



# THE PROBLEM OF LEGAL PROOF OF THE CONTRACT IN ELECTRONIC TRANSACTIONS.

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## **Abstract:**

*Civil law scholars and jurists are concerned with two important issues in electronic transactions: electronic contracting and electronic proof. Electronic transactions are a reality in today's world and are developing rapidly, but they face a problem related to proof. They require means other than the traditional ones in order to be consistent with legal solutions. Electronic transactions do not require specific legislation, except for electronic proof. As for contracts, they are subject to the general rules of contract theory, which, according to some opinions, are sufficient to accommodate this modern means of contracting. As far as Algerian civil law is concerned, some amendments have been introduced, but these are limited to clarifying the legal validity of proof by electronic means.*

*Keywords - consistent, contracts, require, validity*

## **INTRODUCTION:**

The continuing development of information transport and communication technologies has facilitated faster and more cost-effective connections between people around the world. In this technological environment, it was natural for people to use these advanced means to communicate and express their intentions. This has been a major factor in the emergence of a new type of contract, known as an electronic contract, which refers to the technological and technical means used to create it.

At an accelerated pace, people have begun to take successive steps towards carrying out their legal transactions and actions using these technological means, thanks to the conditions they offer for the free exchange of intentions without recognising borders or material obstacles.

Considering that the contract system has a significant legislative importance in various laws, being one of the most important legal acts in everyday human transactions and serving as an engine of economic activity between individuals in private law, the use of electronic communication means in the formation of contracts has cast its shadow on the rules of contract theory and has become a central aspect of civil law.

And since the contract system is constantly influenced by successive developments in its environment and the parties involved, contract theory has been significantly affected by the remarkable advances in modern means of communication. In light of this situation, civil law scholars have recognised the importance of addressing two crucial issues in electronic transactions: electronic contracting and electronic evidence.

This research paper focuses on these issues and addresses the following problem: to what extent should information recorded on electronic media, such as written documents, be considered valid evidence? And what is the validity of such evidence when a party relies on it in a dispute? Can the general rules of contract theory adequately accommodate this new way of expressing intentions?

In order to answer these questions, we have chosen a descriptive-analytical approach, following the outline below:

First topic: The e-contracting system

First requirement: The nature of electronic contracting



Electronic contracting is a prominent and significant aspect of the legal systems of various jurisdictions. It encompasses the essential legal acts involved in everyday transactions and serves as the basis for the economic activities that give rise to most contractual obligations.

However, with the rapid and successive development of communication systems and technologies, modern means of communication have emerged and become widely used in the formation of contracts. This has raised questions about contracting using these modern communication methods and the extent of their impact on the general theory of contracts.

In order to explore and understand the electronic contracting system, we have dedicated the first topic of this research paper to its study, addressing three requirements.

#### **First requirement: The nature of e-contracting**

In order to understand the nature of e-contracting, it is necessary to define the concept and examine its characteristics. This will provide insight into the nature of e-contracting.

##### **Subsection 1: Definition of e-contracting**

###### **First, from a legal perspective:**

Some legal scholars define electronic contracting as "an agreement in which offer and acceptance converge through an international remote communications network, facilitated by an audible or visible means that allows interaction between the offeror and the offeree"<sup>1</sup>.

It is worth noting that this definition restricts electronic contracting to transactions conducted exclusively over the Internet. However, it is recognised that communication technologies are diverse and varied and that contracts can be concluded by a variety of means which continue to evolve over time<sup>2</sup>.

###### **Second: Legislative definition**

The French legislator defines electronic contracting in Article 121-16 of the French Consumer Code as follows "The provisions of this section apply to any sale of goods or provision of services concluded without the simultaneous physical presence of the parties between a consumer and a professional who use, exclusively or in combination, one or more means of remote communication to conclude the contract".

It is clear from this text that the French legislator defines electronic contracts by referring to contracts concluded at a distance or at a distance<sup>3</sup>.

The Algerian legislator also deals with the definition of electronic contracts concluded at a distance, without the actual and simultaneous presence of the parties, exclusively by means of remote communication technology<sup>4</sup>. This is the same terminology used by the French legislator.

Furthermore, the Algerian legislator refers to Law 04-02<sup>5</sup> to define contracts in Article 06 of the aforementioned Law 18-05. Referring to article 03, paragraph 04 of this recent law, it defines a contract as "any agreement or arrangement for the sale of goods or the provision of a service, prepared in advance by one of the parties to the agreement with the consent of the other party, in such a way that the latter cannot make any substantive changes to it.

The contract may take the form of an order, an invoice, a guarantee document, a schedule, a delivery note, an invoice or any other document, regardless of its form or format, provided that it contains the specific terms or references that correspond to the general conditions of sale".

###### **The second branch: Characteristics of the electronic contract**

1. The electronic contract is a contract concluded at a distance. With the advent of more advanced means of communication, such as telex, fax and the Internet, contracts can now be concluded in a matter of seconds because of their speed and the variety of ways in which they can be used to conclude contracts at a distance. The time between offer and acceptance is very short, to the point of being insignificant in terms of value. The electronic contract is therefore concluded without the physical presence of the parties in a real contractual meeting. The electronic offer and acceptance are exchanged online and constitute a virtual contractual meeting. It therefore belongs to the category of contracts concluded at a distance and is also a modern immediate contract due to its interactive nature between the parties<sup>6</sup>.

2. The electronic contract can be a commercial consumer contract. The electronic contract can be a commercial contract if it is concluded by a trader for commercial purposes, and it can also be

considered as such if its subject matter is commercial, in accordance with Article 2 of the Algerian Commercial Code. The commercial nature of the electronic contract is based on the fact that it is mostly concluded between a professional trader and a consumer, which makes it a consumer contract. It is therefore subject to the provisions of the consumer contract law and the protection of the consumer as a party to be protected<sup>7</sup>.

3. The electronic contract is an international contract. As the electronic contract is concluded at a distance, without physical contact between the parties, it is likely to go beyond the borders of a single state. Accordingly, it is called an international contract. In the process of adapting the electronic contract, there have been differences in jurisprudence regarding the concept of its international nature. These differences are due to the difficulty of localising the legal relationships arising from contracts concluded by electronic means, in particular those concluded via the Internet<sup>8</sup>. The electronic contract therefore requires concerted efforts at international, regional and national levels to establish the legal rules governing its provisions in such a way as to ensure that there is no conflict between the legal rules of different legal, social and economic systems<sup>9</sup>.

#### **The second topic: Means of electronic contracting and its forms**

In this topic we will discuss two sub-branches: the first is the electronic exchange of data messages, and the second is the forms of electronic contracting.

##### **First sub-branch: Electronic exchange of data messages**

The electronic exchange of data messages is one of the most important means of communicating intentions by electronic means. A data message is defined as information created, sent or stored by electronic, optical or similar means, including but not limited to electronic data interchange, e-mail, telegram, telex or facsimile. Electronic data interchange refers to the electronic transfer of information from one computer to another using an agreed standard for information formation<sup>10</sup>.

As the process of electronic data exchange requires parties to enter into a contract, the parties to a data message are the sender and the recipient. It is important to identify these parties because they are not physically present in the same location. This makes it difficult to verify the authenticity of the originator and the addressee. Since the information contained in a data message represents the intent of its originator, it is necessary to identify both the originator and the addressee in order to attribute the intent to its rightful owner and bind them to its content<sup>11</sup>.

##### **The second sub-branch: Forms of e-contracting**

With the variety and diversity of technologies used, the forms of e-contracting have also diversified. Contracts can be concluded via e-mail systems, websites or direct online conversations.

1. Contracting by e-mail: E-mail refers to the electronic exchange of messages between parties and is considered the electronic counterpart of traditional mail<sup>12</sup>. The concept of email is based on the allocation of space within an email service provider for incoming and outgoing mail, and each subscriber is given a unique address that allows them to exchange email messages, files, graphics and images by sending them from the sender to one or more recipients<sup>13</sup>. Article 60 of the Algerian Civil Code states that the expression of will may be made orally, in writing or by recognised signs, as well as by a position that leaves no doubt as to its intended meaning. In the absence of specific legislation governing electronic contracts in Algerian law, Article 60 can be applied to the expression of intent by e-mail, since it does not differ from ordinary mail except for the advanced technology used<sup>14</sup>.

2. Contracting through websites: Internet sites display products or services aimed at consumers. These goods and services may be delivered either by traditional means, such as physical goods, or by electronic means, such as medical or legal advice or cultural programmes<sup>15</sup>.

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##### **The third sub-sector: The formation of electronic contracts**

In this sub-branch we will discuss the formation, validity and performance of electronic contracts.

##### **First: Consent in electronic contracts**



According to the law, the formation of a contract requires the existence of consent and the agreement of the contracting parties in order to create the intended legal effect of the contract. Will, as a component of consent, has no legal value unless it is expressed by an external and manifest act<sup>17</sup>.

A contract is formed as soon as the parties exchange expressions of consistent intent, taking into account the specific conditions required by law for the conclusion of a contract<sup>18</sup>.

With regard to the positive aspect of electronic contracting, the expression of the parties' will, their positive acceptance and their binding agreement are carried out at a distance, using modern communication technologies and electronic means, instead of traditional methods. Electronic acceptance is defined as an offer made by a person expressing a clear and unequivocal intention to enter into a specific contract. If it is met with a corresponding acceptance, the contract is formed<sup>19</sup>. Electronic acceptance is defined as "the acceptance by the offeree of the offer made to him without modification, provided that the offeree is aware of it"<sup>20</sup>.

#### **Second: the electronic contracting session**

Article 64 of the Algerian Civil Code defines the contracting session as follows: "If an offer is made in a contracting session to a person present without specifying the time limit for acceptance, the offer shall be considered null and void if it is not accepted immediately. Similarly, if an offer is made from one person to another by telephone or similar means".

The contract consists of two elements: a material element, which is the spatial aspect, and a moral element, which is the temporal aspect.

#### **The second subdivision: Validity of electronic contracts**

A contract requires the existence of mutual consent, and it is not enough for consent to exist; it must also be valid. Consent is considered valid if it is given by a competent person and if the will of one of the parties is not affected by defects that could limit its effect. Electronic contracts, by their very nature and the way they are made, may give rise to difficulties that do not arise in traditional contracts. This is because transactions are carried out in a virtual space using modern communication technologies. In addition, the contract must have a valid reason and a specific subject matter as required by law, in addition to complying with the general principles of contract formation. An electronic contract that does not deviate from its general nature simply because it is concluded by electronic means is also valid<sup>21</sup>.

#### **The second section: Proof of electronic documents**

It is well known that scientific and technological progress has led to the emergence of new electronic documents that are very different from traditional paper documents. As a result, evidence in civil and commercial matters is no longer limited to official and traditional paper documents, but electronic documents have also become widely used in this important area of law. In this section we will discuss the concept of electronic documents as a primary element, followed by the electronic document as evidence as a secondary element and the validity of the electronic document as a third element.

#### **The first topic: The concept of an electronic document**

In this topic we will discuss the definition of an electronic document and its parties according to the following sub-branches. The concept of an electronic document is often associated with written paper documents.

#### **First sub-branch: Definition of an Electronic Document**

An electronic document is defined as "information created, sent, received or stored by electronic, optical or similar means, including but not limited to electronic data interchange, electronic mail, telegram, telex or facsimile"<sup>22</sup>.

The term "electronic document" is therefore used to refer to all types of digital files, whether in text, image or audio format. This concept is in line with and supports the validity of electronic contracts concluded online.

#### **Second subdivision: Parties to an electronic document**

First, the sender (or creator) is the person responsible for sending or creating the electronic document. The sender can be:



- The person who personally sends or creates the document.
- Another person who sends or creates the document on behalf of the sender.

The concept and definition of an electronic document remains the same whether it is intended to be communicated to others or simply stored without communication.

Second, the recipient is the person to whom the sender intends to deliver the electronic document. Therefore, the accuracy of the description of the recipient depends on the person the sender intends to contact by sending the electronic document<sup>23</sup>.

Thirdly, the intermediary is defined as a person who, on behalf of another person, sends, stores or provides other services related to the electronic document. It should be noted that this definition applies specifically to electronic documents and does not describe intermediaries as a general category<sup>24</sup>.

### **The second topic: The electronic editor as evidence**

Due to the nature of the electronic editor and the risks associated with the storage and exchange of information, it is necessary for it to meet several conditions in order to acquire full evidentiary value. The possibility of equating it with traditional editors in terms of legal strength also raises the question of whether what is recorded on electronic media, such as writing, should be considered admissible evidence. This is what we will discuss in this topic, within two sub-branches.

#### **First sub-branch: Conditions for accepting the electronic editor as evidence**

Firstly, the electronic editor must be readable, which means that the editor containing the writing to be used as evidence should be understandable and clear through its written characters, symbols, numbers or intelligible data, if it can be grasped and its content understood. This condition is found in written or electronic editors, despite the fact that the writing language in these editors, generated by a computer, is a machine language<sup>25</sup>.

Secondly, maintaining data integrity, which here refers to continuity.

Continuity of writing means that it is recorded on a medium that allows stability and continuity of writing so that it can be referred to when needed. The medium of paper, due to its physical composition, allows this condition<sup>26</sup>.

Thirdly, non-intrusion, which refers to unauthorised access to the electronic editor, meaning that others should not be able to access the contents of the editor or make changes to the data or erase any part of it without the right to do so. The electronic structure through which electronic editors are transmitted and exchanged between parties raises significant concerns. For an editor to be acceptable, it must be referenced in the form in which it was created, without distortion, addition or deletion, and protected by means that prevent intrusion or alteration. Encryption technology, which ensures that information transmitted over the Internet cannot be understood or read except by the sender and receiver, is one such means. The ability of the editor to serve as evidence is determined by its security from any defect that may affect its external form<sup>27</sup>.

#### **The second sub-branch: Considering the Electronic Editor as Full Written Evidence**

Legal systems, including the judiciary and jurisprudence, have generally accepted electronic evidence and have established a general principle of equating electronic editors and electronic signatures with paper editors and handwritten signatures. Most traditional evidence laws contain exceptions that allow the exclusion of traditional written evidence requirements in civil matters. However, most laws agree on the freedom to prove commercial transactions between merchants, and this is where most lawyers see the possibility of using electronic editors to confer legal validity<sup>28</sup>.

### **The third topic: Validity of the electronic editor as evidence**

The real challenge in dealing with the electronic editor lies in the question of evidence, specifically the validity of this editor in proving legal actions arising from it. The electronic editor can be divided into an official electronic editor and an informal electronic editor, each of which has a different evidential value. In this topic, we will discuss this distinction within two sub-branches.

#### **First sub-branch: Validity of the official electronic editor**

Article 324 of the Algerian Civil Code states that "an official contract is a contract in which an official, a public servant or a person entrusted with a public service certifies what has been done or



received by the parties concerned, in accordance with the legal formalities and within the limits of his authority and jurisdiction".

The conditions for the validity of the official electronic editor, as derived from the text of Article 324, can be divided into general conditions, such as

- The editor must be issued by a public official or a person entrusted with a public service.
- The public official must be authorised to write and sign the editor.
- Compliance with the conditions laid down by law for the organisation of the document.

As for the specific conditions, they include:

- The physical presence of the public official during the creation of the official electronic editor.
- The secure electronic signature of the public official on the official electronic editor.
- The signature of the relevant parties and witnesses on the official electronic editor.
- The date of the official electronic editor<sup>29</sup>.

Once these conditions have been mentioned, the validity of the official electronic editor in evidence, as stated in the above conditions, leads to the establishment of a presumption of the physical integrity of the editor and its issuance by those who signed it. It serves as evidence against all parties unless forgery is proven. We will discuss the validity of the original official electronic editor as follows:

Article 324, repeated in 05 of the Algerian Civil Code, states: "What is stated in the official contract is considered evidence until its forgery is proven, and it is considered valid throughout the national territory".

According to the above text, the official electronic editor is considered valid if it is issued by a competent public official and signed by the relevant parties and witnesses. The validity of the secure electronic signature is based on the procedures followed by the electronic signature service provider, which gives the signature credibility and strong evidential value that can only be challenged by allegations of forgery. This is in contrast to simple electronic signatures<sup>30</sup>.

Therefore, the secure electronic signature is presumed to be valid and to indicate the identity of the signer, be it the public official or the person with authority, and their acceptance of the content of the editor. The link between the signature and the signer is also presumed. The official electronic editor is considered valid in its physical integrity and absence of alteration or tampering. If anyone claims otherwise, they must challenge the forgery of the official electronic editor. Unless there are obvious reasons to doubt the official electronic editor, the court may reject its value and summon the official who prepared the editor to clarify the matter<sup>31</sup>.

By examining the repeated text of Article 324 (06) of the Algerian Civil Code, the validity of the official electronic register for third parties varies according to the data recorded in the official register. The data prepared by the official within the limits of his authority cannot be challenged by third parties, except on the grounds of falsification. However, data received by the official from relevant parties and entered into the official electronic editor without verification may be rejected and contested by third parties in accordance with the general rules<sup>32</sup>.

#### **The second branch: Validity of the Informal Electronic Editor**

Informal electronic editors are issued by individuals without the involvement of an official employee or a person charged with a public service in their preparation. Therefore, they are not surrounded by the guarantees that apply to official editors and, as a result, they can be rejected by the interested party<sup>33</sup>.

However, the situation is different when it comes to informal electronic editors equipped with a secure electronic signature. This is due to the trust placed in such editors, which presupposes the validity of the data they contain, and is often not disproved except by allegations of forgery<sup>34</sup>.

Regarding the validity of informal electronic editors, the law attaches the validity of the informal editor to its issuance by the person who signs it, unless it is explicitly denied and the issuance of the editor by the attributed person is proven.

It serves as proof of the facts stated in it and its validity as full proof of all actions and events. It also serves as proof against anyone who claims otherwise<sup>35</sup>.



This means that challenging the informal electronic editor against the attributed person requires one of two scenarios: either the attributed person unequivocally acknowledges the validity of the signature and the editor, or they remain silent in the face of the opponent's insistence on the editor, which is considered an implicit acceptance of the validity of the signature and the editor<sup>36</sup>.

### Conclusion:

Through this research paper, the issue of electronic contract and its evidentiary validity in the era of the Internet remains one of the emerging issues in civil law. It is a result of the practical existence of information technology systems and electronic commerce, which have adopted electronic alternatives that have replaced traditional methods. These alternatives achieve the same objectives and functions faster and at a lower cost. For this reason, various legal systems have sought to establish a comprehensive legal framework that recognises the validity of these electronic contracts and gives them the same legal formality and evidential value as traditional civil contracts and written documents.

We have drawn a number of conclusions from this study:

- International and national legislation equates electronic editors with written editors in terms of functionality.
- Electronic contracting is a reality recognised by the law, and it is recognised by different legislations because they recognise data media as a method of expressing intent, whether through email or web pages.
- Proof of electronic contracts is provided by electronically written and signed editors, which indicate the existence of a legal transaction and specify its content.

The recommendations include:

- The need to establish specific rules, mechanisms and standards for the preservation of electronic receipts by creating facilities dedicated to this task. These rules and mechanisms should regulate the responsibility of these facilities for any tampering with these editors.
- Activate protection methods used over the Internet and give direct legal status to encryption and electronic signatures as protection methods. This can be achieved by establishing specific legal rules that criminalise attacks on these means.

### Footnotes :

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