

**Electronic Contract under Iraqi law**  
**A Study**  
**Under the Iraqi electronic transactions Act No. 78 / 2012\***

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**Abstract:**

Internet has been widely used in the conclusion and implementation of electronic contracts in the law and appeared as a new type of contracts which are implemented through non-traditional means and traditional rules which are not able to cope with the problems of this type of contract law.

There is legal problems were produced by electronic contracts cannot find a solution to the traditional rules of civil law as a problem the conclusion of electronic contract and the time and the venue of the applicable law to emerging about conflicts, and the competent court that prove the evidence disputes are used the Iraqi legislator issued in 2012 a law of electronic contracts No.78 that deals with the provisions of these contract.

This statutory research is considered as a modest effort to show some of the provisions of the electronic contract under Iraqi law.

**Key words:**

E.contract, E.transactions, E.evidence, conclusion of electronic contract.

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## العقد الإلكتروني في القانون العراقي

دراسة على وفق أحكام قانون المعاملات الإلكترونية العراقي رقم 78 في 2012

الملخص:

استخدمت شبكة الانترنت في ابرام وتنفيذ العقود الالكترونية فظهر في القانون نوع جديد من العقود يتم وينفذ عبر وسائل غير تقليدية وان القواعد التقليدية المقررة في القانون غير قادرة على مواكبة مشكلات هذا النوع من العقود فثمة مشاكل قانونية افرزتها العقود الالكترونية لم تجد لها حلا في القواعد التقليدية في القانون المدني كمشكلة ابرام العقد الالكتروني وزمان ومكان انعقاده والقانون الواجب التطبيق على المنازعات الناشئة عنه، والمحكمة المختصة بتلك المنازعات وادلة الاثبات المستخدمة فيها ولكل ذلك اصدر المشروع العراقي قانونا خاصا بالعقود الالكترونية رقم (78) لسنة (2012) نظم فيه بعض احكام هذه العقود.

وهذا البحث هو محاولة علمية متواضعة لبيان بعض احكام العقد الالكتروني في القانون العراقي.

الكلمات المفتاحية:

العقد الإلكتروني، المعاملات الإلكترونية، الإثبات الإلكتروني، إبرام العقد الإلكتروني.

### Le contrat électronique en droit Irakien à la lumière de la loi des transactions électroniques

#### Résumé :

L'évolution de l'Internet a conduit à la refonte du droit des contrats. On assiste en effet à l'apparition, en sciences juridiques, de contrats d'un type nouveau. Le contrat électronique pose un certain nombre de questions dont le droit commun se trouve incapable de résoudre. Ces questions ont, notamment, trait à l'espace et le temps de la conclusion du contrat, la loi applicable, à la juridiction compétente et aux moyens de preuves... de ce fait, le législateur Irakien a jugé judicieux d'édicter une loi spéciale aux contrats électroniques (n° 78, 2012).

#### Mots clés :

Contrat électronique, transactions électroniques, la preuve électronique

#### Introduction

If a man who lives in the second decade of the twenty first century has made the achievements of some of them were not ever nursed even in his dreams he discovered the atom and landed on the lunar surface and held human organ transplants computer and spread in most walks of life, Internet has entered life dramatically and brought about substantial change in the transfer, and exchange of information; shortened thus time and place the world has become like small village.

Nowadays man has achieved things that were not even thought of as imaginary like the discovery of the atom, travelling to the moon, human organ transplants, and the revolution of computers which has dominated the various aspects of our daily life.

Also, traders have found what they wish in the internet and that because of its particular advantages of unrivaled trade conducted through traditional means.

Consequently, law was not far away from the Internet, as the network has become an important way for transformation and exchanging of legal information to those interested in it, and also facilitated the organization of electronic transactions<sup>(1)</sup> of all types. Any person can contract with others through the internet; and ask for goods and services or to repay and withdrawals cash, all that processes can be done at home by using one's own personal computer which is connected to the network.

Without having to bear the trouble of going to the place that has the goods and commodity or service requested. As a result of the widespread of information technology new method of online contracting emerged.

This kind of contract however, has many legal problems under civil and commercial law, private international law, Civil Procedure and Evidence Act, and various other laws.

Legislators have been focusing on formulating a set of regulations in order to find legal solutions to the problems mentioned previously. This resulted in issuance of relevant laws like the Iraqi Electronic Transactions Act No. 78 (2012), as it stated in its reasons for its issuance, "consistent with the development in the field of information and communication technologies and activities online and to provide the foundation and legal framework for electronic transactions through modern means of communication and encourage the internet industry, information technology and organization of electronic signature and electronic information services and keep abreast of legal developments in the electronic aspects and adaptation of the traditional legal system in line with modern information and communication technology systems".

### **First: Definition of Electronic Contract under Iraqi law.**

Electronic contract have different names, such as: online contract, distance contract, or the contract so far.<sup>(2)</sup> Iraqi legislature resolves this conflict of terminology under jurisprudence and eventually it has been agreed to use the term *electronic contract*.

The tenth paragraph of first Article of Iraqi electronic transactions Act, defines electronic contract as, "communicate Offer issued by one of the contractors to accept the other and produces its effect in the subject matter, which is an electronic means", this definition has been affected by Article 73 of Iraqi Civil Law No. 40 (1951), that defines contract, "communicate Offer issued by one of the contractors to accept the other and produces its effect in the subject matter".

This definition has some drawbacks: first, the electronic contract under Iraqi law does not take into consideration Psychological Adjustment for contractors, but stands at exterior agrees mentioned, and that is relationship between offer and acceptance, in other words, the definition of the will under Iraqi law, is cares about in the physical appearance.<sup>(3)</sup>

Second, the electronic contract under Iraqi law, is sufficient to take place by sharing the expression of two identical wills, and that can be achieved favorably includes a presentation from one of the contractors and acceptance of the other contracting states agreed to the offer and would then need to match the offer and acceptance and the contract is in conjunction expressions, and does not require the Iraqi electronic transactions Act of a certain form of the electronic contract.

We cannot say that psychological adjustment in the electronic contract is a restricted element and a judge cannot reach it, because the judge can reach it across

disclosed external words, and this must be given to the judge large authority in appreciation for the presence of really mentioned consensus.

Electronic contract under Iraqi law cannot be held when you resolve to do it, is not held if it has been intention in mere internal state, and for that an electronic offer must communicate to electronic acceptance, but this what is the communication, but to prove the Will mentioned<sup>(4)</sup>.

Therefore the communication between the electronic offer and electronic acceptance stipulated in Tenth paragraph of first Article of Iraqi electronic transactions Act, Will not the reason for the creation of electronic contract and its legal effects, but the cause is intention to contractors that are revealed by the expression.

The electronic contract has two intentions behind the expression by the clearing contractors identical mentioned required in two wills either expression is limited to its effect as a means of science the essence of the contract.

We can confirm that there is an implicit reference in the tenth paragraph of the first Article of Iraqi electronic transactions, stating that: this law does not abandon the intention in the definition of contract stipulating in the first Article of the Act, "produces its effect in the subject matter" This legal effect under electronic transaction Act is considered as a voluntary effect.

The third and last drawback can be observed in the fact that the Iraqi law definition of electronic contract has stipulated that there are electronic offer communicated acceptance in this contract through the electronic means, which may be defined as by seventh paragraph of first Article of the same law as the, "devices, equipment, power tools, magnetic, optical, electromagnetic or any other similar means used in the creation and processing of information, exchange and storage" We can define electronic contract as, a voluntary consensus achieved through electronic means to produce certain legal effect.

It is important in our definition direct the will maker of electronic contract to produce the legal effect also settle under our definition of electronic contract phrases Psychological phenomenon, and psychological element in the electronic contract reflected electronic consensus voluntary When is this consensus we are in front of integrated contract.

## **Second: The Fundamental elements of Electronic Contract under Iraqi law**

Iraqi electronic transactions Act, did not contain an explicit language stating the essential elements of the electronic contract, Is this indicates that the desire to subjugate the contract to the general theory of the contract stipulated in the Civil Code.

It seems to us that, since the electronic transactions law did not contain an explicit language specifying the essential elements of the electronic contract, it shows that, the legislator chose a judgment different from the general theory of the contract stipulated in the Civil Code, and that he wanted to make to hold the electronic component alone "Agreement" , which meant in the first subparagraph of Article (18) of electronic transactions law by saying, "may be offer and acceptance of the contract by electronic means" Electronic contract is based on the will, there is no legal substance of the will be determined by pre-law, but that the will is sovereign in this matter which alone draws its content everything and put it in this context must be respected unless it is contrary to the provisions binding in law, public order or public morals.

This will have to tend to achieve a very legitimate, reason here relates closely communicated to the will, because it do not move only to achieve a particular purpose<sup>(5)</sup>.

Therefore, it does not have the electronic contract only involuntary elements of any components determined by the will the same reason in the electronic contract must be understood as a motive, motive of the contract and therefore must look for in itself will reason here is not an independent element in the electronic contract but is an internal component of Will.

### **Third: Electronic offer.**

Iraqi electronic transactions Act, did not defines this kind of offer, but jurisprudence in Iraq defined it as: "all the final expression through electronic means going to one person to another for exhibitors contracted under certain conditions<sup>(6)</sup>".

Electronic offer, can be defined as the electronic display filed by the offeror by electronic means, this offer includes the price and terms of the contract and can be directed to a certain particular person or to the public during a certain period of time for the purpose of the contract according to the price and conditions and during the period presented.

### **Electronic offer must be included the following information:**

- The identity and address of an owner.
- A full description of the various stages of the conclusion of electronic contract.
- How to deliver the good, commodity or service and the amount of insurance payable on the spot.
- How long is the good, commodity or service before the specified prices.
- The nature and characteristics of the good, commodity price or service.
- Methods and procedures to fulfill the price.
- The procedure and duration of obligations arising from the electronic contract.
- The right to refrain from electronic contract and the duration of this termination.
- Electronic offer under Iraqi law divided in to two types:

#### **The first type:**

Electronic offer that directs to a certain person or a certain group of people is called "the special offer".

#### **The second type:**

Electronic Offer that directs to everyone, this called" the world at large".

However, this type faces two problems:

**The first problem:** run out of stock of the goods from a merchant, but can overcome this problem by including a reservation in offer which says, that the goods and commodity or service is available upon customer in the usual stock-border demand.

**The second problem:** The problem of the regional scales of the electronic public offer but can overcome this problem, by selecting a regional scale in which electronic offer is valid to bring about legal effect<sup>(7)</sup>.

### **Forth: Electronic acceptance.**

Iraqi legislator did not define the electronic acceptance, but it can be said that, the electronic acceptance is the expression and subsequent of the electronic offer which includes the approval of the conditions contained in the electronic offer and

must be available in the electronic acceptance of the general conditions of the will and that comes at a time still electronic offer valid and matches with it.

Iraqi electronic transactions Act did not require a special form of electronic acceptance, everything required by this Act is to be accepted by an electronic means<sup>(8)</sup>.

There for can be done in the electronic acceptance by electronic means, such as: -E-Mail or by Chatting room or across the Downloading or through Click on Agreement....etc.

expressed acceptance by all means that are commensurate with the nature of the Internet<sup>(9)</sup>.

Iraqi electronic transactions Act was organized the provisions of the electronic means to express the will, under eighth paragraph of first Article of the law, that defines the electronic means "a program or an electronic system to a computer or any electronic means other uses in order to perform an action or respond to an intent to create, send or receive a message information".

#### **Fifth:- contact offer with electronic acceptance.**

Iraqi electronic transactions Act requires contact offer with electronic acceptance the contract in this law does not take place before contact is achieved mentioned but when this communication is achieved? Iraqi electronic transactions Act adopted theory of export acceptance in this topic, Article (20) of the Act on it:-

1- Electronic documents was sent from the time of when entering the information processing system, not control by website on a person who set if on behalf unless the signer and the consignee have other agreement.

2- If the receiver selects a system to process information to deliver documents, it is considered received when entering into the system. If not sent to the selected system shall be deemed to have been sent since the establishment of the receiver to exact rerun of it the system to receive the information.

3- If the consignee did not specify a system for processing information to receive electronic documents, it shall be deemed delivered time, is the time of entry into the system to process information of the consignee.

However, Iraqi electronic transactions Act, came out this theory in Article (19) which indicated that, if a request sent by the consignee under electronic document informed of the extradition of that document or has agreed with him on that, the establishment of the consignee shall inform the sender by electronic means or by any other means, or carrying out any act, or conduct indicates that he received the document is a response to that request or agreement.

If the sender postpones the effect of electronic document delivered notice of the consignee, it shall be deemed to extradite document is the recipient until the delivery of the notice.

#### **Sixth: Matching acceptance of the electronic offer.**

Acceptance must comes in conformity of the electronic offer, which means that is given electronic acceptance on all matters contained in electronic offer<sup>(10)</sup>. If electronic offer included details, the electronic acceptance must be missed if these details secondary, but if electronic acceptance included any change in the electronic offer, it is considered a rejection of the electronic offer. At the same time this can be a new electronic offer can be accepted by the owner of the first show.

However, if agreed contracting parties on the core issues in the electronic contract and maintained a detailed matters agreed by them later, and did not required electronic contract not to be held when it is not agreed upon, the electronic contract

when it is not agreed the contract can be held. In addition the difference of these matters, a judge can be ruled in accordance with the nature of the electronic contract, the provisions of law, custom and justice<sup>(11)</sup>.

### **Seventh: Proof of electronic contract.**

Jurisprudence believe that, if there is no legal obstacle of the contract by electronic means, but the style of expression of acceptance required to provide proof that confirms the wish of the will of contractor to express their acceptance of the electronic offer<sup>(12)</sup>.

The proof of the electronic contract is considered the most important legal problems faced by this type of contract<sup>(13)</sup>, because the evidence contained in the Iraqi law exclusively in accordance with the provisions of the Evidence Act No. 107 (1979). Despite, the fact, this Act passed to a judge to issue a court ruling based on the means of scientific development<sup>(14)</sup>, but Iraqi Supreme Court had rejected the proof through electronic means. For example, the court has refused tape recorder electronically by means of proof accepted legally considered<sup>(15)</sup>, and rejected the proving via E-mails<sup>(16)</sup>.

However, it may change after the issuance of electronic transactions Act No.78 (2012) the second paragraph of forth Article says, "to be the electronic signature of the legal value of the traditional signature".

This Act also authorized the proof in electronic writing which defined as, "each letter, number, symbol, or any other sign to prove similar means give and indication are aware of and understand"<sup>(17)</sup>.

Also, the Act gave the electronic document the same legal value in proof of a paper document<sup>(18)</sup>, and more than that the Act gave a copy of an electronic document the same legal value of proof in which the original electronic document<sup>(19)</sup>.

### **Eighth: Conclusion**

The electronic contract is a recent and rapidly evolving subject, and it's legal and judicial system still under preparation. Researcher needs a technical and legal knowledge at the same time, as characterized. This contract has specific properties is not like the rest prescribed in the general theory of civil law and traditional contracts. The electronic contract is through held in a virtual world electronic techniques acrossing international boundaries of what it means that the differences in language and culture between the parties to the contract, it is likely there will be many interpretations per word.

Although, electronic contract occupies a small area of practice in Iraq, but this not prevented Iraqi legislature to legislate special law regulating the provisions of this contract in accordance with the privacy of the electronic means by which the contract is through.

And certainly, the organization of electronic contract legislatively in Iraq despite the lack of judicial applications of this contract, but that will help the judiciary in dealing with cases, problems or issues that may be offered in court.

We find, it is very necessary at the present time, especially after the issuance electronic transactions Act Iraqi judiciary must prepare in the future for the big cases will be brought before courts in connection with this contract, and is what requires of acknowledge base for judges are specialists in this technical field of contracts.

**Notes:**

- (1) The sixth paragraph of first Article of Iraqi Electronic Transactions Act No. 78, 2012, known as the electronic transaction (applications, documents and transactions by electronic means).
- (2) See Maloh Fatima Drew, Taleb Musadaq Adel, Holding the Electronic Working Contract and Proven under the Iraqi law, research published in the Journal of *the Faculty of Law - University of Al- Nahren*, Volume 13, Issue 3, 2012, Baghdad, p. 296.
- (3) The effect of psychological adjustment in the contract see Al- Saadi Jalil, *Intention in the Contract*, first edition, Baghdad 2012 .
- (4) Otherwise see Al-Aboudi Abas, *explained Iraqi electronic transactions Act*, first edition, Baghdad, 2015, p. 44.
- (5) Al-Saadi Jalil, the psychological element in the contract study under Iraqi law and the English law, *Journal of Legal Sciences*, college of Law - University of Baghdad, Volume 27, 2012, p. 71.
- (6) Al-Saadi Jalil, *contracted over the Internet*, first edition, Baghdad, 2011, p. 63.
- (7) Osama Abu Hassan Mujahid, *contracted over the Internet*, first edition, p. 71.
- (8) See tenth paragraph of first Article of Act.
- (9) Al-Rubaie Abdul Juma Musa, Al-Alwani Fouad, *General Provisions of the Negotiation and Contracting. Contracting online . commercial sales contracts*, Baghdad, the House of Wisdom, 2003, p 77.
- (10) Article (85) of Iraqi Civil Code, which stipulates that, "if one contractor shall be required to convene contract acceptance of others knitter on the corresponding face of the offer".
- (11) Article 86 of Iraqi Civil Code, which stipulates that, "1- corresponds to the acceptance offer if the parties have agreed on all the core issues, which negotiated the agreement either on some of these issues is not enough for the parties' commitment even if the agreement in writing proved. 2- If the parties have agreed on all the core issues in the contract and maintained a detailed matters agreed by them later and did not require that the contract is not in session when the lack of agreement on these matters shall be deemed to have been the decade, and if the dispute over the issues that have not been agreed upon the court shall in accordance with the nature of the subject and to the provisions of law and custom, and justice".
- (12) Al-Rubaie Abd Juma Musa, Al-Alwani Fouad, *Ibid*, P. 77.
- (13) Kazim ASL, the legal value of electronic evidence in civil proof, doctoral thesis from the University of Baghdad - Faculty of Law, 2006.
- (14) Article 104 of the Act.
- (15) Iraqi Supreme Court Decision No. 12 on 29.08.1984.
- (16) Iraqi Supreme Court Decision No. 2691 on 19/8/2008.
- (17) See fifth paragraph of the first article of the Act.
- (18) See first paragraph of Article 13 of the Act.
- (19) See Article 14 of the Act.