

REVIEW ARTICLE

# CONTEMPORARY VISION OF INTERNATIONAL RULES ON ELECTRONIC ARBITRATION IN DISPUTE RESOLUTION

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## ABSTRACT

Electronic arbitration and the resulting electronic decisions are among the most important modern means of resolving disputes between the parties to the contractual relationship. Since the electronic arbitration decision rendered by the arbitrator or arbitration body is made electronically (either in writing or by signature), it requires the availability of the legal rules for its regulation. However, majority of the rules are in the legislation of the various countries of the world. It is obliged to lose party in this decision to implement judicial commitment or by alternative means dealt by the traditional legal systems. These aspects highlighted the need of focusing on the effectiveness of the electronic arbitration decision that is the subject of present study. The study focuses on global and intangible nature of electronic commerce, where there is no specific place. A special law is required to ensure the legal security sought by entrepreneurs.

**Keywords:** *Arbitration Disputes; Electronic Arbitration; International Rules*

## INTRODUCTION

Mankind has witnessed changes in the modes of production, exchange, communication, way of life with the depth, comprehensiveness and speed since the introduction of modern life in information and communication technologies. These technologies have penetrated certain sectors such as the financial, banking, and the commercial sector to the extent that the methods and practices using them have been transformed. The institutions operating in these sectors are radical and presented as an example of global transformation. The transformation includes the structures and entity of these institutions that resulted in emergence of an organization with no specific site or traditional hierarchical structure or material entity. However, its existence and activity depend on the network of exchanges and communication relationships through which its activities and activities are carried out and its institutional entity is represented. The institutional entity has become a flexible entity that is not present physically, but communicates information and communication.

The information and communication revolution has greatly contributed to increase the size of the mainstream that encompassed the world economies and the way of life known as the globalization trend over the last quarter century. The effects of this wealth of information and communication are expected to continue and expand to include all sectors of activity, production, and exchange in societies.

In the e-commerce environment, it is natural for disputes to arise, as they do in the non-electronic world. These disputes often involve a foreign party to get engaged between parties not belonging to the same regional domain, raising many questions about the law applicable to the dispute, where it has not. Much is being accomplished in the area of collective response to jurisdictional and conflict-of-law issues in the electronic commerce environment. This issue is also related to the effectiveness and importance of using alternative dispute resolution methods, in particular arbitration, to resolve disputes related to electronic commerce.

The research problem stems from the recent and increasing use of the Internet system at the international and local levels. A lot of problems stem due to lack of technical capacity that a person has to use this method of procurement. In addition, there is insufficient knowledge of the mechanism and conditions regarding its use, particularly in the area of shopping and procurement accompanied by the modernity of the UAE legislature in the age of the enactment of the Electronic Signature and Electronic Transactions Act. This was free of stipulation of any conflict of laws resolution mechanism, along with the scarcity of judicial decisions in this area.

The importance of studying the subject of the physical rules of electronic commerce emerges from the effects of technological progress on the means of communication and information. The United Nations and the Internet community

to find international solutions to these problems, since traditional award rules are not sufficient to find appropriate solutions in a manner compatible with the technical nature of procurement via electronic communication networks. Perhaps the most important of these solutions is the adoption of the will standard; however, in its absence the physical rules of electronic commerce in international law are applied in addition to International Arbitration and Model Contracts.

The study is significant as a legal library in the Arab world considers this field and the lack of legislation in terms of all the problems arising due to the increased use of the Internet. The present study presents proposals to the UAE legislator through the creation of a legal system due to the recent legal organization of electronic signatures and electronic transactions in the United Arab Emirates. This is likely to keep abreast of developments and gain benefit from the experiences of some preceding countries. The scope of study would be in the physical rules of electronic commerce considering their definition, characteristics, sources and evaluation at the organizational level.

The nature of the research requires the use of a number of accepted methods of scientific research and the adoption of several approaches, including the descriptive approach to describe the technical. Therefore, the analytical (deductive) method would be helpful in this study to discuss the technical problems related to the subject. This study is likely to play a significant role in the elaboration of the provisions and principles, including the mission of the Emirati legislator. The Emirati legislator elaborates legal texts in a consistent manner with appropriate solutions to the problems of conflict due to modern procurement methods. It is believed that internet system provides new means of communication that urge the Emirati society to deal through the World Wide Web and to cultivate trust between them in this interaction. The study is organized as follows; firstly, the physical rules of electronic commerce are defined, which is preceded with explaining the network of internet sites.

## PHYSICAL RULES OF ELECTRONIC COMMERCE

E-commerce contracts are more liberal than contracts concluded by traditional means because of the nature of global network contracts, which are characterized by a weak link between such contracts and one or more particular countries. In addition to the universality of the space or scope, the rules of attribution to define the law are applied in the event. It bodes well for the birth of new substantive rules in the legal system of electronic contracts by giving sufficient freedom to the merchants in the field of electronic commerce for construction of this legal system. Once they are free, internal systems have no other law governing their contracts other than the law determining ordinances for themselves as long as national laws alone are unable to organize them. The search for substantive rules of an international nature concerning the business of electronic commerce

outside national laws requires that it be defined in the first branch and distinct from what is suspected in the second branch.

## DEFINING THE PHYSICAL RULES OF E-COMMERCE

Physical rules or rules of customary international trade law are generally defined as the law directly establishing a private and independent organization of each domestic law, for certain legal relations because of its international character. It is also known as a set of principles of systems and rules drawn from all the sources that feed the legal construction and functioning of the group of workers in international trade. It is clear from this definition that it focuses on substantive rules as the constituent rules of international trade law. For this they include, as a professor, the general principles of law, and transit systems. For countries and others, international economic relations can be completely governed by a specific set of rules, including transnational customs and general principles of law or arbitral jurisprudence. These general principles of law are not limited to what was mentioned in Article 38 (c) of the Statute of the International Court of Justice. It also includes principles created by general and established customs in international trade (Sadiq, 2007). Dr. Ahmed Abdel Karim Salama is familiar with the rules of Materialism as the set of rules that directly establish objective solutions to the problems of international commercial contracts. It separates it from the reference rules contained in national systems of private international law and from the definitions of the physical rules of electronic commerce. These rules consist of a set of customs and practices accepted and established in the virtual society, developed by the judiciary and users of the global network and the governments of countries in the field of communication and information technologies. The term “physical mathematics” for electronic commerce (E-Commerce Materials) is given to the set of rules that establish direct regulation, especially for legal relationships to distinguish them from the physical rules of commerce. International law, and substantive rules established by national legislators govern private international law relationships directly, because they differ from the supporting rules contained in national legal systems. These rules are better suited in their content and objectives towards electronic transactions.

### *I. Distinguishing Material Rules from Suspicions*

Many questions have arisen to distinguish directly applicable rules, which can ensure uniformity and harmony in transactions across the global network, with the necessary application or rules of public policy.

## *A. Substantive Rules with the Necessary Application*

The necessary implementing rules also called as police or security rules, rules of immediate application, or rules of public policy were initially established by the national legislator. These rules were responsible for controlling the internal links with the possibility of extending their rules to be applied to international private relations. Under the jurisprudence of private international law, saving recognized the certain national rules of an absolute and mandatory nature that must be applied. The application of these rules is irrespective of the relationship of the legal relationship with more than one legal system, despite its actual orientation in a foreign country. Its purpose is to protect society from economic and social risks.

Substantive rules include an objective that applies directly to the problem in dispute. The rules with necessary application are always applied; whereas, the physical rules are often applied in international trade, so that the boundary can be distinguished between physical rules and rules with necessary application through the following elements:

### 1) Nature of Relationship

It is understood that the necessary rules of application apply irrespective of the nature of the relationship, whether national or international, having regard to the objectives it seeks to achieve. Sometimes, they are a necessary application, when applied absolutely without distinction between internal and international disputes. However, they are substantive rules when applied to private international relations, i.e. relations with a foreign element.<sup>1</sup> This is what the foreign trade laws of the former socialist countries were all about.

### 2) Priority of Application

The rules of necessary application take precedence in application, whether over physical rules or rules of attribution, since the judge must first look for the rules of his law, to determine the extent of their applicability to the relationship. If he cannot find them, he turns to the substantive rules of his legal system, either directly or as a conflict of law.

### 3) In Terms of Sources

The necessary implementing rules are distinguished by a legislative source, because they are rules of national origin and purpose. The status of the situation is mostly general; so that it neglects the international character once the relationship has entered into the scope of its validity. This means that it is of regional application, because it applies to any person in the territory of the country and cannot be applied outside that region. As for the substantive rules, it can be applied outside the region of the State, which means that they are transnational rules.

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<sup>1</sup> Deby: the role of the rule of conflict in the settlement of international relations, these 1937 bets.

## *B. Substantive Rules of International Public Policy*

Part of the case law has been to distinguish between two types of public policy rules, the first being the rules of the protection system and the second the rules of the general guidance system. The first is intended to protect the private interest or the economically weak party, such as the electronic consumer in consumer contracts, the worker in the employment contract, and the borrower in the loan contract. As for the second, it aims to protect the public interest, and includes special laws relating to credit regulation, trade, prices, investment, transport, the environment, and commerce.

The rules of a protective public policy are those which correspond to foreign law. It is proven that it contradicts the fundamental principles of the community in the judge's country. Therefore, it has an exceptional character or has a negative impact, similar to rules of the general directive. These rules are applied directly as soon as the national courts have jurisdiction to hear the dispute and there is a serious link between the dispute and the national legal order of the judge.

Professor A. Chappelle distinguishes between two types of rules in the general directive system. The first type comprises of substantive rules in a specific direction by encouraging and creating private self-regulation compatible with the growth of cross-border trade. While, the second type comprises police and security rules aimed at protecting the economic, social and political objectives. As for the jurisprudence of international trade law, it has been argued that the foundations are based on traders that are the third type of public order known as the general international system. It is defined as the group of rules closely related to international trade that meet all the requirements and needs by encouraging and creating private self-regulation compatible with the growth of trade between countries. It is a set of general rules which do not relate to the fundamental interests of a particular national community. Rather, it relates to the specific fundamental interests of the international community, as it comprises of set of rules common to the different legal systems and related to international relations.

## *II. Properties and Sources of Physical Rules*

It is necessary to observe characteristics in the first branch and to devote the second branch to the search for its sources, after defining the physical rules of electronic commerce and distinguishing them from the rules of public policy and the necessary rules of direct application.

## *A. Physical grammatical characteristics*

The electronic rules of the *lex electronica*, or what some call “substantive Internet law”, have a set of characteristics that distinguish them from the rules of private international law and the law of international traders. Those rules are as follows;

### 1) Sectarian and specific rules

The particular nature of the virtual community leading to the refusal to apply national legal rules as it was originally established to govern tangible material transactions. The sectarianism of those rules is embodied in its people and subject matter as it is directed to all the users of global network and service providers of digital sites. The sectarianism of these rules is also apparent with regard to the issues they regulate. While, there are detailed rules for each type of international trade, there are also more detailed provisions regulating gender in this type of trade. Similarly, Professor Kan pointed out that this law is in place to govern a small or large group of professionals, i.e. non-professionals. The substantive law is only affected by an offer. It is not being limited to a group of practitioners rather it extends to the countries of origin of these rules. The principles of the International Institute for the Unification of Private Law promulgated in 1994 that is concerned with international commercial contracts as it includes substantive rules focusing towards two absolute categories of debtors and debtors.

As for the quality of the substantive rules of international trade, it indicates that these are rules designed to solve the problems arising from electronic commerce in general. These problems might include; advertising for goods and services, automated data processing, electronic banking, and electronic payment processing systems. It is believed that qualitative and sectarian characteristic is not limited to the persons and transactions provided in the framework of the material rules of electronic commerce. Rather, it goes beyond that of the body or institution that applies these rules when the so-called virtual justice that takes place through judges who have held their sessions via networks. These judges render their decisions to expel the subscriber, cancel his subscription to the Internet or block him, and suspend his use for a specified period of time. Therefore, this jurisdiction is characterized by the confidentiality of its rules, provisions and procedures to ensure compliance of dealers across the global network.

### 2) Automatic Rule of Origin

It must be said that the automatic characteristic was the main feature of the law in its general sense. This is because the customs and norms prevailing among members of society were the basis for the emergence of such laws until modern countries relied on legislation to enact laws, along with the development of modern international trade and its tools. Conducting commercial activities through the global network has become a global medium in which traders, consumers and governments come together

without pre-established rules to regulate this medium. It is logical that these transactions lead to conflicts of interest and violation of rights between members of the new society. This directs towards the need of preventive and curative regulation without going through formal channels as is the case of positive law. Therefore, the first rules that have emerged in the field of electronic commerce are the norms and customs established and exchanged by electronic commerce merchants. These merchants have been respected with their conviction and their transactions on the Internet. There is no doubt that these norms and customs are automatic rules of origin and have not been adopted by the national legislative authorities of any country. The main advantages of this automatic function are as follows:

- a) The application of what has been dealt with customs at e-commerce dealers is in line with the technical and technological nature of transactions on the global network. It is digital in nature, as the transmission of data and information takes place via digital media but not on paper.
- b) The substantive rules of electronic commerce are in line with the expectations of the parties on the global network, as they are intended to lay the foundations of these rules with their practices and customs. These practices and customs are far from national laws that have not yet respected this model of transactions, which means that the application of these rules does not require the intervention of public authorities.
- c) The automaticity of the birth of these substantive rules has made it flexible and sensitive towards any technical, economic or political effects that occur in the virtual space. This is because, these rules have come in response to the needs of the dealers in the global network reflected by the reality of the network.

### *B. Substantive Rules*

The objective rule is generally defined as the rule that establishes provisions governing the essence of the legal relations that deal with its rule, and defines the rights and obligations under it. Therefore, this rule distinct from the procedural rule that is limited to clarifying the procedures that guarantee the implementation of substantive law and its application. It directly provides an objective solution to the basis of the conflict, along with several labels including common law of the virtual space, non-national law, transnational law, electronic law, and cross-border law. These laws are opposed by attribution rules, which require reference to the law. It is necessary for a country to extract an objective solution through the law referred to, which means that the physical rules are like the rules of national law that apply directly to the issue in dispute. However, the strength of the physical rules includes customs, usages, and practices that have engaged the dealers in electronic commerce and national legal rules in terms of

their objective nature. The national legal rule for its application is determined by the borders of the country that issued those rules, while the physical rules of electronic commerce are distinguished by transitional rules for countries as they do not originate from a specific national authority. There are no international rules governing disputes in electronic commerce, since the global network is not subject to the domination of any country, organization, regional authority, global authority or jurisdiction. This clarifies that the limits of physical electronic rules are crossed as the result of the nature of the transactions governed by those rules.

### *C. Direct Physical Rules*

The substantive rules of online transactions are distinguished by a direct and objective approach because it provides objective solutions to the problem in dispute directly without deriving solutions by reference to another law. Therefore, it is completely different from the traditional conflict method, which is based on the idea of referring to the applicable law. Rather, it refers referred to the applicable domestic law that sets the final objective solution to the conflict.

### *D. Sources of Substantive Rules*

Electronic commerce is characterized by the multiplicity and diversity of the rules governing it due to the recent birth of the electronic environment. This is because case law differed on the emergence of internationally unified substantive rules with respect to the internet and electronic commerce. These rules differed from the rules of private international law governing conflicting laws and distinctions based on public international law rules and national rules. Therefore, it is necessary to identify the sources of these rules which flow from its provisions and uniformity and harmony can be achieved for these substantive rules. In the light of divergent case law, living the first legal trend was to reject the idea that electronic physical rules (*lax electronica*) were independent of traditional physical rules (*lax mercatornica*), and that the former was only a part of its scope and an extension of it. The first team indicates the main international recommendations, including the work of international and regional governmental and non-governmental organizations, in addition to the contractual rules. The other team looked at the sources of the rules on electronic documents, unified international law, European common law, and non-binding law issued by international organizations. These rules depend on commercial practices and customs in this area, as its development is based on contractual rules. The model contracts are developed by international institutions and private activities with self-regulation, along with international customs and international contractual practices. As for the third party, it was concluded that the source of these rules comes from codified professional customs in addition to legal groups.

From the foregoing, it is clear that the second doctrinal trend neglected the role of international agreements or contracts between individuals who could be an official or unofficial source of the rules in question. On the other hand, it ignored the role of national electronic commerce organizations that contained many rules that correspond to the nature of this type of commerce.

## INTERNATIONAL SOURCES

International trade has become more diversified, with a set of substantive rules for electronic commerce that has proved to be stand-alone solution to many problems related to electronic commerce and the internet community away from the national framework. They rely on international standards and customs that are an important tributary of these rules, except that Practical Reality. Practical Reality has proved that these rules alone cannot contain all the new developments in the new electronic reality, which has prompted many international, regional and professional organizations. The virtual community aims to establish new rules through the agreement, in the light of basic international recommendations and standards. In order to highlight these sources, the physical rules of electronic commerce of organizational origin and research on the physical rules of electronic commerce of automatic origin have been discussed.

### *I. Physical rules of E-Commerce with Organizational Origins*

International agreements and treaties are among the most important sources of substantive rules on the grounds as they establish international nature to regulate legal relations, in which a foreign component is involved. It also involves international recommendations and model laws issued by basic international and regional organizations. The importance of substantive rules in this regard, depends on international legal conventions, along with the need for rules governing its problems and electronic commerce. These agreements and recommendations were an important tributary to the organization of some of the problems of electronic commerce despite the difficulties encountered in its application. The rules of electronic environment include:

#### *A. International Conventions*

An international agreement is defined as a written agreement between persons governed by private international law. It intends to provide specific legal effects in private international law, as international agreements have proliferated in the field of traditional international trade.

As far as the field of electronic commerce is concerned, international agreements dealing with electronic commerce issues is very limited corresponding to the absence of an international collective agreement regulating electronic commerce. Therefore, this limited number of agreements is not able to provide sufficient and effective solutions to deal with this large number of electronic commerce transactions. It is necessary to refer to certain agreements concluded in the field of traditional international trade that may be applicable to electronic commerce to address the question. The United Nations Agreement on Contracts for the International Sale of Goods of 1980 and their Trans border Circulation were adopted by the countries of the European Council in 1981. In addition to the European Union rules No. 44 / 2001 concerning jurisdiction, the recognition and enforcement of judgments in civil and commercial matters.

Finally, it is necessary to refer to the agreement published by the United Nations concerning the use of electronic letters in international contracts for the year 2005 A.D. it played a leading role in the development of substantive rules for electronic commerce by seeking to adopt unified rules to remove obstacles in international contracts. In particular, problems result from the questioning of the legal value of electronic communications in international contracts. Obstacles may arise in the application of certain international agreements related to commercial law, such as in the case of applying the United Nations agreement on the use of electronic letters in international contracts for the sale of goods. Where certain obstacles prevent the use of electronic letters, that agreement aimed at overcoming those obstacles by establishing international rules to achieve parity between electronic letters and their paper-based equivalents.

The agreement applies when electronic communications create or implement a contract between parties, whose head offices are located in different countries. It is important to note that it is sufficient to implement contract, leading to the application of the law of a contracting State. The application of the agreement to a contract takes place at work or the habitual place of residence in a different country. The agreement does not apply to an international contract, where it is not clear that whether the contract is present between two different countries or from the transactions between the two parties. The agreement permits the application of the internal law of the State intended to deal with within the limits of its internal system. The main purpose of internal system is to protect the legitimate expectations of the contracting parties, with no explicit reference to Article 6(5). The article states that the domain name or e-mail address of the party related to a particular country does not create a presumption about the place of business.

The contractual system and unilateral systems reject distinction by completely excluding it from the scope to avoid some of the rules of the agreement which are not appropriate for consumers. For instance, Article 10(2) assumes that the recipient receives the electronic letter as it enters the site that has been previously determined by the recipient. This means that the consumer

must see his email continuously and regularly. It should be noted that this agreement is an important source to create physical rules of e-commerce because its actions are carried out by direct application to the contractual relationship. This direct application clearly expresses the material approach to dispute resolution of e-commerce contracts, despite the physical application of the agreement. However, the agreement can be applied through the approach of two-way attribution rules in the law of challenged court.

It is observed that the possibility of concluding international agreements related to traditional international trade and electronic commerce through both of the above approaches reflects the possibility of the coexistence of the two approaches to resolve problems of electronic commerce contracts.

### *B. International Actions*

There is scarcity of modern international agreements on the regulation of electronic commerce and electronic data exchange. Most international trade agreements do not meet the needs of electronic commerce. Moreover, the increase in the number of transactions through electronic data exchange and other means of communication is steady that have become an alternative to paper documents. Their acceptability of these modern means highlights the need to create a unified substantive legislative system that is compatible with electronic commerce data.

It should be noted that many collective actions, recommendations and guidelines have established model laws. These laws form the core of future agreements because of their practical value with a general commitment to comply with these international recommendations and model laws developed by well-established international organizations. Appropriate solutions to transactions are conducted on the Internet since it is an important source of substantive rules. The European Union has also published directives in this field, such as Directive 95/46 / EC on the protection of personal data, Directive 96/9 / EC on the legal protection of databases, and Directive No 99/93 / EC on the common framework for electronic signatures. Directive 2000/31 / EC on the legal aspects of information society services is often referred to as the e-commerce directive, as well as on the work of the European Commission on dispute settlement, in particular among consumers. Calligraphy, including Recommendation No 257/98 at 30 years of age 1998, on 25 May 2000 covered all consumer disputes of the financial and services sector in Europe. This facilitated information exchange and communication between businesses and consumers. This network offers its services through online mediation (online mediation) and disputes are settled via the Internet. Recommendation No 257/98 establishes guidelines to ensure the best possible protection of European consumers' transactions on the Internet; therefore, the projects aim to inform consumers about the existence of an online dispute resolution committee.

In addition, reference should be made to the 1980 Organization for Economic Co-operation and Development (OECD) recommendations on special protection and the flow of personal information across borders. According to Recommendation No 16, member states shall take all reasonable and appropriate measures to ensure the flow of personal data flows across borders. Finally, it is worth recalling some of the directives that preceded the emergence of electronic commerce and aimed at regulating the use of information technologies. The International Maritime Committee (IMC) argued that the rules on electronic bills of lading should be adopted to establish a mechanism to replace the traditional physical paper bill of lading with an electronic bond. Under this regulation, the parties agree on the possibility of sending the bill of lading as well as notifying the delivery of the goods by e-mail.

Finally, mention should be made of the UNCITRAL Model Law on International Commercial Arbitration, the Model Law on Procurement of Goods, Construction and Services, Electronic Commerce and Electronic Signature, and the Arab Model Law on Transactions and Electronic Commerce.

### *C. Basic Practices*

The basic practices included in the field of electronic commerce are physical rules;

- 1) Standard contracts: Certain standard contracts in the field of electronic commerce have been drawn up to be compatible with new international trade, as in the French standard contract for electronic commerce between traders and consumers. The conditions were established in accordance with French law. The rules of the model contract are compatible with modern technology because it leads to the creation of special rules. The provisions of this model contract are organized in two parallel parts. The first part contains standard conditions that include the rules governing this contract, and the second part contains details and comments that provide a practical guide for the application of these standard condition. On 19 October 1994, the European Commission issued an important recommendation to economists and organizations working in the field of electronic commerce on regarding the usage of the model contract drawn up by the former with the help of comments made by the same committee. The United Nations Centre for Electronic Business and Enterprise Facilitation (underact) adopted recommendation 31 under the title of the Agreement on Electronic Commerce, which includes a model for a contractual approach to electronic commerce operations.
- 2) General conditions: Contracts necessary for the conduct of electronic commerce often deal with many conditions, which are defined by the competent technical or commercial authorities so that each user (network contractor) accepts these conditions. This is required before the start of the transaction on the web, as in the communication contracts. Under this contract, there is a connection between

a computer networks device set by the service connection that is imposed by the users of the resource. These conditions should be the common commitment to the rules of certain legal principles of conduct and business.

- 3) Information rental contracts: This contract is closely related to the Internet and constitutes a contract for the provision of services, provided by network service providers to network users. This contract is applied, when computer devices are made available to some of the technical capabilities, which leaves the user the freedom to use E-mail and have the information at his disposal, after reserving the required capacity of the site. It is important to note that these actions may be limited at any given time and paid for by the beneficiaries of these services to comply with the rules of conduct established in the field of electronic commerce.
- 4) Contracts for the creation of virtual stores, called some (participation contracts), contracts that the virtual store shares with the virtual shopping Centre, which brings together many merchants under the same title, and is thus closer to the traditional shopping Centre, which brings together many stores in a complex. Consequently, the co-owner of the store will be bound by the general conditions of the same virtual shopping Centre governing issues relating to the supervision and respect of the content of the virtual store.

#### *D. Contractual Practices*

The electronic contract, as one of the elements of electronic law, provides source of the substantive rules of electronic commerce. This is because electronic contract is able to create its own legal system and regulates the relations between the contracting parties in accordance with the principle of the contract. Certainly, the law of the chosen parties is considered to be retained by judicial arbitration as in the principle of non-enrichment without cause. The contract, in the first place and in accordance with the above principles, may establish a company governed by the law of the contract, where the parties to the contract may agree on the conditions to be applied. This freedom of individuals is an advanced stage of self-regulation; therefore, the governments must take steps to overcome legal and regulatory obstacles to recognize this freedom and comply with the promulgation of new regulations in this field. However, it is not possible to solve all legal problems. The resulting law does not prevent the use of any legal system of a state to fill the gap that guarantees the possibility of considering the law of the contract for the most emerging cases. This clearly shows that some of the conflict rules must be excluded, so that the parties agree to establish a legal relationship in accordance with the conditions stipulated in the contract. It is important to know that these practices have created rights and obligations for Internet service providers and network users.

Law No. 27 of 1994 on Egyptian Commercial Arbitration adopted this directive in article 39: (1). The arbitral tribunal shall apply to the dispute to pave the way for the freedom of the parties to determine the applicable law. These customary

rules are considered appropriate when the parties explicitly choose the contractual conditions that have been predetermined as essential rules applicable to the dispute.

The Code of Conduct is defined as a set of principles and judgments issued by professional and commercial organizations, national or international, that aim to regulate electronic commerce and ethical conduct rules on the World Wide Web. Some international organizations and institutions have developed rules of conduct for international trade in general and electronic commerce. The most important of these institutions and bodies are:

- 1) ICC: It was established under the International Chamber of Commerce (Unified Rules of Conduct for the Electronic Exchange of Commercial Data by Remote Transmission) in 1987 with a number of international organizations. The International Chamber of Commerce has also set up an e-commerce project with three working groups dealing with trade practice issues. ICC's motivation was to develop a self-regulatory framework for e-commerce and make it usable by the merchant community, by revising the guidelines on advertising and online shopping. These guidelines apply to all advertising and marketing activities on the Web to promote any type of goods, services, or ethical rules of conduct to be observed by advertisers and merchants to increase public credit for purchases. This ensures advertisers' free expression and minimize the risks. The ICC Guidelines on Electronic Requirements, which came into force in 2003, are used by parties to conduct their electronic transactions. This guide includes all the necessary means to organize contracts on the World Wide Web and initiate electronic transactions with the least legal risk. This guide was followed by the development and complementing of manuals, including the manual on online media activities.

## UNITED NATIONS CENTRE FOR ELECTRONIC BUSINESS AND ENTERPRISE FACILITATION

In March 2001, the Centre adopted a recommendation entitled Model Code of Conduct for Electronic Commerce, which was seen as a means of facilitating electronic commerce transactions in support of the previous recommendation on electronic agreement. This recommendation invites States to promote and develop instruments for the self-regulation of electronic commerce, annexed to an example of these rules, namely the model codes of conduct established by the Dutch Electronic Commerce Program. The Institute has been working on a number of principles for international commercial contracts since 1994.

## *Stable habits, customs and practices of electronic commerce*

It is necessary to distinguish between custom and commercial custom by defining each of them. Electronic commerce is defined as the behavior to be adopted by sellers, traders, or consumers of electronic commerce in a particular commercial problem of electronic commerce. The conduct becomes binding and its waiver entails a specific sanction, in which workers in the electronic commerce sector automatically contribute to the substantive rules of electronic law. Perhaps the most important of these rules, are what has established the professional community of habits and customs in the digital world of information and communication. This is characterized by the cooperative and sectarian nature of each type of transaction in this virtual world, as in the norms and customs in force. In the field of advertising and promotion of goods and services, it is important to preserve the intellectual property rights.

With regard to the application of electronic commerce practices and customs, many customs have been codified and others are in the process of being codified. This is done by including the practices and customs in standard contracts necessary to start electronic commerce.

## ADNAN TURKMANI CONTROLS THE CONTRACT IN ISLAMIC JURISPRUDENCE

### *Electronic Contracting Council*

The applicable law and the contract council may be effective if the contractors meet at the same place and may be judged in the absence of one of the contractors. According to most case law, the criterion for discrimination in procurement between those present and those absent is the existence of a time lag between the issuance of the acceptance and positive knowledge. The synchronization standard is the distinction between the two contractualization cases. There are two conditions for the formation of the Electronic Contract Board; the presence of the contractors in the chair of the default contract and the beginning of concerns about the formula. The period of validity of the Electronic Contract Board is determined according to the terms of the contract:

In an e-mail contract, usually the contract is concluded in writing directly between the two parties, i.e. communication between them is instantaneous. In such case, subcontracting procedure begins from the moment the positive result is published and the beginning of the negotiation, which continues until one or both parties leave the site. However, if the contract is indirect or not instantaneous, the Contract Council begins from the moment the viewer is informed of the offer, whether it is a product or a service, and continues until the expiry of the specified

period. However, no tradition can be consulted in this regard, due to the novelty of electronic contracts.

In the contract via the website, the Contract Council begins from the moment the contractor has entered the site and continues until the contractor leaves.

In the case of a contract award by conversation and viewing, the Contract Board begins with the issuance of positive results and continues until the end of the conversation.

## KHALED MAMDOUH IBRAHIM IBID - ELECTRONIC ARBITRATION ON SECURITY IN E-COMMERCE HABABA<sup>2</sup>

The options of the Contract Board are as follows<sup>3</sup>:

- 1) A positive party has the right to withdraw its favor before it is combined with acceptance, unless otherwise indicated, he is obliged to stay.
- 2) The party who wishes to enter into a contract has the right to reflect on the matter before it and is not obliged to choose the contract directly (acceptance option).
- 3) The contract is considered by both parties as the right for each of them to withdraw one of the contracts without the consent of the other, as long as contact with the site assigned to the contract still exists (option of the Council). However, this is not possible in case of non-option; as the contract now gives the right of withdrawal to one of them. It is with the majority of scholars who say that the council has the opportunity to do so.

The jurisprudential trends differed in determining the timing of concluding the contract, and the jurisprudence in this aspect has four directions:

- 1) The theory of the declaration of acceptance, which considers that the moment of the conclusion of the contract, is the moment when the acceptor is declared.
- 2) The theory of export acceptance considers that the moment of conclusion of the contract is the moment when the acceptance is issued by the acceptor and that she is separated from it in such a way as to lose the possibility of going back. Moreover, measuring on the Internet, the contract starts the moment after clicking on the acceptance key, when the acceptance is separated from the acceptor's will and no longer has the ability to control or reverse it.
- 3) The time of click or advertising is equal to the time of publication. In an attempt to separate the two previous phases, it is note that the interviewer may declare acceptance and not deliver it.
- 4) By clicking on the stop button at the top of the electronic display or by leaving the site permanently after clicking on the Accept button, the acceptance will not

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<sup>2</sup> Mohammed Khaled Zureikat: E-commerce contracts - online sales contract Dar Al-Hamed analytical study for publishing and distribution Jordan 2007 p85

<sup>3</sup> Musleh Ahmad Tarawneh and Noor Hamad Al-Hijaya, "Electronic Arbitration", Journal des droits, volume II, first issue, Syria, 2003.

leave the acceptor's authority and will remain at the declaration of acceptance stage.

### *Eligibility for the Electronic Contract*

Eligibility in electronic contracts where it is contracted at a distance, it may be difficult for one of the contracting parties to verify the eligibility of the other contractor. In this spatial separation between the parties, it is possible that they do not know all the basic information about each other. Therefore, the website dealing is an imaginary place.

The electronic contract must be valid and must be issued by two contractors with contractual capacity. This has led specialists in this field to propose solutions and suggestions to avoid this defect, particularly through advertising, which is a neutral third party in which both parties have confidence. Although, some legal experts believe that the solution is to adopt a legal system that allows the identity of the parties to be verified by any means. This verification would allow personality verification, i.e. each party can confirm the identity of the other party. It should be noted that the legalization of French consumption stipulated in Article 12/18 and the European Directive of 20 May 1997 decided that, for each offer to sell a product or service at a distance, the supplier would include in its presentation data relating to the identification of the entity. The identification detail would include the name and address of the establishment and electronic mail address.

The electronic contract, like any other contract need to be stored properly and must be issued by two contractors with contractual eligibility. If the parties wish the contract to be properly signed, they must check the question of eligibility by any available means. Data submitted by an online contractor may not be correct. In this case, the contractor cannot verify the other contractor's identification data, which can certainly affect the validity of the contract, if the eligibility of one of the parties or one of them to the contract is already unavailable. The defects of will (defects of consent), which are tainted by the will of the person's defects, will become inappropriate, because it will not emanate from free will.

ABDUL RASOUL ABDUL REDHA, D JAMAL FAKHER ALNKAS<sup>4</sup>

### *Proof of electronic contract*

Judicial evidence focuses on a specific legal fact and the forms prescribed by law. As with traditional contracts, electronic drafting alone is not sufficient to constitute full evidence unless it is signed by those who wish to contest it. Evidence in electronic transactions poses many technical difficulties due to the modernity and complexity

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<sup>4</sup> Samir Hamed Abdul Aziz Jamal, *ibid.*, P. 79.

of this technology and the character of the owners of illegal electronic transactions. Deception, subtlety, and fraud use high efficiency and quick information technologies to erase any illegal work and its concrete external effects.

### *Taher Shawky*

There is trust and security in international commercial contracts concluded by traditional methods, as these contracts are concluded in the presence of the parties to the contract or their legal representatives. They agree by writing on fixed paper that is easy for each party to keep. In e-commerce contracts, the contract is often concluded between two parties who do not have a physical means of communication, which raises many problems as to how to prove the contract during dispute. There is no doubt that if the contract were concluded electronically and performed by the parties without dispute, such implementation would not raise the issue of proof and would not determine the law applicable to them. It should be noted that the increase in the volume of trade via e-commerce networks is closely linked to the availability of stable rules of evidence, as this is the only thing that brings confidence to legal certainty in e-commerce contracts.

### *Types of E-Commerce Contract Disputes*

Electronic contractual disputes vary according to their diversity and much jurisprudence is classified into three types, based on the contractual components incorporated in electronic contracts. These contracts are signed between merchants and hybrid electronic contracts to create a virtual store.

The contract to enter the network is the oldest type of e-commerce. It is a “contract under which the service provider undertakes to provide the customer with technical access to the Internet, by providing the means to activate it. This is the most important communication program for establishing the link between the computers. It performs certain technical steps necessary to register the new customer, in return for the customer’s obligation to pay the prescribed subscription fees.

### *Mohammed Khalid Zureikat<sup>5</sup>*

This contract is binding on both sides and the service provider has the obligation to connect the customer to the network, which implies providing the customer with a username, password and e-mail address. In addition to the contractual obligation, the hotline aims to solve technical problems that the customer may encounter

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<sup>5</sup> Inas Khalid, op. cit., P. 129

through telephone; although, the customer is solely responsible for paying subscriptions.

Disputes arising from this type of contract are considered to be one of the most complex types of disputes, because of the legal problems with regard to the interpretation and amendment of the contract. It requires coping with technological advances.

A housing contract is also called an information rental that is closely linked to the Internet. It is defined as the service contract under which a service provider makes available some of the functionality of its equipment or information tools through the availability to use the hard disk of its computer in another way. This type of contract is concluded by anyone wishing to have a website address or create a virtual store, in which the service provider allocates space on the hard disk of his computer to store subscriber information. This ensures easy access to the subscriber's website or virtual store for a certain period of time and for a certain value. The second party to the Internet access contract only pays the premiums, as the subscriber in the hosting contract, who commits to the obligations.

### *E-commerce contracts - online sales*

Payment of subscription fees, acquisition of all the material necessary for the management of its site, and the commitment to abide by a charter of good conduct is required in hosting service provider. This includes several obligations, including the non-management of racial sites, the online sale of objects, etc. It also warns that it may be liable to civil or criminal prosecution if it violates applicable national and international laws.

The contract for the establishment of the virtual store is where many merchants gather under an address similar to the traditional shopping. This type of contract has allowed small and medium-sized companies to access new markets to get rid of their products and to break the monopoly of the large institutions in these markets, particularly those specializing in software, publishing books, newspapers, magazines, videos and music. These companies can sell their products at the best prices to avoid transport costs. A physical delivery is where the consumer can pay for the product by credit card and download a book, a cassette, software magazines, and films on his own computer. The store is established in agreement with the service provider or owner of the virtual shopping centre, the latter being obliged to open the participant's store on the Internet. This requires the license to use a specific program allowing him to trade directly on the network. However, it rises many contractual disputes such as compliance with the terms of the agreements between the company and the virtual store service provider, as well as non-contractual disputes such relating to unfair competition or trade secrets. These contracts are the most common electronic transactions, where conflicts are encountered, especially with the consumer, but most of them involve simple

financial values. This has led many countries to adopt several laws to protect the consumer under contract via the Internet against arbitrary conditions.

### *Law Applicability to Electronic Transactions*

It is necessary to know the legal implications of electronic transactions and determine the rights and obligations of their parties to verify their validity in accordance with the law applicable to them. This also helps in the identification of law that is necessary to settle disputes arising from such transactions. It is conceivable that these disputes will be brought to court when the parties remain silent on the choice of arbitration as a means of resolving their dispute, if the dominant method of resolving these disputes is through arbitration once the parties have agreed. These transactions fall within the fertile domain of private international law. On the other hand, the conduct of electronic transactions may be associated with the commission of crimes or errors by their sellers, causing damage to others or committing acts or actions involving irregularities or violations of the laws in force in all these cases, it is necessary to know the applicable law.

### *Electronic Contractual Transactions*

The law of the State in which the common domicile of the contractors is located shall be applied to contractual obligations. Electronically agreed transactions are subject to this notice, regardless of how the parties to the transaction communicated to each other to conclude the contract. This is confirmed by Article 1477 of the French Code of Procedure and Article 1054 of the Dutch Code of Procedure and international conventions. It is stipulated in all the regulations of arbitration centers to limit the parties' willingness to choose the applicable law for a link between the disputes or to deal with the law chosen by the parties. If the parties do not agree on the determination of the applicable law, the implied will may be inferred from all the circumstances surrounding their transactions, including the nationality of the parties, their domicile, the currency agreed or fulfilled. In relations with another party, it may be a professional or craft activity or through an institution that frequently carries out transactions such as airlines, insurance companies or banks. It leads to derivation of the concessionaires' desire to apply that party's law electronically as the holder of the separate obligation. This reflects the provisions of Article IV of the Rome Convention which apply the law of the State, with which the contract is most closely connected with the law of the State.

If the arbitrator or judge is unable to determine the willingness of the parties to apply a specific law considering all the circumstances surrounding their transactions, the case law and judicial system of some countries have been assumed to determine the law governing the contract. In this case, the court imposes a non-existent will on the contracting parties and evaluates it on the basis of evidence

drawn from the circumstances of the contract, such as domicile, nationality or place of contract. The law applicable in the absence of the explicit or implicit will of the contractors is determined by fallback controls that the judge may use if he does not comply with the will of the contractors. In this case, the legislator has considered that the contractors being established within a State. One is considered as an adequate criterion to justify the subordination of the contract to the law of that state. However, such an agent may not be able to determine the applicable law, if the contractors do not have a common domicile. A final support agent will then be set up in the event that do not expressly or implicitly agree to subject the contract for a particular law. It may seem difficult for electronic transactions to determine where they are concluded in cases where each party to the transaction has a contract with a country different from the one with which the other party has a contract.

## CONCLUSION

International conventions direct towards transactions containing many legal obstacles. The most important of which is the requirement for traditional writing in some international conventions and the non-acceptance of electronic writing in addition to the problem of delivery over the Internet. The United Nations Convention on the Use of Electronic Communications in International Contracts was adopted by the United Nations International Trade Law Commission .It was found that most traditional attribution rules could be applied, with the exception of certain attribution rules such as the attribution rule on literary and artistic property and attribution rules referring to the application of the law of the place where legal persons have their headquarters. While personal and regional attribution rules are capable of resolving conflicts of law in international commercial contracts, their dependence on geographical and spatial concentration and location makes their application to electronic contracts a problem that raises many difficulties. This has led to the inability of some private international law standards and controls governing international commercial contracts to cover e-commerce transactions in the event of a dispute over the law applicable due to the nature of the medium used. The proposed solutions to the problem of conflict of laws in electronic commerce contracts are the material electronic approach. The case law is divided into two directions; the first is that its proponents run counter to the idea of the private existence of electronic physical rules and deny any independence from traditional substantive rules. The latter is an extension of it. The second trend believes in the particular existence of electronic physical rules .It confirms its independence from traditional substantive rules, because they originate in an electronic environment and in the arms of electronic commerce. This divergence has not reached the level of negation of the status of the legal system; although, it has not escaped criticism of corrections because of its shortcomings and its inability to take over all disputes arising in the field of electronic commerce. This signifies the need for a conflict approach in private international law to fill the above gaps and deficiencies, with the

possibility of adapting some of the rules to support the implementation of electronic commerce contracts. In the absence of commercial premises, this confirms that the two approaches coexist and that it is possible to complement each other.

## RECOMMENDATIONS

The present study recommends determining the penalties for questioning this law. There is also need to determine the legal nature of electronic contracts in for investigating the legislative competence. Moreover, reference to the applicable law on the basis of both physical and contested approaches is required to provide the necessary protection for electronic commerce. The protection of electronic consumer is always the weak point of these contracts, considering the nature of Arab society, the rules of behavior, the habits and customs of the electronic society, and its material rules.

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