

# Depict Expressions Of Will In The Electronic Contract

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## Introduction:

Given the distinctive features of electronic contracts that differentiate them from traditional contracts, the issue of mutual assent (offer and acceptance) in electronic contracts also possesses its own unique characteristics. These differ from what is found in other contracts due to the nature of the means through which they occur. The act of acceptance online is not fundamentally different from traditional acceptance, except for the medium used. While online acceptance is no more than traditional acceptance, the difference lies in the medium, as it is not characterized differently than traditional means of acceptance in a physical gathering between an offeror and an offeree, or through immediate means such as telephone, fax, telex, or telegraph. However, it encompasses all these means, making online acceptance any medium similar to these traditional methods (Ababneh, 2012).

Whereas some legislations have stipulated provisions requiring the presence of such acceptance in electronically formed contracts, the first paragraph of Article 11 of the United Nations Model Law on Electronic Commerce (UNCITRAL), issued on December 16, 1985, provides: "In the context of contract formation, unless otherwise agreed by the parties, an offer, or the acceptance of an offer, may be expressed by means of data messages. Where a data message is used in the formation of a contract, such contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose." Additionally, paragraph (2/3) of its Model Law on Electronic Commerce includes the following: "A message is an offer if it is sent to one person, or to several persons identified or identifiable so long as they are identified with sufficient certainty and indicates the sender's intention to be bound in case of acceptance. A message available electronically to the public in general is not an offer unless it is so indicated."

## Study Problem

The use of the digital environment has had a profound impact on the entire contracting process, affecting various provisions and creating several challenges due to the uniqueness of this type of contracts. Contracts are formed remotely through electronic means without the physical presence of the contracting parties in an actual contract meeting. This has implications for the validity of offers and acceptances, impacting the formation of contracts. Therefore, the problem of the study lies in elucidating how expressions of intent in electronic contracts can be accurately confirmed, given the distinctive nature of these contracts and the absence of the parties in a physical contract setting.

## Study Importance.

The importance of this study lies in its examination of contracts that have become a necessity in the present time. The electronic contract is considered one of the important topics imposed by both the present and the future. The significance of this study can be highlighted from two perspectives:

- Practical Significance: The practical importance of the research topic is evident in its connection to contracts that are increasingly becoming a part of daily transactions. This necessitates the

development of methods to protect these contracts. Dealing with international contracts through electronic communication networks has become a matter that countries and individuals must consider, given the material and economic value it brings and the time and effort it saves compared to traditional travel between countries.

- Scientific Significance: The scientific and legal importance of the study lies in attempting to clarify and dispel ambiguity surrounding the definition of some concepts related to how offer and acceptance align in contracts formed in the electronic environment. It also aims to provide legal security for the parties involved in these transactions.

### **Study Objectives**

The main objective of this study is to elucidate the legal provisions regulating the elements of mutual assent (offer and acceptance) in electronic contracts and their impact on the formation of electronic contracts. This will be achieved through the following sub-objectives:

- Clarifying the significant challenges posed by the uniqueness of electronic contracts concerning mutual assent (offer and acceptance).
- Defining the nature of offer and acceptance in electronic contracts.
- Identifying the methods through which electronic contracts are formed.
- Explaining the methods used to verify the identity and eligibility of the parties in electronic contracts.
- Revealing defects that may affect the intent in electronic contracts.

### **Study Questions.**

- What is meant by electronic contracts?
- What is meant by offer and acceptance in electronic contracts?
- What are the methods of expressing intent through electronic means?
- Is an advertisement through electronic means considered an offer or an invitation to contract?
- What are the methods of proving electronic offer and acceptance?
- How is the identity and eligibility of the parties verified in electronic contracts?
- What is the impact of offer and acceptance on the formation of electronic contracts?

## **Chapter One: The Concept of Electronic Contracts**

The electronic contract does not differ from the traditional contract in that it involves the commitment of one party's offer to the acceptance of the other, in a manner that legally binds the parties involved. However, the difference between them lies in the fact that the expression of intent in electronic contracts occurs through electronic means (Bayati, 2016). Therefore, the study of the concept of electronic contracts necessitates dividing this chapter into the following two sections:

### **1- The Nature of Electronic Contracts**

Exploring the nature of electronic contracts requires elucidating the concept of the contract by defining it linguistically, within Islamic law, under legal frameworks. Since electronic contracts are agreements concluded through the online space using modern communication methods, their inherent nature sets them apart from traditional administrative contracts. This distinction lies in the manner of formation and proof, which occurs through the use of electronic communication devices emerging from the Internet. This modern method introduces advanced features and objectives in contracting between administration and others.

Given these considerations, the research context necessitates focusing on electronic contracts by providing a general definition. It also involves clarifying the legal nature of electronic administrative contracts, highlighting their importance, characteristics, essential components. This will be sequentially addressed through the subdivision of this subsection into the following two parts:

#### **1/1- General Definition of The Contract**

Determining the concept of an electronic contract requires initially defining the contract. Through this subsection, the contract will be defined linguistically, followed by its meaning in technical and legal terminology. This will be accomplished as follows:

### **1/1/1- The Contract in The Language**

The contract is defined as “from the triple verb to knot, to knot the rope, to turn, meaning to make a knot in it, to knot the two ends of the rope, that is, to connect one of them to the other with a knot that holds it tightly and connects it tightly” (Mustafa et al., 1961), what is meant by it is: “The covenant and the plural are contracts, it is said: I made a covenant with so-and-so.” In such-and-such, that is, I made it binding” (Ibn Manzur, 1997). It also becomes clear that “the contract refers to tightening, rulings, documenting, confirming, binding, strengthening” (Al-Fayoumi, 1931).

### **1/1/2- Contract in Islamic Jurisprudence.**

The majority of jurists, specifically those in Islamic Sharia, use the term (contract) to encompass every transaction that may have a legal consequence, whether the action is based on the Intent of two parties, such as in a sale, or if it relies on the Intent of one party, as in a bequest. However, this perspective is not universally accepted, particularly among Hanafi jurists, who define the contract in a more specific manner, referring to it as an interaction between two parties that gives rise to obligations between them. Therefore, they define the contract as: "A connection between two expressions or their equivalents that results in a legal consequence" (Al-Fadl, 1996).

Contemporary Sharia jurists have adopted a broader view. They use the term " contract " to refer to any legal transaction based on the Intent of two parties only. They define the contract as: "The commitment arising from the affirmative act of one of the contracting parties and the acceptance of the other in a manner that establishes its legal effect on the subject matter, with each party being bound by what is due to the other" (Qadri Pasha, 1988).

### **1/1/3- Definition of Contract in Law.**

Some legal scholars distinguish between a contract and an agreement, considering that an agreement is a broader term. They define an agreement as: "The convergence of two wills to create an obligation, transfer it, modify it, or terminate it," while they define a contract as: "The convergence of two wills to create or transfer an obligation" (Al-Ajlouni, 2002).

Proponents of this distinction argue that its significance lies in legal capacity; the legal capacity required in a contract to establish an obligation is not the same as the legal capacity required in an agreement that terminates the obligation (Bdouwi, 1998). However, many jurists view this distinction as impractical, stating that "it is useless from a practical perspective." Therefore, they assert that "there is no difference between a contract and an agreement" (Sultan, 2002).

On another legal aspect, the Iraqi legislator defined the contract in Article 73 of the Civil Code No. 40 of 1951 as: "The commitment arising from the affirmative act of one of the contracting parties and the acceptance of the other in a manner that establishes its legal effect on the subject matter."

As for the Law of the Code of Civil Procedures, it defined the contract as: "The commitment and undertaking of the contractors, it is an obligation established by the affirmative act and acceptance."

In conclusion, for a contract to fall under the provisions of the general theory of obligations, three conditions must be met in this contract:

- Agreement of two wills, distinguishing the contract from legal actions based on a single will. The agreement does not necessarily have to cover all the detailed aspects of the contract, but it suffices to agree on the essential issues.
- The two wills must aim to create a legal effect, whether it is the establishment of an obligation, as in a sales contract where the seller commits to transferring ownership, the buyer commits to paying the price, or the transfer of an obligation, as in an assignment.

- The alignment of the two wills must be within the framework of private law. International treaties, despite having legal effects, are not considered contracts and are not subject to the general rules of obligations. Instead, they are governed by the principles of public law (Al-Saadi, 2007).

## **1/2- Definition of Electronic Contract**

The electronic administrative contract is considered one of the most important actions of administration that the electronic government has attempted to regulate, as it is viewed as a contract subject to regulation by the general rules and provisions governed by the general theory of contracts. Its most distinguishing feature lies in its conclusion through modern communication methods, whether the contract is made via email, the internet, or international telecommunication networks. This evolution is not limited to the process of contracting alone; it extends to decision-making and the functions of administrative authorities in all public facilities, a concept commonly referred to as "e-government" (Al-Hallou, 2009).

Before elucidating the concept of the electronic administrative contract, we will clarify the concept of the electronic contract as follows:

### **1/2/1- Definition of Electronic Contract in Jurisprudence: -**

Legal jurisprudence has provided several definitions for the electronic contract, depending on the perspective from which it is viewed. Some legal scholars consider the electronic contract as a form of distance contract – contracts concluded remotely. Others view it as a contract often characterized by an international nature. Another aspect takes into account the means through which the contract is concluded, such as modern communication tools, including the internet. On the other hand, another perspective defines the electronic contract as: "An agreement where the offer and acceptance meet on an international open communication network, using audible and visible means through the interaction between the offeror and the offeree" (Mujahid, 2010).

It is notable that this definition emphasizes that the contract is made between parties who are physically distant, without a common gathering, involves a temporal contemporaneity between the contracting parties. This presents an advantage for the electronic contract over other traditional contracts concluded remotely, where there is a time gap between the offer and acceptance. However, the mentioned definition is criticized for not clarifying the consequences resulting from the meeting of offer and acceptance (Ibrahim, 2005).

Another aspect of jurisprudence has defined the electronic contract as: "The contract in which offers of goods and services, expressed through various technological means, especially the international information network (the Internet), converge between parties located in the same or different countries, with acceptance that can be expressed through the same means to complete the contract" (Al-Khatib, 2012).

Furthermore, the electronic contract has been defined in terms of the electronic payment method as: "The contract involving the exchange of messages between the seller and the buyer, based on predetermined and electronically processed formulas, creating contractual obligations" (Al-Matalqa, 2007). It is also defined as: "The contract that is concluded entirely or partially by electronic means, electronic means include any electrical, magnetic, optical, electronic-magnetic, or similar means suitable for exchanging information between the contracting parties" (Nassif, 2009).

Some legal scholars make a distinction between a contract and an agreement (Al-Sanhuri, 1976). They consider that an agreement is a genus, while a contract is a species. They define an agreement as: "The meeting of two wills to create, transfer, modify, or terminate an obligation," while they define a contract as: "The meeting of two wills to create or transfer an obligation" (Al-Ajlouni, 2002).

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### **1/2/2- Definition of The Electronic Contract in Legislation: -**

Legislations have undertaken to define the electronic contract; however, Iraqi legislation has not provided a comprehensive and detailed definition. To define the electronic contract, it is necessary to refer to comparative definitions or jurisprudential definitions. One such definition is the European approach issued on May 20, 1997, concerning consumer protection in distance contracts. Article 2 of this approach defines a distance contract as: "Any contract related to goods and services concluded between a supplier and a consumer through the regulatory framework for remote sales or the provision of services regulated by the supplier, using one or more electronic communication means, until the completion of the contract."

The electronic contract does not deviate from the general concept of contracts; it is essentially an ordinary contract that acquires specificity based on the means through which it is concluded or executed. In the general framework, it remains subject to the general provisions of obligations. However, it possesses uniqueness compared to other traditional contracts, focusing on the electronic element in this contract. It involves the promotion and exchange of goods and services and the completion of transactions using modern remote communication methods (Al-Bayati, 2016) (Mansour, 2006).

The Jordanian Electronic Transactions Law of 2000, in Article 2, defined the electronic contract as: "An agreement concluded through electronic means, either wholly or partially." The same article added a specific definition for the electronic means through which the contract is concluded, stating that they are: "Any technology using electrical, magnetic, optical, or any similar means for the exchange and storage of information."

The Jordanian legislator did not limit the definition of the electronic contract only but also defined the means through which it is concluded. According to the law, it is sufficient for one stage of the electronic contract formation process to take place electronically for the entire contract to be considered electronic. The definition of electronic means is left open to future technological developments.

It is notable in this definition provided by the Jordanian legislator that it deviates from the traditional definition of a contract, which emphasizes the connection of offer and acceptance and their agreement in a way that proves their impact on the subject of the contract. The use of the term "agreement" in the definition inevitably leads to entering into the legal dispute about the difference between a contract and an agreement, the controversy surrounding them. Additionally, the Jordanian legislator, in this definition, overlooks the negotiation stage in electronic contracting, despite its being considered a fundamental stage in the electronic contracting process (Rasheed, 2009).

Through the previous definitions, it becomes clear that electronic transactions, meaning the exchange of goods for money or services for money, must necessarily occur through an electronic intermediary or electronic document. Consequently, written documents, such as contracts, delivery acknowledgments, invoices, the like, fall outside its scope. All these matters are conducted electronically, where the contracting parties negotiate, issue the necessary acceptance and approval for contract formation, agree on the detailed conditions for its execution, all through an electronic means, regardless of its type.

The researcher agrees with the definition of the electronic contract, which refers to it as the connection of acceptance with approval between two wills, partially or entirely, through an electronic

means, with their consensus aimed at producing a legally binding effect (Al-Khatib, 2012). This definition is concise and comprehensive.

## **2- The Legal Nature of Electronic Contracts.**

Electronic contracts possess a distinct nature that warrants an exploration of their legal character, especially as several questions arise regarding the nature of these contracts. Are they contracts built on bargaining between the parties? Or do they exhibit an imbalance in the legal positions of the parties? Therefore, they may be considered adhesion contracts. Can they be described as either commercial contracts or civil contracts, given that they serve as the clearest example of electronic commerce contracts? These are among the contentious issues that surround the nature of this type of contract. Through this section, we will delve into the nature of electronic contracts and distinguish them from other legal forms, focusing on the following two subsections:

### **2/1- The Applicability of the Adhesion Contract Description to Electronic Contracts**

An adhesion contract is defined as a form of contract formation that relies on the use of a standardized contract template prepared by one party to the contractual relationship unilaterally. It is presented to the other party, who has only the option to accept it as is or reject it, without the ability to alter the terms and conditions it contains. There is no real negotiation or bargaining over its terms with the party preparing the contract (Al-Faar, 2004).

The Iraqi legislator in the Civil Law of 1993 referred to the adhesion contract, stating in Article 167: "Acceptance in the adhesion contract is limited to the mere delivery of a contract with a predetermined system set by the offeror, it cannot be subject to discussion." Several characteristics define a contract as an adhesion contract, including:

- The contract relates to goods or facilities considered essential primary necessities for the consumer or beneficiary.
- The offeror monopolizes these goods or facilities, either legally or practically, or at least does not expose them to competition except within limited scope.
- The offer is directed to the entire public under identical conditions, for an unspecified duration, these conditions are printed, serving the interest of the offeror.

Legal scholars have divergent opinions regarding whether electronic contracts should be considered adhesion contracts, falling into three main perspectives.

**First Perspective:** Advocates of this perspective, such as (Mutaqqi, 2007) consider electronic contracts as adhesion contracts. They argue that if the general terms of a sales contract, being one of the most prevalent contracts, are mentioned on the Internet, where the buyer browsing the website has no option for discussion or negotiation and can only accept or reject without negotiation, the contract, in this case, is considered an adhesion contract.

Supporters of this perspective contend that contracts concluded online are often standardized contracts appearing on the seller's website in the form of an electronic form, including contract details and directing similar conditions to the general public. The acceptance is binding for an extended period and does not allow discussion or modification, constituting adhesion terms. Therefore, an electronic contract is deemed an adhesion contract (Matar, 2009).

This perspective relies on the belief that the absence of sufficient negotiation is enough to consider the electronic contract an adhesion contract, neglecting the presence of conditions such as legal or practical monopolization of the goods, which might not be conceivable in electronic contracts due to the existence of numerous online platforms offering the same product. Consequently, the buyer can test and select the product according to suitable conditions (Mutaqqi, 2007).

**Second Perspective:** Advocates of this perspective consider the electronic contract as a bargaining contract. Bargaining contracts are those contracts where the parties can negotiate, discuss, sign the terms freely and willingly. This ability to negotiate is achievable in electronic contracts, where consumers have

absolute freedom to contract with any product or supplier. If the terms displayed on the Internet do not appeal to the consumer, they can freely move from one site to another, choose what they like, leave what they don't. Thus, voluntariness prevails in electronic contracts (Ibrahim, 2008).

**Third Perspective:** According to the legal perspective in this direction, electronic contracts may be adhesion contracts or bargaining contracts depending on the means used to conclude the electronic contract. If the contract is formed through email or chat programs, where parties exchange opinions and views through electronic messages and negotiate freely on the contract terms, it is considered consensual. However, when contracting through a website that usually employs standardized contracts with predetermined terms by the offeror, leaving no room for negotiation, the contract becomes an adhesion contract. In such cases, the contracting parties are not on an equal footing due to the imbalance in contractual capacity, leading to the classification of the contract as an adhesion contract (Rashid, 2009).

Regarding these perspectives, some legal scholars believe that it is more appropriate to leave the determination of the contract nature to the judge who decides, in each case presented to him, whether the electronic contract falls under adhesion contracts or bargaining contracts. If the adhesion contract conditions prescribed by law are met in an electronic contract, it will be considered as such, legal provisions will be applied to protect the weaker party. Otherwise, it will be considered a bargaining contract (Al-Far, 2004).

## **2/2-The Electronic Contract between International and National Characteristics.**

Electronic contracts, like other contracts, involve parties who may belong to the same nationality or different nationalities. Furthermore, this contractual relationship is not confined to a specific place or country. It is conceivable to establish this relationship between individuals residing in different countries, where the seller may be in Dubai, the buyer in Jordan, the product in China (Zurayqat, 2007).

This diversity in nationalities, contractual parties, the countries where the parties may reside, coupled with the global nature of the Internet, raises questions about the nature of the electronic contract: Does the international character prevail over the electronic contract, or can the national character be attributed to it? There are divergent opinions on this matter, they can be summarized into two perspectives:

**2/2/1- First Perspective:** This perspective distinguishes between two types of electronic contracts, determining whether they are national or international (Al-Monzlawi, 2007):

1- Electronic contracts concluded between individuals residing in different countries are precisely considered international contracts due to their connection with more than one country through residency, nationality, or business centers of one of the contracting parties. Their association with electronic commerce interests establishes the necessary criteria for international contracts, namely:

- Legal Criterion: The contract acquires an international character according to this criterion if the contracting parties are present and affiliated with different countries.
- Economic Criterion: The contract becomes international based on this criterion if it is related to the interests of international trade involving the flow of goods, products, services across borders.

2- Electronic contracts concluded between individuals residing in the same country, where all legal relationship elements are concentrated, are purely considered national contracts.

**2/2/2- Second Perspective:** Advocates of this view believe that the predominant characteristic is the international nature of electronic contracts. This is because the Internet embodies the concept of globalization, leading to difficulties in consolidating the legal relationships formed through it (Salama, 2010).

Furthermore, the international nature of the electronic contract renders it a form of international commitment. Most contractual obligations established through the Internet involve individuals from different countries, the contract's place of execution might be a foreign country not belonging to the

contracting parties. This raises a significant challenge regarding legislative jurisdiction and determining the applicable law for electronic contracts (Al-Sharqawi, 1999).

The electronic contract has a distinct international character, an international contract may include a specific format for a type of general terms or refer to such a format. It may take the form of a model contract, the international nature of the electronic contract is derived from the nature of the relationship it governs. The international electronic contract conducted over the Internet is typically characterized by its global scope. Some have defined the international electronic contract as: "A contract in which offers for goods and services meet acceptance from individuals in other countries through various technological means, including the international Internet network, for the purpose of completing the contract" (Abu Maghli, 2014).

In accordance with the international nature of the electronic contract, it is the convergence of a positive statement from the offeror regarding a proposal made electronically, whether auditory, visual, or both, over the communication and information network, with an accepting statement matching it from the opposing party, using the same methods, to achieve a specific transaction or deal that both parties desire to accomplish.

In light of the above, it becomes clear that the concept of a contract varies depending on its nature. Internal contracts are governed by national rules and are subject to mandatory rules, where individual wills alone cannot override or violate these rules. Moreover, conflicts of laws issues are not raised regarding this contract, as it is governed solely by the internal law of the state to which it belongs, often the law of the judge. In contrast, the electronic contract, with its predominantly international character, can exempt itself from the authority of mandatory rules in a particular state by subjecting itself to the law determined by the will of the parties in accordance with the sovereignty of the will, considering it a fundamental principle of private international law (Khalil, 2002).

Based on the above, the researcher believes that the international character of electronic contracts is predominant and embodies the idea of globalization, as evident in the opinions of scholars on this matter.

## **Chapter Two**

### **Electronic Affirmation and Acceptance as Expression of Will**

The default in contracting is that the contract is concluded during the physical presence of the contracting parties within the framework of what is known as a "contract meeting," with the aim of exchanging affirmation and acceptance. However, this is not entirely the case in some situations, especially after the widespread use of modern electronic means, such as the Internet, which has managed to connect people across different geographical locations in the world within seconds. Contracts can be concluded without physical presence between the parties in a single contract meeting. At the moment when affirmation meets acceptance, the contract is concluded. The convergence of wills is what creates the contract, determining the time of legal connection. However, challenges arise in electronic contracts, considering them as contracts concluded remotely. The physical distance between the parties and the means of conclusion have eliminated all concepts based on the spatial determination element. This has sparked a legal debate about the nature of this contract, impacting the essence of the electronic contract meeting (Abdul Rahman, 2005).

And one of the main challenges is related to the eligibility of the contracting parties; the eligibility of the parties in electronic contracting is a significant research point due to the complexities it involves. Among other important challenges facing electronic contracting is the integrity of the will of the contracting parties and the potential defects associated with it. This is in addition to the defects stipulated in the general rules that affect the integrity of consent and its application to electronic contracts. This section will delve into these challenges in some detail through the following demands:

**Demand One:** Eligibility in Electronic Contracting and Verification Methods.

**Demand Two:** Defects in Affirmation and Acceptance in Electronic Contracting.

### **1- Eligibility in Electronic Contracting and Verification Methods.**

For a contract to be valid, the legal capacity required for its conclusion must be present in both parties. This requirement is easily met in traditional contracts conducted between present parties. However, in contracts concluded through modern means of remote communication, addressing this matter seems challenging (Almutalaq, 2007). This demand will explore the general provisions of eligibility and the methods of verification in electronic contracts, through the following branches:

#### **1/1- General Provisions for Eligibility in Electronic Contracts.**

Eligibility, in general, represents an individual's capacity to commit and personally engage in actions legally. Eligibility can be obligatory or performance-based, involving rights and duties. Scholars differentiate between obligatory eligibility and performance eligibility. The former relates to a person's capacity to enjoy rights and bear duties defined by the law, connected to legal personality rather than personal will. Obligatory eligibility can be established even without the presence of will, proven for minors and individuals lacking mental capacity. On the other hand, performance eligibility is a person's capacity to undertake legal actions in a manner recognized by law. Performance eligibility is interconnected with obligatory eligibility, it is the ability to use the rights one possesses. Thus, a person may have the right but may not be able to use it personally, such as a minor who has property rights but cannot exercise them independently, demonstrating a lack of performance eligibility while maintaining obligatory eligibility. This separation of obligatory eligibility from performance eligibility is possible (Sahloub, 2008).

Eligibility can be complete, incomplete, or absent, varying with life roles, mental well-being, cognitive abilities. Considering the focus on the validity of electronic contracts, the crucial aspect in this context is performance eligibility. Generally, a person is presumed to possess eligibility, any deviation is determined by legal provisions. There is a legal presumption of eligibility, the burden of proving otherwise lies with the party making such a claim. This is reflected in both the Iraqi Civil Law and the Egyptian Civil Law. The difficulty arises when verifying the eligibility of the contracting party in electronic contracts conducted remotely, where personal verification of the identity and necessary eligibility for a valid contract is not feasible. The challenge of verifying the eligibility of the other contracting party in an electronic contract becomes apparent, exposing the seller to risks of dealing with those lacking eligibility or having deficiencies. This is particularly relevant as most users of modern communication technologies are teenagers and young individuals who might misuse their parent's credit cards for contracting with a well-intentioned merchant or engage in contracts for amusement or experimentation (Al-Oboudi, 2002).

The presumption is that a person possesses complete eligibility when seeking to enter into a contract, this presumption should be adopted when evaluating actions. The exception is the non-completion of eligibility affecting the existence or continuation of the contract. Therefore, the burden of proving such claims lies with those seeking to invalidate the contract or asserting its invalidity due to the lack of eligibility for contract formation (Abdul Rahman, 2005).

The electronic contract is concluded through modern communication means without the physical presence of the contracting parties. This necessitates each party to verify the eligibility of the other contracting party, which may lead to one of the parties entering into a contract with a person lacking eligibility.

This is evident through the electronic capabilities available to all members of society, allowing the use of modern communication means regardless of the user's age. These capabilities enable individuals lacking full eligibility to enter contractual relationships by using their parent's credit cards and contracting with a well-intentioned merchant. Minors can also engage in contracts for amusement and experimentation. Moreover, these means are not immune to hacking by pirates or credit card theft, leading to unauthorized transactions in the name of the cardholders without proper authorization.

In this scenario, two conflicting interests arise: the interest of the minor in annulling the actions, as general rules grant the right to annul or suspend actions based on circumstances, the interest of the

merchant or the other party in maintaining the contracts. In an attempt to achieve a balance between these two interests, the English judiciary has distinguished between two issues (Abu Al-Haija, 2017).

- **Simple Contracts:** These are contracts with low values, such as those involving food and similar items. Contracts of this nature, entered into by minors, are considered valid (Al-Sarhan and Khater, 2000).

- **High-Value Contracts:** These are contracts where the financial consideration is significant, such as real estate transactions. The validity of these contracts is often determined by considering the minor's best interests, indicating that they may be deemed void in many cases.

Some scholars in jurisprudence suggest addressing this issue by expanding the application of the theory of apparent behavior, prioritizing the interests of professionals. Thus, if a contract is made with a minor, it is permissible for a merchant, with good intentions, to argue that the minor, at the time of entering into the contract, exhibited the appearance of a mature individual. Additionally, the merchant can also rely on the principle of negligence liability, as stipulated in most legislations holding individuals accountable for the actions of others due to a relationship of dependency or supervision over the minor child (Zurayqat, 2002).

The Iraqi legislator has neglected to address this issue, necessitating a review of the general principles governing capacity in the Iraqi Civil Law. Upon referring to these rules, it can be concluded that the contracting party who entered into an electronic contract with a minor has the right to hold the minor's guardian or trustee accountable based on negligence, not contractual liability. The aggrieved party has the right to claim damages resulting from the annulment of the contract.

In this context, the researcher emphasizes the need to establish a genuine balance between the contractual parties, avoiding the dominance of one party's interests over the other. If the good intentions of the merchant are proven, it is essential to provide legal protection for the actions initiated, preventing manipulation or fraud from the minor. This also includes safeguarding the merchant from financial burdens resulting from the annulment of transactions or pursuing the minor and their guardians based on negligence liability, which requires effort and financial resources.

### **1/2- Means of Verifying Eligibility in Electronic Contracts.**

Verifying the eligibility of contracting parties in electronic contracts is a delicate technical matter. This issue has prompted specialized technology experts and legal scholars interested in electronic contracting to search for technological and legal means to address this problem. As of now, there are no definitive technological solutions in this field. However, there are precautionary and advisory measures that can be employed to verify the identity of the contracting parties, attempting to prevent those lacking eligibility from entering into contracts, or identifying their eligibility. These means can be classified into two categories:

#### **1/2/1- Category One: Direct Means.**

The European legal experts developed a conceptual framework for the guidance manual on the validity of computer records and electronic messages in 1997. This framework emphasized the necessity of accepting and trusting electronic means, replacing traditional non-automated methods relying on paper records for executing, proving, assessing transactions (Al-Dasuqi, 2013).

Achieving a significant acceptance level for electronic contracting and proof requires a comprehensive awareness program for users, businesses, judicial and legal entities. It also involves promoting technical knowledge and the requirements of the information age (Arab, 2000). Direct electronic means used to verify the identity of contracting parties in our era can be classified into two types:

- **Electronic Identity or Smart Cards:**

Smart cards are defined as "smart cards made of electronically processed plastics with high-density silicon chips, powerful processing units. They can store all personal data of the cardholder, such as name, age, residence, the bank they deal with, all transactions related to this card" (Ismail, 2013). These cards act as portable personal computers, containing a complete record of personal information, a secret number protected by various elements against forgery, counterfeiting, misuse in case of theft or attempted duplication due to the material used, magnetic strip, photographic images of the cardholder, the secret number, with an inability to open its outer cover (Al-Jamal, 2005).

Despite their theoretical effectiveness, smart cards have not achieved widespread use. They are extensively used in European countries, the United States, Japan, requiring international coordination between governments. The use of smart cards for identification has been limited to certain institutions, authorities, banks (Al-Khatib, 2012).

- **Certification Authorities (Electronic Authentication Entities):**

The authentication entity plays an intermediary or a connecting link between the sender and the intended recipient. Each party in an electronic transaction needs a trusted entity to confirm the identity of the contracting party, the validity of their electronic signature, the integrity of the transaction, its legitimacy, keeping it safe from fraud and deception (Nasr, 2010). This entity is referred to by various names, such as the authentication authority or the electronic authentication service provider (Al-Janabi, 2009).

Legislation related to electronic transactions and e-commerce has defined this entity. The UNCITRAL Model Law of 1985, in Article 2 (h), defined an authentication service provider as "a person that issues certificates and may provide other services related to electronic timestamps." Article 2 of the European Directive No. 93/1999 defined the electronic authentication entity as "any natural or legal person providing electronic certification to the public or offering services related to electronic signatures." The above definitions indicate that authentication entities may be natural or legal persons whose task is to provide electronic certificates to the public or offer services related to electronic signatures.

Authentication entities perform several tasks, the most important of which is to verify the identity of the site, which is the heart of the electronic signature process. Some consider this certificate as an electronic identification card for the site. These entities issue the private key used to encrypt electronic transactions, the public key used to decrypt them. These functions ensure the safety of electronic signatures. The regulations have organized the work of authentication entities, specifying how they should be regulated, the authority granted to them, the supervision over them. The Iraqi Electronic Signature and Transactions Law No. 78 of 2012 (Nafan, 2017) requires defining the concept of certificates issued by these entities and clarifying their responsibilities. The law asserts that the electronic signature is a valid signature attributed to its source and fulfills the required conditions and controls, considering it as evidence relied upon (Al-Janabi, 2009).

Through an electronic authentication certificate, the contracting party can accurately and truly identify the eligibility necessary for contract conclusion (Abu Al-Lail, 2013). The entity issuing authentication certificates is responsible for the accuracy of the data and information contained in the certificate it issues. It ensures the validity of the signatures it contains, allowing any interested party to rely on them, entering into an electronic transaction that has legal consequences, whether that responsibility is contractual or based on negligence.

The entity issuing authentication certificates bears the responsibility for the accuracy of the data and information contained in the issued certificate. It ensures the validity of the signatures included, allowing any interested party to rely on them and engage in an electronic transaction that has legal consequences. This responsibility can be contractual or based on negligence.

**1/2/2- Category Two: Indirect Means:**

Indirect means have significant value, not less than direct means. A simple review of electronic platforms indicates that indirect means are the most widely used at present. It is also observed that these means are more technical than legal. The diversity of these indirect means includes the following:

- **User Data Form:**

These means are among the most widely used at present. They are implemented by placing warnings on the internet, alerting users not to enter a website unless they are a person with legal capacity. The user is required to fill out a personal data form before entering the site, disclosing information such as legal eligibility, age, nationality, residence, occupation, the purpose of the message. After filling out the form, the user can enter the website and enter into contracts. Otherwise, access to the site is prohibited if false or misleading information is provided regarding eligibility, date of birth, age (Nassif, 2009). It is criticized that this method does not protect the other party from deception by the contracting party if false information is provided, violating the truth, regarding eligibility, date of birth, age (Bahjat, 2012).

- **Firewall Technology or Firewall:**

This is an advanced technology with the ability to design a highly secure network and effective systems to detect unauthorized intrusion by sending a warning message about hackers infiltrating the internet network. This technology has a superior ability to identify the identities of users or operators through passwords or smart cards, or a combination of both (Nafan, 2017).

- **Electronic Platforms:**

In light of this, the design of the electronic platform obligates the party intending to contract to disclose their identity and reveal their age. In case of non-disclosure, they are not allowed to proceed with the desired transaction.

- **Electronic Contract Templates:**

Many electronic platforms have started resorting to preparing standardized contracts that are placed on the electronic platform and are specific to it. Such a contract includes the necessary matters for the parties involved, these contracts must be drafted appropriately and in a language that is clear and understandable. The website owner can specify conditions that determine the identity and eligibility of the contracting party, such as not accepting contracts from individuals below the age of majority. However, the provider or product seller must draw the attention of the customer or user to the necessity of reading the templates before expressing a desire to contract. If they fail to do so, they have no one to blame but themselves, in any case, the matter is entirely left to the judiciary, which will have the final say (Al-Sharifat, 2009).

And this approach is not without its drawbacks, especially if the user provides information that contradicts the truth regarding their eligibility. Hence, some legal experts argue that it is more accurate not to allow electronic contracting except through a dedicated website accessible only to registered users. Access should be restricted to subscribers only, using a password in their possession alone. Previous subscription to the site is allowed only for those who have reached the age of majority. The service provider records all the user's data that appears automatically on their contract data page, such as the electronic contract template. This is not allowed for non-subscribers who are adults but have not reached the age of majority, preventing them from using it and thus preventing electronic mischief by non-contracting parties who are minors, or those with impairments or ineligibility (Buhjat, 2012).

In summary, whether direct or indirect, means are not immune to mischief as long as the human mind is continuously and actively thinking of illegitimate ways to achieve its goals. The researcher believes, through examining the laws regulating trade and electronic transactions, that proper application of these laws, especially regarding sending information messages, will necessarily confirm the eligibility of the contractor and express their electronic intent through the information message, which becomes binding on the creator, whether it is issued by them or through an electronic intermediary on their behalf (Hijazi, 2007). Therefore, the electronic signature of the creator is an expression of true intent, indicating and confirming the identity of the contracting party.

**Defects in Offer and Acceptance in Electronic Contracts.**

According to general rules, the completion of a contract requires the presence of matching offer and acceptance, meaning a specific offer and corresponding acceptance through a valid consensus. Consensus

is achieved when the will of both contracting parties is issued by individuals with legal capacity and is free from defects. Otherwise, the contract becomes voidable, as the binding force of the contract is affected by defects in will as be stipulated by Arab civil legislation (Abu Al-Hijaa, 2017).

Another aspect of legal scholars' interpretation is that electronic contracts are less affected by defects in will. This is because an electronic contract allows a party to return to the state that existed before the contract without the need to claim nullity. It is much easier for a contracting party to notify the other party of their intent to retract in an electronic contract, to rid themselves of the contract and its consequences, without the necessity of resorting to legal proceedings, by requesting the annulment of the contract due to a defect in their will (Mujahid, 2007).

Based on the above, we will present traditional perspectives on defects in will, their application to electronic contracts, the following categorization.

- **The First Aspect: Mistake and Its Applicability in Electronic Contracts**

Mistake is defined as a state of self-delusion that involves imagining something contrary to reality. Contrary to reality can either be an untrue event that a person mistakenly believes to be true, or a true event that a person mistakenly believes to be untrue (Al-Sanhuri, 1976).

The Iraqi legislator, through Article 118/2 of the Iraqi Civil Code, defines mistake as follows: "Mistake in a person's identity or a characteristic of theirs shall not be binding; the contract is not enforceable if the mistake is in the identity or characteristic of one of the contracting parties, such identity or characteristic is the sole or main reason for the contract."

This definition of mistake encompasses all types of mistakes and is not limited to considering mistake solely as a defect in will. Not every delusion in the mind of the contracting party leads to the annulment of the contract. The mistake that vitiates consent is the mistake where both parties agree to the contract, but the contract is not valid due to a mistake. If the party committing the mistake knew the truth, they wouldn't have entered into the contract. In this case, the mistake does not negate consent but vitiates it.

The occurrence of a mistake in electronic contracting can be envisaged. For example, one of the contracting parties may mistakenly believe that the other party is known to them. For instance, someone offering handmade products may want to contract with another party due to their skills and expertise. However, it later becomes clear that the counterparty is an unknown person due to similar names or a similar website presenting the same products. In such a case, the mistaken party has the right to request the annulment of the contract (Al-Fadl, 1999).

- **The Second Aspect: Deception with Gross Fraud (Fraudulent Misrepresentation) and its Applicability to Electronic Contracts** During the pre-contract negotiations phase, it is customary for both parties to exchange discussions and statements with the intention of urging and encouraging each other to conclude the contract. However, not everything stated by the parties is necessarily true and honest. One party may resort to tricks and deceit to create an illusion that persuades the other party to enter into the contract (Ubeidat, 2009).

The Iraqi legislator did not define fraudulent misrepresentation as an independent defect of will. Therefore, specific provisions regarding fraudulent misrepresentation are not present in the Iraqi Civil Code. Moreover, deceit alone is not a sufficient reason to nullify a contract under Iraqi law. Even if fraud is gross, it is not considered a defect of will but rather a defect of the contract. However, this does not prevent the contract from being enforceable as long as the deceit is not accompanied by coercion. If the deceit is gross, the deceived party is confined or if the funds obtained from the gross fraud are from state or endowment funds, the contract is considered void, it is not permissible to challenge it on the grounds of fraud, even if it is accompanied by deceit in a contract through public auction. This is because public auction negates the motive for contracting being deceitful. Moreover, it serves as evidence that the bid-settled price is the true value, eliminating the existence of fraud. This is affirmed by Article (124/Paragraphs 1, 2, 3) of the Iraqi Civil Code.

**- The Third Aspect: Coercion Defect and its Applicability to Electronic Contracts**

The Iraqi Civil Code adopts a definition of coercion derived from Islamic jurisprudence, as stated in Article (112), which defines coercion as "compelling a person, without right, to perform an act against his will".

Coercion can manifest through physical (sensory) or moral (psychological) means. The former involves physical pressure, such as violence, which is rare in civilized societies. The latter, more common form, occurs through moral means involving threats that may not entail physical force but create a serious threat to the coerced person, causing them to fear harm to themselves or their property. Article (113) of the Iraqi Civil Code emphasizes that coercion requires the coercer to be capable of carrying out the threat and that the coerced person genuinely fears the consequences if they do not comply.

As a defect of will, coercion does not negate consent. The coerced individual still has a will because they choose between their own will and the coercion they are threatened with, opting for the lesser of two evils. However, the will expressed in this situation is corrupt because it is not freely chosen. In such cases, the contract is susceptible to annulment under certain legal frameworks and is not enforceable under others (Al-Halalsheh, 2011).

- Coercion may occur in standardized electronic contracts prepared in advance on websites. If such a contract contains expressions indicating acceptance or rejection, the coerced party, upon seizing the sender's hand, could be forced to press the acceptance button using the cursor or approval button. In this case, the buyer's will is considered defective due to coercion, as they expressed acceptance under duress.
- Coercion may arise from economic dependence. A contracting party might be compelled to enter into a contract under the pressure of economic need. For example, coercion could be envisioned in the context of supplying or monopolizing a product with unfair conditions, where the coerced party, under the fear generated by threats to their interests, is forced to accept the contract (Nafan, 2017).

In conclusion, the variation in legislation regarding the capacity required for the validity of a contract in general and electronic contracts, in particular, may lead to a situation where one of the contracting parties is a minor in the law of their country but fully competent in the law of the other contracting party. This discrepancy may result in disputes over the validity or voidability of the contract. The resolution of this issue lies in the application of conflict of law's provisions regarding the capacity mentioned earlier. Furthermore, a party contracting with a partially competent individual in good faith can seek compensation for damages resulting from that contract if the conditions for such liability are met.

**- The Second Section: Methods of Proving Electronic Offer and Acceptance.**

Proof holds great importance, as rights lose their value unless there is evidence supporting the underlying events. Evidence is the cornerstone and backbone of legal rights. The legal system of proof is fundamentally based on writing on a paper document signed by hand by the author. Both writing and handwritten signatures constitute the written evidence for proof. However, the challenge arises in the compatibility of electronic technological means with legal requirements for proving legal transactions. The problem lies in the extent to which electronic methods can meet the legal requirements for proof on one hand and how new media can be accepted as compelling evidence on the other (Al-Oboudi, 1977).

Some argue within the scope of electronic contracts that proof through electronic documents and electronic signatures is of particular importance due to the guarantees they provide, which other methods lack. Electronic evidence is seen as an indicator of the truth, given that it is generated at the time of the legal transaction or the material occurrence. Despite the prevailing trend in electronic transactions, allowing proof through various means while respecting legal conditions, proving electronic contracts relies on electronic documents. Proving contracts before the judiciary is a legal challenge that emerged with the development of Internet use and electronic media in contracting. Thus, this section explores electronic documents for proving electronic contracts and electronic signatures.

Since proving through electronic writing, electronic documents, electronic signatures hold special significance in our research, this section will be divided into the following two sub-sections:

Sub-section 1: Electronic Signatures as a Means of Proving Electronic Contracts.

Sub-section 2: Electronic Writing for Proving Electronic Contracts (Record or Document) .

### **1- The First Sub-section: Electronic Signature as a Means of Proving Electronic Contracts.**

The electronic signature refers to a set of technical procedures that allow identifying the person who issues those procedures, as well as accepting the content of the transaction associated with the signature. It encompasses a series of procedures and methods used through symbols, numbers, or codes to produce an electronic message containing a distinctive mark for the sender of the electronically transmitted message. The electronic signature is encrypted using a pair of keys, one public and the other private, known only to the message sender. Others recognize it as unique elements specific to the site, taking the form of letters, numbers, symbols, signs, or other characters. These are placed on an electronic document to identify and distinguish the person or entity associated with the site, also express their consent to the content of the document (Al-Obaidi, 2010).

The following will elaborate on the nature of the electronic signature and the necessary conditions for its validity, through the following branches:

#### **1/1- The First Sub-section: The Concept of Electronic Signature and Its Conditions.**

Some attempted to define the electronic signature by combining the technical definition, which is based on modern technological methods underlying electronic signatures, the functional definition, which focuses on the functions performed by the signature (Zahra, 1999). Many have commonly used the term "electronic signature" to describe digital signatures, but in reality, the two terms do not mean the same thing. Electronic signatures refer to all possible methods of a person producing their signature electronically to authenticate a signed document or commit to its content. On the other hand, a digital signature is just one method among various electronic signature methods. Therefore, an electronic signature is a more comprehensive term that includes: "The production of a person's signature by capturing an image of the handwritten signature produced by the signatory and stored electronically on the document intended to be signed. It also includes producing a person's signature by typing the sender's name at the end of an email or by using a personal PIN or code, such as in credit card and ATM transactions" (Obaida and Nu'man, 2010). The electronic signature is defined as: "Electronic data included in a data message indicating the signer's approval of the information contained in the data message" (Zahra, 1999).

While some jurists have defined the electronic signature as: "A combination of letters, numbers, symbols, or signs with a distinct nature that allows the identification of the person who signs and distinguishes them from others. It is a necessary means for conducting and executing electronic transactions while maintaining the confidentiality of information and messages" (Hijazi, 2007).

Considering the electronic signature as an indispensable means in electronic transactions, Iraqi Electronic Signature and Transactions Law No. 78 of 2012 defined it in Article 4 as: "A personal mark in the form of letters, numbers, symbols, signs, sounds, or others, with a distinct nature indicating its attribution to the signatory, it is authenticated by the certifier." Therefore, the crucial aspect is that the signature must be securely issued by its holder, carrying a code or number that is kept confidential, preventing its use by others. The signature should conclusively indicate its owner, this alone allows the transition of the document from the preparation stage to the execution stage. Thus, every signature designating its owner unmistakably signifies the commitment of the signatory to what has been signed, making it an electronic signature (Al-Mouni and Al-Momani, 2013).

Others defined it as: "The code, source, or secret number entered into the computer by input devices to accomplish certain transactions, following specific agreed-upon procedures between the parties involved within the legal boundaries agreed upon between them" (Obaida and Nu'man, 2010). The European Directive in Article 28/A defined a dual system for electronic signatures:

- Ordinary Electronic Signature: It is electronic information that takes an electronic form logically associated with other electronic data, forming the basis for the authentication process (Al-Mouni and Al-Momani, 2013).

Advanced Electronic Signature: This signature is linked to the signed text. For an electronic signature to be considered advanced, it must meet certain conditions (Al-Mataliq, 2016).

- To be uniquely associated with the signatory.
- To enable the identification of the signatory's identity.
- To be generated through means placed under the control of the signatory.

The 1985 UNCITRAL Standard Rules on Electronic Signatures defined it in article (2/a) as "data in electronic form included in, added to or logically associated with a data message, which may be used to identify the location for the data message and to indicate the location's approval of the information contained in the data message". From the overall definitions mentioned above, it is evident that an electronic signature is a modern means to identify the signatory and accept the legal transaction they endorse. Considering that contracts and transactions are increasingly conducted electronically, it is imperative for the signature to be electronic as well.

### **1/2- Branch Two: Conditions of Electronic Signature for the Proof of the Electronic Contract**

As mentioned earlier, the Iraqi legislator has acknowledged the validity of electronic signatures in evidence. Consequently, these legislations have established controls and conditions for the electronic signature to be deemed valid. An electronic signature is considered legally protected if the following conditions are collectively met:

- It is uniquely associated with the signatory to distinguish it from others.
- It identifies the signatory.
- The private key is under the control of the signatory at the time of signing.
- It is linked to the electronic record in a way that prevents alterations to the electronic record after signing without changing the signature.

Article 5 of the Iraqi Electronic Signature and Electronic Transactions Law of 2012 refers to these conditions, stating that "the electronic signature shall be valid as evidence if it is accredited by the authentication entity and satisfies the following conditions:

- a. The electronic signature is uniquely linked to the signatory.
- b. The electronic intermediary is under the control of the signatory alone.
- c. Any alteration or substitution of the electronic signature is detectable.
- d. It is created according to the procedures specified by the Ministry through instructions issued by the Minister".

**Therefore, the Conditions for an Electronic Signature Are:**

#### **1/2/1- The Requirement for the Signature to Be Distinctive to the Signatory:**

To enable the legal effects of an electronic signature, it must express the identity of its owner. This does not mean that an electronic signature replaces a personal identification card, nor does it replace an alias. Instead, the understanding is that the identity of the signatory can be ascertained through the electronic signature being under the control of the signatory alone.

#### **1/2/2-The Signature Must Be Readable and Its Presence Characterized by Continuity:**

The electronic signature should be drafted in a way that allows reference to it throughout the necessary period for its use in evidence. Since the signature, as a form of writing, lacks independent provisions regarding this matter (Al-Jumayi, 2000).

It is evident from the above that maintaining the validity of the electronic signature is a necessary requirement for recognizing its validity in evidence, particularly in light of the risks to which electronic messages are exposed, such as alteration, deletion, or addition from the moment of sending to the moment of receipt.

### **1/2/3-: Signature's Contact with The Written Editor- :**

So that the signature can perform its function of demonstrating the website's acknowledgement of the content of the editor signature must be physically and directly related to the written editor, although custom has settled on signature status at the end of the editor. However, this is not a condition of the signature's existence or validity, it is important that the signature indicate the author's acknowledgement of the content or acceptance of the editor.

We agree with the argument of some (Al Gemaie, 2000) that the use of papers and unlike electronic signature in writing editions prepared for proof makes it possible to physically and chemically communicate the signature with the editor with which one of them can be separated only by damaging the document or modifying the chemical composition of each ink or paper material used so that it can only be detected by resorting to technical expertise. In the light of these factual data, the traditional signature satisfies the requirement of physical contact with the editor as soon as it is placed on the editor previously described.

The researcher therefore considers that the electronic signature has the authority to prove in both Jordan and Iraq, provided that the signature is prepared and used in the manner prescribed by law. This applies to each party or individual, whether of a normal nature, or legal, in the sense that government agencies can use an electronic signature to conduct their electronic transactions, as well as invoke it as a binding authority of proof.

### **- Article Two: Electronic Writing for the Proof of the Electronic Contract (Record or Document).**

Electronic writing is considered the second condition among the proof conditions in electronic documents, as it constitutes evidence in the electronic contract, serving as proof in electronic transactions. This applies to both official and customary documents, with differences in their evidentiary strength. The probative value of an official document is greater than that of a customary one. A customary document is one issued by individuals without the involvement of a public official. Article 9 of the UNCITRAL Model Law adopted in 1985 contains two provisions (1, 2) addressing the acceptance and probative value of electronic documents. The first paragraph discusses the acceptance of electronic documents as evidence, emphasizing that any provision of the law regarding the acceptance of electronic documents as evidence cannot be altered. The second paragraph addresses the probative value of electronic documents in evidence. Therefore, Article 9 of the UNCITRAL Model Law acknowledges the acceptance and probative value of electronic documents, while customary document images have no probative value in evidence. As for the paper printout of an electronic document, produced by printing the electronic document on paper, it lacks any probative value as it does not bear an electronic or handwritten signature. However, if the electronic document is copied electronically and signed electronically, this image is considered an original as long as it bears an electronic signature and enjoys the same probative value as the original. In this case, the customary electronic document is considered probative in evidence whether it is signed electronically or handwritten (Abdul-Ridha, 2015).

As for the official document, it refers to a document attested to by a public official, documenting legal situations within the scope of their duties and authorities. The French legislator has granted probative value to the official electronic document. A second paragraph was added to Article 1317 concerning the official electronic document, stating that it is created on an electronic support if it is created and stored according to the conditions set by the decree issued by the State Council. A fourth paragraph was added to Article 1316 of the French Civil Code, stating that if the electronic signature is affixed by a public official, it confers authenticity to the document. In 2005, French Council of State

Decree 973 allowed the authentication of the electronic document. The first provision in Article 16 of the decree stipulates that the authenticator must establish a data processing and transfer system, subject to approval by the High Council of Authenticators. This system must ensure the integrity and confidentiality of the contents of the electronic documents transferred through it and be connected to other systems created by other authenticators in France. Regarding the preservation of the official electronic document, the authenticator is required to create an electronic index recording all data of the official electronic documents created. This index, hosted on the president of the Authenticators' Council's website, includes the date of the official electronic document, the nature of the contract, the names of the contracting parties. All of this is outlined in Articles 23-25 of the French decree (Hamdi, 2015).

The Iraqi legislator, in Article 13 of the Electronic Signature and Electronic Transactions Law, stated: "Electronic documents, electronic writing, electronic contracts have legal validity equivalent to their paper counterparts if they meet the following conditions:

- a. The information contained in them must be preservable and storable for retrieval at any time.
- b. They must be capable of being retained in the form in which they were created, sent, or received, or in any form facilitating the proof of the accuracy of the information contained in them when created, sent, or received, without allowing alteration, addition, or deletion.
- c. The information in them must indicate the originator or recipient, along with the date and time of sending and receiving."

To be admissible as evidence in proving electronic transactions, including electronic contracts, electronic writing must meet these conditions:

#### **2/1- First: The Electronic Writing Must Be Readable:**

For the content of a document to be contested against others, the document must be readable. Therefore, the written document must be legible, with characters or symbols that are known and understandable to the person against whom the document is contested.

The special feature of documents issued by the International Organization for Standardization (ISO) supports this interpretation. It defines a document as a set of information and data written on a physical medium that can be directly read by humans or by using a dedicated machine. In the context of proving through modern electronic means, the French legislator added Article 1316 to the French Civil Code, defining the document used in evidence as "any sequence of letters, symbols, numbers, or any other signs indicating the intended meaning and understandable by others."

This condition is also emphasized in European directives related to electronic signatures, such as Article 43 of Directive 18-2004 on electronic signatures and the European directive on electronic commerce (Zahra, 1999).

Based on the foregoing, we observe that electronic writing in the realm of proving electronic contracts must meet the conditions of ordinary writing, as the legislator, as mentioned earlier, did not distinguish between ordinary and electronic writing.

#### **2/2- Secondly, Continuity of Electronic Writing:**

Recognizing electronic writing in evidence requires documenting it on a medium that allows the stability and continuity of the writing. This enables referring back to the document whenever necessary for reviewing contract terms or presenting it to the judiciary in case of disputes.

While physical media, such as paper, easily meet these conditions, the use of electronic media raises questions about the extent to which this condition is met, considering the material characteristics of electronic media. The physical and chemical composition of magnetic disks used in online contracting is sensitive and prone to rapid damage due to variations in electrical power or significant temperature changes during storage, making them less capable of preserving information for an extended period compared to ordinary papers that may be affected by time-related factors such as humidity or pests (Al-Jamei, 2000). Nevertheless, technological advancements have overcome these technical difficulties by using more robust devices capable of retaining information for extended periods, potentially surpassing the longevity of ordinary papers affected by time-related factors.

### **2/3- Thirdly. Immutability and Lack of Physical Alteration:**

This condition is primarily linked to the discretionary power of the judge to accept or reject evidence. The judge's freedom in civil disputes is a prominent feature of electronic contracts, where the judge adheres to specific methods and means according to the law of evidence. Therefore, the assessment of the strength of written evidence in proving is determined in light of the physical integrity of the document and the absence of alterations through addition, erasure, or highlighting unless there are visible material defects in the document. If such alterations occur, they should have a visible physical effect on the document for the judge to assess the legal consequences. Thus, a written document must be non-modifiable or non-addable except for visible alterations introduced onto it, allowing the judge to evaluate its probative value (Hamadi, 2015).

In conclusion, after examining the topic of expressing will in electronic contracts, we must summarize the key findings and proposals that the Iraqi legislator may consider.

#### **- Results.**

1. The Iraqi Electronic Signature and Electronic Transactions Law No. (78) of 2012 defines an electronic contract as "the commitment of the positive statement issued by one of the contracting parties to the acceptance of the other in a manner that proves its effect on the contracted party, it is done electronically." This definition is considered predominant as it refers to the stages of contracting through the connection of the positive statement to acceptance, leading to the stage of contract execution. The legislator did not specify the means through which the will is expressed.
2. Electronic contracts are concluded remotely without the physical presence of the contracting parties and without the existence of a real contract council. This adds privacy to them, distinguishing them from traditional contracts. The contract council in electronic contracts is considered a virtual governance council, as it falls within contracts made between present parties in time and absentees in place.
3. The electronic contract is characterized by the specificity of proof, as proof is obtained through electronic documents and electronic signatures, thanks to the integration between wireless communication and information technologies
4. There is no difference between offer and acceptance in the electronic contract compared to the traditional contract, except that offer and acceptance in the electronic contract are expressed through a computer device.
5. Electronic contracts are subject to international status and the resulting consequences due to the manner in which contracting is done, which is not limited by state borders and is not subject to the law of a specific country.

#### **Recommendations**

1. The researcher recommends joining international trade treaties established by advanced countries or committees affiliated with international organizations specialized in order to unify solutions and achieve the national interests of the country.
2. The researcher advises the Iraqi legislator to align with other legislations that provide special protection for consumers in electronic contracts, as general legal principles may not suffice to protect them from mistakes, deception, or exploitation.
3. To achieve a distinctive level of acceptance for electronic contracting and proof methods, comprehensive awareness campaigns are essential for both users and business entities, as well as judicial authorities.

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