**The emergence of electronic contracts has come about as a result of major shifts in communications and information technology. They are considered as valid and binding as any other contracts. Their unique characteristic resides in the fact that they are concluded remotely using an electronic medium, primarily the internet. Offer and acceptance are expressed electronically, such as by e-mail or through digital communication platforms, similar in principle to traditional contracts. This means that electronic contracting can happen regardless of the parties' physical location or time zone. In fact, determining the precise time and place of conclusion for an electronic contract is crucially important under contract law principles. Regarding time, the general rule dictates that the moment of contracting is typically the moment when the acceptance is received by the offeror. Regarding place, the location where the contract is deemed concluded, along with the nature of the agreement, are pivotal factors. They directly influence the determination of the applicable law governing the contract and the jurisdiction of the competent court to adjudicate any disputes arising between the parties to the electronic contract.

**Keywords---**Electronic Contract, Concluding the electronic contract, Proving the Electronic Contract.

### Introduction

At the end of the twentieth century and the beginning of this century, humanity witnessed a great development in the means of communication and its technologies, which made human behavior change from various economic, cultural, social and legal aspects as well. The continuous development of the means of information transmission and communication technologies has helped to create faster and less

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### How to Cite:

Lecheheb, N. L., & Nourine, H. (2025). The electronic contract between the legal procedure for convening and proof. *The International Tax Journal*, 52(4), 1309–1324. Retrieved from <https://internationaltaxjournal.online/index.php/itj/article/view/148>

The International tax journal ISSN: 0097-7314 E-ISSN: 3066-2370 © 2025

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Submitted: 15 May 2025 | Revised: 20 June 2025 | Accepted: 23 July 2025

expensive connections between individuals in various parts of the world. In this technical environment, it was natural for human beings to use these developed means to convey and express their wills, and this was a major reason for the spread of a new group of contracts called electronic contracts, in reference to the technical and technological means used to conclude them.

Very rapidly, man began to take successive steps towards concluding his legal transactions and actions using these technical means, as a result of the conditions they provide that allow the exchange of the two wills in an immediate manner that does not recognize physical limits or obstacles. The electronic exchange of data through electronic documents has begun to replace ordinary paper documents, and thanks to this, people have been able to conduct many transactions remotely without being in one place through contracts called electronic contracts because they are concluded through electronic means.

While the contractual system enjoys an important legislative position in various laws, given that it is considered one of the most important legal actions in the daily transactions of human beings, and is considered an engine of economic activity among private law persons, the use of electronic means of communication in concluding a contract has cast a shadow on the rules that govern contract theory and constitute the axis of civil law. Since the contracting system is always affected by the successive developments that occur in the environment around it and its periphery, contract theory has been greatly influenced by the amazing development of modern means of communication.

In the face of this situation, civil law scholars have always paid attention to two of the most important issues of electronic transactions: electronic contracting and electronic proof. On the occasion of the enactment of legislation regulating various issues of electronic transactions, two divergent jurisprudential trends emerged, the first of which holds that electronic transactions do not need special legislative regulation except with regard to electronic proof, while the electronic contract must be subject to the general rules in contract theory, which are sufficient in the view of this trend, to accommodate this modern means of contracting. The first is that careful reading and careful consideration of these rules suffices the purpose, as they still contain a lot of what is worth delving into, and the general theory of the contract was not born of an emergency situation or a transient event to be unable to keep pace with the development and contain the new issues.<sup>1</sup>

The second thing is that the general rules are acceptable for development through diligence in interpreting legislative texts and expanding the search for their meanings to face the new issues. While the proponents of the second trend argued that the legislative regulation of electronic transactions should include both issues, they are of equal importance, as the general theory of the contract may not be sufficient to face some of the problems created by the widespread use of electronic means in concluding contracts, as most legislators in the countries of the world have been wise to enact independent legislation to regulate this type of transactions or to introduce provisions in civil codes to accommodate these means when they are used to transfer will. Putting these issues in the context of Algerian legislation, a look should be taken at the Algerian Civil Code and its draft amendments.

The reasons for the preliminary draft of the Ordinance 05/10 of the Ordinance of 26/09/1975 of the Ordinance of 58/75 and the amended Supplementary Ordinance of 20/06/2005 of the Civil Amendment and Supplementary Amendment stated the following:

**"...There are external considerations that necessitate a review of civil codification, especially with regard to scientific and technological progress on the one hand, and the transformations that the world is experiencing on the other hand, and since the civil code is considered to be new and only a quarter of a century has passed since its issuance, events have overtaken it,**

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<sup>1</sup> Ajali Khaled, *The Legal System of Electronic Contracts in Algerian Legislation*, Thesis for Obtaining a Doctorate in Law, Tizi Ouzou, June 2014, p. 6.

especially in the field of technology, especially dealing with the Internet and the use of electronic documents and documents instead of the use of paper.

**This technological progress has increased the speed of commercial transactions, made trade less expensive and time-saving, and therefore the provisions of the Civil Code cannot ignore these developments, especially since the current policy of the State seeks to attract foreign investors, works to consolidate human rights and adopts the necessary measures for scientific and technological development and the requirements of globalization.<sup>2</sup>**

As is clear, this paragraph of the presentation of the reasons for the draft amendment, part of which was subsequently approved and carried out in the order of Law No. 10/05, reflected the legislator's concern and conviction that the provisions of the Algerian Civil Code no longer accommodate contracts and transactions carried out through electronic means, having become an imposed reality dictated by the rapid development of the means of communication and the increasing desire of man to use them in most of his daily transactions.

On the other hand, this paragraph carried an acknowledgment by the legislature that civil codification has become incompatible with the international conventions to which Algeria is a party. In response to the provisions of this paragraph, some amendments were made to the Civil Code by Law No. 05/10 of 20 June 2005, and the text of Article 323 bis 01 and the text of Article 327 were amended, which are articles devoted to the legal validity of proof by electronic means.

However, the amendments did not complete their way and did not reach a point that shows how the contract is concluded using electronic means, the forms of expression of the will through modern communication techniques and the recognition of their use by law, and the means that enable the parties to ascertain the attribution of the will to the owner of the contract, and to verify the eligibility of each party and the place where the contract is concluded when it is concluded in this way.

In the midst of this technical and technological reality, which has made dealing by electronic means common and imposed, and based on the unclear position of the Algerian legislator on the issue, this study has turned towards examining the legal system of contracting by electronic means, in an attempt to answer the following problem:

What are the procedures for holding such contracts? Do electronic transactions need to be legally regulated for themselves? To what extent are the general provisions regulating the contract in the stages of concluding, executing and proving it compatible with its electronic privacy?

In order to answer these sub-questions that revolve around the concept of contracting by electronic means, it is necessary to examine electronic means and the legitimacy of dealing with them and transferring the will through them.

How can each party verify the identity of the other contractor and ensure that it is competent and competent to conclude such a contract, and what are the ways in which each contractor can verify the specifications of the good or service for which he wants to be contracted, and how the time and place of this contract are determined.

To answer this problem and these questions, it can only be achieved by looking at the legislation that preceded the Algerian legislator to think about developing a legislative framework to regulate the various issues of electronic contracting, and what the use of technical means raises in the expression of will.

A quick look at the international legislative system regulating this subject reveals that the Model Law on Electronic Commerce prepared by the International Trade Law Commission of the United Nations in 1996, followed by the laws of the Arab countries regulating electronic transactions, including Tunisia

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<sup>2</sup> This paragraph was presented in the presentation of the reasons for the draft law to amend the civil code prepared by the committee in charge of reviewing the civil code at the Ministry of Justice, an unpublished document.

which issued the Electronic Commerce Law on 09/08/2000, followed by Jordan with the Electronic Commerce Law on 11/12/2001, then the Emirate of Dubai on 12/02/2002, and the Law of the Kingdom of Bahrain on 14/09/2002. Then the Kingdom of Morocco on 3/11/2007. A number of legislators in the rest of the Arab countries have completed the preparation of projects regulating electronic transactions, as is the case in Egypt, Kuwait and Palestine<sup>3</sup>.

We will focus on what France has taken in particular since 2000 to 2005 as the first European country to regulate contracting by electronic means. The Model Law prepared by the United Nations Commission on International Trade Law, and the French experience in this area is also significant for the draft amendment to the civil code, because we will see during the stages of the study that the draft amendment of the civil code on the subject is adapted from the French legislation.

Thus, it is clear that the scope of the study is to identify the aspects of privacy in the process of concluding a contract by electronic means, and the use of the latter in expressing the will. Accordingly, in this research, we have divided it into two topics, as we will deal in the first topic with what the electronic contract is, its means and forms, or the second topic, in which we discussed the means used in transferring the will from one party to another, which is called the electronic exchange of data, where we stood at the definition of the data exchange and the identification of its parties, its validity to transfer the will, how to exchange electronic data, and the possibility of verifying and assigning the electronic message to the person who issued it. Methods of proving it.

### **First Topic: What is the Electronic Contract**

The electronic contract is a technical concept that has entered the field of law, and it is one of the most important products of the information revolution that resulted from the integration between the development in the field of informatics and the development in the field of telecommunication technologies.

Defining the concept of the electronic contract is important from a legal point of view, as it helps to understand the legal problems posed by the electronic contract at the stage of conclusion, execution and proof, and in order to determine what the electronic contract is, we see the need to adjust the exact concept of the electronic contract (the first requirement) and then explain its legal nature and characteristics (the second requirement).

### **The first requirement: the concept of the electronic contract**

Before addressing the legal nature of the electronic contract, it is necessary to first address its definition, but it is noted that there is no uniform definition of the electronic contract, especially if we take into account the multiplicity of parties and forums that have mentioned these definitions on the one hand, and the type of technology used in concluding it on the other hand.

### **Section One: Jurisprudential Definition of Electronic Contract**

Although the electronic contract does not constitute a new type of contract to be added to the contracts known in the jurisprudence of civil law, and although civil technologies did not pay attention to the method of expressing the will to determine the type of contract, the contract was not agreed upon in its definition, whether from a jurisprudential or legislative point of view, nor was it the subject of agreement on its legality and the permissibility of expressing the will in it by electronic means.

In order to reach an accurate and integrated definition of the electronic contract, we will deal in this section with the various jurisprudential and legislative definitions, and then discuss the legality of contracting by electronic means.

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<sup>3</sup> Ajali Khaled, *op. cit.*, p. 10.

A part of American jurisprudence defined it as **"a contract that involves the exchange of messages between the seller and the buyer, which is based on pre-prepared and electronically processed formats and creates contractual obligations."**<sup>4</sup>

Some Latin jurisprudence has also defined it as: **"an agreement in which the offer and the acceptance converge on an international network open to telecommunication by means of audio and visual and by virtue of the interaction between the offeror and the receiver."**<sup>5</sup>

A part of the jurisprudence defined an electronic contract as: **"an agreement in which the offer and acceptance converge through an international network for remote communication through an audible or visual means that allow interaction between the offeror and the receiver."**<sup>6</sup>

There are jurisprudents who have focused in their attempt to define the electronic contract on its international character, as they have considered it to be: **"A contract in which the offers of goods and services expressed through multiple technological media, especially the international information network, converge by persons present in a different country or countries, with an acceptance that can be expressed through the same means by the completion of the contract."**<sup>7</sup>

In the same context, some jurisprudence has defined e-commerce contracts as: **"the set of numbered exchanges related to commercial activities between projects and individuals or between projects and management, and it is characterized by the elimination of geographical distances and the limitation of time."**<sup>8</sup>

However, several criticisms have been made of these definitions, some of which are briefly mentioned:

**First:** The international communication network does not know geographical boundaries, as it is possible to conclude an electronic contract between two people through the international network while they are in the same country, not every electronic contract is necessarily international, and the international network is not the only means to conclude an electronic contract, as there are other means used to conclude it.

**Second:** Focus on the commercial and consumer character of the contract, and in fact, although this character prevails over the contract because sales monopolize the electronic environment by various means, this contract can be concluded between ordinary individuals who are not merchants, and it can also respond to purely civil services and contracts such as rent and nudity, and therefore the character of the parties to the contract cannot prevail over its definition<sup>9</sup>.

In an attempt to find a general definition of the electronic contract by avoiding the previous criticisms, a part of the jurisprudence sought to develop a focused definition on the means of concluding and executing it and some of its characteristics, stating: **"An electronic contract is an agreement that is concluded and executed in whole or in part through the technology of telecommunications, without the simultaneous physical presence of the contractors, positively and acceptably,**

<sup>4</sup> Kazem Karim Ali Electronic Contract, Journal of the Local Investigator for Legal and Political Sciences, Issue 1, University of Babylon, 2009, p. 133.

<sup>5</sup> Dr. Osama Abu Al-Hassan Al-Mujahid, The Privacy of Online Contracting, Dar Al-Nahda Al-Arabiya, Cairo, 2000, p. 39.

<sup>6</sup> See: Dr. Osama Abul Hassan Megahed, The Mediator in the Law of Electronic Transactions, Dar Al-Nahda Al-Arabiya, Egypt, 2007, p. 120, Dr. Essam Abdel Fattah Matar, Electronic Commerce in Arab and Foreign Legislations, New University Press, Alexandria, 2009, p. 148.

Olivier ITEANU, Intern and the Law; Legal Aspects of Electronic Commerce, Editions Ayrolle, 1996, p. 23.

<sup>7</sup> For this definition, see Dr. Saleh Al-Nazlawi, The Law Applicable to Electronic Commerce Contracts, New University Press, Alexandria, 2006, p. 12, Dr. Ahmed Abdel Karim Salama, Qualitative Private International Law, Dar Al-Nahda Al-Arabiya, Egypt, First Edition, 2002, p. 68.

<sup>8</sup> For a review of this definition, see: Dr. Mohamed Hassan Qasem, Remote Contracting, New University Press, Alexandria, 2005 edition, p. 13, footnote no. 20, p. 14, same footnote, Dr. Taher Shawky Abdel Momen, Electronic Sales Contract, Dar Al-Nahda Al-Arabiya, Egypt, 2007 edition, p. 20.

<sup>9</sup> See, Rahima Al-Saghir Sa'ed Namdili, Electronic Administrative Contract, Master's Thesis, Alexandria University, 2006, p. 45.

which can be expressed through the same media by interacting between them to satisfy their mutual needs by concluding the contract."<sup>10</sup>

Although this definition remedies some of the criticisms that have faced the previous definitions, it does not refer to the result of contracting, which is the creation of contractual obligations, and it also focuses on the characteristics of the means used in concluding the contract and the lack of physical presence of the parties, while it is keen to confirm its conclusion and execution by electronic means, which is the same as used to express the offer and acceptance, although the meaning of the conclusion refers to that, which is an additional detail to what should have been stated<sup>11</sup>.

## Section Two: Legislative Definition of Electronic Contract

In this section, we will discuss the definition of an electronic contract in some charters, for example, but not limited to:

### First: Definition of the Electronic Contract in International Covenants and the Directives of the European Union

#### 1. Definition contained in the United Nations Model Law on Electronic Commerce

The Model Law on Electronic Commerce, prepared by the United Nations Commission on International Trade Law (UNCITRAL), called UNCITRAL OU CNUDCI,<sup>12</sup> only defines an electronic contract:

Article 2 of the Definitions Section 2 of the Definition Clause (a) states: **"Information generated, transmitted, received, or stored by electronic, optical or similar means, including, but not limited to, the exchange of electronic data, e-mail, telegraph, telex or telecopy"**

Article 2/b of the Electronic Data Exchange (l'échange de données informatisées) states that "the electronic transmission of information from one computer to another using an agreed standard for the formation of information..."<sup>13</sup>

Article 11 of this Law also stipulates that: **"In the course of the formation of contracts, and unless otherwise agreed by the parties, data messages may be used to express the offer and accept the offer, and when a data message is used in the formation of a contract, that contract shall not lose its validity or enforceability merely by using a data message for that purpose..."**

The committee prepared for this law considered that the definition refers to all the uses of electronic information, and thus includes the conclusion of contracts and various businesses, and therefore according to this law, an electronic contract is "a contract in which the will is expressed between the contractors using the means specified in articles 2/A and 2/b.

1. Transfer data from one computer to another according to a unified display system.
2. Transmitting e-mail using general rules or standard rules.
3. Electronic transmission of texts using the Internet or through the use of other technologies such as telex and fax<sup>14</sup>.

<sup>10</sup> Dr. Saleh Al-Manzalawi, The Law Applicable to Electronic Commerce Contracts, New University Press, Alexandria, 2006, pp. 14, 15.

<sup>11</sup> Tamer Mohamed Suleiman Al-Damiati, Proof of Electronic Contracting Online, Ph.D. Thesis, Unpublished, Cairo University, 2008, p. 39

<sup>12</sup> This law was promulgated on 12 June 1996 by the United Nations Commission on International Trade Law and was approved based on the recommendation of the United Nations General Assembly No. 51-162 on 16 December 1996, this law consists of 17 articles that can be increased in the future, and these articles are divided into two chapters, the first chapter deals with the subject of electronic commerce in general in articles 1 to 10 and the second chapter consists of a single chapter related to contracts for the carriage of goods and documents in articles 16 17 An internal commentator who instructs Member States in an incorporating manner into their domestic legislation is attached to the Act.

<sup>13</sup> See article 2/b of the 1996 UNCITRAL Model Law on Electronic Commerce.

<sup>14</sup> Abdullah Anwar Shaat, The Electronic Contract within the Framework of Arab Legislation, Al-Wafa Legal Library, Alexandria, 2017, p. 60 and p. 61.

## 2. Definition in European documents

<sup>15</sup>Article 2 of Directive No. 97-07 of 20 May 1997 of the European Parliament on Consumer Protection in Remote Contracts stipulates: **"A tele-contract is any contract relating to goods or services concluded between a supplier and a consumer within the scope of the sale or provision of services remotely organized by the supplier who uses one or more telecommunication technology for the conclusion or execution of the contract."**<sup>16</sup>

According to the provisions of the European Directive, telecontracting is any contract concluded by means of a modern means of communication, including the Internet, which defines communication technology in the same text as: **"Any means without the physical and instantaneous presence of the supplier and the consumer can be used to conclude contracts between the two parties".**<sup>17</sup>

It is clear from the texts of European Directive No. 97-07 that every contract made by a modern means of communication is a telecontract, which means that an electronic contract made by modern means of communication is a telecontract.

## Section Three: Definition of Comparative Laws for Electronic Contract

Due to the frequent occurrence of the electronic contracting process from a scientific point of view in recent times and the legal problems it raised, some countries have issued legal legislation to address this, and some of these legislations have defined the electronic contract, including:

### First: Foreign Legislation

**1- French law:** Compliance by the French legislature with the provisions of the European Directive No. 97-07 Ordinance No. 741-2001 on distance sales was issued, in which the legislator assumed the concept of a remote contract by adding article 121-16 to the French Consumption Regulation.<sup>18</sup>

**2- US law: It has been defined as an** electronic record, which is an electronic contract concluded between the parties, as defined as "a contract or any other record that is violated, created, sent, transmitted, received, or stored by any electronic means."<sup>19</sup>

### Second: Definition of the Electronic Contract in the Arab Shari'a

If the definition of an electronic contract has been of this level of attention at the European level and in the French legislative arena, some Arab legislation has come to take care of the regulation of electronic transactions.

**1- Tunisian law: Tunisia** was the first Arab country to develop a special regulation for electronic transactions, which is Regulation No. 83 of 2000, <sup>20</sup> where it is stated in paragraph 2 of the first chapter of the law: "Electronic contracts are governed by the system of written contracts in terms of the expression of will, their validity and their enforceability in a manner that does not contradict the provisions of this law.

**1- Jordanian law:** The electronic contract is defined as **"an agreement that is concluded by electronic means, wholly or partially"**.<sup>21</sup>

<sup>15</sup> Makhoulfi Abdel Wahab, E-commerce via the Internet, a thesis submitted to obtain a doctorate in law degree, Hajj Lakhdar University, Batna, 2011/2012, p. 52.

<sup>16</sup> Refer to Dr. Shehata Gharib Shalkami, Electronic Contracting in Arab Legislation, Dar Al-Nahda Al-Arabiya, Cairo, 2005, p. 17, Dr. Mohamed Hassan Qasem, op. cit., p. 17, Mohamed Khaled Gamal Rustom, The Legal Regulation of Electronic Commerce in the World, Al-Halabi Human Rights Publications, First Edition, 2006, p. 250.

<sup>17</sup> . directive N 97 – 07 cedu 20 Mai 1997 K joce 04/06/1997 N 144 .p19

<sup>18</sup> Souli Al-Zahra, The Legal System of the Electronic Contract, Memorandum for Obtaining a Master's Degree in Law, Mohamed Khidir University, Biskra, 2007/2008, p. 17.

<sup>19</sup> Khaled Mamdouh Ibrahim, Concluding the Electronic Contract: A Comparative Study, Dar Al-Fikr University, Alexandria, 2006, p. 136.

<sup>20</sup> This codification was issued on 9/8/2000, and it included 53 chapters (articles) divided into nine chapters concerned with defining a legal system for electronic exchanges in the civil and penal aspects, see the articles of this law, Muhammad Khaled Jamal Rustom, op. cit., p. 161.

<sup>21</sup> T. Lawrence Muhammad Obeidat, Proof of Electronic Contract, Dar Al-Tarqa for Publishing and Distribution, Amman, Jordan, 2005, p. 193.

**UAE law:** Electronic transactions are defined as "any transaction, contract or agreement concluded or executed in whole or in part by means of electronic correspondence".<sup>22</sup>

### **Second Requirement: The Legal Nature of the Electronic Contract and its Characteristics**

The legal nature of the electronic contract is still the subject of study and the diligence and explanation of those interested in this field, which leads to an attempt to classify it in terms of its nature and whether it is a contract of acquiescence or consent, and this will be explained as follows:

#### **Section One: The Legal Nature of the Electronic Contract**

To determine the legal nature, the following points must be addressed:

**1 - Electronic contracts such as the contract of acquiescence:** The jurists differed between the supporters and opponents of the fact that electronic contracts are contracts of acquiescence or not, so the English, French and Arabic jurisprudence supported that electronic contracts are contracts of acquiescence, considering that the contractor can only press in a number of fields open to him in the seller's or buyer's website on the specifications he desires from the commodity and the predetermined price, which he does not have the power to discuss or negotiate with the other contractor and everything available to him. It is either accepting the contract in its entirety or rejecting it altogether.<sup>23</sup>

#### **2 - Electronic Contract Consensual Contract**

Proponents of this approach argue that the electronic contract is only a consensual contract because the contractor can resort to another supplier or producer of the good or service if he does not like the conditions of one of the suppliers or producers, and it is not possible to rely on the economic criterion only, but the legal and economic considerations must be considered together.<sup>24</sup>

#### **3 - The electronic contract is of a special nature**

A jurisprudential opinion goes that a distinction must be made between two types of electronic contracts when determining the legal nature, as electronic contracts in terms of the mechanism of concluding them are either contracts concluded through the e-mail of contractors or through websites, as contracts concluded through websites may contain the characteristics of compliance contracts, while contracts concluded through websites are often consensual contracts, as the conclusion of the contract is negotiated through Sending e-mails are often consensual contracts, as the contract is negotiated through personal websites until the offer of one of the contractors is accompanied by the acceptance of the other, and the contract is<sup>25</sup> concluded.

### **Section Two: Characteristics of the Electronic Contract**

An electronic contract concluded over the Internet has characteristics that distinguish it from other contracts, and this contract can share some of the characteristics found in traditional contracts, and this will be explained as follows:

**1- The electronic contract is one of the contracts that are concluded remotely:** The basic characteristic of this type is:

1. The physical absence of the parties at the moment of mutual consent between them, as it is a contract concluded between two parties who are not present face to face at the moment of the convergence of their wills.
2. In addition, it is concluded through one or more means of telecommunications<sup>26</sup>.

#### **2 - The electronic contract has an internal and international nature**

Electronic contracting that is done over the Internet is of an internal and international nature, and the electronic contract is of an internal nature when the contract is between two parties within the same country, while the international contract is in the case of going outside the borders of the country, as electronic transactions over the Internet can be carried out between people who are located in different

<sup>22</sup> Bashar Mahmoud Dudin, The Previous Letter, p. 57

<sup>23</sup> Burhan Samir, Contract in International Electronic Commerce, Symposium on the Management of International Trade Contracts, Arab Organization for Administrative Development, Cairo, 2006, p. 8.

<sup>24</sup> Lama Abdel Sadiq Salhab, The Electronic Contract Council, Thesis Submitted to Obtain a Master's Degree in Law, An-Najah National University, Nablus, 2008, pp. 60-61

<sup>25</sup> Kazim Karim Ali, Electronic Contract, op. cit., p. 135.

<sup>26</sup> Dr. Abdullah Anwar Sha'at, The Electronic Contract in the Framework of Arab Legislation, op. cit., p. 72.



countries, the user is from one country and the supplier is from another country, the technology company for processing data, entering and uploading it through a network in another country<sup>27</sup>.

**3 - The electronic contract is one of the bargaining contracts: The bargaining** process prevails in these contracts, where its terms can be negotiated and discussed, and these conditions are set freely by the will of both parties, i.e. the obligor is not limited to merely agreeing to the pre-prepared conditions, but has absolute conformity in contracting with any product and has the right to move from one location to another, and that the contract does not relate to goods that affect a real interest and provide a service that the consumer cannot easily dispense with, and that it is the subject of a monopoly<sup>28</sup>.

#### **4 - The electronic contract is a consumer commercial contract**

The electronic contract is of a commercial nature, so this contract is often called an electronic commerce contract, and in fact, this is the dominant reputation, as commercial sales occupy the largest part of the majority of contracts concluded through the information network, but it can respond to services and benefits in the form of a lease or contract, but often the provider of the commodity is at least a merchant, i.e. it has a commercial character<sup>29</sup>.

### **Second Topic: Legal Regulation of Electronic Contract**

In terms of organization, the electronic contract is subject to the general rules and provisions of contract theory, but its electronic nature and the convergence of offers and acceptance of it electronically on the Internet distinguished it from traditional contracts, so these contracts derive their legitimacy and provisions from the laws of exchanges and electronic commerce, and in the event that these rules are insufficient and unable to find solutions, the general rules are referred to<sup>30</sup>, and in this topic, I will address the conclusion and proof of the electronic contract and the applicable law as follows:

#### **The first requirement: the conclusion of the electronic contract and its multiple forms**

The electronic contract is concluded and produces its effects, so the basic elements must be available, and with the multiplicity of technologies used and their differences, there are many forms of electronic contracting, it may be done by e-mail or through websites, or it may be done through direct chat through the network.

### **Section One: Elements of the Electronic Contract**

The contract concluded through one of the electronic means of communication must have the general elements of the contract, which are consent, object, and reason.

**Satisfaction in the electronic contract:** Consent is the essence of the contract, and it is the expression of the will of the parties to the contract according to what has been agreed upon, and satisfaction is expressed in the electronic contract through the electronic information message, which is one of the means of expressing the legally acceptable will to conclude the offer or acceptance with the intention of creating a contractual obligation<sup>31</sup>.

#### **1 – Electronic Offer**

Clause 3.2 of the draft Model Contract on Electronic Commerce, suspended by the UNCITRAL Model Law, reads as follows: "A message is an affirmative if it contains an affirmative of the conclusion of a

<sup>27</sup> Dr. Abdulhay Al-Qasim Abdel Momen, The Concept of the Electronic Contract and its Characteristics, Al-Rida Yacht Scientific Magazine, Thirteenth Issue, Sudan, 2014, p. 208.

<sup>28</sup> Lazaar Wasila, Implementation of the Electronic Contract, Memorandum for Obtaining a Master's Degree, University of Algiers, Ben Aknoun, 2010/2011, p. 18.

<sup>29</sup> Dr. Mohamed Hussein Mansour, Electronic Liability, Ma'aref Foundation, Alexandria, 2006, p. 18.

<sup>30</sup> Ghada Jawad Massoudi, The Legal Organization of Electronic Contracts in Palestine, Master's Thesis, Birzeit University, Palestine, No Year of Publication, p. 11.

<sup>31</sup> Mohammed Dhaar Al-Otaibi, The Legal System of Electronic Contracts, A Comparative Study between Kuwaiti and Jordanian Publishing, Master's Thesis, Middle East University, Amman, 2012/2013, p. 52

contract addressed to one or specific persons as long as they are sufficiently known and indicates the intention of the sender of the offer to be bound in the event<sup>32</sup> of acceptance.

The electronic offer may be a special offer addressed to specific people, which is usually made by e-mail, and it may be a general answer addressed to all visitors to the website through the website.<sup>33</sup>

## **2 – E-Admission**

Electronic acceptance is expressed through an electronic means, and the conclusion of the contract requires that the offer converge with an acceptance that corresponds to it, as defined in the 1980 Vienna Convention on the International Sale of Goods, where Article 18/1 states: "Any statement or any other act made by the addressee stating the acceptance of the offer shall be considered acceptable."<sup>34</sup>

In order for the acceptance to produce its effect, it must be exactly identical with the offer, if it differs in anything from the offer, it is considered a new offer that needs to be accepted in order for the contract to be concluded, and the acceptance must be explicit, and this acceptance may be done either by e-mail, it is done by sending his acceptance in the form of an electronic message containing all the necessary elements to complete the contract, while acceptance through websites is done by Click or touch the icon dedicated to the acceptance announcement<sup>35</sup>.

Since the consumer in electronic contracts cannot accurately judge the product, he has the right to revoke and then suspend the completion of the contract, and many legislations such as French law and the European, American and English directives have approved the right of the consumer to revoke electronic contracts during the grace period, and this period varies from one law to another<sup>36</sup>.

## **Second: Time and Place of Concluding the Electronic Contract**

The electronic contract is concluded when the offer of acceptance is concluded and this disposition takes place at the place and time agreed upon between the parties to the contract.

### **1 - Time of the contract**

(a) The time of electronic acceptance in the event that the contract is assumed to be between absent persons.

There is a period of time between the offer and the acceptance, and this raises the problem of determining the time of this contract.

1. **Theory of Declaration of Acceptance:** The contract is concluded at the time and place in which the Acceptance of the Offer is declared.
2. **The theory of sending acceptance:** The contract is concluded when the acceptee is sent, and it is not enough for the conclusion of the contract to declare the acceptable, but this acceptance must be sent to the obligor.
3. **Theory of receipt of acceptance:** that the acceptance was made in the event that it was received by the observer, and that the contract was made either by receiving the data message or clicking on the designated space, and this statement was adopted in article 15 of the UNCITRAL Model Law on Electronic Commerce of 1996.
4. **The theory of knowledge of acceptance:** The contract is concluded with the knowledge of the offeror of the acceptance, so it is not enough to send a message, but the offeror must open it, read it, and know its conformity with the offer.

<sup>32</sup> Makhloufi Abdel Wahab, E-commerce Online, op. cit., pp. 88-93.

<sup>33</sup> Bouchuberg (Lionel) – Internet Electronic Commerce, First edition, Delmas, 1999, p. 114

<sup>34</sup> Majd Al-Morsi Zahra, Civil Protection for Electronic Commerce (Electronic Contract, Legal Proof, Electronic Consumer), Dar Al-Nahda Al-Arabiya, Egypt, 2008, p. 43.

<sup>35</sup> Kazim Karim Ali, Electronic Contract, op. cit., pp. 143-146

<sup>36</sup> Dr. Khaled Mamdouh Ibrahim, Concluding the Electronic Contract: A Comparative Study, Dar Al-Fikr University, Alexandria, 2008, pp. 347-351.

B. Time of electronic acceptance in the event that the electronic contract is assumed to be between two attendees.

1. The moment the contract is concluded via the web on the network is once the model contract is approved, and the word "OK" is printed.
2. The moment the contract is concluded via email, the time of its conclusion varies<sup>37</sup>.

According to the theory of sending acceptance, a contract is concluded when the recipient sends the email containing his acceptance, and it is considered concluded the moment he clicks on the send key.

According to the theory of receipt of acceptance, the contract is concluded by e-mail from the moment the letter containing the acceptance is delivered to the proformer's mail, which is introduced by the UNCITRAL Model Law in article 15<sup>38</sup>.

## 2. Place of conclusion of the electronic contract

The UNCITRAL Model Law indicated that if the parties to the contract did not agree on the place where the contract should be concluded, the contract would have been concluded at the place where the consignee's business of acceptance was located.

If there are many such locations, it is in the workplace that is most relevant to the subject matter of the contract or the main place of work, and if there is no place of work, the usual place of residence is resorted to instead of the place of work.

## Section Two: Multiple Forms of Electronic Contracting

There are many techniques used and forms of electronic contracting:

**First: Contracting by Email:** Email refers to the exchange of messages between parties in an electronic manner, and is considered as the electronic counterpart of regular mail<sup>39</sup>.

Article 1 of the French law, called the Law of Trust in the Digital Economy, defines email in its last paragraph as: "**Any message in any form of text, voice, images or sounds that is sent through a public telecommunications network and stored on one of the network services or in the devices of the addressee so that the latter can retrieve it.**"<sup>40</sup>

The process of contracting and exchanging data messages is done by e-mail when the person who wants to contract enters the e-mail box and sends a message to the person who wants to contract with him at the e-mail address of the sender, then writes down the message he wishes to send and then presses the send key in the . The message is then sent to the addressee's computer, which stores the message in the addressee's inbox , and when the addressee enters his email box, he can read the message and respond to it in the same way by accepting, rejecting or modifying<sup>41</sup>.

## Second: Contracting through the website

After the spread of the Internet and the attachment of individuals to it, it has become possible for the contractor to choose the available good or service offered on the website, and by browsing all the available information about it in a way that leads to his knowledge of the subject of the contract sufficiently and without due diligence, he can ask the website for some clarifications about the good or

<sup>37</sup> Dr. Khaled Mamdouh Ibrahim, Concluding the Electronic Contract: A Comparative Study, Dar Al-Fikr University, Alexandria, 2008, pp. 347-351.

<sup>38</sup> Yahya Souf Falah Hassan, The Legal Organization of Electronic Contracts, op. cit., pp. 58-64

<sup>39</sup> IT IS CALLED ELECTRONIC MAIL IN ENGLISH AND IS ABBREVIATED AS E-MAIL, AND EACH EMAIL ADDRESS CONSISTS OF TWO SECTIONS SEPARATED BY THE SYMBOL @, AND THE FIRST PART INDICATES THE NAME OF THE USER, THE OWNER OF THE MAIL, OR EVEN A PSEUDONYM FOLLOWED BY THE SYMBOL @, THEN THE NAME OF THE COMPANY, NETWORK, OR LOCATION WHERE THE EMAIL IS LOCATED, THAMER MOHAMMED SULEIMAN AL-DAMIATI, OP. CIT., P. 34.

<sup>40</sup> The wording of this article in French is as follows:

E-mail is any message, in the form of text, voice, sound or image, sent by a public communication network, stored on a server on the or in the recipient's terminal equipment, until the recipient picks it up

<sup>41</sup> Dr. Khaled Mamdouh Ibrahim, op. cit., p. 130.

service he wishes to contract for and then announce his agreement to accept the contract after reviewing the conditions written in the model contract.<sup>42</sup>

It is clear from the above that contracting through the website represents a form of contracting event and the most developed and exploitative of the network in terms of displaying goods, services and price lists to you, on the other hand, it carries with it the greatest degrees of risk in terms of not ascertaining the existence of the good or service and its quality, and the difficulty of verifying the eligibility of the contractors<sup>43</sup>.

### **Third: Contracting through conversation**

The development of information technology has led to the fact that any user of the Internet can talk to other people, whether by writing or voice, and it has become possible to meet them face to face by simply using a camera that is connected to a computer, and this achieves direct dialogue between the two parties<sup>44</sup>.

In order to operate the chat system, both parties must be connected to the chat program technically prepared for this purpose, and this program divides the main page into two parts, where one party writes his thoughts on the screen of his personal device in the first part and at the same time sees what the other party writes on the second part of the page, and it is noted that this means provides a time synchronization for the exchange of ideas between the two parties<sup>45</sup>.

Through this method, contractors can add a digital camera that allows each party to watch the other party, so that the contract becomes by talking and watching at the same time.

Although this method is effective as a form of electronic contracting, it is less widespread and important in contracting through the Internet, although it combines the manifestations and forms of expression of will, as the parties can communicate orally using words that are understandable between them, and it can be limited to writing or signing, all of which are aspects of the explicit expression of the will approved by the general rules of civil technology.

### **Fourth: Contracting through an electronic intermediary**

If it is known that a contract is always concluded between two persons of the law, the use of electronic means of communication in contracting has shown some contracts and transactions that are carried out without the intervention of the natural person in its creation, as the so-called electronic intermediary or agent is currently being used rapidly and increasingly in concluding the contract.

According to this system, a computer that concludes a contract with a human or another computer is programmed as an automatic way to express the will in the e-commerce environment, which means that the offer and acceptance occur automatically depending on the elements and information that are pre-programmed by the computers connected to the Internet<sup>46</sup>.

Due to the widespread use of this method in concluding contracts, most of the legislation regulating electronic transactions has given it a great deal of attention, especially to the legal issues raised by contracting through the electronic intermediary, especially if we know that the civil regulation when regulating the contract did not address special provisions for this form of contracting, which is the programming of a machine for the transfer of will.

## **Second Requirement: Proof of Electronic Contract**

The contract concluded through the information network is based on the exchange of electronic data on paperless supports inside or outside the communication devices and the signature of the person who sends the electronic message by means of the electronic signature, and this will be explained as follows:

### **Section One: Electronic Editors**

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<sup>42</sup> Tamer Al-Damiati, op. cit., p. 51.

<sup>43</sup> Ajali Khaled, Prior References, p. 126.

<sup>44</sup> Tamer Al-Damiati, op. cit., p. 52

<sup>45</sup> Ahmed Khaled Al-Ajlouni, op. cit., p. 48.

<sup>46</sup> Ajali Khaled, op. cit., p. 128.

An electronic editor is electronic information that is sent or delivered by electronic means, whether it is the means of extracting it at the place where it is received, or it is data and information that is exchanged through electronic means, whether through the Internet, through hard disks, computer screens, or any electronic means<sup>47</sup>.

In order for the electronic editor to acquire full authority by proof and to be able to be equal to traditional documents in legal force, several conditions must be met:

1. Writing: Writing on the electronic editor is in the form of algorithmic equations that are exhausted through the processes of entering and extracting data through the computer screen or any other electronic means.
2. The precedence of electronic editors by retaining the information contained therein.
3. The possibility of keeping the electronic editor<sup>48</sup>.

## **Section Two: Electronic Signature**

### **First: Definition of Electronic Signature**

In order for an electronic signature to have legal value and produce its effects, it must be signed, as the electronic signature has been defined by several definitions, the most important of which is what the Universal Electronic Signatures Law of 2001 stipulates in Article 2/A that: "Data in electronic form included in a data message, or added to it or logically linked to it, the identity of the signatory may be used on the information contained in the data message."

It has many forms and forms, such as either an electronic pen, an electronic fingerprint, a digital signature, or a biometric signature<sup>49</sup>.

### **Second: The Authenticity of the Electronic Signature in Evidence**

The granting of the legal value of an electronic signature and its equating with a traditional signature depends on the availability of certain conditions that enhance this signature and provide confidence in it.<sup>50</sup>

### **Third Requirement: Determining the Jurisdiction and the Law Applicable in Electronic Contracts**

No contract is free from the emergence of disputes, whether at the stage of its conclusion or at the stage of its implementation, which raises the problem of determining the court competent to hear these disputes on the one hand, and on the other hand, determining the law applicable to them, which will be clarified as follows:

## **Section One: The Judiciary Competent to Consider Electronic Contract Disputes**

Disputes concerning international information in the electronic field are subject to the general rule of international jurisdiction of the courts, where the case can be filed before the court of the defendant's domicile or residence, and this is called the principle of administrative subordination or agreement on jurisdiction in disputes of an international nature<sup>51</sup>.

In the absence of one of the two former officers, we resort to the reserve officer, which is the place of conclusion or execution of the contract, and with the exception of the preceding provisions, disputes related to electronic re-consumption are subject to the jurisdiction of the court of the consumer's domicile or place of residence<sup>52</sup>.

## **Section Two: Law Applicable to Electronic Contract**

<sup>47</sup> Kazim Karim Ali, *Electronic Contract*, op. cit., pp. 143-146.

<sup>48</sup> Yahya Youssef Falah Hassan, *The Legal Regulation of Electronic Contracts*, op. cit., pp. 72-73.

<sup>49</sup> Abdullah Nawar Shaat, *Evidence and Obligations in Electronic Contracts*, Al-Wafa Legal Library, Alexandria, 2017, pp. 314-317.

<sup>50</sup> Iyad Ahmed Saeed Al-Sari, *The Legal System for Concluding the Electronic Contract, A Comparative Study in the Light of Arab and Foreign Laws*, Al-Halabi Human Rights Publications, Beirut, 2016, p. 153.

<sup>51</sup> Gautias – *Electronic Commerce Law and Applicable Norms-Review of International Business Law*.1997.p547

<sup>52</sup> - Gasti – *la protection des consommateurs en matière de contrat à distance*, revue du droit des affaires international, 1997, p1378

The law applicable to electronic contracts is divided into two parts, according to the rules of attribution in private international law, which are:

**First: Selection of the Parties by the Applicable Law (Law of Will)**

The subject matter of the contract is subject to the law chosen by the parties expressly or implicitly, and this rule is applicable in various legal systems and international treaties, and this will determine the applicable law that governs the contractual relationship between the parties by adding a special clause in the terms of the electronic contract, and the parties' choice of the applicable law does not require a real connection between it and the subject matter of the contract, and this choice stipulates the substantive rules without the rules of conflict<sup>53</sup>.

**Second: Lack of agreement on the applicable law**

If the parties do not expressly agree on the law applicable to the electronic commerce contracts concluded between them and promote the derivation of the implied will, the judge here shall resort to the clues derived from the contractual circumstances by resorting to objective indicators that refer to the law closely related to the contract, such as the place of conclusion or execution of the contract, the common nationality of the contractors or their common domicile in case of conflict of laws<sup>54</sup>.

## **Conclusion**

In this research, the electronic contract has been identified in most of its aspects, and it has been shown that this contract is distinguished from traditional contracts through the mechanism by which it is concluded, which is the contract that is concluded through the information network, whether through e-mail or websites, and it is characterized by several characteristics, including: it is a contract between those present in terms of time and those who are absent in terms of place, and the offer in it. It is characterized by generality in most cases, and this contract has a peculiarity in terms of proof and fidelity.

The practical applications of this contract and its widespread spread have prompted many countries of the world to issue legislation that dealt with the provisions of this contract and its specificity, and the first law in this regard was the UNCITRAL Model Law on Electronic Commerce, issued by the United Nations in 1996, which was the basis for most of the legislation dealing with electronic commerce that have been issued in the world, especially the legislation issued by the Arab countries.

In the light of what has been studied above, I offer some recommendations:

Granting electronic documents and electronic signatures authenticity in evidence before courts and government agencies, and giving it the authority of paper documents in proof

- . Finding the necessary means to achieve trust and security among contractors by finding the necessary guarantees for the execution of electronic contracts

- . The Algerian legislator regulates the law of exchanges and electronic signatures, and implements it, with the need to find the means to ensure that the

The Algerian legislator has granted a license to certain authentication and authentication bodies to enable them to authenticate and verify the authenticity of electronic signatures, which provides trust, security and guarantee for the merchant and consumer dealing in e-commerce.

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<sup>54</sup> Dr. Muhammad Ibrahim, E-commerce Contracts, Dar Al-Farqa for Publishing and Distribution, Amman, Jordan, 2005, p. 120.

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