

Features of international trade contract

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Keywords	Abstract
International Trade Electronic Contracts Internet Transactions Contract Law	<p>The electronic environment of the Internet is considered one of the most modern means of concluding contracts and fulfilling the obligations arising from them, especially in the field of commercial transactions. The nature of electronic contracts in relation to their validity, form, and conformity with the general rules and regulations of civil law regarding contracts is one of the new debates, the understanding and examination of which relations and legal effects arise from it, depend on the formal structure of the electronic environment and the concepts of communication technology recognized in this field.</p> <p>The conclusion of electronic contracts and the characteristics specific to these contracts, the impact of the electronic nature on their formation, and the aspect of harmonization of general rules and regulations of electronic contracts are the main objectives of this article. Electronic contracts, in principle, do not have a different nature from traditional contracts. However, with this existence, the formal structure of the electronic environment has given new characteristics and concepts to this type of contract.</p> <p>In this regard, it can be said that the formal structure and technical characteristics of the electronic environment have created a modern and extensive transformation in various dimensions of contract law, which will potentially affect the concepts of benefits in the way contracts are concluded. The present article attempts to address the characteristics of such contracts in a descriptive and analytical manner.</p>

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Introduction

The computer and the global electronic communication network are considered to be the great transformations of contemporary electronic communication technology. The emergence of this transformation in all areas of human life, including economic, commercial, and legal, has led to the need to re-examine and create new standards in various concepts of communication rights, and as a result, has provided the field for the emergence of a new type of electronic contracts. The codified laws in this area are designed to take into account the commercial aspect of these relationships and to create a framework for facilitating e-commerce exchanges.

In the field of law, the emergence of multiple concepts and relationships based on various Internet applications has increased the need to understand and examine the various dimensions of the use of new electronic communication tools in legal relations in order to create a balance between the interests of individuals and the protection of their rights. Today, with very little experience and resources, e-commerce law is not sufficiently recognized in our country. Therefore, the publication of the opinions and thoughts of lawyers in various descriptive, review, analytical, and research forms will naturally play an important role in the expansion of e-commerce and the creation of laws and their appropriate implementation.

E-commerce law has various aspects, each of which requires multiple legal studies. Despite the lack of domestic resources, valuable articles have been published on some of its descriptive and analytical aspects, which is appreciated.

Therefore, emphasizing this importance, examining the characteristics of electronic contracts with regard to general rules and regulations and the compatibility of the application of existing laws to this type of contract will constitute one of the main objectives of this article.

Part One: Electronic Contracts

Article One: Definition of Electronic Contracts

In general, electronic contracts, in terms of the basic conditions of the contract and the regulation of the effects resulting from it, are subject to the provisions and general rules of contract law and obligations. However, in terms of technical characteristics and methods of conclusion and the manner of protecting its legal effects, it requires its careful recognition and compliance with the general principles and rules governing contracts.

Electronic contracts, in fact, do not have a different nature from conventional contracts, depending on the conditions of the case or the subject matter. Rather, they are considered a new description of the environment for the formation of contracts, for which the legislator has not provided specific provisions to regulate it. The term electronic contract was first used in the European Union Regulation on Electronic Commerce.³

³ Akhlaqi, 2014:54.



In the section on commercial transactions, this Code refers to the same legal status of electronic contracts as other contracts based on paper and traditional instruments, and no specific definition of electronic contracts is specified.

Electronic contracts, in legal doctrine, are generally defined as contracts concluded using modern electronic tools such as electronic data interchange networks, electronic mail, and Internet pages. In contracts concluded through these pages, the offer of a good or any type of service by the Internet provider, in the form of an image or electronic text, within the terms and content of the offer, or The invitation to bid is announced. The buyer also expresses his bid or acceptance electronically by connecting to this network. In fact, the parties' wills are exchanged through the Internet provider.

Some lawyers have defined an electronic contract as follows: “An electronic contract is an agreement in which the offer and acceptance of the parties are exchanged within an international network through remote communication with audio and visual devices.”⁴ .

This definition only describes the general nature of the interaction of offer and acceptance and does not address the effects of the exchange of offer and acceptance. Some other lawyers have defined an electronic contract as follows: “It is a contract in which the offer and acceptance are made using an international communications network and through the electronic exchange of data, with the intention of creating contractual obligations.”⁵

Therefore, electronic contracts, including commercial or non-commercial transactions, in addition to electronic offer and acceptance, also include various aspects of electronic transactions, such as the offer of goods and services for the purpose of inviting the conclusion of a contract, electronic purchase orders, electronic invoices, and electronic payment orders, each of which may be a form of manifestation of the expression of will or the effects resulting from it in the electronic environment.

Article Two: Form of E-Commerce Contracts

In general, the creation of a legal relationship in the Internet environment, especially the conclusion of contracts, in accordance with the principle of the sovereignty of the will and freedom of contracts, is not subject to any special form or formalities, as long as the law and the will of the parties do not expressly provide otherwise.⁶

That is, the will to conclude contracts is in principle consensual and individuals can conclude any type of contract of their own free will within the framework of the law.⁷

With regard to the conclusion of contracts that are legally subject to written or formal form, these contracts face structural or security obstacles in the electronic environment due to the lack of provision or the impossibility of carrying out these procedures, such as the official signature of the competent authority or

⁴ Mujahed,2000:39.

⁵ Mamdouh,2006:51.

⁶ Samavati,2010:102.

⁷ Shahidi,2024:25.



their documentation and registration in official registers, such as contracts for the purchase and sale of immovable property.

However, the removal of this matter and the ability to conclude contracts subject to special legal procedures depends on the creation of a structural framework for the development of special legal regulations regarding it, which requires the active role of the state in this matter.

The creation of offices for providing signature certification or transaction approval procedures by a legal authority requires the provision of a technical mechanism and legal regulation regarding it.

Regarding the written form of the contract, under the laws of Iran and most countries, the parties to the contract can, according to the relevant law, by contacting electronic signature certification service centers, validate the written form of their contracts with an electronic signature verified by the aforementioned reference.

However, at present, there is no technical and legal basis for formal contracts such as contracts for the purchase and sale of immovable property in an electronic environment. Given the technological methods of electronic communications, the form of concluding an electronic contract is not uniform. However, the form of concluding electronic contracts in a computer environment is mainly carried out in three different forms.

1-Concluding a Contract Through a Website Page

A website page is considered to be an electronic display of images and virtual texts that can be viewed, printed, etc., and transmitted. The owner of the page is generally the provider of certain goods or services for the purpose of information, advertising, or conducting electronic transactions.

Therefore, in electronic contracts via the Internet, one of the contracting parties is generally a merchant or a business operator. Today, more than thousands of websites have been installed on the Internet as virtual trading places. Customers can access the pages of each provider through their Internet addresses.

The customer can simply click on options such as "I accept" or "Confirmed" on the aforementioned page to declare his/her acceptance or rejection, so that an electronic contract can be concluded in accordance with the will of the parties. Of course, this depends on the usual methods of correspondence and sequence of acceptance and rejection between the parties. If the terms and conditions on the website are considered an invitation to offer, the customer can submit a purchase request or request for specific services by announcing his electronic offer. The rules of custom and custom and the parties' prior expectations of the concept of offer and mutual acceptance play an important role in distinguishing an offer from an invitation to offer.⁸

In general, despite the difficulty of distinguishing between an offer and an invitation to an offer, this is usually not difficult to identify in the field of commercial transactions for professional traders.

Because providing sufficient information about goods and services and, within the scope of advertising, dedicating a web page to selling goods or providing services is a sign of the seriousness of the offeror's

⁸ Elsan,2005:51.



intention to make an offer. Therefore, to determine whether the offering of goods and services on web pages is obligatory or an invitation to be obligatory, each case of offering on each page must be examined individually.

- 2 By electronic mail

Electronic mail is considered the electronic equivalent of traditional mail. Communication of wills by electronic mail is not usually immediate and simultaneous. Therefore, these contracts can be considered as correspondence contracts and the provisions related to them can be applied to them. The conclusion of an electronic contract by electronic mail, like ordinary distance contracts, is considered a contract between those not present at a meeting.⁹

Therefore, in general, legal doctrine does not distinguish between electronic contracts concluded by electronic mail and contracts concluded by fax, traditional mail, and telex.

3- Through data exchange

In this form of contract, the human element does not have direct physical intervention in the technical operations of concluding the contract. Because the contracting parties have already organized the manner of exchanging communication and concluding FIMA contracts between themselves electronically and have replaced the necessary instructions such as ordering goods or services, accepting them or paying the price, etc. on the computer.

Therefore, based on the programmed data, the parties' computers can automatically declare and create a contract based on the subject and conditions determined electronically. In other words, contracts that are automatically executed between the parties' computers through data exchange are subject to the parent contract, in which all the conditions for concluding subsequent contracts have been previously regulated in the electronic environment.

4- Through virtual presence in an electronic chat room

In indirect contracts, such as correspondence contracts, although the parties do not have physical presence at the time of concluding the contract, no intellectual or psychological connection is established between them to affect each other's personality.

However, in contracts where, despite the lack of physical presence of the parties, direct audio, visual or intellectual communication between them establishes a close relationship similar to virtual presence. In fact, this direct intellectual or psychological connection can be likened to the environment of a meeting, and the options recognized for a physical meeting can also be applied to this virtual meeting.

The principles underlying contracts are based on mutual obligation and commitment to the purposes of the contract, and the choice of the meeting is considered an exception to this principle. Therefore, if the existence or absence of the choice of the meeting is in doubt, the principle is that the choice of the meeting

⁹ Hance and Dionne Balz, 1996:910.



is absent. Accordingly, the Parliament's option does not apply to electronic contracts. Unless the legislator has expressly provided for a specific option.¹⁰

Clause Three: Subject of Electronic Contracts

The subject of the contract, given the electronic nature of the environment in which the contract is concluded, does not have any special characteristics compared to traditional contracts. Therefore, based on the principle of the sovereignty of free will, the parties to the contract have no restrictions on the choice of the subject matter of an electronic contract within the framework of the law. The subject matter of an electronic contract can be divided into three types according to its characteristics:

A- Sale of goods (in these contracts, the fulfillment of the obligation to deliver the goods is carried out outside the electronic space and in accordance with the general rules of the IFA. However, payment of the price is possible electronically).

B- Providing services (such as banking, airline services, etc.).

C- Selling a digital product such as a book, article, picture, film or electronic writing.

In these sales, the contract is concluded and fulfilled entirely in an electronic environment. The digital product is delivered with the seller's permission and by installing the software subject to the contract on the customer's computer, and in return, payment is usually made electronically.

A large part of digital products is software and is often sold in one of these ways: (1) directly (in a package such as a CD containing one or more software programs); (2) by issuing a license to use that product, such as reading a specific book or article or watching a specific slide or film; (3) by subscription or barter transaction; (4) by online sales, which involves the physical delivery of a set of software programs in the form of Automatic.

Of course, in these methods of selling digital products, the conclusion of a contract is carried out with a special feature, the most common of which is the agreement by clicking on the specified option, or the agreement of the package, which is that opening the package, or installing it usually means accepting delivery and accepting it.¹¹

D- Providing information (such as a contract whose subject is the provision of a report or scientific or economic information by an institution or relevant specialists). In this type of contract, which The main subject of the is the provision of information, the contractor does not undertake to provide any other services or deliver any other goods. Such as providing a report on the exchange of various prices, freight rates or weather conditions.

As mentioned, in principle, it is possible to include any type of property as the subject of purchase and sale or the provision of services in an electronic contract.

However, according to the meaning of Article 6 of the Electronic Commerce Law, three items cannot be selected as the subject of an electronic contract. These items are: a) ownership documents of immovable

¹⁰ Katouzian,2024:170.

¹¹ Jennifer,2008:198.



property. b) Sale of pharmaceuticals to final consumers. c) Notices, notices, warnings or similar expressions that issue specific instructions for the use of goods or prohibit the use of specific methods in the form of an act or omission. The reason for this exception is probably that the legislator did not consider the message data to be written in the ruling in these cases.

Because according to the mentioned article, “Whenever the presence of a writing is required by law, the message data is written in the ruling, except in the following cases.” Also, according to Article 33 of the aforementioned law, sellers of goods and service providers on the electronic exchange platform must, before the contract is concluded, provide consumers with at least the necessary and effective information in their decision-making to purchase or accept the product, at an appropriate time. The subject of the minimum necessary information is mentioned in the same article in paragraph six. Of course, the exclusion of the aforementioned items in Article 6 of the E-Commerce Law from the scope of electronic contracts has been criticized by legal doctrine.

Because the legislator implicitly eliminated the possibility of removing legal and technical obstacles in the aforementioned items and did not foresee the possibility of providing a legal basis for using these items through electronic contracts.¹²

Article Four: Parties to Electronic Contracts.

In principle, the existence of at least two parties is mandatory for the formation of a contract. In the conclusion of electronic contracts, transactions are usually carried out through electronic tools, and in some of these methods of conclusion, human power does not directly intervene and the computer acts automatically on behalf of their will. Therefore, in general, regardless of the formalities of conducting electronic transactions, the will of the parties is assumed in each part of the transaction.

One of the most important difficulties in concluding an electronic contract is the lack of an environment necessary for each party to be informed of the other's true capacity and personality to conclude the contract. In this case, each party must be satisfied with the information provided, and the burden of proving the invalidity of the electronic contract due to the absence of one of the parties will be on the plaintiff.

As mentioned in the above discussions. The message data, which contains the expression of will, is just like other evidence that can be cited in the lawsuit, and its invalidity can also be proven by other evidence.

According to Article 12 of the Electronic Commerce Law, “documents and evidence of a claim may be in the form of message data, and no court or government agency can deny the probative value (message data), one of the essential elements for the validity of a contract, based on the existing rules of evidence, solely on the basis of its form and format.”¹³

According to the Electronic Commerce Law, the existence of an originator and an addressee and the exchange of message data between them is necessary for the establishment of a legal relationship in the electronic environment.

¹² Elsan,2005: 41.

¹³ Qolizadeh,2007:102.



However, according to Clauses B and C of Article 2 of the Electronic Commerce Law, these parties shall in no way include a person who acts as an intermediary in relation to the message data. Within this law, the legislator has limited the cases of attributing message data to the originator to two cases. According to the user, in cases other than that, the message data will not be attributed to the originator.

The cases of attribution of message data to the originator according to Article 18 of the aforementioned law are: "A- If it was sent by the originator or by a person authorized by the originator to do so. B- If it was sent by a programmed information system or an automated entity by the originator."

Thus, in electronic contracts where contractual transactions are carried out automatically, the computer actually acts as a tool under the control and prior will of the parties.

Clause Five: Conclusion of Electronic Contracts

According to Article 190 of the Civil Code, the intention of the parties is the most basic condition for the validity of the contract, which the parties must possess.

In addition to this condition, the validity of the contract requires the provision of other conditions such as the capacity of the parties, determination of the subject of the contract, and its legality. The principle of contract law is the consent of the parties to the declaration of wills and the use of appropriate and customary means to declare their wishes, the most common of which are customary words and gestures or actions indicating the will of the parties.

The declaration of will can also be made in writing, since writing is also considered as verbal. According to Article 191 of the Civil Code, "A contract is concluded with the intention of creating it, provided that something that indicates the intention is lawful." Therefore, the legislator has not limited the establishment of intent to a specific means. The basis is that this means must be something that indicates intent. The same applies to electronic contracts.

Therefore, despite the real intention of the parties to an electronic contract, in the electronic structure, the manner of declaring the intention contains its own special characteristics, which, although from the perspective of the parties who based their will on the electronic contract, its inherent validity is preserved and worthy of respect, but from the perspective of the law and the regulation of legal protection and the creation of a balance of interests and benefits of the parties and their private rights, the form of concluding electronic contracts and the manner of expressing the intention It must be recognizable and enforceable through it.

In this regard, contracts concluded through electronic means are, by their very nature, formal contracts, in which the parties can, by prior agreement, make their contracts in a formal form. However, this is not legally binding in any way. However, it should be noted at this point that according to Article 6 of the Electronic Commerce Law, whenever the existence of a written document is required by law, the message data (which, according to the legal requirements, is an expression of intent sent or received via electronic means) is considered written.

Therefore, from the legislator's point of view, electronic contracts, except in cases specified in the law, are generally considered written contracts, and whenever a contract is subject to written form under the law, its



conclusion through electronic data will be sufficient. Of course, the important point that is important in written contracts as the final will of the parties is the signature. In electronic contracts, by providing the basis for creating an electronic signature and its legal validity, an important deficiency in the validity of electronic contracts has been eliminated.¹⁴

In any case, the existence of the nature of technical elements of mediation in electronic communications, in addition to preventing the continuity and convergence of wills, on the other hand, the lack of physical presence, even voice communication, and as a result, the loss of mental and psychological contact between the parties, can be considered factors in considering electronic contracts via the Internet in all common methods between parties not present in a meeting.¹⁵

In the electronic environment, the will of the parties is expressed through message data, which is a representation of an event, information, or concept that is produced, sent, received, stored, or processed by electronic, optical, or new information technologies.

Therefore, if we examine the validity of the declaration of intent of the contracting parties according to the message data, contrary to the theory of declaration of acceptance as the time of conclusion of traditional contracts, we see that in electronic contracts, this theory, according to the technical structure and the express nature of the Afghan Commercial Law, the sending of the message containing the will of acceptance is considered the time of conclusion of the electronic contract.

1- Electronic offer

In the literal sense, offer means offering something to another, which in Persian is synonymous with the word offer. In legal terminology, the initial declaration of intent by one of the parties to create a legal relationship between them in a specific matter is called an offer. An electronic offer is no different in its legal nature from an offer in traditional contracts.

The obligation as the first constructive will, despite the variety of its means of transmission, must contain the basic elements for the creation of a contract. Electronic communication has special characteristics compared to traditional communication, depending on the nature of the communication medium and the form of its notification.

For example, traditional communication can be expressed in any conventional means and practice. However, electronic communication is limited to message data that is converted by the Internet service provider into text and images that can indicate the intention and will of the person on the Internet page.

Also, the addressee of traditional communication is not limited to specific individuals. However, in electronic bidding, the addressees are individuals who can access the electronic environment of the Internet using a computer and become aware of the electronic bidding and its conditions on the Internet page. Electronic bidding has distinctive features that can be summarized in a few points: First, electronic bidding is a declaration of intent from a distance.

¹⁴ Akhlaqi, 2014:102.

¹⁵ Fayzi Chekab, 2011:431.



Therefore, to protect the recipients of electronic offers, who are mostly consumers, the legislator has foreseen specific rules that the offeror is generally required to comply with. Among these, the offeror is required to indicate the specifications and address, determine the subject of the contract and its descriptions, the price of the goods and services offered, the payment method, the right of withdrawal period, the warranty period and after-sales services when offering the sale of goods or services.

The Afghan legislature has provided specific provisions in the E-Commerce Law to protect the rights of consumers in electronic contracts. According to the aforementioned law, sellers and providers of goods and services are required to provide information that is effective in the decision-making of buyers before concluding a contract.

Based on this article, it can be said that an electronic offer must include all information that is effective in decision-making and acceptance of the offer. Second, an electronic response is basically in the form of message data that can be converted into understandable written language by electronic means. In the e-commerce laws of various countries, including the Afghan e-commerce law, electronic message data is recognized as a valid expression of will.

According to the Electronic Commerce Law, message data is any representation of an event, information or concept that is produced, sent, received, stored or processed by electronic, optical means and new information technology.

Therefore, electronic communication in the form of message data is created or sent according to the will of the person sending it via the Internet or new information technologies. In the Afghan Electronic Commerce Law, the term “originator” is used in clause “B” of Article 2 in the definition of electronic technology.

According to this law, the originator is “the original source of the message data by whom or on behalf of whom the message data is generated or sent, but does not include a person who acts as an intermediary in relation to the message data.” Third, due to the electronic aspect of the obligation, the place of the obligor loses its importance and the electronic obligation acquires a transboundary, i.e. global, quality.

However, the obligor, i.e. the originator, can, within his obligation, limit his obligation to a specific geographical area or countries or limit the effects of his obligation, i.e. his obligations, such as the obligation to deliver goods or services, to a specific geographical area or areas.

In contrast, traditional procurement is more spatially limited to a specific location, city, region, or country. Fourth, electronic procurement in the Internet environment is actually carried out through an intermediary who generates and sends the procurement on his behalf. This intermediary provides electronic services.

For this reason, the demand does not become legally effective simply by its issuance by the demander, unless the order for its production and transmission is submitted through Internet communication services so that the demand finds its usual and legal form.

Of course, it is possible for the demand to disappear from the page or email on the Internet for reasons beyond the will of the demander, in which case the demand is also considered to have disappeared.¹⁶

¹⁶ INTERNET TRENDS 2015 – CODE CONFERENCE. <https://www.glokalde.com/pdf/issues/3/republished-3.pdf>



2- Electronic Acceptance

Acceptance in the conclusion of a contract is a statement of will that is declared in accordance with the will of the other party. In other words, acceptance is the unconditional acceptance of the proposal presented for the conclusion of the contract.¹⁷

Declaration of consent to the terms of the offer in an electronic environment is called electronic acceptance. Whether the declaration of acceptance is electronic or non-electronic does not affect the nature of the will and the way it implies the creation of legal relations.

Electronic acceptance does not have a special status compared to traditional acceptance in the nature of the expression of will in contracts. However, in terms of the form and manner of the declaration of will, a different status can be observed in electronic acceptance.

Electronic acceptance is usually effected by simply clicking on an electronic statement of consent to the purposes of the electronic response provided in the online environment. According to the Afghan Electronic Commerce Law, the sending of a message is considered valid when it is entered into an information system outside the control of the originator or its authorized representative.

For the purposes of this law, the message data is valid for the purpose of the addressee's acceptance when it leaves the computer information system and enters the information system of the requester in a way that is beyond the control of the acceptor. Some writers consider the sending and receipt of the electronic acceptance as the time of conclusion of the electronic contract.¹⁸

In addition to containing the conditions of validity of the will and definitely and specifically producing legal effects, acceptance must also be expressed in the outside world. In addition, the will to accept must be declared within the validity period of the offer. If the acceptance is in accordance with the offer and is free from conditions and matters that are excessive and incomplete for the purpose of the offer, the contract is concluded.

The expression of will to accept electronically can be communicated in various ways, such as by electronic writing and confirmation of its sending, an electronic mail containing the text of consent with an electronic signature, verbally through chat rooms, or by downloading a software program or digital product from the Internet and installing it on the computer belonging to the recipient. Also, one of the common methods for declaring electronic acceptance is a single click or double click on the word "Accept" in the symbol specified below the required items.¹⁹

Electronic acceptance, due to the form of its declaration electronically, is considered an explicit and definitive declaration. However, this does not prevent the implicit declaration of acceptance from being recorded and sent in the contents of a letter or electronic conversation.

¹⁷ Katouzian,2024:219.

¹⁸ Fayzi Chekab,2011:431.

¹⁹ Hossam El-Din,2016:105.



Because the electronic means performs the operations of transferring message data, and in the form of transmission, there is no room for reasoning or inferring implicit will.

3. Determining the time and place of concluding an electronic contract

Regarding determining the time of a contract, four main methods have been recognized in contemporary legal systems. These are: the time of declaration of acceptance, the time of sending acceptance, the time of receipt of acceptance, and the time of notification of the offeror. In Afghan civil law, “A contract is concluded with the intention of creating something that indicates the intention,” is more consistent with the broad concept of declaration of acceptance.²⁰

However, some civil law writers, while accepting the basis of the theory of declaration of acceptance, consider the sending of acceptance to be more logical and practical.²¹

Therefore, from a legal point of view, the time of conclusion of contracts according to civil law is the time of the addressee’s declaration of acceptance for the purposes of the obligation. Of course, this approach is often not implicitly used in commercial transactions, and most of the time for concluding a contract depends on the time of sending or receiving the acceptance at the place of the offeror.

The validity of the time of conclusion of electronic contracts, although subject to the general rules governing contracts in civil law and customary practices, however, considering the methods of electronic communication and the special provisions that the legislator has expressly foreseen in the Electronic Commerce Law, the time of conclusion of electronic contracts is considered to be the moment of sending the electronic acceptance.

The Commerce Law has not explicitly referred to the time of conclusion of the contract. However, despite the existence of the Electronic Commerce Law, the validity of sending message data is subject to the fact that this data is entered into an information system outside the control of the originator or his/her representative. With regard to the validity and referability of message data, it is necessary to mention that the Electronic Commerce Law considers message data to be in writing. As this point is referred to in the law.

The parties to electronic contracts concluded in a virtual environment generally have a location or address of a website or an email system member. However, in legal terms, due to its virtual nature and its ability to change quickly, a virtual location other than a website address or email address cannot be considered a valid place of conclusion of an electronic contract.

Because the determination of the place of conclusion of the contract must have factual or legal characteristics so that the effects arising from this relationship can be legally applicable in various aspects, such as determining the competent court or the manner of implementing the obligations arising from the contract or determining the laws governing the contract and resolving the disputes arising from it.²²

²⁰ Qasemzadeh, 2022:68.

²¹ Safai, 2024:76.

²² Samavati, 2010:204.



Determining the place of conclusion of an electronic contract, given the international nature and flexibility of electronic tools, is considered a complex issue due to the nature of this type of contract. Therefore, the Electronic Commerce Law has provided specific provisions in this regard.

The Afghan legislature has determined the place of realization of the offer and acceptance in an electronic contract in accordance with the provisions of the aforementioned law. According to this article, if the location of the information system sending the data is the same as the location of the information system receiving the same data, then the location of the sender and the location of the recipient are the same place. However, if these two places are different from each other, the legislator has provided three options in this case.²³

The first option, unless the parties have agreed otherwise, is the place of sending the message, the place of business, or place of work of the originator, and the place of receiving the message is also the place of business or place of work of the addressee.

The second option, in the case of multiple places of business or place of work of the originator, the place closest to the place of transaction of the credit area for the place of sending is the place of business or place of work, otherwise the main place of business of the company is considered the place of business or place of work. The third option is that if the originator or the addressee does not have a place of business or work, their legal residence will be the property.

Accordingly, in electronic contracts, the determination of the place of occurrence of the offer and acceptance in the sense of sending and accepting it is implemented according to the Electronic Commerce Law.

As can be seen, the legislator has explicitly limited the place of conclusion of an electronic contract by law. So, the place of conclusion of an electronic contract, according to the theory of sending or receiving acceptance, will be, respectively, the place of business or work, the main place of the company, and the legal residence, according to the options agreed upon by the parties. Here, with the voluntary or legal determination of the place of conclusion of the contract, the role of the time of conclusion of the contract in determining the place of the contract also loses its importance.

2 Part Two: Characteristics of Electronic Contracts

The electronic nature of the declaration of wills is considered a form of contract conclusion that does not contradict the essence of the principles of contract validity. No specific provisions have been foreseen in the Civil Code or other special laws to regulate electronic contracts.

However, by deducing and reasoning from the rules and principles governing contract law, comparing the manner in which such contracts are concluded with traditional contracts, and reflecting on the nature of the structure of the electronic tool and environment, the main characteristics of electronic transactions can be determined. Determining these characteristics will lead to a better understanding of the legal aspects of electronic contracts and a detailed analysis of the effects arising from them:

Article One: The legality of electronic contracts

²³ Fayzi Chekab, 2011:434.



A contract concluded in the electronic environment of web pages is considered to be a legal contract. Because the seller displays his goods and services on his website, along with the necessary information and general conditions. The buyer or consumer, if he is willing to buy, can only accept it under the announced conditions. Generally, there is no other place to present new conditions or negotiate with the seller.

However, the seller usually offers the buyer multiple options for sale and different methods for paying the price. The buyer chooses one of the options according to his desire and offers it to the seller to make the purchase. In contrast, the field of electronic contracts via electronic mail is open to negotiation and amendment of terms prior to the conclusion of the contract, and such contracts do not have a legal aspect.

Clause Two: Lack of physical presence of the parties in an electronic contract (remotely) In principle, the physical presence of the parties is not necessary for the conclusion of the contract. The parties can communicate their wills to each other from anywhere and at any time through various means and result in the creation of a contract.

In principle, contracts in which the parties do not have each other's physical presence in a meeting during the conclusion of the contract and a certain material obstacle prevents the creation of a physical connection or a mutual mental and intellectual connection are called distance contracts.

Another basic characteristic of an electronic contract is that it must be concluded electronically or in an electronic environment without the physical presence of the parties. The presence of the parties in an electronic environment is not real. With this description, an electronic contract can be considered a remote contract.

However, due to the speed of information exchange on the Internet, an electronic contract can be considered a contract. Of course, the sequence of offer and acceptance in an electronic contract depends on the method of electronic communication and the degree of temporal synchrony of acceptance with respect to offer.²⁴

However, the conclusion of an electronic contract between those not present in a meeting also presents some unique problems. Among these, the lack of access of the parties to sufficient information about each other's personality, the lack of assurance of the parties that they are healthy and of sound will to enter into a contract, the proof of the contract, and the manner of relying on electronic evidence are considered issues raised in electronic contracts.

Clause Three: The Principle of Consent in Electronic Contracts

In principle, in Afghan law, the need to adhere to a specific form of formalities is not a condition for the validity of the contract.²⁵

As the Afghan legislator explicitly states in the Commercial and Civil Code, “a contract is concluded with the intention of creating it, provided that it is lawful to do so.” Therefore, the parties to a contract are free to choose the manner in which they express their will. This freedom of expression also applies to the nature

²⁴ Mamdouh, 2006: 218.

²⁵ Shahidi, 2024: 172.



of electronic contracts. With the difference that the means of concluding an electronic contract, by its structural nature, imposes certain technical operations on the way of declaring will in electronic form.

Because the generation of the expression of will in the form of message data and the form of electronic methods of sending and receiving the expression of will are considered to be the nature of the technological application of the electronic tool of the Internet.

The principle of consent for contracts, including electronic contracts, does not prevent the parties from agreeing to determine a specific form for a contract between them. Because the Commercial and Civil Code explicitly states that “private contracts are valid for those who have concluded them unless they are expressly contrary to the law.”

Without a doubt, the consensual nature of contracts makes legal relations and transactions between individuals easy and inexpensive, which leads to trust and the practice of good faith in transactions. However, on the other hand, the consensual nature of contracts, in addition to providing the basis for the abuse of the environment of trust between the parties, also brings with it the problem of proving the expression of will.

Therefore, this particularity leads to weak legal protection and imbalance of the interests and benefits of individuals in this type of contract. For this reason, the legislator, from various aspects, including social and economic, to protect public order or good morals or to create a balance of economic interests and benefits of individuals in legal relations, has made the conclusion of some contracts subject to special procedures. In the international arena, with regard to the laws governing electronic contracts, there are no specific procedures that would reduce the validity of electronic contracts.

For example, Article 5 of the UNCITRAL Model Law states in this regard that “the legal effect, validity and influence of information shall not be denied solely because it is in the form of a message.”

In this regard, according to Article 9 of the EU Directive,²⁶ 2 Member States are requested not to create obstacles to the conclusion and use of electronic contracts that are in accordance with the legal regulations governing contracts in their legal systems and not to consider these contracts ineffective and invalid simply because they are made by electronic means.

Section Four: The International Aspect of Electronic Contracts

Electronic contracts, due to the international nature of the Internet, have a cross-border aspect. Because the Internet environment is an environment that is free for everyone, regardless of borders and a specific geographical location, and it is possible for anyone to enter it.

As the legislator has pointed out in the interpretation of the Electronic Commerce Law, the need to pay attention to international specificity.

²⁶ Directive 2000/31/EC



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According to the aforementioned law, “in interpreting this law, attention must always be paid to the international nature, the need to develop coordination between countries in its application, and the need to observe the requirement of good faith.”

In this regard, it can be said that the Afghan legislator, in drafting and approving the Electronic Commerce Law, has practically paid special attention to the international aspect of electronic contracts in the field of electronic commerce law.

In this way, the provisions of the Electronic Commerce Law have been codified and established in accordance with the provisions and basic concepts of the UNCITRAL Model Law. Of course, this is part of the laws that are expected to be established in the international arena in a uniform manner regarding various legal issues related to international electronic transactions.

Because local and domestic laws are not sufficient and adequate to regulate electronic transactions in international dimensions to resolve and resolve the legal effects arising from international law relations in this area.²⁷

With regard to the cross-border aspect of electronic contracts, the possibility of the existence of an external element must always be taken into account.

Because the electronic environment does not have any specific restrictions on the entry of people from anywhere in the world, in the event of a dispute arising in transactions between them, the issue of determining the applicable law and the competent court for settlement will be one of the important characteristics of international contracts.

Therefore, in the electronic environment, the parties to the transaction usually agree within the framework of the contract to prevent disputes regarding the terms and legal effects of the contract, especially with regard to conflict of laws and the competent court.²⁸

Clause Five: The necessity of using electronic software and hardware in concluding contracts. In general, a contract whose means or environment of conclusion is not an electronic device is not called an electronic contract. In this regard, concluding a contract through electronic communication devices is considered one of the special characteristics of electronic contracts.

An electronic contract is no different from non-electronic contracts in terms of its subject matter, contracting parties, and essential conditions of validity. The only difference is the method of conclusion or the environment in which it is concluded. As the use of hardware and software to create the basis for the provision of an electronic environment within its technical framework, it results in physical limitations and specific locations, and consequently requires the creation of special technological facilities for the conclusion of electronic contracts.

Article Six: The Commercial Character of Electronic Contracts and the Need for Consumer Protection Since the subject matter of electronic contracts commonly constitutes commercial transactions, especially the purchase and sale of movable property, both tangible and intangible, or other intermediary services, or

²⁷ Samavati, 2010:218,

²⁸ Akhlaqi, 2014:76.



transactions between merchants, therefore, these types of contracts are classified as commercial, including commercial transactions between merchants and transactions that are generally considered commercial in nature according to the Commercial Law.

In general, in the supply of goods and services, one of the parties to electronic contracts is often consumers. For this reason, in the field of electronic commerce, electronic contracts are also called consumer contracts. Because these contracts are often concluded between traders, businessmen and consumers. For this reason, electronic contracts have an important place in consumer protection laws. The Electronic Commerce Law provides for specific provisions regarding consumer protection.²⁹

These regulations include, respectively, the obligations of sellers and service providers through electronic tools and new communication systems (M), (33), the duty of the supplier in verifying the information provided by the suppliers of goods and services (M), (34), the rights of consumers in various methods of electronic presentation (M), (35-41), matters not covered by this law (M), (42), the implementation of consumer rights protection (M), (43-48), the role of legal organizations and Civil Law on the Protection of Consumer Rights (M, 49). In order to protect the rights of consumers and maintain public order, the Afghan legislator has also regulated the rules of advertising through electronic tools by law.

Article Seven: Regarding the fulfillment of obligations arising from electronic contracts, most transactions conducted in the electronic environment involve the purchase and sale of goods and services. The main obligation of consumers as a party to these transactions is Electronic payment is the payment of the price of goods or the use of services provided.

One of the characteristics of electronic contracts is that the method of payment for the price of goods or services is electronic. Even electronic payment in some cases, in addition to being considered as the fulfillment of a commitment, is also considered to be a practical indication of the customer's acceptance.

Today, various electronic payment methods have appeared in electronic transactions, replacing traditional money, whether banknotes or checks.

Section Four: Electronic Contract Signature

The Afghanian legislature has not defined a signature. It only stipulates in the Commercial and Civil Code, in the statement of its validity and authentication in writing: "A signature on a writing or document is evidence to the detriment of the signatory."

With this description of a signature on a writing or document, it gives it the validity of relative evidence.

According to the definition of some jurists, signing is drawing a special mark or writing one's identity details on ordinary or official papers and documents that contain the occurrence of a transaction, commitment, confession, testimony, and the like.³⁰

²⁹ Ibid.

³⁰ Jafari, 2024:181.



According to the provisions of the aforementioned article and the aforementioned definition, writing without a signature is not recognized as valid documentary evidence, except in the aspect of evidence. Therefore, the written content of a contract will be invalid until it is signed by the parties.

In written contracts, the signature is considered as a declaration of the final will of each party. Therefore, the signature of a letter or telegram or its equivalent by the accepting party is considered as a declaration of will and his contract with the offering party is concluded at that moment.³¹

An electronic signature is: Electronic data in the form of numbers or letters for the purpose of expressing the final will and identifying the identity of a person that is added to an electronic document. Some authors have defined electronic signature in the general sense of the word as follows:

“An electronic signature is an independent and confidential code that identifies the sender and attaches it to a document that constitutes the content of the data.”

Although the Civil Code and the laws governing the rules of contracts and obligations do not define a signature, due to the unique characteristics of electronic transactions, in which the expression of will is usually expressed and transmitted electronically (message data), it is necessary to define and identify the signature and its degree of validity.

The legislator of the Electronic Commerce Law defines the term secure electronic signature and makes its validity conditional on the presence of the characteristics foreseen in the Commercial and Civil Law. According to the aforementioned law, “a secure electronic signature must have the following conditions:

A- It must be unique to the signatory.

B- It must identify the identity of the signatory - the message data.

C- It must be issued by the signatory or under his exclusive will.

d- Be connected to a message data in such a way that any change in that message data is detectable and discoverable.

A secure electronic signature with these conditions requires a reference that certifies its validity and warranty conditions. The Electronic Commerce Law has a separate discussion on the establishment of electronic certificate issuance service offices.

The legislator has established regulations regarding the legal protection of the validity of electronic signatures by defining two types of electronic signatures and stating the conditions necessary for the evidentiary validity of electronic signatures. According to the Electronic Commerce Law, “all message data created and stored in a secure manner, in terms of its contents and signatures, the commitments of the parties or the party that made the commitment and all persons who are considered their legal representatives, the implementation of its provisions and other effects, are valid documents and can be cited in judicial and legal proceedings.”

³¹ Safai,2024:174.



In this way, the signing of a secure message data, its contents, and compliance with its implementation are citable in legal and judicial references.

Also, according to Article 5 of the aforementioned law, “With respect to secure message data, secure electronic records, secure electronic records, and secure electronic signatures, denial and doubt are not permissible, and the authenticity of the said message data can only be claimed or proven by proving that the said message data has been legally invalidated.”

In this article, the legislator has considered the validity of electronic evidence, including secure electronic signatures, to be as undeniable and irrefutable as signing official documents, and has distinguished it from ordinary evidence.³²

Conclusion

Electronic contracts concluded via the Internet are considered to be contracts subject to general principles and rules. The compatibility and conformity of the verbal and customary concepts of the legal rules of contracts with the technical concepts of the electronic environment, the determination of the rights and options of the parties in protecting their interests and maintaining the balance of their interests in contracts concluded via the Internet, and the regulations governing multiple methods and the fulfillment of obligations via the Internet are among the issues that have made the conclusion of electronic contracts via the Internet face hesitation and reflection.

The main reason for this is that many of the concepts and provisions of the E-Commerce Law governing electronic contracts lack any background in customs, habits, or social and economic needs in our country and are relatively unfamiliar to the legal concepts contained in our country's legal sources. Although the E-Commerce Law, with its specific content, does not appear to conflict with the general rules and regulations of civil and commercial laws, it does not have much coherence and integration with the formal and technical concepts and regulations of legal sources such as civil and commercial laws, and its effectiveness in applying these rules to legal issues of contracts in e-commerce is considered very limited.

The declaration of the intention of the contracting parties remotely, the writing of the contract, the exclusiveness of the contracts to the transactions of the sale and purchase of goods and the provision of services, as well as their formality, are among the main characteristics of the contracts subject to the provisions of the Electronic Commerce Law.

Considering the specifics of the Electronic Commerce Law, it can be said that the principles of the application of electronic contracts are based on an information system and the exchange of message data, which constitute the information, or the means of expressing will (offer and acceptance) of the content of the electronic product that can be exchanged and exchanged in an electronic contract.

Electronic contracts are potentially considered to be part of written contracts, and electronic signatures have also been recognized as the main axis of the validity of the expression of will in valid electronic transactions. This should have been established primarily within the rules of civil law that cover all electronic transactions.

³² Jennifer, 2008:120.



On the other hand, many substantive and formal issues related to civil contracts, in fact, as well as commercial contracts, require the expression of comprehensive and general rules and regulations in the electronic environment, and regulating them under the title of the Electronic Commerce Law will result in a plurality of concepts and limitations in the application of legal rules to electronic contracts. Therefore, it is proposed that all issues related to e-commerce concepts and transactions be codified within a special chapter of the new Commerce Law.

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