

## ماهية العقد الإلكتروني وتمييزه عن العقود الأخرى

### The Nature of the Electronic Contract and its Difference from Other Contracts

Date of Sending: 17/12/2019 | Date of Acceptance: 19/12/2019 | Date of Publication: 10/01/2020

ط.د. تباني سعيد

Tebani seid

كلية الحقوق والعلوم السياسية - جامعة المسيلة

Faculty of law & political sciences University of M'sila

[tebaniseid@gmail.com](mailto:tebaniseid@gmail.com)

#### Résumé:

Les contrats reposent sur le principe de la consensualité, c'est-à-dire la conformité entre positif et acceptable, et avec le développement technologique que l'humanité a connu à cette époque, certains contrats ont été créés au moyen de moyens technologiques modernes, ou ce que l'on appelle le contrat électronique.

Le contrat est passé entre contractants utilisant des technologies modernes

telles qu'un ordinateur ou un ordinateur utilisant Internet.

**Mots clés:** Contrat électronique - transfert de données - ordinateur - réseau numérique - contrats de commerce électronique.

#### ملخص:

تقوم العقود على مبدأ الرضائية أي تطابق الإيجاب والقبول، ومع التطور التكنولوجي الذي عرفته البشرية في هذا العصر، نشأت بعض العقود التي تتعقد بواسطة الوسائل التكنولوجية الحديثة، أو ما يعرف العقد الإلكتروني. فالعقد الإلكتروني يتم بين متعاقدين باستخدام الوسائل التكنولوجيا الحديثة متمثلة في الكمبيوتر أو الحاسوب وذلك باستخدام الشبكة العنكبوتية (الأنترنت).

الكلمات المفتاحية: العقد الإلكتروني - نقل المعطيات - الحاسوب (الكمبيوتر) - الشبكة الرقمية - عقود التجارة الإلكترونية.

### Introduction:

The business process is based on the exchange of goods and services under the so-called supply and demand theory, where commercial contracts in this area are concluded very quickly due to the speed and certainty of business.

The enormous technological development in public life in general and commercial life in particular has allowed other modes of remote contracting in so-called contracts.

Electronic contracts have become prevalent in various areas of economic and commercial life, these contracts have characteristics that distinguish them from traditional contracts.

This lead to ask the the following question :

What are electronic contracts?

What are their characteristics?

What distinguishe them from other traditional contracts?

This is what we will study and analyze in two sections:

**Section I:** in which we will discuss definition of e-contract and its characteristics

**Section II:** in which we will discuss thr discrimination of electronic contract from the other contracts.

### Section 1: What are electronic contracts?

The contract is the convergence of two or more wills to produce a particular legal effect, and the contract in terms of composition is either consensual, formal or abstract, while in terms of effect is either binding on the two sides or binding on one side. Moreover, contract is either restitution contract or contribution contract. It is also either immediate or continuous contract ,specific contract or eventual one.

The electronic contract in fact does not go beyond this, whether in its construction ,composition or type . It compels to the provisions of the general theory of contracts , it is an indefinite contract that's why most of the legislation did not put to it a special organization. (1)

The Algerian law in civil law did not address the legal systems governing the electronic contract and did not address its definition. (2)

On this basis, we will see the different definitions of the electronic contract.

### **1 / Definition of the electronic contract:**

The specificity of the electronic contract lies in the electronic aspect of this contract, namely the way in which this contract is held, namely the Audiovisuel, a remote international network.

#### **First: Legislative definition:**

Several definitions of e-contract, e-commerce contract or online contract have emerged:

\* The provisions of the United Nations Model Law defined the electronic contract as "Information generated, sent, received or stored by electronic, optical or similar means, including, for example, Inventory, electronic data exchange, e-mail, telegram or fax >>. (Article II, paragraph A, of the UNCITRAL Model Law on Electronic Commerce 1996). (3)

As defined in Article 2 of the European Directive of 20 May 1997 on the protection of consumers in remote contracts, the term remote contract is defined as << a contract of goods and services between a supplier and a consumer through the regulatory framework for remote sale or provision of services Organized by the supplier, which is done using one or more electronic means of communication until completion of the contract >>. (4)

This latter definition is the same as that defined by the United Nations Commission on International Trade Law (UNCITRAL) on 17 December 1997 and added that "every means without a physical presence of the supplier or the consumer could be used to conclude the contract between its parties."

This lack of comprehensiveness, limitations and limitations of electronic contracting in certain areas is a violation of this definition. The transfer of goods, services, products and consumers. (5)

The UAE legislator in its law on transactions and electronic commerce << Any transaction or contract or agreement concluded or implemented in whole or in part by electronic mail >>. (6)

The Egyptian legislator defined the e-contracting as "it is every commercial transaction carried out remotely using an electronic means."

The Tunisian e-commerce project defined it as a commercial operation whether it was a commodity, service or work performed through electronic exchanges. (7)

The Canadian legislator, according to the Law on the State of Quebec for Consumer Protection Section 20, << Remote contracting as a contract between any merchant and a consumer without a physical presence between them, both in the case of positivity or acceptance when the offer is not directed to a particular consumer >>. (8)

### **Second: the definition of jurisprudence.**

Some expand the definition while others narrowed it . (9)

- The French jurisprudence defines the electronic contract as "Consent to acceptance of the offer of sales and services of the International Telecommunications Network using audiovisual media"

An open international network for telecommunications by means of an audiovisual medium, thanks to the interaction between positivity and communication. " This definition did not address the impact of the contract between the positivity and the acceptance of the establishment of the obligation.

As the e-contract is on the Internet, that is, at the international level, it is «the convergence of offers of goods and services accepted by the response from other countries through media, including the Internet for the completion of the contract. (11)

Thus we can conclude that the jurisprudence was divided into the definition two opinions:

The first view is that the contract is intended to be "the contract that is signed through the Internet".

This view limits the scope of the electronic contract in one type of contract, which is concluded through the Internet.

The second view is that the contract is «that contract, which is through modern means of communication and that this contract has many images, the first of which are computer-based contracts >>.

This contract extends beyond the scope of the electronic contact. The electronic contract is not limited to online contracting only. The contract can be done by phone, television, telex, fax or emitter, and finally through a network of computers (closed network of computers, Computers unlimited (12)

In addition to that there are other definitions:

- The process of buying and selling across electronic networks at the commodity and service levels, along with information, computer programs and other activities that help in business practices.

- All online transactions, even if they do not have the trademark, although they are often not as such by the provider of the goods or services at least who is often a trader. (13)

According to what is mentioned above contracts can also be defined as:

- a contract concluded by an electronic means, wholly or partly, when such means give rise to the interaction required for the completion of the contract between the parties and set obligations on them. (14)

- The contract in which the offer is accepted through an international telecommunications network using EDI, with the intention of establishing contractual obligations.

<< A positive meeting of the positive about an offer made in an electronic, audio-visual manner or both on a communications and information network, with identical acceptance issued by the same party in order to achieve a particular transaction or transaction that the parties wish to achieve. (15th)

### **Third: Definition of the Algerian legislator of the electronic contract:**

The Algerian legislator stated that the electronic contract does not come out of its terms and conditions from the traditional contract and therefore the provisions of article 54 of the Civil Code states: "The contract is an agreement whereby one or several persons commit to another person or several persons to grant, Do something >>. However, by virtue of holding the contract in terms of place among absentees, it is necessary for the legislator to intervene to regulate the controls and guarantees governing the contract and to achieve the necessary protection of its parties and its enforcement. (16)

All this until 2018, with the Algerian legislator finally issuing the e-commerce law 18-05. (17)

Referring to this law, in particular Article 60 of the second paragraph, in which the legislator finally defined the electronic contract by saying:

"Contract under the meaning of Law No. 04-02 of 05 Jumada Al-Awal 1425H corresponding to 23 July 2004, which sets the rules applicable to commercial practices and is concluded remotely without

the actual presence and synchronization of the parties using exclusive communication technology." (18)

It follows from the text of the article that the legislator did not come in addition in this area, where the definition was given to the aforementioned Law 04-02.

Referring to Article 30 of Law 04-02, paragraph 4, which states: "The conclusion of any agreement or agreement aimed at the sale of a good or the performance of a service is pre-edited by one of the parties to the agreement with the other party's acquiescence so that the latter can not make a real change in it. . >> (19)

From this point of view, the opinion of the Algerian legislature can be determined in the following points:

The contract is based on the idea of contracting (first)

Then this contract is done on the idea of contracting remotely (II)

In this contract, modern technological communication technology is used (III).

## **2 / Characteristics of the Electronic Contract:**

It is clear from the above that the electronic contract has several advantages that distinguish it from the traditional contracts, which are as follows:

### **First: The electronic contract is concluded without the physical presence of the parties**

The traditional contract between the attendees requires the presence of two parties in the Council of the contract in order to agree on the details of the contract to be concluded.

The basic feature of an electronic contract is that it is made between contractors that are not collected by a real contract board. Remote contracting is done by different means of technology. Mutual exchange is electronically via the Internet through a virtual governing council. (20)

It is not prohibited to adapt the contract remotely the presence of an electronic mediator and may be electronic contract is not contemporary, ie the non-contemporary offer of acceptance and this is the result of the interactive character among the parties to the contract. (21)

This feature is intended to provide protection to the consumer, especially the online contractor. Physical presence reduces the risks arising from the contract, allowing each party to verify the identity of

the other and the date and time of the contract. In electronic contracting, it takes some time. Electronic contracting requires time to check the eligibility of the other contractor and to investigate the pictures of the positive and the result of acceptance as well as the preparation of the evidence beforehand.

Electronic contracting over the Internet, doubts arise in the previous issues, especially since most of the electronic contracts are between contractors each in a home other than the home of the other contractor.

In addition, the consumer in the e-contract is able to verify and verify the goods purchased. (22)

The use of telecommuting techniques is asymmetrical and varies from one country to another. (23)

#### **Second: Electronic media are used to conclude the contract**

One of the most important aspects of privacy in the electronic contract is the basis of the electronic contract that this contract is concluded through an electronic communications network. The electronic contract is not different from the traditional contract in terms of subject matter and parties than other traditional contracts, but it differs only in terms of the method of conclusion, It is media that have led to the disappearance of traditional writing based on paper media to be replaced by electronic writing based on electronic props. (24)

#### **Third: The electronic contract is a commercial contract**

The electronic contract is characterized by the fact that it is a contract and that electronic sales contracts account for the bulk of all contracts. The electronic contract is also consumer-oriented because it is often between a consumer and a professional who is subject to consumer protection rules. (25)

#### **Fourth: Electronic contract bargaining contract**

According to the jurisprudence, in view of the means by which the contract is concluded, the electronic contract is a contract of compliance if the general conditions for sale are mentioned ... so that neither the contractor nor the contractor will accept or not contract at all. Where the acceptance of pressure on a number of the boxes open in front of the seller on the specifications desired by the commodity and the price set in advance, the consumer does not have sufficient

opportunity to preview the product and does not have competition or negotiate with the other contractor and all the ownership either accept (accept the contract And to conclude or reject it altogether). (26)

## **Section II: Discrimination of electronic contract from other contracts**

The contract is not the only contract concluded by an electronic intermediary, but there are other contracts concluded in this area, which differ from the electronic contract and this is what we will address as follows. (27)

**Firstly:**

### **1 / E-contracting and conventional contracting:**

The sale contract provided for in article 351 of the Algerian Civil Code: the sale of a contract under which the seller is obliged to transfer to the buyer the ownership of something or other financial right for a monetary price.

The traditional contract of sale is consistent with the electronic contract in that they are held by the consent of the contractors. However, the privacy of the electronic contract is reflected in the means used to transfer the will of each party to the other. In the traditional contract, the parties are joined during negotiation, Time and place. (28)

### **2 / E-contracting and contracting by telephone:**

Both contracts are immediate and straightforward, where the time element fades. Contracts are concluded between absentees in terms of the place at least. However, the electronic contract is characterized by contracting by telephone. The latter is an oral contract that may require a written confirmation from the seller in the case of the sales contract. , And the electronic contract concluded on the Internet may interact with the positive and the client does not need to be issued in writing, the contract is once the other party expressed his will to accept by pressing the words OK through the keyboard of the computer.

The electronic message sent to the computer can also be viewed, printed, obtained, stored and stored in the computer, while the message in the telephone contract is oral.

Here the question arises as to the contract made by videotape and the camera is also oral. (29)

**3 / E-contracting and contracting by television:**

In this case, the positive is often directed at the public who wishes to contract for a goods or services,

The difference is that the TV contract may be a very short offer period (several seconds), the duration of the commercial advertisement for the place of interest. If the contractor wants more details, he should contact the producer or the company by phone or move to the headquarters.

The assignee can identify all the contracting information and items through the website of the Mujib, where he can negotiate and conclude the contract until it is sometimes executed electronically. (30)

**4 / E-contracting and contracting by fax and telex:**

The difference is that a contract is made by a fax or telex machine, which is simply a means of exchanging documents

The editors of the contract in paper form.

In other words, the physical presence of the traditional editor is achieved by fax and telex, and in electronic contracting, all this is done electronically. (31)

**Secondly: discrimination of electronic contract from other Internet contracts**

It included every process executed on the Internet such as the Internet access contract, the Internet subscription, the information lease and the virtual store contract.

**1 / Internet access contract:**

Is the contract that provides access to the network from the technical point of view. The service offers access to the Internet to the client means that enables access to the network where access to the network from the technical point of view, such as the obligation to supply materials necessary to communicate and commitment to maintenance and development of the network, Unlimited duration while continuing to pay the subscription before renewing the contract.

Completion of the contract of access to the network shall be for the client a specific site on the Internet in which he exercises his activity by maintaining the symbols and passwords assigned to him. (32)

**2 / Information lease:**

A service contract in which the Internet service provider is obliged to provide the subscriber with some of the technical possibilities for their

use and is usually allowed to use an area on the hard drive of one of its own devices.

For example, a subscriber's service provider may have the possibility of having an e-mail address that has a hard disk space that holds the computer owned and connected to the Internet. (33)

### **3 / Contract hotline service:**

Which is that the hotline service provider undertakes to perform telephone assistance to solve the problems that may be encountered while on the network, that is, the hotline service provider must provide effective and good assistance whenever requested, and this is called a technical assistance service contract.

This service is often contracted between the supplier and the customer on the occasion of subscription to the Internet. (34)

### **4 / contract creation of the virtual store:**

The virtual store: A web page that can be accessed via the Internet and listed as the virtual center area through which the merchant ensures its display.

It is a contract whereby the service provider is required to enable the merchant to display his merchandise through a website or a virtual mall, at an agreed fee and to open the online store.

In accordance with the conditions governing the conduct of the business, regulating the control of the contents of the shop, respect for commercial practices and the organization of contracts.

The electronic contract also differs from other contracts in terms of payment. Electronic payment methods in electronic contracting replaced ordinary money and introduced various means of electronic payment, many of which are electronic cards, e-money, electronic check and electronically transfer transactions. (36)

### **Conclusion:**

The electronic contract has become a requirement of e-commerce, and due to the rapid growth in the field of communication, where most of the legislation tries to regulate the laws of electronic commerce and the regulation of electronic commerce contracts.

In this regard, most countries in the world have passed legislation regulating the process of e-commerce, and the legislator recently recalled this by issuing the e-commerce law 18-05, which left some organizational matters of the executive authority issuing executive and regulatory decrees to regulate the process of entering into e-

commerce. However, this gap led to ask the following question what are the legal guarantees that the Algerian legislator used to frame the process of electronic commerce, especially Algeria, in negotiations to join the World Trade Organization (OMC)?

### References:

- (1) Dr. Khaled Mamdouh Ibrahim - the conclusion of the electronic contract - a comparative study - University Thought House - Alexandria - 2006 - p. 50.
- (2) Belkacem Hamidi - conclusion of the electronic contract - a thesis for the introduction of a doctorate degree in legal science specialized business law - University of Haj Lakhdar Batna - 2014/2015 - p.
- (3) Professor Lazhar bin Said - Legal System of Electronic Commerce Contracts - Dar Houma - 2 - 2014 - p.
- (4) Khalid Mamdouh Ibrahim - ibid. - p. 51.
- (5) Majid Mohammed Sulaiman Aba Al-Khalil - Electronic Contract - Al-Rashed Library Publishers - First Edition - Riyadh - Saudi Arabia - 2009 - p.
- (6) Ben Khadra Zahira - Legal nature of the electronic contract - PhD thesis in law special law special - University of Algeria (1) - 2015/2016 - p.
- (7) Majid Mohammed Suleiman Aba Al-Khalil - ibid. - p. 17.
- 8 Khaled Mamdouh Ibrahim, op. Cit., P. 51.
- (9) Majid Mohammed Suleiman Aba Al-Khalil - the previous reference - p.
- (10) Ben Khadra Zahira - ibid. - p.
- [11] Khalid Mamdouh Ibrahim - ibid. - p. 52.
- (12) Sameh Abdel-Wahid El-Tohamy - Online Contracting Comparative Study - Legal Books House - Egypt (Mahalla El Kubra) - Dar Shatat Publishing & Software - 2008 - pp18-19
- (13) Majid Mohammed Suleiman Aba al-Khalil - ibid. - p. 19.
- (14) Zahar bin Said - ibid. - p. 43.
- (15) Khalid Mamdouh Ibrahim - ibid. - p. 52.
- (16) Ben Khadra Zahira - op. Cit. - p.
- 17 Law No. 18-05 of 10/05/2018 relating to electronic commerce No. 18 dated 16/05/2018.
- [18] Article 06 of Law 18-05, ibid., P.
- 19 Article 30 of Law 04-02 of 23/06/2004 defines the rules applicable to commercial practices - No. 41 issued on 27 June 2004.
- [20] Belkacem Hamdi, op. Cit., P.
- 21 Belkacem Hamdi, ibid., Pp. 38-39.
- [22] Belkacem Hamdi - ibid. - p.
- (23) Belkacem Hamdi - ibid. - p. 40.
- 24 Khaled Mamdouh Ibrahim, op. Cit., P. 53.
- [25] Belkacem Hamdi, op. Cit., P. 41.

- (26) Lazhar bin Said - ibid. - p. 47.
- (27) Lazhar bin Said - ibid. - p. 51.
- [28] Belkacem Hamdi, op. Cit., Pp. 44-45.
- [29] Belkacem Hamdi - ibid. - p.
- (30) Belkacem Hamdi - ibid. - p.
- [31] Belkacem Hamdi, ibid., Pp. 46-47.
- (32) for Lazar bin Said - ibid. - p. 53.
- 33 Lazhar bin Saeed - ibid. - p. 56.
- (34) Lazhar bin Said - ibid. - p.54
- 35 Khaled Mamdouh Ibrahim, op. Cit., P.
- (36) for Lazar bin Said - ibid. - pp. 54-55.