



# Affirmation Comparative Study Between Traditional Contract and Electronic Contract

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## Abstract

In the electronic environment, several contracts will be conducted; especially that contracting is permissible legally through this mean. Since the contracting involves the affirmation and acceptance, I will address the electronic affirmation distinguishing it from the conventional affirmation. I have used the comparative analytical description method.

I have divided this research into two sections; the first one addressed the theory of contract, where the affirmation can be discussed only after clarifying the contract theory and indicating some specificity with respect to electronic contracting, while the second section addressed the affirmation, as a major pillar of contract by comparing conventional contract and electronic contracting.

**Key words:** E-Contract; Contract; Contract theory; Affirmation; Jordanian legislations

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## INTRODUCTION

The means of contracting through which individuals generally conclude their contracts and transactions passed through several stages of development of all elements and pillars of contract. The most important element that accompanied development is the environment of contracting through which the elements of the contracting are interchanged, as such contracting environment

recently went from being, for hundreds of years, a conventional environment of contracting as a result of using telephone, fax, telex, telegraph and television, and that it came to (the Internet).

The Internet is a foreign term taken from the abbreviation of (International Network), and the Arabic contrast term perhaps leads to the significance of this term where it is called (the World Wild Web “WWW”) in the sense that it is made up of linking very large numbers of computers and associated devices which are very spaced geographically through a network of technical channels and cables to eventually lead to the link between these devices and their contents, where connectivity between devices and users is through several forms (audio, image, video call, a written conversation, coded messages, regular messages) as well as the role they play in the area of transferring knowledge and social and scientific services... Etc... For the purposes of this research, we focus on the communication that is between individuals to contract through this network. It is noted that the other legislative techniques and methods could not confront the rapid growth of the technique of E-contracting by precise legislative identification in the various countries of the world and specifically in the developing countries, although these countries also varying in the field of legislative protection afforded to dealers in this mean, especially when we recognize that there are many problems that have not been noted by various legislation and have not been over search - at least in its current form - in this legislation.

One of the main subject matters is the means of expressing will through this network, especially when we know that the contractors do not know each other at all, but often do not live in one country, and this also raises a question about the contract assembly and contract venue and time for the purposes of determine the law applicable temporally and spatially on this contract, this is in addition to mention that this dealer is delusive or even impersonating for other persons trying contracting on their

behalf for his account, or even selling data and products of others through cyber-crimes where the crime is made by simply pressing the buttons of a computer from unknown location, as well as major problems have been emerged such as the problem of proving these transactions and also the extent of its binding force in light of existing legislation. The jurisprudence have considerably studied the ways to solve such questions in the conventional contracts without fully setting a steady legal status, while this mean raised these issues again to be studied by Jurists, but in a more complex and accurate way.

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## 1. THE CONTRACT THEORY

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The contract theory is one of the major legal theories that govern individuals transactions, as well as this theory is the most important source of commitment in the various jurisprudential schools. Therefore, studying such theory contains several details and particulars suitable to be subject of research separated from other particulars. As this research addressed the issue of affirmation in conventional contracts and modern electronic contracts, it was necessary to keep a clear picture of the contract as a general rule in terms of its definition and scope and also in terms of the concept of will power, reaching to conclude the contract. Each of these main ideas forms a title for each of the following three questions:

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## 2. DEFINITION AND DETERMINING THE SCOPE OF THE CONTRACT

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The contract is the most important legal act in our practical life, as the person enters into many contracts such as sales, rent, insurance and other contracts, which are endless, and these contracts varied in their ways to study. Some of these contracts, such as sales contract, are studied in detail, so this type of contracts is called nominated contracts, while other contracts are studied in general applicable to many of other forms of contracts which called unnominated contracts. Given the importance of studying this subject to reach the concept of affirmation, we have discussed it in two sections; the first in the definition of the contract, and the second in the field and scope of contract, as follows:

### Definition of contract

#### 2.1 The Conventional Contract

The Article 87 of the Jordanian civil law defined the contract as “the joining of affirmation of the offer by one of the contracting parties with acceptance from the other in a manner which prove the effect thereof on the object of the contract and the obligation of each party by what he is bound with to the other”.

The Iraqi legislator also defines the contract, in Article (83) of the Civil Code, as “the joining of affirmation of the offer by one of the contracting parties with acceptance

from the other in a manner which proves the effect thereof on the object of the contract”. The French legislator defines the contract in Article (1101) of the French Civil Code as “an agreement by which one or more persons obligate themselves to one or more other persons to give, or to do or not to do, something”.

Through the definition of Jordanian legislator states in Article (87) we find that the Jordanian legislator quote on this text of the Iraqi Civil Code, which in turn quoted by Murshed al-Hairan. The legislator tried committing to judicial judgments magazine by defining the contract in the articles (Khater & Al-Sarhan, 2005, pp.101-104).

One of the advantages of the definition made by the Jordanian legislator that he chose the phrase (joining the affirmation to acceptance) rather than what refers in modern jurisprudence that the contract is based on the (consensus of two wills), because that the consensus of wills of two contracting parties is not enough to make the contract but must obtain express of these two wills and to interact together, while the idea of stronger joining in more significance of the idea of consensus, Although the Jordanian legislator added the phrase (and their consensus) combining a (joining the affirmation with acceptance and the phrase “and their consensus”).

However, the addition by the Jordanian legislator stating: (and the obligation of each party by what he is bound with to the other) is an useless and what came in the definition of Article (87) (prove the effect thereof on the object of the contract) is adequate, because that the obligation of each party by what he is bound with to the other is of the effects of the contract, and this limitation makes all contracts binding of both parties, which cannot be recognized at all while this definition will become non terse (Al-Jbouri, 2008).

The contract is based on two matters (the first) joining of two or more wills (the second) to two wills turn in their acceptance to produce a legal effect. We present these two matters briefly as follows:

#### 2.2 Combining Between One and More Wills

The single individual will is not able to create a contractual obligation unless being joined to and consistent with the will of the other, and this corresponding and acceptance is the only pillar forms the contract.

#### The Wills of Both Parties Turn to Produce a Legal Effect

As long as the two wills are not turned to create a legal connection, there is no contract. If a person invites a friend to a banquet and the friend accepts that invitation or if a doctor treated his friend for free at his clinic, which does not create a contract between them because they did not intend to establish a legal obligation. The agreeing of two wills in the compliment does not create a contract, because if the friend cancel his invitation or his treatment of his friend, he will not be accountable, will is here not turn to produce a legal effect, but tended to conclude

an courtesy agreement non-binding to parties, while if the inviter breached his invitation, he will not bear any responsibility.

### **2.3 The E-Contract**

The electronic contract does not differ from the conventional contract in terms of its pillars, its validity and its effect in terms of responsibility, but differs in the way of conclusion, where it acquires the electronic nature from the way in which it concluded, it concluded by affirmation and acceptance due to communication between contractors by visible audible mean across an open international network for remotely connection. As the electronic contract differs from the conventional only in the way of concluding through modern means of communication (Al-Zraiqat, 2007). however, some techniques have distinguished the electronic contract by particular definitions to determine its concept, and certainly the Jurisprudence has made similar role; e.g. the second article of the European directive of May 20, 1997 has defined the contracting as (means any contract concerning goods or services run by the supplier, makes exclusive use of one or more means of distance communication) (Khalid, 2006), it is possible to note the earlier idea in this definition where it has not added a new definition of the contract but only the means by which the contract is made. Paragraph 8 of Article 2 of The Jordanian Electronic Transactions Act has defined the E-Contract as (An agreement concluded in whole or in part by electronic means)<sup>1</sup>. This definition is terse as this law came as a necessity to keep up with some issues and matters technically urgent, that is maybe why the Jordanian legislator had feared from cracking down on these advanced means, so this text may imply the ambiguous and the evolution of the electronic field at time and beyond.

### **3. THE FIELD AND SCOPE OF THE CONTRACT**

Identifying the contract scope is to indicate the scope in which the agreement is the origin of the contract which is subject to the general rules set out in the Civil Code. Since the contract is the source of obligations and personal rights, it must take into account several matters which so arguably determine its scope, as the contracts concluded by States as a public authority, are not subject to civil law but are Administrative Contracts subject to the general law, because that the state is a party which has authority while the other party does not have such authority in the contractual relationship, however, in the other hand, there are contracts entered into by state companies as automotive industries, for example in the sale of autos to individuals is civil contracts (Amjad, 2003), and so this is not a general rule.

<sup>1</sup>Electronic Transactions Code, no 85 of 2001.

The legal effect of which the will tended shall be of a financial nature “such as selling, rent” and therefore the contracts that do not bear this financial nature such as marriage contracts, for example, these are not subject to the rules of Civil Code, but subject to different legal regulation, both in the personal status law, or other from.

### **4. THE PRINCIPLE OF WILL POWER**

Dispute arose between jurists and philosophers since ancient times and still on the role played by the will in the formation of contracts, and schools established in this regard differ from each other: the Individual School and Social School. The individual school believes that will arises the contract and this is what called the School of will power. while The Social School assigned to will a modest role in the formation of a contract and does not recognize that the will is solely arising the contract[7]. The principle of will power has appeared as a result of the emergence of individual school that called for individual freedom, and that the existence of the law came to protect individual liberty, will is the source of all the acts of individual to the emergence of the right in all its forms (Nouri Khater, 2005, note 1).

The consequent of principle of will power is that individuals are free to contract and only limited by damages to others, and that the contract generates binding force may not be cancelled or amended except by agreement of the parties, and also that the relative contract does not extend to non-contractors.

### **5. ATTRIBUTE OF ISLAMIC JURISPRUDENCE AND JORDANIAN LEGISLATOR OF THE PRINCIPLE OF WILL POWER**

Jordanian legislator did not come out in civil law of the attribute of Islamic jurisprudence of consensual in the contract and will power. The Islamic jurisprudence recognizes the role of will in creating contracts, and that the contract is a source of personal right (obligation).

Before formation of the contract, the contractor has a fully freedom to contract or not to contract, and when contracting he shall be free to determine the terms of the concluded contract and terminate his contract. However, the independence of the contractor in contracting is restricted in that he does not have the right to enter into the contract which is contrary to public order and public morals as required by Article 163/1 civil and in Article 164/1, there is no forcing of anyone to enter into a contract as a creditor or debtor.

This referred to in Article 588/1 – Jordanian Civil Code - However several exceptions to the freedom of the

person in the non-contracting are stated, as to obliging the owner of the vehicle or its driver to conclude an insurance contract covers the civil liability incurred to him, owner of the vehicle or its driver for bodily and material injury caused by the use of the vehicle.

One of the forms of will power is that an individual is free in determining the conditions and the terms of its contract which is called contracting freedom, although this freedom is not an Absolute freedom but it is restricted by public orders and public morals as well as within what the law provided for that cannot be breached. An individual is free to revoke and terminate the contract and this is include dc in what is known as the will power (Al-Jbouri, 2008, note 2).

## 6. THE CONCLUSION OF THE CONTRACT

The Prevailing trend in the civil legislations observes the cause and the location as two essential pillars together with satisfaction (the agreement between the two parties) and this is the trend of the Jordanian Civil Code where it provided for in Article 90 that (satisfactioin) is enough to conclude the contract but in other articles it added the two essential pillars (location and cause) as the islamic legislation deems satisfaction is the only pillar by which the contract is duly concluded but location and cause are conditions to exist the obligation arises through the contract.

Some felt that the location and cause are two pillars of commitment, others saw that the location is a pillar of commitment and cause is a pillar of the contract with reference that there are contracts need to formality imposed itself as a pillar of the existence of the contract, and cannot imagine its existence without this, and this what was provided for in the provisions of Article 1084 of the Civil Code, that there are contracts in which registration is a n essential pillar in the contract as in the case of the sale of real estate and cars.

The fact that the search deals with satisfaction and affirmation in particular, so we cannot talk about the location and cause of concluding the contract and the reason being the pillars independent of compromise, not forgetting the importance of the contract, so we will limit our research on satisfaction and its validity in two independent sections, the first deals with the satisfaction while the second deals with the validity of satisfaction.

### The Existence of Satisfaction

Article 90 of the Jordanian Civil Code provided that (the contract is concluded at the time of the existence of affirmation and consent taking into account what the law decides and provides for). Accordingly, the contract is deemed as concluded when consent is issued on the basis of the affirmation issued by the first party, this means the two parties' will shall be associated together and such wills shall be identical.

First: express of will: will and its expression are an external aspect that is taken by an individual to express its intention to contract. It is a physiological action in origin but it does not gain its legal form unless expressed and shown to public (Nouri Khater, 2005, note 1). If will is existed, the parties shall intent to exist a legal effect, where there are many actions taken by an individual but he does not intend to make a legal effect such as inviting a friend to ride a car, so this is not a contract but a courtesy (Courtesy Contracts).

### How to Express the Will?

To answer this question we have to distinguish between the implied will and the external aspect and expression of a will. The implied will is : an intended action to be done but only known by the person only and nobody knows this will or the intention to do such action unless he expressed such will by one of the aspects of the expression of will (Abdul-Qader, 2005). Article (93) of the Jordanian Civil Code expressed this where it provided that the expression of the will may be explicit by talking or writing or a signal known by people even the person is not speechless such as moving the head vertically to express consent or shaking shoulders to express refusal, or exchanging goods by money without speaking or talking or any other action that undoubtedly expresses consent such as when the merchant offers his goods on public with their prices to express explicit affirmation, and this is what is provided for in the first paragraph of Article (94) of the Jordanian Civil Code: (1- the offer [showing] of the goods with their prices is considered as an affirmation). 2- but publication and advertisement with the prices of the goods are not deemed as affirmation but it's a call for negotiation). The expression of will may be implicit if it was in a form that does not express the will but it cannot be interpreted without the existence of the will, for example, a tenant who stays and remains in the real estate after the end of the term of the lease contract and commits an action that is understood as he desires to renew the term of the lease contract. However, any form of implicit or explicit expression is deemed enough to express the will taking into account that there are some formal contracts the law requires to express the will in certain form such as in writing as the case is in the sale of the real estates and cars (Al-Shraifat, 2005). (The Resolution of Court of Cassation 479/80).

In light of the dual search between the traditional and electronic contract, the question here is: Do the previously mentioned articles are valid and is the internet valid as a mean to express the will?

Some studies in the literature provided that there is no legal restriction that internet pages and internet sites are used to express the will in particular these are now actual and real means in the global level and the Articles of the Civil Code can apply in this regard (Mohammad Hussein Mansour, 2006).

We shall here indicate that the electronic environment raises problems in terms of the expression of the



will where lot of these problems do not exist in the environment of the traditional contracting such as the security of the data and information relating to the parties of the contracting process what if violated the trust on this mean of contracting may be affected, as well as the issue of the commitment via the internet particularly in terms of electronic payment, data piracy, intellectual property problems and trademarks. These are problems that hinder the development of the usage of such means.

### **Dose Silence Expresses the Will?**

The general rule adopted by the Jordanian Civil Code is that:

- No speech is attributed to a silent person nor considered as consent.

- The silence is considered as consent, particularly if there was a previous deal between the contractors and consent is linked to this deal or if consent implies the benefit of the addressee (Al-Ajlouni, 2003).

Silence is far away of being consent, and in terms of consent the Jordanian legislator provided one exception represented by which we previously mentioned when there was a deal between the contractors “the parties” or if it was in favor of the addressee. An example on this case is when a merchant requests goods from another merchant, then the second one sends the first one the goods without expressing his consent. Now when this case is repeated, then the silence of the merchant shall be deemed as consent. Another example is that when the lessor reduces the value of the lease, then the silence of the lessee shall be considered as consent. The Ambiguous cases of consent mentioned in the text of law are not more than examples.

### **Two Wills Compatibility**

will must have legal effect and this is determined by the form of the affirmation and then the consent, provided that consent shall be compatible with the affirmation consent. As the affirmation is the essence of our search so we will discuss it in the next sections and which will deal with the traditional and the electronic affirmation and here we will only discuss the consent within the consensus of the two wills.

Affirmation whether binding or non-binding cannot be a reason for a contract unless associated to consent which is the topic we discuss.

### **Consent**

An expression of will of addressee including his approval and affirmation with all its elements. The consent may be expressly or inclusively issued where the contract can be concluded in the same assembly and also consent shall be given in line with conditions of the affirmation with no breach of these rules. Article 96 of Jordanian Civil Code provided for (The contractors shall have the right to choose and to change their options until the end of the Assembly, and thus, if one of the parties of the contractors refuses any of what was agreed upon, the consent shall be deemed null and invalid). Article 96 of the Egyptian Civil

Code provided for (if consent combined any surplus over the affirmation, restricted it or modified it, it shall be deemed as a refusal and a new affirmation shall replace it).

The basic principle is that the freedom of consent or rejection without any responsibility is guaranteed for that person who was asked to express affirmation. For example, if an employer announced or advertised a vacancy then a person applies for this job but the employer refused this person, unless an acceptable reason is existed, the employer shall be deemed wrong. Article 96 of the Jordanian Civil Code dealt with the Assembly of the contracting. This idea is very perfect which was intended by Muslims Scholars to confirm the double bond of the contract.

### **Time and Venue of the Conclusion of the Contract**

To determine the place and time of the contract is of great importance in terms of the determination of the law governing the contract if the place of contracting was between two absent parties not found in a single state and the competent court to settle emerging dispute.

In the contract between the absentee (Contractors are not at the same assembly when contracting. Al-Jibouri, 2008, note 2.) defining time in which the contract is concluded and the place where it takes place are of great importance. According to Jordanian legislator adopts the announcement of the consent as provided for in Article 101 of Jordanian Civil Code. Jordanian legislator considered contracting by phone as if the parties are absent and not existed in the same place but in respect of time the contract is deemed as a valid contract as if the parties are in the same contracting assembly, this is due to that there is no an time interval between the issuance of consent and awareness of such consent by the other party as Article (102) of the Jordanian Civil Code stated and thus the venue of the contract is the place in which consent is given.

The assembly of electronic contract has varied opinions where some sees it is valid in terms of place and time, but the parties are absent while others deem it as a valid assembly as if the parties are in the assembly because they are in a live connection. The third opinion sees that such a contract is deemed as a contract between present parties in terms of time but they are absent in terms of place. In considering the third point of view we shall note that some electronic connections may be non-Instantaneous and this form of contracting is between two contractors (parties) who are absent in terms of time and place.

### **Validity of Satisfaction**

Satisfaction alone does not give the contract its strength if it is not accompanied by validity of satisfaction, otherwise, the contract is either suspended or subject to dissolution in the Jordanian. The invalidity of satisfaction arises from the lack of confidence of one of the contractors or a defect in the satisfaction itself. There is a difference between the satisfaction which is a significant pillar of the contract and the validity of the satisfaction which makes the contract suspended.

### **First: Competency**

The contract to be valid it must be issued by competent parties who must be adults, otherwise, the contract will be considered invalid. Article 30 of the Jordanian Civil Code stated that (the personality of a human begins from the moment of its birth (alive newborn) and ends by his death. Accordingly the legal personality of a person is the competency through which he can bear responsibilities and have rights and such competency ends by his death and specifically after the settlement of his debts after his death because legacy is not distributed until all the debts are settled.

Article 116 of the Jordanian Civil Code states (each person has the right to contract unless his competency is restricted or limited by law). Who claims the incompetency shall bear the responsibility to prove that.

The competency of performance: the competency of an individual to practice its rights and to commit itself to the obligations of its own<sup>2</sup>.

### **Second: The Incidents of Competency**

Any one may face different incidents that limits or restricted his competency; as such incidents restrict the ability of the human to manage his affairs. Such incidents include madness, dementia and negligence. These incidents may affect the mind of an individual what makes him unable to manage his affairs such as idiots. The incident may be double handicap such as deaf and speechless. Accordingly a person cannot express his will and then the court may assign a guardian to manage his properties.

### **Third: Defects of Satisfaction:**

The Jordanian legislator identified three defects of satisfaction which are **Compulsion, Delude and fraud combined to extreme injustice**. The Jordanian legislator ignored dealing with extortion which was dealt with by other civil laws such as Egyptian, Iraqi, Syrian and French Civil Codes. Compulsion was identified by Article 135 of Jordanian Civil Code where it distinguished two types of Compulsion. Any of these two types makes the contract invalid until the reason of Compulsion terminates and depending on the consent of the victim or his heirs explicitly or implicitly.

**Each fraud and extreme injustice** is considered as independent defect of will in the Western legislations, but in Jordanian Civil Code they are dealt together (they must take place together).

Jordanian Civil Code deemed intentional Silence as fraud if the victim would not enter into the contract if he knew such fraud, and accordingly he shall have the right to terminate the contract. This is provided for Expressly in Article 144 of the Jordanian Civil Code where fraud combined to extreme injustice invalidated the contract and it becomes non-bending and the victim shall have the right to terminate the contract whether such fraud committed by the second party or any other parties.

Injustice is identified as a defect in the contracts of Trade-offs where one trade-off is unequal to the other one in value. Such as low value sale contract that may harm the seller. According to Article 146 extreme injustice is what cannot be valued by the evaluators.

Delude is defined by the explanatory memorandum of the Jordanian Civil Code as (an action by which the mind is forced to consider true events as false ones and vice versa). Dr. Sanhoori identified it as (Illusion which is far from reality).

The impact of delude differs according to the case. If delude occurs in the conditions of the conclusion of a contract, the contract shall be deemed as invalid. But if delude occurs in a desirable feature or characteristics the victim whose will was affected shall have the right to terminate the contract.

The abovementioned defects of will may include some aspects of the electronic contracting only because the material Compulsion in electronic contracts is not applicable, thus, such compulsion is not applicable due to the lack of special regulations in this respect.<sup>1</sup>

### **Affirmation**

The previous section dealt in details with the elements of the theory of contract, and accordingly we will discuss also the affirmation in its traditional and electronic form in this section followed by a section dealing with the extent of affirmation bind in each one of traditional and electronic contract.

### **The Legal Regulation of the Affirmation in the Traditional Contract**

Any full contract shall be there affirmation followed by consent. The Jordanian Civil Code dealt with contract conclusion in detail, where it took its regulations from the Islamic rules in this field. The contract is identified by Article 87 of Jordanian Civil Code as (the commitment by the parties of the contract to implement something pursuant an affirmation and consent). This correlation shall be meaningful to be considered by the legislator, and thus the wills of those who have disorder in mind shall not make a contract. Some see that a contract is the association between the consent and affirmation because affirmation I prior in issuance and it is impossible to be connected in a thing that is not existed when it is issued, but the consent when issued associates to affirmation.

#### **Part One: Affirmation**

The Jordanian legislator in Article 1/91 of the Jordanian Civil Code identified Affirmation as (Affirmation and Consent are two terms used customarily to conclude contracts, whereas the first word in the contract is an affirmation and the following one is consent).

Juridical Provisions Journal identified it in Article (101) used this definition also

<sup>2</sup> Equivalent to Article 1/11 of typical unistral law of electronic commerce, and Article 1/13 of electronic commerce and transactions of U.A.E NO 2 of 2002.

Accordingly, if the seller addressed the buyer saying “I sell you this book for (one hundred Dinars), this is considered as an affirmation from the seller to the buyer. And if the buyer addressed the seller saying” would you sell me this book for (one hundred Dinars) this is considered as an affirmation from the buyer to the seller. Affirmation is the first step to conclude a contract and there are a set of conditions shall be met to have a valid affirmation.

In a resolution by the Egyptian Court of Cassation the term was identified as “Affirmation is the offer by an individual to express his full will, and if such affirmation followed by a consent (acceptance), the contract then is concluded”.

And so Affirmation can be defined as: expression issued by one of the contractors and directed to the other party in order to produce a legal effect.

### **Part Two: Terms of Affirmation**

Affirmation must involve identifying the core elements of the contract to be concluded, for example Affirmation (offer) of selling needs to include desire at the conclusion of the sale, the product and the price, and the offer of lease must include the desire to conclude a lease, and the leased, the fare and duration, and without these elements the will is not valid to express the desire. The express of will is enough to include core elements of the contract intended to be conclude even if it does not include the whole terms and conditions of a contract such as the location and the time, the expenses of the delivery of the goods, and in this case it is referred to the legislation rules and traditions to complement the provisions of the contract.

There is no need to mention the place and the expenses or other details unless they are essential in the contract. This is stated in (Article [2/100] if disputes arise between the parties in terms of the details they did not agree upon, the judge shall settle such dispute where the duty of the judge is not to interpret the will of the parties but also to complete the lost aspects of it.

**First:** There must be a clear affirmation (offer) and to be so, it must be directed to a specific person or several persons or to the public, in one of the ways of expressing explicit or implicit will. The French Court of Cassation stipulated that the offer should be directed a particular person and confirms that offer directed to the public is in fact an offer directed to the first person to accept it.

But the authors of the Vienna Convention for the sale of goods and to make affirmation clear the convention did not consider the affirmation addressed (directed) to the public but considered it an invitation to contract. Addressing affirmation to a person or a number of persons is evidence on the intention of this person who issued the affirmation to conclude a contract but this is not sufficient because the affirmation shall be absolute and irrevocable and this was clear in the mind of the Jordanian legislator when it provided for this in Article (2/94).

**Second:** Affirmation must be decisive, i.e. not depending on any conditions, and the expression of will shall not include what may terminate the process of contracting. An example of affirmation depending on a condition, that the person sells an oil paintings at a price he determined but reserves the right to modify this price and in accordance with the ongoing changes in prices.

Any proposal for contracting shall not be considered as affirmation (offer) of a contract although it contains the core elements of the draft contract For example, if a person declared that he is not bound by what he affirmed in case of consent by the other party, this is not deemed as an affirmation but a call for contracting by which he keeps the right to accredit or not to accredit the consent of the addressee. And here we do not consider the affirmation of the offered if he kept his right to conclude the contract or not or only he intended to pave for such contract or put some conditions and terms to enter into a contract.

The opinions of the scholars differed in determining the meaning of the reservation in affirmation. Some of them stated that we must distinguish between the relative reservation: a reservation of affirmation before specific individuals, and the absolute reservation that is before public. The first one changes the nature of affirmation, then becomes a call for contracting while the second one does not affect the nature of the affirmation and then becomes an absolute affirmation.

If a party put a condition that he shall has the right to refuse or accept the consent of the other party, then such affirmation shall be deemed invalid because it is arbitrarily affirmation (offer) and then the consent of the second party may be deemed as an affirmation (offer) directed to the first party.

And so affirmation shall be clear, not ambiguous, and decisive and shall not include multiple changes where it is difficult to detect the will of the offer or. When the affirmation (offer) as such, consent is enough to conclude the contract.

### **Part Three: Forms of Affirmation in the Contract**

Article 93 of the Jordanian Civil Code stated and provide for the cases of the expression of the will. This Article dealt with the other manners of expressing the will rather than (orally). Article 93 of the Jordanian Civil Code stated that (expression of will can be Implicit unless the law provides or the parties agree to be explicit). With regard to the acceptance of the Speechless, this article is compatible to Article / 79 of Iraqi law.

### **The Legal Regulation of the Affirmation (offer) in Electronic Contracting**

In terms of the definition of affirmation on electronic contract it was defined by the European Directive of 20.05.1997 (that each remote connection includes all the elements necessary to enable the addressee to accept a contract directly and excluded from this range just advertising)<sup>3</sup>.



The term electronic when added to the affirmation (offer) it does not affect the meaning mentioned in accordance with the general theory of obligations, the matter is just a description because of the different means of expression of will, as the expression in the electronic contract is embodied in the modern means of communication through the computer. The expression of the will can be expressed electronically via e-mail, through the Internet site or by conversation. and we will talk about these aspects and forms in some detail, but we say here that whatever the way of the expression of electronic affirmation is, affirmation shall include all the required elements to conclude the contract, where affirmation shall be consistent, specific and irreversible, in the sense that the intention of the offer or to the conclusion of the contract as soon as associated to consent.

The Jordanian Electronic Transactions Act allows the use of information messages to express affirmation, as stated in the text of Article 13 (information messages is a means of expression of will legally accepted to express affirmation or acceptance for the creation of a contractual obligation)<sup>4</sup>.

By the foregoing we will try to conclude the most important forms of electronic affirmation, by which we can understand the practical reality of the electronic affirmation more clearly, and with some privacy required by every form of affirmation.

#### **First: The Offer Via E-Mail**

This affirmation (offer) via e-mail is intended to offer specific individuals the goods the merchants wants to sell when the merchant (manufacturer) wants to show certain group of the clients his products who are interested in such products. Affirmation to an individual is not binding unless limited by a specific period of time. The non-binding affirmation (offer) it is can be refused by signing out from the e-mail and shut down his computer or by navigating in another site. This is called special affirmation (Al Jbouri, 2008, note 2).

If the offer is directed to several people, it would be when in doubt just call to negotiate or contract shall not be positively based on that publication or declaration or statement prices being dealt with or requests directed to the public is not considered when in doubt positively, but is a call to contract.

#### **Second: Affirmation via Web Pages**

This type of positive not much different from the offer issued by the newspapers or on television because it is a continuous affirmation and is often directed to public not to one single individual. The affirmation on web pages is not limited and restricted in a specific period of time. And that this offer is mostly directed at the public, not

to a particular individual. And in this case affirmation is considered valid if includes its general conditions.

#### **Third: Affirmation (Offer) Via Conversation (Chat) and Video**

The party in this case can see his counterpart on the monitor and can talk to him via the camera connect the computer. One may give an offer while the second party may accept it directly as in this case the parties are considered as if they are present in the same assembly.

In fact the electronic affirmation (offer) shall be preceded by negotiations stages before concluding the contract and in this case the first party (the manufacturer) shall apply some obligations in terms of consumer protection. Some obligations and requirements shall be met including the determination of the identity of the seller, its address, determining the product or the service provided to the costumer, descriptions, specifications, price, method of payment or settlement and the option of the contractor to contract in a specific period of time and to provide the consumer with the previous information within a period of time not exceeding the re-delivery period, warrantee period and After-Sales Service.

#### **The Strength of Affirmation**

Is the first party (offerer) obligated for a specific period of time in which his offer is not irrevocable when no consent is given by the second party? We will answer this question in the following parts. This issue was discussed in detail by researchers but scholars did not address the distinguish between the obligatory strength of traditional and electronic contracting; even the titles of the studies were mere repetition of what was the case in the traditional contracting.

#### **Part One: Binding Offer and Non-Binding Offer (Affirmation)**

In general the affirmation is not binding, as the offerer can withdraw it if no consent is given by the second party. Thus affirmation (offer) is not binding without the consent because it is an expression of the will and cannot have its legal effect if not given consent by the second party. Article (98) of the Jordanian Civil Code dealt with the binding affirmation (whereas the offerer shall remain offering his offer for specific period of time (Abdul-Qader Al-Far, 2005).

The affirmation associated to a period of time makes it binding and the basis of this commitment is the will provided by law. the obligation may benefit from the case or the nature of the transaction, so the sale conditioned to be a retail obliges the seller to commit its affirmation in the specified period of time, but if the affirmation s issued for an absent party, the offerer shall stay affirming during the period of time enough to the second party to

<sup>3</sup> To avoid repetition about the time and location of contract please refer to the explanation in p.15 of this research ,see also Omar Zuraiqat ,ibid.p.121.

<sup>4</sup> This is provided for by the Egyptian legislator in Article 93 of Egyptian Civil Code.



receive such affirmation, but if the offerer did not determine a period of time for consent or if the time is not essential factor depending on the nature of the transaction he can withdraw his affirmation if not accepted or having a consent of the other party.

In terms of non-binding affirmation, which applies only in case that the parties are present in the same assembly, it can be revoked and can be withdrawn in the following cases:

If the offerer withdraws his offer (affirmation) before the adjournment of the assembly.

Withdrawal may be explicit or implicit. For example if the insured informed the insurance company that he was subject to loss by fire after he notified the companies he does not desire to renew the contract with the company. But the offerer is bound to compensate the loss if he abused his right on the basis of the rules of harmful actions (Tort rules).

#### **Specified Affirmation (binding affirmation)**

If the offerer issued an offer and gave the second party a specific period of time to accept or refuse, such an affirmation is binding for the offerer to remain offering such affirmation (offer) until the period of time he specified. And this is what provided for by Article 98, but in terms of determining the time of consent in this case is not stated in the Jordanian Civil Code. But the specification of a date (a period of time) for consent is may be extracted according to the objective circumstance that surrounds the contractor or the nature of the transaction. For example, in the case of tendering and bidding the offerer shall commit its affirmation to the date of opening the envelopes of the tender as the competent court has discretion in extracting such period of time according to the circumstance of the contracting.

#### **Binding Affirmation (offer)**

Now, when the offerer offers (affirms) this means that he shall remain offerer until the date (specific period of time) he determined. But, what if he withdrew before the end of the period of time he specified? Some say that the offerer in this case shall compensate the second party, while others see that the withdrawal has no significant effect. The Jordanian Civil Code did not give a resolution or judgment in this respect in spite that the Jordanian legislator did not provide more than this we cannot say that the contract is considered as concluded if it received a consent pursuant to Article (106) and Article 98 equivalent to Article (102) of the Egyptian Civil Code which adopted the previous opinion. But the Iraqi Legislation has provided for in Article 84 the same as Article 98 of the Jordanian Civil Code.

#### **Part two: Termination of the Affirmation (Offer)**

Binding affirmation shall be terminated and shall have no effect if the specified period of time ended if consent by the second party was not given, and also if consent was not given before the end of the specified period of time whether refusal was explicitly or implicitly. For example if the offerer affirms that he wants to sell his car for two

thousands Dinar, and adding "but I accept to sell it for one thousand and five hundred Dinar), this is considered as a new affirmation. If the affirmation is not bending so it is cancelled if the offerer withdrawn its affirmation in the assembly of the contract without receiving the consent at the same assembly the second party. And this is what is provided for in the same sense in Article 94 of the Egyptian Civil Code.

#### **First: Cases of the Termination of the Offer**

If the offerer withdrew his offer/Article 96

Frequent offer by offerer before the second party gives his consent/Article 97

If the offer is refused by addressee (Article 96).

#### **Second: The Cases of Termination the Binding Affirmation (offer)**

Expiry of the specified date (period of time) with no consent given by the addressee (Article/98).

If the offer is refused by the addressee.

The death of the offerer or becoming incompetent. The Jordanian Civil Code did not deal with this point but it can be applied because it is derived from the Islamic Legislation. The interpreters of the Egyptian Civil Code have discussed this issue through the explication of Article 92 which provided for that the affirmation is to be cancelled in the case of the death of the offerer because such affirmation is an expression of the will. but the death of the addressee or the lack of his competence has no effect on the affirmation before the end of the specified period of time.

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## **CONCLUSION**

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This research was an attempt to compare between the general theoretical rules of the contracting and contracting via the internet in particular after that legal projects arose such as the legality of the contracting via this mean, the privacy of the expression of will via this mean, the place and location of the contract in both cases, and the affirmation and its related privacy and problems.

We reached some results represented by the following:

The Jordanian Civil Code did not explicitly nor implicitly deal with contracting via the Internet, but its provisions and legislations are adequate to manage and regulate such contracts.

Privacy in electronic contract lies only in the means of expressing the will, where the computer and the internet do not differ from the discussed means of communication such as telephone.

The Internet is deemed as anew mean representing a contract assembly between two parties who are not present at the same assembly.

Electronic offer (affirmation) is a valid mean for contracting provided that conditions and regulations in this respect shall be met and the verification of the personality of the contractor such as (electronic signature).

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