

*Electronic contract: A Legal mechanism for the e-commerce  
An analytical study under law n° 18-05; related to e-commerce*

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دراسة تحليلية في ضوء القانون رقم 05-18: المتعلق بالتجارة الإلكترونية

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**Abstract:**

The IT's revolution the world is currently witnessing is part of the developments of the era of digitalization, which has led to several changes that impacted various areas and sectors and helped to introduce technical concepts, resulting in the emergence of the modern era trading which is e-commerce adopted by all countries as the new method of dealing in the virtual platforms by issuing domestic legislation and regulations on the electronic contracting process as one of the methods to practice e-commerce activity and thus impulse the development of this digital economy in order to modernize their national economy. This includes Algeria back in 2018; the legislator has sought to issue law no. 18-05 on electronic commerce as one of the legislative anchors to regulate the conclusion of the electronic contract to provide confidence and security to economic operators especially at the international level.

**Keywords:** Digital economy; Electronic Acceptance; Electronic contract; Electronic Commerce; Electronic Offer; World Wide web.

مُلخَص:

تعتبر ثورة تكنولوجيا والمعلومات التي شهدتها العالم في الوقت الراهن من بين مستجدات عصر الرقمنة التي أحدثت عدة تغيرات مست مجالات وقطاعات مختلفة وعملت على ادخال مفاهيم تقنية فأسفرت عن ظهور ما يسمى بـ "تجارة العصر والمستقبل" أي التجارة الإلكترونية، ولقد اعتمدت كافة الدول –التي تبنت أسلوب التعامل بالوسط الافتراضي- في ظل تشريعاتها الداخلية على تنظيم نمط التعاقد إلكتروني كأحد الأساليب التعاقدية لممارسة نشاط التجارة الإلكترونية والدفع بعجلة تطور هذا الاقتصاد الرقمي لترقية اقتصادها الوطني، ومن بين هذه الدول، نجد الدولة الجزائرية بحيث سعى المشرع في سنة 2018 إلى إصدار القانون رقم 05-18 يتعلق بالتجارة الإلكترونية كأحد الدعامات التشريعية لتنظيم جُل أحكام وقواعد إبرام العقد الإلكتروني لغرض إضفاء طابع الثقة والأمان في نفوس المتعاملين الاقتصاديين على الصعيد الدولي خاصة.

كلمات مفتاحية: الاقتصاد الرقمي، الايجاب الإلكتروني؛ التجارة الإلكترونية؛ العقد الإلكتروني؛ القبول الإلكتروني؛ شبكة الأنترنت.

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## I. INTRODUCTION

The IT's known to mankind today has led to the emergence of many technical developments and concepts that have impacted all areas of scientific and practical life, with the most important of these developments being the rise of a new type of economy, which is the digital economy embodied in the form of electronic commerce.

Hence, the activity of electronic commerce that emerged with the Internet is considered as the most important commercial way on which the economic traders rely to develop and expand the digital economy to international level through virtual markets, knowing that this can only be achieved through the adoption of the electronic contracting method.

Indeed, the contract lies nowadays behind everyday life, and its considerable expansion can't be denied in the modern era, especially with the developments of the World Wide Web each day. In fact, most of the daily transactions in the developed countries are done via the internet. The fierce outbreak of the COVID-19 has revealed the paramount importance of electronic contracting as a possible substitution of our daily traditional contracting.

Therefore, the Algerian Legislator's intention to accompany the technological advances in the era of speed and digitization emerged through the issuance of law no. 18-05 on electronic commerce which aims to regulate the arrangements related to the conclusion of the electronic contract, as an essential requirement for conducting the activity of electronic commerce, in which light we present the following problematic: **how the Algerian legislator regulated the transactions regarding the electronic contract under the law no. 18-05?**

To answer this problematic, the researchers relied in their study on the inductive approach to analyze the various legal aspects that the Algerian legislator has identified under the provisions of law no. 18-05 regulating the process of electronic contracting (1), by casting light on several legal issues associated with the conclusion of the electronic contract (2).

### 1. Definition of The Electronic Contract

An electronic contract has a technical specificity that derives from the method of its conclusion, which is done by relying on modern means of communication, and therefore it is necessary to define the concept of this type of contract as follows:

#### 1.1. Jurisprudence Definition of Electronic Contract

Jurisprudence has covered the definition of the electronic contract, but it is clear that lawyers have been divergent in their opinions, which led to the emergence of several jurisprudential definitions.

A part of the jurisprudence defines the electronic contract according to the method in which it is concluded as an agreement in which the offer and the acceptance converge on an international network open to telecommunications in an auditable and visual way through the interaction between the offerer and the acceptor (Karim, 2000, p 68).

Another jurisprudential approach takes into consideration the international aspect of this type of contract, and defines it as: **“The contract in which offers of goods and services meet the acceptance of people in other countries through multiple technological means, including the international information network and Internet, in order to perform the contract”** (Karim, 2000, p 68).

While another aspect of jurisprudence relied on various electronic means to conclude the electronic contract, by defining it as: **“the contract concluded by a full or partial electronic means, whether electrical, magnetic, photoelectric, and electromagnetic”** (Al-Roumi, 2004, P 49).

Based on the various definitions referred to above, another jurisprudential definition of the electronic contract can be provided as follows: **“the electronic contract is the contract in**

which the offer and acceptance converge through an international communication network using the electronic exchange of data, intending to establish a contractual relationship between the contracting parties”. (Al-Roumi, 2004, P 49).

### 1.2. The Legislative Definition of The Electronic Contract

Electronic contracting is considered to be one of the legal issues that have generated a considerable degree of controversy in the legislative field. Therefore, many international and national legislations have dealt with the provision of a comprehensive definition and the particular feature that distinguishes the electronic contract from other contracts.

Thus, the UNCITRAL Model Law on Electronic Commerce (UNCITRAL Model Law on Electronic Commerce with Legislative Guide published on 16 December 1996 and with an additional article 5bis in its final form, held 1998, United Nations New York 2000) is considered to be the first law stating the possibility of contracting by electronic means. The electronic contract was defined in its Article 2/A-a as "the term 'data message' is intended for information that is generated, sent or received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegraph, telex or telegraphic copies". In addition, article 11 of the same model law which fell under the heading "Formation and validity of contracts", stated that: **“In the formation of contracts, and unless the parties agree otherwise, data messages may be used to express the offer and acceptance of the offer and when using the data message in the creation the contract. A contract does not lose its validity or enforceability simply because a data message is used for that purpose”**.

The electronic contract has also been defined according to the European directive n°97/7/CE on the protection of consumers (directive n°97/7/CE, 1997) in the field of distance contracts within its article 2/1 which specifies that: **“any sale of goods or any service concluded, without the simultaneous physical presence of the parties between a consumer and a professional who, for the conclusion of this contract, uses exclusively one or more techniques of remote communication”**.

The French legislator has defined the concept of electronic contract, based on its definition of the contract concluded at a distance in accordance with French consumer law (Consumer code), and which falls within the scope of its article 121-16 precisating that **“any sale of a good or any provision of service concluded, without the simultaneous physical presence of the parties, between a consumer and a professional who, for the conclusion of this contract, use exclusively one or more techniques of remote communication”**. In addition to addressing the definition of electronic commerce in Article 14 of law for confidence in the digital economy (Law No. 200-575 of June 22, 2004), also known as the law on electronic commerce, which states that: **“electronic commerce is the economic activity by which a person offers or ensures the supply of goods or services at a distance and by electronic means”**.

The Algerian legislator has regulated the activity of electronic commerce according to law 18-05 (law n° 18-05, 2018), whose definition of the electronic contract within the article 6/2 states that: **“contract within the meaning of law n°04-02 of 5 jomada El oula 1425 corresponding to June 23, 2004, fixing the rules applicable to the commercial practices, concluded at a distance without the simultaneous physical presence of the parts by the exclusive use of a technique of electronic communication”**.

In this regard, an observation related to this text should be made concerning its importance that can't be neglected. In fact, the definition of the electronic contract has never been given by the Algerian law until 2018. The civil code, whether before or after this date, doesn't mention it neither. However, the only reference to the electronic contract in the civil code is related to matters of proof, and cannot be considered though, as a proper definition of it. This is why the definition of the electronic contract should be rightfully considered as the newest.

Another observation goes to the definition of the electronic contract itself; in fact, article 6/2 of law n° 18-05 tries to combine its new definition with the definition given by law n° 04-02 (law n°04-02 of 23th of june 2004, 2004), but, surprisingly, in place of linking the definition of electronic contract with the one given by the civil code in its article 54, article 6/2 of law n° 18-05 has instead linked it to the definition elaborated by article 3/4 of law n° 04-02. This liaison can be justified by two possible explanations at least; the first explanation is that, unlike article 3/4 of law n° 04-02, the definition of the contract in article 54 of the civil code is not part of the public order. In this context, it seems the legislator preferred devoting an imperative definition rather than a suppletive one. While the second one is that the electronic contract's definition is part of consumption law that includes also law n° 04-02, which makes it the most appropriate text to refer to in this matter instead of the civil code (H. Barbier, 2018, 96 et ss).

### **1.3. Characteristics of The Electronic Contract**

The civil doctrine admits, since always, that the electronic contract has some specific characteristics that differentiate it from traditional contracts. It follows that the classic definition of the contract given by the civil code in its article 54 is too general to match these characteristics. Thus, the principal aim of the legislator in law n° 18-05 was to cope with the quite expansion of the e-commerce in Algeria beginning by elaborating a precise legal definition of the electronic contract that could fill the criticized existed gap regarding this type of contracts.

Furthermore, the electronic contract is distinguished from the regular contract by several characteristics and particularities that make it the most reliable contractual mode in terms of commercial transaction, and these characteristics are as follows:

#### **1.3.1 An Electronic Contract Is An International Contract**

The electronic contract is characterized by its international feature in its conclusion via various modern means of communication, which transcend all geographical boundaries of the countries, and this is what makes most countries of the world in permanent contact online. (Lionel, 2001, P131).

#### **1.3.2 Electronic Contracting Is Mainly Commercial And Consumption-Based In Its Nature**

The electronic contract is closely related to commercial transactions, hence it was referred to as "e-commerce", this feature is considered as one of the characteristics that distinguish this contract since often the provider of the good or service is a merchant, meaning that it has a commercial character (Ibrahim, 2011, P 76). A large part of the total contracts is concluded at distance. On the other hand, it is characterized by a consumption character, given that it is often concluded between a merchant and a consumer, making this type of contract is also a consumer contract.

Moreover, this type of trade requires modern techniques that are constantly developing. Such technical evolution, characterized by its astonishing speed, could escape the legislator accompaniment regarding consumers' protection matters as concretized by law n° 04-02 and law n° 09-03 of the 25<sup>th</sup> of February 2009 related to consumer protection law (law n° 09-03 of the 25th of february 2009, 2009), both are to be considered as general rules in the field of consumer's protection. According to this approach, the e-consumer would be a new category of consumers that appeared at the very beginning of electronic commerce enterprises, and thus, should be provided with particular protection that takes into consideration that specific nature.

#### **1.3.3 The Electronic Contract Is Concluded At Distance By Electronic Means**

The electronic contract is marked by the material and contemporary absence of its co-contractors brought together by a hypothetical contractual council (Brunaux, P. 227), which makes this type of contract part of a group of contracts formed at distance (distance contracts or contracts between absentees), since the co-contractors exchange expressions of their will using electronic means. This is also confirmed by the European Directive n°97/7/CE in its definition

of distance communication in its article 4/2, stating that **“any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of the contract between these parties”**.

### 1.3.4 Electronic Contract Negotiation

According to jurisprudence, considering the means by which the contract is concluded, the electronic contract is a consensual contract if the general conditions of sale are set. Therefore, the protection that the civil code offers to the electronic consumer is way too general and aims exclusively, at this stage, to preserve his consent and his acceptance like any other contractor. Due to its generality, this protection remains an equal and a neutral one regardless of the parties' economic, social, or technical situation. It is obvious the contractor's consent is a major bloc in the contract law, and its preservation remains fundamental for the contract's sake (djihad, 2021, 07).

## 2. The Basic Elements Of The Electronic Contract

The electronic contract is based on the following elements:

### 1.1. Electronic Offer

The electronic offer is defined according to one aspect of the jurisprudence as: **“The offer made by a specific person to one or more persons with the intention of concluding a contract, to obtain the acceptance of this offer and thus the conclusion of the contract”**. (Al-Saeedi, 2007, P. 109).

The Algerian legislator was not aware of the electronic offer under the law on electronic commerce as it is the case with foreign laws, although these laws emphasize the lawfulness of expressing the offer by electronic means, including the message of data via the Internet according to Article 11L1 of the UNCITRAL Model Law on Electronic Commerce which states: **“data messages may be used to express an offer and accept an offer...”**. In addition, clause 3L2 of the electronic transaction draft, which is annexed to the UNCITRAL Law, states that: **“A message represents an offer if it includes a contract to enter into a contract sent to a specific person or persons”**. (Mansour, 2008, P 105)

The electronic offer is referred to as the expression of the will of the person who wants to contract at a distance, as it takes place through an international communication network in an audiovisual way and includes all the elements necessary to conclude the contract so that anyone who addresses it can accept the contract directly.

The offeror is obliged to register his commercial offer on the same database mentioned in article 11 of law n°18-05 such as: (but not limited to)

- The tax identification number, physical and e-mail addresses as well as the telephone number if the e-supplier;
- The number of the trade register or the number of the professional card of the trader;
- The nature, characteristics and price of the goods or services offered with all taxes included.
- The state of availability of the good or service;
- The terms, costs and delivery times;
- The general conditions of sale, in particular the indications relating to the protection of personal data;
- The conditions of commercial warranty and after-sales service;
- The method of calculating the price, when it cannot be fixed in advance;
- The terms and procedures of payment;
- The conditions for terminating the contract, if applicable;
- A complete description of the different stages of the execution of the electronic transaction;
- The duration of the offer, if applicable;
- The conditions and time limits for withdrawal, if applicable;
- The delivery time, the price of the product subject to the pre-order and the terms of

- cancellation of the pre-order, if applicable;
- The method of returning the product, exchange or refund;
- The cost of using the means of communication electronic when is calculated on a basis other than the current rates.

### **1.2. Electronic Acceptance**

Acceptance is defined according to jurisprudence as **“The expression of the will of the party to whom the offer is addressed by accepting the offer made by the offeror”**. (Al-Saeedi, 2007, P 109). While some authors have defined it as **“An expression made by the person to whom the offer was addressed, and if it is identical to the offer, the contract shall be concluded ”**.

The Algerian legislator has neglected to give a legal definition of acceptance, whether in the context of the general rules, since he referred only to the modalities of expression of the will in Article 60 of the Algerian Civil Code, and has taken the same position with regard to electronic acceptance since he did not give a precise definition in accordance with the law on electronic commerce.

Electronic acceptance can be defined as the expression of the will, with the support of electronic media, in relation to the obligation imposed on the subject using a specific expression of his will to cause a certain legal effect.

Nevertheless, the question of silence remains among the legal problems that interfere with the expression of electronic acceptance; the civil doctrine define it as a negative state that is not accompanied by a word, writing, sign, or action that carries the meaning of the expression of the will. This means that silence in general rules is not considered as an expression of will. However, this principle suffers from an exception mentioned in article 68 of the civil code, where silence is an expression of acceptance of the conclusion of the contract if it is related to three situations:

- When either because of the nature of the matter, commercial practice, or other circumstances, the offeror should not expect express acceptance, the contract is assumed to be concluded if the offer has not been refused within a reasonable time.
- The absence of a reply shall be regarded as acceptance when the offer relates to a business relationship already existing between the parties.
- Or when it is only in the interest of the offeree.

By applying these general rules contained in Article 68 of the Civil Code, it becomes clear that silence alone could not express acceptance of the electronic contract despite the existence of prior interaction between the contracting parties, but this contract must be accompanied by other circumstances that should inevitably indicate that the intention to contract with silence is considered as acceptance. However, this rule do not apply regarding the practice which cannot be taken within the framework of electronic contracts, due to the newness of this type of contract revealed by the technological development.

### **1.3. Match Of The Electronic Offer With The Electronic Acceptance**

Among the legal matters arising from the process of matching the offer with the acceptance to conclude an electronic contract, is the problem of determining the time and place of its conclusion, which shall be detailed as follows:

#### **1.3.1 Determination When The Electronic Contract Is Concluded**

Most legislations regulating electronic commerce do not require that the contract should be concluded at the time of the offer since the latter is characterized by an international character, which raises a practical difficulty that appears in the different legal solutions involved in determining the moment of conclusion of contracts through modern communication techniques.

Consequently, we note that the European Directive n°97/7/CE of 20/05/1997,

determinates the time of conclusion of the electronic contract, by setting the time to confirm the arrival of this acceptance to the provider, as it was stated in its Article 5 as follows: **“1- The consumer must receive, in writing or on another durable medium available and accessible to him, confirmation of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract and at the latest at the time of delivery in the case of goods not intended for delivery to third parties, unless this information has already been provided to the consumer before the conclusion of the contract in writing or on another durable medium available and accessible to him”.**

The Algerian legislator has adopted the theory of affirmation of acceptance in the context of determining the time of conclusion of the electronic contract, in order to protect the consumer regarded as the weak party in the electronic contractual relationship, especially in article 12/ 3/4 of law n°. 18-05 that states: **“The details of verification of the order by the e-consumer, including the products or services ordered, their total and unit price, the quantities ordered, change of the order, cancel it or correct any errors;**

**- The confirmation of the order which leads to the formation of the contract ”.**

### **1.3.2 Determining Where To Conclude The Electronic Contract**

Doctrinal opinions differ in determining the place of conclusion of the electronic contract, but legislation in return has been based on the theories of jurisprudence to put a definitive end to this issue. Therefore, by going back to the UNCITRAL Model Law on Electronic Commerce, we note that it based the determination of the place of conclusion of the electronic contract on the place of residence of the debtor without taking into account the existence of an information system for sending or receiving. In this regard, its article 15/4 states: **“The second paragraph applies even if the place where the information system is located is different from the place where the data message is considered to have been received in accordance with paragraph 4.**

**- Unless the originator and the addressee agree otherwise, the data message shall be considered to have been sent from the location of the originator's business and shall be considered to have been received at the location of the addressee's business;**

**- If the originator or receiver has more than one place of business, the place of business shall be the one most closely connected with the transaction concerned or the registered office in the absence of such transaction;**

**- If the sender or the recipient has no establishment, then its habitual residence should be indicated from there”.**

As for the Algerian legislator, he remained silent and did not enter into the statement of the position regarding the place of conclusion of an electronic contract under the law of electronic commerce.

However, indeed, that the traditional view that a contract requires the identification of a valid offer and a valid acceptance of that offer “ Art. 59; Civil Code” has been reconsidered in recent years due to the apparition of electronic trading. Still, the offer and acceptance’s matching is constantly required whatever the method of contracting was.

## **II. Conclusion:**

At the end of this study, we conclude that the electronic contract is the most reliable contractual aspect in the field of concluding international commercial transactions. This type of contract is distinct from the traditional contract due to the emergence of the internet with several features and characteristics that make it more effective in advancing the development of the digital economy.

The consumer market has been quick to adopt electronic communications technology in order to increase its expansion even further. Consequently, all countries that rely on this contracting method have sought to regulate their domestic laws based on their directive laws and their opinion on the 1996 UNCITRAL Model Law on E-commerce.

The Algerian legislator, just like his foreign homologues, responded to the e-commerce

phenomena through law n° 18-05, to provide more protection to the new emerging category of e-consumers and to regulate the provisions and rules that are in line with the privacy of the electronic contract, due to the difficulty of applying the traditional rules to this type digital contract.

It is noticed through analyzing the texts of law n°. 18-05 that the Algerian legislator has been in accordance with the regulation of the legal aspects of the process of concluding an electronic contract especially with the peculiarity of this contractual mechanism in order to give legal stability in dealing with this type of contract in light of the legislator's policy of developing the digital economy, as well as the embodiment of the legislator's intention to impart a character of confidence and reassurance for the economic dealers.

In this way the electronic contract is the core of e-commerce; therefore, this contractual mechanism must be controlled in the light of a legal system that regulates all its legal aspects, to achieve the main purpose of resorting to it, which is the development of the digital economy in Algeria.

However, although the topic subject is centered on this point, it is worth to mention that law n° 18-05 didn't regulate the full aspect of e-commerce since it focuses only on the relation between the e-supplier with the e-consumer, also called: B2C (Business to Consumer), and terribly omitted to regulate the relations between the e-supplier with other economic agents who are obviously not consumers, whom relations are commonly referred to as: B2B (Business to Business), and which is considered as another area of e-commerce. Yet, this criticism can be quickly reduced if it is noticed that law n° 04-02 already regularizes this matter, but manifestly not in an e-commerce context.

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