

The Consent in Contracting By Electronic Means With A Professional Party According to the New French Law of Contract of 2016-An Analytical Comparative Study With The Iraqi Law

Assistant Professor Doctor

Younis Salahuddin Ali

College of Law, International Relations and Diplomacy

Cihan Private University

younis888sss@yahoo.com

Receipt Date: 26/4/2024, Accepted Date: 29/5/2024, Publication Date: 15/6/2024.

DOI:



This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/)

Abstract

This research is concerned with studying the consent in contracting by electronic means with any person in general, and with a professional in particular, in the light of the French civil code, amended by the ordinance No.2016-131 dated February 10, 2016 concerning reforms of the law of contract, general regime and proof of obligations. The study is aimed at the benefit of the Iraqi law from the special rules of the new French law of contract as exemplary rules, concerning the expression of the consent in contracting by electronic means, particularly with a professional. The problem of the study lies in how to fill the gaps in both the Iraqi civil law No.40 of 1951, and the law of electronic signature and electronic bargains No.78 of 2012 regarding the up-to-date requirements and modalities of the consent

in contracting by electronic means, and its components of the offer and acceptance. To achieve this aim, the study adopts the comparative analytical methodology of legal research. The most significant findings that the study reached are the considerable shortage of the legal regulation and the rules concerning the consent in contracting by electronic means in the Iraqi civil law, as compared to the detailed regulation of this topic in the French law of contract. Finally the study suggested many recommendations to the Iraqi legislator to follow suit the new rules of the French law of contract particularly the article (1127).

Keywords: Consent, Electronic means, Professional Party, Amendment, Offer, Acceptance.

الرضا في التعاقد بالوسائل الالكترونية مع طرف مهني وفق قانون العقود الفرنسي الجديد لسنة ٢٠١٦ – دراسة تحليلية مقارنة مع القانون العراقي

أستاذ مساعد دكتور

يونس صلاح الدين علي

كلية القانون والعلاقات الدولية والدبلوماسية

جامعة جيهان الخاصة

younis888sss@yahoo.com

تاريخ الاستلام: ٢٠٢٤/٤/٢٦ ، تاريخ القبول: ٢٠٢٤/٥/٢٩ ، تاريخ النشر: ٢٠٢٤/٦/١٥.

المستخلص

لقد أولى هذا البحث إهتماماً بدراسة موضوع التراضي في التعاقد بوسيلة الكترونية مع أي شخص عموماً، ومع مهني على وجه الخصوص. وذلك في ضوء القانون المدني الفرنسي المعدل بمقتضى المرسوم رقم ٢٠١٦-١٣١ والخاص بقانون العقود، والنظرية العامة للإلتزامات وإثباتها. وتهدف الدراسة الى إفادة القانون العراقي من القواعد الخاصة لقانون العقود الفرنسي الجديد كقواعد نموذجية يحتذى بها. وذلك فيما يتعلق بالتعبير عن التراضي في التعاقد بوسيلة الكترونية، ولا سيما مع طرف مهني. وتكمن مشكلة البحث في كيفية سد الثغرات في كل من القانون المدني العراقي رقم (٤٠) لسنة ١٩٥١، وقانون التوقيع الإلكتروني والمعاملات الإلكترونية رقم (٧٨) لسنة ٢٠١٢. بخصوص المتطلبات الحديثة وطرق التعبير عن التراضي في التعاقد بوسيلة الكترونية، ومقوماته المتمثلة بالإيجاب والقبول. ولغرض تحقيق هذا الهدف فقد تبنت الدراسة منهج البحث القانوني التحليلي المقارن. أما أهم النتائج التي توصلت اليها الدراسة فهو النقص الكبير في التنظيم القانوني والقواعد ذات الصلة بالتراضي في التعاقد بوسيلة الكترونية في القانون العراقي مقارنة بالتنظيم التفصيلي لهذا الموضوع في قانون العقود الفرنسي. وأخيراً فقد قامت الدراسة بإقتراح عدة توصيات للمشرع العراقي ليحذو حذو القواعد الجديدة في قانون العقود ولا سيما المادة (١١٢٧).

الكلمات المفتاحية: التراضي، وسيلة الكترونية، طرف مهني، تعديل، الإيجاب، القبول.

Introduction

First: Introductory Preface to the Topic: The contracting by electronic means is one of the topics regulated by the French civil law, amended by the ordinance No.2016-131 dated February 10, 2016 concerning reforms of the law of contract, general regime and proof of obligations. Therefore, the new French law of the contract regulate the consent in contracting by electronic means with anyone in general, and with a professional in particular, in conformity with the article (1127). It is worth-mentioning that the consent of the parties is considered as one of the new three basic elements necessary for the validity of the contract after the amendment, as well as the capacity to contract, and the lawful and certain content of the contract. Whereas the general rules of the Iraqi civil law no. (40) Of 1951, are restricted to the contracting between two absent person, and contracting by telephone. While the law of electronic signature and electronic bargains no.(78) Of 2012 regulated the contracting by electronic means and the electronic contract.

Second: The objective of the research: This research is aimed at trying to fill the gaps and complete the shortage of both the Iraqi civil law and the law of electronic signature and electronic bargains regarding the up-to-date requirements and modalities of the consent in contracting by electronic means and its components of the offer and acceptance.

Third: The problem of the research: The problem of this research is focused on the considerable shortage of the legal rules concerning the consent in contracting by electronic means, and the requirements, conditions and modalities of the offer and acceptance particularly suitable for the contracting by electronic means, whether in the out-of-date rules of the Iraqi civil law, or even in the relatively up-to-date rules of the law of electronic signature and electronic bargains.

Fourth: The methodology of the research: This research has been studied under the analytical methodology of the legal research as a first step, then comparing each situation of the new French law of contract with its counterpart of both the Iraqi civil law, and the law of electronic signature and electronic bargains, if possible.

Fifth: The plan of the research: According to the methodology of this research it has been advised to divide it into three topics as follows:

First Topic: The concept of consent in contracting by electronic means with a professional party.

Second Topic: The requirements of the consent in contracting electronically with a professional party.

Third Topic: The legal effects arising from the validity of consent in contracting electronically.

First Topic

The Concept of Consent in Contracting By Electronic Means with a Professional Party

Studying the concept of consent entails to investigate with some details about the consent in general and in contracting electronically in particular, by defining it and some other closely-related terms, as well as reviewing the characteristic features of the consent in contracting electronically with a professional party as follows:

First Requirement

The Definition of the Consent in Contracting Electronically With a Professional Party

To start with, we can say that the consent (le Consentement) is considered as one of the three basic elements upon which the contract is based, according to the new article (1128) of the French civil code, amended by the ordinance No.2016-131 dated February 10, 2016, concerning the new law of contract, which provides that (the following are necessary for the validity of a contract: 1.the consent of the parties; 2.their capacity to contract; 3. content which is lawful and certain). Therefore, some French jurists⁽¹⁾ defines the consent as a mental operation comprising two-fold or double stages: the first is the expression of the will (volonté) of each party, and the second is the exchange of the offer and acceptance, in order for the accord of wills (le concours de deux volontés) to be realized. This element is a prerequisite of the validity of the contract besides two other elements⁽²⁾. Another French jurist⁽³⁾ defines the consent as the meeting of wills, in order for the contract to be concluded by the correspondence of the offer and acceptance. It is also defined⁽⁴⁾ as the meeting of the intentions of all the parties at interest, and must be free and devoid from mistake, duress and fraud. Since drafting the original code of 1804, the consent has been the most important basic element of the contract, in conformity with the article (1108).⁽⁵⁾ It also maintained its importance pursuant to the new article (1128). It is worth-noting that

when the consent is being made by electronic means (*par voie électronique*) in contracting with a professional party, it has the specificity of going through different steps and stages needed for the conclusion of the contract, as well as resorting to some technical means for identifying any errors in the data entry, and correct them⁽⁶⁾. It is to be noted also that the term "professional party" may refer either to professional person or any business or institution specialized in a certain profession⁽⁷⁾. As far as the Iraqi civil law no. (40) Of 1951 is concerned, it has only regulated the contracting between absent persons, in conformity with its article (87). But the article (1/10) of the law of electronic signature and electronic bargains No. 78 in 2012 defines the electronic contract as the (unison or engagement of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the subject-matter of the contract by electronic means). In fact this definition is literally derived from the article (73) of the Iraqi civil law, except that the phrase (by electronic means) was being added. Then the article (18/1) of the same law allows the offer and acceptance of the contract to take place by an electronic mean. Traditionally one of the Iraqi civil law jurists⁽⁸⁾ defines the consent as the harmony or accord of two wills to produce a legal effect. These two concordant wills are materialized by the combination of offer and acceptance⁽⁹⁾. It should also be noted that the expression of will or intention by electronic means is not restricted to the electronic mail (e-mail), but it can be expressed via web-sites, downloading-uploading files and data and by internet relay chat⁽¹⁰⁾.

Second Requirement

The Distinctive Features of the Consent in Contracting Electronically

The consent in contracting by electronic means in new French law of contract is characterized by the following distinctive features, as compared the Iraqi law:

First: Although the expression of consent is generally subordinated to the principle of the contractual liberty or freedom⁽¹¹⁾, but because the consent in contracting via electronic means is subject to many restrictions emanating from the technical formalities of using electronic means, the force of the afore-mentioned principle is considerably attenuated by these restrictions⁽¹²⁾. The same is true for the Iraqi law of electronic signature and electronic bargains, which imposes restrictions on the consent of both the signatory and consignee as to the sending of electronic documents via an information processing system.

Second: The expression of the consent by electronic means may be transferred by electronic mail for the conclusion of the contract in general, in accordance with the article (1126) of the new French law of contract which provides that (information requested with the view to the conclusion of a contract or provided during its performance may be sent by electronic mail if the recipient has agreed that this means may be used). And for contracting with a professional party in particular⁽¹³⁾, according to the article (1127) which provides that (information intended for a business or professional may be addressed to them by electronic mail as long as they have communicated their electronic address). It has then been confirmed that both the paragraphs (4) and (5) of the article (1127) have determined two types of the letters to be transmitted via electronic mail, simple and registered letters, concerning the conclusion or performance of a contract⁽¹⁴⁾. The contracting by electronic means and expression of consent is not confined, in the Iraqi law of electronic signature and

electronic bargains, to the electronic mail, but they can be made by any other modality other than the E-mail, in the light of the article (18/1) which permits the offer and acceptance of the contract to take place by electronic means in general.

Third: Another distinctive feature of the consent in contracting electronically is that it entails a time span between the issuing of the acceptance and the offeror's recognition of which, in order for the conclusion of the contract to be realized. Because all the information accompanying the exchange of wills is transmitted by instantaneous techniques of communication via the cyberspace as a network of networks (*réseau de réseaux*)⁽¹⁵⁾. The same is true for the Iraqi law, in conformity with the general rules of contracting between absent persons in both the articles (87) of the civil law, which entails a period of time between the emission of the acceptance and the offeror's knowledge of its content⁽¹⁶⁾. As well as the articles (1/10) and (20) of the law of electronic signature and electronic bargains.

Fourth: The consent by electronic means is characterized by its modernity and novelty⁽¹⁷⁾, in that it has been recently introduced to the French civil law after the amendment taking place by the ordinance No.2016-131 of 10 February 2016. The same is true for the Iraqi law of electronic signature and electronic bargains of 2012, which regulated the offer and acceptance in contracting by electronic means.

Fifth: The consent in contracting electronically is the one of the types of the contracting between absent persons, which is characterized by the physical absence of the parties to a contract or their representatives in the moment when the contract is concluded⁽¹⁸⁾. The moment of formation the electronic contract, as we shall investigate later, will be determined by four theories: the theory of the declaration of will, the emission of will, the reception of will and the theory of information, or the recognition of the acceptance⁽¹⁹⁾. The same is true for the Iraqi civil law, which regulated the rules of the contract between absent

persons in the article (87). And the contract is deemed to be concluded at the time when the offeror recognizes or gets informed with the acceptance, and in the place where the recognition or knowledge of the acceptance takes place⁽²⁰⁾.

Sixth: The consent in contracting by electronic means is also characterized by its informatics feature, that is to say, it is expressed in the light of indicating contractual stipulations, conditions or any other significant information like contractual documents and archives⁽²¹⁾ according to the article (1125) which provides that (Electronic means may be used to make available contractual stipulations or information about property or services). The same is true for the Iraqi law of electronic signature and electronic bargains, which requires an information processing system to send and transmit electronic documents.

Seventh: The consent in contracting by electronic means is also characterized by the feature of the agreement between the contracting parties to use this means. Therefore the acceptance of an offer by the electronic means can be realized, if the offer or the recipient of the offer agrees of communicating information contained in his acceptance by this means. The article (1126) of the new law of contract provides that (Information requested with the view to the conclusion of a contract or provided during its performance may be sent by electronic mail if the recipient has agreed that this means may be used). The same is true for the article (18/1) of the Iraqi law of electronic signature and electronic bargains, which entails impliedly the agreement between the offeror and offered to exchange expressions of offer and acceptance by electronic means.

Second Topic

The Requirements of the Consent in Contracting By Electronic Means with A Professional Party

After the reform of 2016 had introduced in the civil code explicitly the doctrine of offer and acceptance, which was absent in the original code⁽²²⁾, the new French law of contract provided for special requirements of both the offer and acceptance to be satisfied in contracting by electronic means with the professional, in order for the consent to be expressed and exchanged validly⁽²³⁾. Some of these requirements are special conditions of expressing the offer. Other requirements are represented by the particular modalities of expressing the acceptance by electronic means as follows:

First Requirement

The Conditions of Expressing the Offer by Electronic Means

Four conditions should be available in expressing the offer by electronic means, in order for the consent to be valid, if other conditions are satisfied in the expressing the acceptance. These conditions are provided for in the article (1127) of the new French law of contract. Therefore we shall review and discuss these conditions as follows:

First Branch

The Offeror Should Make Available the Applicable Contractual Stipulations

When the offeror in his or her capacity as a professional, displays the supply of property or services by electronic means to the other contracting party, the professional should announce and make available the applicable contractual stipulations and terms⁽²⁴⁾ in a method allowing their storing and reproducing in the future⁽²⁵⁾. In conformity with the article (1127/1) of the new law of contract which provides that (A person who, in a business or professional capacity, makes a proposal by electronic means for the supply of property or services, must make available the applicable contractual stipulations

in a way which permits their storage and reproduction). It is to be noted here that the French text of this article mentions the phrase (prestation de services), which means literally the performance of services. But strictly speaking it means the rendering or supply of services⁽²⁶⁾. Although the Iraqi civil law did not regulate the contracting by electronic means, but in harmony with the general rules the offer must be firm, definitive and peremptory comprising all the conditions and information about the contract to be concluded. Such as the details of the content of the contract, its type and its basic elements⁽²⁷⁾. Therefore the first paragraph of the article (80) of the Iraqi civil law provides that (The display of goods with a price shown on them is deemed to be an offer).

Second Branch

The Offeror Should Remain Bound by His or Her Offer

This condition requires that the offer or should remain bound by his or her offer, because the offer has been expressed by electronic means. As long as the offeror lets the consignee make access to the offer expressed by electronic means⁽²⁸⁾. According to the article (1127/1) providing that (A person issuing an offer remains bound by it as long as it is made accessible by him by electronic means). The basis of the obligatory or binding force is the unilateral will of the offeror⁽²⁹⁾. But some French jurists⁽³⁰⁾ think that this situation in which the offeror remains bound by his offer runs contrary to the principle of contractual liberty or freedom. Since the offeror is permitted originally to withdraw his offer⁽³¹⁾. This article means that the withdrawal of the offer is still possible, unless it reaches the consignee in line with the theory of reception of expression⁽³²⁾. Compared to this situation the Iraqi civil law includes a similar type of an offer known as the "binding offer", by which the offeror will be bound, if connected with a certain period of time during which the acceptance should be expressed⁽³³⁾, in conformity with the article (84) of this law which provides that (The offeror who has set a time limit for his offer will

be bound by his offer until such time limit expires). The basis of the obligatory force of the offeror is the unilateral will⁽³⁴⁾.

Third Branch

The Offeror Should Notify the Acceptor (Offered) By Electronic Means

The third condition to be satisfied is that the offeror using electronic means should, without any undue delay, notify the offeree about the receipt of the order addressed to the latter according to the article (1127/2) of the new law⁽³⁵⁾. Some French jurists⁽³⁶⁾ think that the term of the (party issuing the offer) refers to service supplier (le prestataire) who should acknowledge the reception of the order addressed to him by the receiver of the service (destinataire). Particularly when the order is being issued by electronic means. Furthermore, it may be supposed that the order, the confirmation of acceptance of the offer, and the acknowledgement of receipt are to be received when the parties to whom they are addressed are able to have access to them⁽³⁷⁾. When we compare this situation with that of the Iraqi law, we can find a considerable shortage in the general rules of the Iraqi civil law, but the first paragraph of the article (19) of the law of electronic signature and electronic bargains considers the consignee's notification to the signatory's request by the electronic means of the receipt of the electronic documents as a response to that request, and provides that (If the signatory requests the consignee by an electronic document to notify him/ her of the receipt of such document or agrees with him/ her on that, the consignee's notification to the signatory by the electronic means or any other means or by taking any action or behavior indicating he/ she has received the document shall be considered as a response to that request).

Fourth Branch The Contents of the Offer

In order for the offer emitted by a professional to do its function in contracting by electronic means, and take part in the realization of the consent validly, it must contain a lot of information⁽³⁸⁾. These pieces or bits of information are included in the following five points⁽³⁹⁾, provided for by the article (1127/1): The different steps to be followed in the process of the conclusion of the contract by electronic means, the technical means which may be used by the offeree to identify the errors in the data entry and correct them, the languages proposed and offered for the purpose of concluding the contract, particularly the French language, which should be obligatorily included among them⁽⁴⁰⁾, the methods or modalities of filing the contract by the offeror, if necessary⁽⁴¹⁾, and the conditions for the access to the contractual documents filed, the means of consulting electronically the professional and commercial rules to which the offeror intends to be bound or obliged. But the article (1127/3) includes two exceptions from these five points⁽⁴²⁾: the first is represented by the contract for the supply of property and services, which are excluded from being subject to these points. Because they are concluded exclusively by the exchange of electronic mails. Secondly another exception from these points are the contracts concluded between businesses or professionals⁽⁴³⁾. On the contrary, if only one of the contracting parties is a professional, the offer must contain or indicate the afore-mentioned points. If we compare this situation with the Iraqi law, we do not find any technical means to be used by the offeree to identify the errors in the data and correct them, except for the information processing system used an electronic medium to transmit or send electronic documents from the signatory to the consignee⁽⁴⁴⁾, according to the first paragraph of the article (20) of the law of electronic signature and electronic bargains⁽⁴⁵⁾. But it is

not certain whether this processing system has the capability to identify errors and correct them.

Second Requirement

The Particular Modalities of Expressing the Acceptance by Electronic Means

If the acceptance of an offer is made or realized by electronic means, there are two particular modalities of expressing the acceptance⁽⁴⁶⁾, in order for the consent to be valid⁽⁴⁷⁾, due to the satisfaction of its requirements. These modalities are as follows:

First Branch

The Offeree Must Have the Possibility of Verifying the Details of the Order and Correcting Any Error

The second special modality of accepting an offer is that the acceptance will not be valid unless the consignee or the party to whom the offer is addressed has the possibility or capability to verify the details of the order he requires from the offeror (supplier of the service)⁽⁴⁸⁾, and its total price and can be able to correct any possible errors before approving his order, and expressing his definitive acceptance⁽⁴⁹⁾. In accordance with the article (1127/2) which provides that (A contract is validly concluded only if the party to whom the offer is addressed had the possibility of verifying the detail of his order and its total price and of correcting any possible errors before confirming his order in order to express his definitive acceptance). Therefore if the party to whom the offer is addressed verifies all the details of the order and corrects any possible error vitiating it, the definitive acceptance will be valid, since it express the true will (volonté) of this party⁽⁵⁰⁾. It is to be noted that the second paragraph of the article (20) of the Iraqi law of electronic signature and electronic bargains adopted a relatively similar situation, when it permitted the consignee (offeree) to retrieve the documents and re-send or return them to the system he specified⁽⁵¹⁾. This retrieval, in its essence, is a process of correcting errors.

Second Branch

The Professional Offeree Can Communicate His Electronic Address

The professional party can communicate his electronic address, if he is an offeree. This is a prerequisite to send the information intended to be communicated to a business or a professional⁽⁵²⁾, in conformity with the article (1127) of the new law, providing that (Information intended for a business or professional may be addressed to them by electronic mail as long as they have communicated their electronic address). This means as long as the professional communicates his electronic address to the offeror, he will be entitled to communicate the information by electronic mail⁽⁵³⁾. Although the Iraqi law does not include a text like this, but it can be inferred impliedly from the article (18/1) of the law of electronic signature and electronic bargains, according to which the offer and acceptance of the contract may take place by electronic means. this entails that both the offeror and offeree provides or communicates their electronic addresses respectively.

Third Topic

The Determination of the Moment When the Contract Is Concluded By Electronic Means in Both the French and Iraqi Laws

The study of the determination of the moment when the contract is concluded by electronic means entails us to investigate the situation in new French civil code, particularly the law of contract of 2016, then compare it with that of the Iraqi law as follows:

First Requirement

The Determination of the Time When the Contract Is Concluded By Electronic Means in the French Law of Contract

It is common knowledge that because the simultaneous presence of the parties to a contract cannot be unified sometimes at the time when the expressions of wills are to be exchanged⁽⁵⁴⁾, therefore four theories have been developed and used by the French jurisprudence to determine the moment when the contract is concluded by electronic means⁽⁵⁵⁾. That is to say, the theory of declaration of acceptance, according to which the contract is concluded at the time when and the place where the acceptor declares or expresses his will of acceptance. The theory of the emission of acceptance, in which the contract is concluded at the time when and the place where the acceptor emits or transmits his acceptance. The theory of the reception of acceptance, in which the contract is concluded at the time when and the place where the offeror receives the letter of acceptance. And the theory of the information or recognition of acceptance, in which the contract is concluded at the time when and the place where the offeror recognizes the acceptance. After reviewing these four theories, it is important to study the prevalent or dominant situation of the French civil code. This situation can be divided into the legislative situation and the juristic or jurisprudential one. As far as the legislative situation is concerned, after the old French civil code of 1804 had not clearly regulated this

matter, particularly the transmission of wills via simultaneous means of communications like internet⁽⁵⁶⁾, the new French law of contract of 2016 filled the gap and adopted the theory of the reception of acceptance, in accordance with the article (1121) pursuant to the amendment by the ordinance n° 2016-131 dated February 10, 2016, which provides that (A contract is concluded as soon as the acceptance reaches the offeror. It is deemed to be concluded at the place where the acceptance has arrived). This means that the conclusion of the contract between two absent persons is considered to be concluded at the time and place of the reception of the acceptance by the offeror. Secondly As to the juristic or jurisprudential situation, it can be said that the majority of French jurists⁽⁵⁷⁾ after the latest amendment of 2016 adopt the same theory of reception of the acceptance. This situation has ran counter to former one which supported the theory of emission of the acceptance. It also go abreast and harmony with the situation of some international conventions, notably the Vienna convention of the international sale of goods of 1980, which adopted the theory of reception in the article (18/2) of which.

Second Requirement

The Determination of the Time When the Contract Is Concluded By Electronic Means in the Iraqi Law

The situation of the Iraqi law regarding the determination of the time when the contract is concluded by electronic means witnessed two situations: the first is the situation of the Iraqi civil law no. (40) Of 1951 and the second is that of the law of electronic signature and electronic bargains No. 78 in 2012. The Iraqi civil law regulated the contracting between absent persons according to the article (87) which provides that (1-Save express or implied agreement or a legal provision otherwise, contracting between absent persons will be deemed to have taken place in the place where and at the time when the offeror becomes aware of the acceptance. 2-It will be assumed that the offeror had become aware of the acceptance in the place and at the

time of his arrival thereto). It has been indicated clearly from this article that it adopts the theory of information or recognition of the acceptance by the offeror⁽⁵⁸⁾, to determines the moment when the contract between absent persons is concluded pursuant to its first paragraph. But the second paragraph considers the reception of the acceptance as the evidence of the offeror's knowledge or recognition of the acceptance⁽⁵⁹⁾. And a rebuttable presumption of his recognition⁽⁶⁰⁾. Whereas the law of electronic signature and electronic bargains No. 78 in 2012 has adopted these two theories in two separate legal provisions. After the first paragraph of the article (20) had considered the electronic documents to be sent from the time they enter an information processing system which is not controlled by the signatory or the person who sends it on his behalf, unless the signatory and the consignee agree otherwise. The second paragraph adopted conspicuously the theory of reception of the acceptance in the first section of the paragraph, and the theory of information or recognition of the acceptance in the second section. Therefore, when the consignee specifies an information processing system to receive the electronic documents, they shall be considered to be received when they enter the specified system⁽⁶¹⁾. This is an obvious application of the theory of reception of the acceptance, and the contract is concluded electronically, at the time when the electronic documents comprising the acceptance enter the specified system. But when the electronic documents are sent to a system other than the one specified, they shall be considered to be sent in the moment when the consignee returns them to the system specified by him to receive the information. This is a clear embodiment of the theory of information or recognition of the acceptance. Because the process of retrieving and returning or re-sending the electronic documents once again to the specified system, requires that the consignee should read and understand the contents of the documents⁽⁶²⁾. Furthermore the third paragraph of this

article is deemed as an application of the theory of reception of the acceptance. In the case that the consignee does not specify an information processing system for the receipt of electronic documents, the time of receiving the documents shall be considered the time when they enter into any information processing system pertaining to the consignee⁽⁶³⁾. The receipt of the documents will be deemed as a presumption or evidence of the consignee's knowledge of their context.

Conclusions

The conclusion is made up of both the findings and recommendations and as follows:

First: Findings: The study has reached the following findings:

- 1- The consent of the parties is considered as one of the three basic elements necessary for the validity of the contract, as well as the capacity to contract, and lawful and certain content. After the amendment in conformity with the ordinance n° 2016-131 dated February 10, 2016 concerning reforms of the law of contract, general regime and proof of obligations.
- 2- The consent is a mental operation made up of two-fold or double stages: the first is the expression of the will (volonté) of each party, and the second is the exchange of the offer and acceptance, in order for the accord of wills to be realized.
- 3- When the consent is expressed by electronic means, particularly in contracting with a professional party or business, it has the specificity of containing different steps and stages needed for the conclusion of the contract, as well as resorting to some technical means for identifying any errors in the data entry, and correct them.
- 4- The expression of the consent by electronic means may be transferred by electronic mail for the conclusion of the contract with any person in general, and with a professional party in particular.
- 5- It has been obviously noted that the consent in contracting by electronic means can lead to the exchange of a great deal of information, including contractual documents, archives, stipulations, addresses and technical means to identify any errors in the data entry and correct them.
- 6- The study noted four conditions to express the offer by electronic means: the offeror's duty to make available the

applicable contractual stipulations, to remain bound by his offer, to notify the offeree about the receipt of the order, and to introduce or list some important items of information in his offer.

- 7- The study also noted two modalities of expressing the acceptance by electronic means: the offeree's possibility of verifying the details of the order and correcting any error. And the communication of the personal electronic address by the professional offeree.
- 8- The new French law of contract of 2016, supported by the majority of the French jurists, adopts the theory of the reception of acceptance, to determine the moment when the contract is concluded by electronic means.
- 9- The study noted the considerable shortage of the legal regulation and the rules concerning the consent in contracting by electronic means, and the requirements, conditions and modalities of the offer and acceptance particularly suitable for the contracting by electronic means, whether in the Iraqi civil law, or in the law of electronic signature and electronic bargains equally. As compared to the detailed regulation of this topic in the French law of contract.

Second: Recommendations: After displaying these findings, the researcher suggests the following recommendations:

- 1- The researcher recommends that the Iraqi legislator make use of the article (1127/2) of the new French law of the contract, and permit the party to whom the offer is addressed (offeree) the possibility of verifying the details of his order, and correcting any possible errors before confirming the order, in order for the acceptance, then the consent to be validly expressed, and the contract to be validly concluded by electronic means, particularly when the other party is a

professional. Therefore the researcher suggests that the following text be added to the first paragraph of the article (18) of the law of electronic signature and electronic bargains: (The offer and acceptance can be expressed by electronic means. and the consents can only be validly exchanged, if a requirement is satisfied that the party to whom the offer is addressed (offeree) must have the possibility of verifying the details of his order, and correcting any possible errors before confirming the order, in order to express informative and definitive acceptance, and for the contract to be validly concluded, particularly when the other party is a professional)

- 2- The researcher recommends that the Iraqi legislator take into consideration the five points the offer should indicate, in conformity with the article (1127/2) of the new French law of the contract, particularly if the offeror is a professional, to make it easy for the other party to comprehend all the technical points contained in the offer. In order for the consent to be expressed, and then the contract to be concluded validly. Therefore the researcher suggests the following text: (In order for the consents to be validly exchanged, the offer expressed by a professional must be informative by indicating: The different steps to be followed in the process of the conclusion of the contract by electronic means, the technical means which may be used by the offeree to identify the errors in the data entry and correct them, the languages proposed and offered for the purpose of concluding the contract, the methods or modalities of filing the contract by the offeror, the conditions for the access to the contractual documents filed, and the means of consulting the professional electronically).
- 3- The researcher recommends that the Iraqi legislator adopts the electronic mail modality to exchange technical information, in

order for the consent to be valid, in contracting by electronic means with a professional, as it is the case with the article (1127) of the new French law of the contract. Therefore the following text may be suitable: (Technical information to be exchanged with a professional, may be transferred by electronic mail, in order for the consent to be validly expressed be electronic means. provided that the professional party provides his address).

- 4- The researcher recommends the Iraqi legislator to formulate a text entailing or necessitating that all the details of the technical information to be indicated by the professional. Must be placed in an electronic form, which must be made available to any person who is required to complete it via electronic mail. Therefore the researcher suggests the following text: (The professional will be bound to place all the details of the technical information he must indicate in a in an electronic form, which must be made available to any person who is required to complete it via electronic mail).

Footnotes

- (¹) François Terré, Philippe Simler, Yves Lequette, François Chénéde. Droit Civil. Les Obligations. 12^e édition. DALLOZ. 2019. p.183.
- (²) Corinne Renault-Brahinsky. Droit des Obligations. 16^e édition. Gualino. 2020. p.49.
- (³) Gérard Légier. Droit Civil Les Obligations. Treizième édition. DALLOZ.1992.P.23
- (⁴) Jean Louis Halperin. The French Civil Code. Translated by Tony Weir. University College London (UCL) Press. 2006. P.43.
- (⁵) Jean Louis Halperin. op Cit . P.43.
- (⁶) Corinne Renault-Brahinsky. op Cit. p.66.
- (⁷) John Cartwright & Simon Whittaker. The Code Napoléon rewritten, French contract law after the 2016 reforms. Hart Publishing Oxford. 2017. p.418.
- (⁸) Abdul Majeed Al Hakim. The Medium Commentary (Al Wasit) in the theory of contract. With the comparison and equilibrium between theories of western jurisprudence and their counterparts in Islamic Jurisprudence and the Iraqi civil law. Part one. Conclusion of the contract. Al-Ahliyyah Publishing house. Baghdad. 1967. p.117.
- (⁹) Dan E. Stigall. Iraqi Civil Law: Its Sources, Substance, and Sundering. Journal of Transnational Law & Policy. Volume 16. Number 1.2006. P.24.
- (¹⁰) Khalid Mamduh Ibrahim. The conclusion of the electronic contract a comparative study. Al-Fikr Al-Jamai'i Publishing House Alexandria. 2011. p.186.
- (¹¹) Alain Bénabent. Droit Civil Les Obligations. Troisième édition. Montchrestien Paris. 1991. p.30.
- (¹²) Vincent Gautrais. Le Contract électronique international: Encadrement Juridique. 2^e édition. Academia Bruylant. 2003. p.24.
- (¹³) Corinne Renault-Brahinsky. op Cit. p.66.
- (¹⁴) section (1127/ (4-5) (4-A simple letter relating to the conclusion or performance of a contract may be sent by electronic mail. The date of sending may be attached as a result of an electronic process which, in the absence of proof to the contrary, is presumed to be reliable as long as it satisfies the requirements set by decree of the *Conseil d'état*. 5-A registered letter relating to the conclusion or performance of a contract may be sent by electronic mail as long as this electronic mail is routed through a third party following a process which allows the third party to be

identified the sender to be denoted and the identity of the addressee to be guaranteed, and as long as it can be established whether or not the letter has been delivered to the addressee).

(¹⁵) Vincent Gautrais. op Cit . p.30.

(16) Hasan Ali Al-Thannon and Mohammad saeed Al-Rahho. The nutshell in the general theory of the obligation. Part one, the sources of obligations, A comparative study with the Islamic and comparative Jurisprudence. First Edition. Dar Wael for printing and publishing. 2002. P.75.

(¹⁷) Corinne Renault-Brahinsky. op Cit. p.66.

(¹⁸) Stephanie Porchy-Simon. Droit Civil. 2^e anée .Les Obligations. 10^e edition. Hypercours & Travaux dirigés. Dalloz. 2018. p.67.

(¹⁹) Corinne Renault-Brahinsky. op Cit. p.65.

(²⁰) Abdul Razaq Al Sanhoury. The sources of the rights in the Islamic jurisprudence a comparative study with the western jurisprudence. The harmony of the two contractual wills in the council of contract-validity of consent. Part Two. Al-halabi Juridique Publishing house. Beirut. 1998. p.53.

(²¹) Corinne Renault-Brahinsky. op Cit. p.66.

(²²) Mustafa Mekki. France - The French Reform of Contract Law: The Art of Redoing Without Undoing. Journal of Civil Law Studies. Volume 10. Number 1. 2017. p.235.

(²³) John Cartwright, Stefan Vogenauer & Simon Whittaker. Reforming the French law of Obligations, Comparative Reflections on the Avant-Projet de Reforme du Droit des Obligations et de la Prescription (the Avant-projet catala) . Hart Publishing Oxford. 2009. p.436.

(²⁴) François Terré, Philippe Simler, Yves Lequette, François Chénédedé. op Cit. p.260.

(²⁵) Corinne Renault-Brahinsky. op Cit. p.66.

(²⁶) John Cartwright & Simon Whittaker. op Cit . p.418.

(27) Dr.Dara'a Hammad. The general theory of obligations. Part one sources of Obligations. Al-Sanhoury Publishing house Beirut. 2016. p.89.

(²⁸) Stephanie Porchy-Simon. op Cit. p.55.

(²⁹) Boris starck, Henri Roland et Laurent Boyer. Obligations 2. Contrat. Quatrième edition. Litec, Libraire de la cour de cassation. Paris.1993. P.26.

(³⁰) François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.209.

(³¹) Philippe Malaurie et Laurent Aynès. Droit Civil. Les contrats spécieux. DEFRENOIS, Edition juridique associées. 2003. p.150. see also Francois Collart Dutilleul et Philippe Delebecque. Contrats Civils et Commerciaux . 6^e edition. Dalloz. 2002. P.65.

(³²) Stephanie Porchy-Simon. op Cit. p.55.

(33) Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006. p.93.

(34)Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. The sources of Obligations, A comparative study with civil laws and Islamic jurisprudence. Second Edition. Zein juridique library. Beirut. 2017, P.54.

(³⁵) The article (1127/2) provides that (The party issuing the offer must without undue delay acknowledge by electronic means the receipt of such an order which has been addressed to him. The order, the confirmation of acceptance of the offer, and the acknowledgement of receipt are deemed to have been received when the parties to whom they are addressed are able to have access to them).

(³⁶) François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.260.

(³⁷) Stephanie Porchy-Simon. op Cit. p.58.

(³⁸) François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.260.

(³⁹) all of these five points are listed in the article (1127/1) which provides that (An offer must set out in addition: 1. The different steps that must be followed to conclude the contract by electronic means; 2. The technical means by which the person to whom the offer is addressed, before the conclusion of the contract, may identify any errors in the data entry, and correct them; 3. The languages offered for the conclusion of the contract, which must include the French language; 4. Where appropriate, the ways in which the party issuing the offer is to file it, and the conditions for access to the filed contract; 5. The means of consulting electronically any business, professional or commercial rules to which the party issuing the offer intends (as the case may be) to be bound).

(⁴⁰) Corinne Renault-Brahinsky. op Cit. p.66.

(⁴¹) Stephanie Porchy-Simon. op Cit. p.58.

(⁴²) The article (1127/3) provides that (There is an exception to the obligations referred to in paragraphs 1 to 5 of article 1127-1 and to the first two paragraphs of article 1127-2 for contracts for the supply of property or services which are concluded exclusively by exchange of electronic mails In addition, the provisions of paragraphs 1 to 5 of article 1127-1 and article 1127-2 may be excluded or restricted in contracts concluded between businesses or professionals).

(⁴³) Corinne Renault-Brahinsky. op Cit. p.66.

(44) Ismat Abdul Majeed Baker. The role of the scientific technology in the development of the contract. Scientific Books publishing house Beirut. 2015. P.219.

(⁴⁵) Article (20/1) (electronic documents shall be deemed sent from the time they enter an information processing system that is not under the control of the signatory or the person who sends it on his/ her behalf, unless the signatory and the consignee agree otherwise).

(⁴⁶) Stephanie Porchy-Simon. op Cit. p.58.

(⁴⁷) Corinne Renault-Brahinsky. op Cit. p.66.

(⁴⁸) Stephanie Porchy-Simon. op Cit. p.58.

(⁴⁹) Corinne Renault-Brahinsky. op Cit. p.66.

(⁵⁰) Stephanie Porchy-Simon. op Cit. p.58.

(⁵¹) Article (20/2) (if the consignee has specified an information processing system to receive the documents, they shall be deemed to be received when they enter the system if they are sent to a system other than the one specified, they shall be considered sent since the consignee returned it to the system specified by him/ her to receive the information).

(⁵²) Corinne Renault-Brahinsky. op Cit. p.66.

(⁵³) Stephanie Porchy-Simon. op Cit. p.58.

(⁵⁴) François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.253.

(⁵⁵) Corinne Renault-Brahinsky. op Cit. p.65.

(⁵⁶) François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.253.

(⁵⁷) Annick Batteur. Droit Civil Des Obligations, Les Annales Du Droit. DALLOZ. . 2017. p.85. see also Corinne Renault-Brahinsky. op Cit. p.66. and François Terré, Philippe Simler, Yves Lequette, François Chénéde. op Cit. p.259.

(58) Hasan Ali Al-Thannon and Mohammad saeed Al-Rahho. op Cit. P.76.

(59) Dr. Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part one, sources of Obligations. a comparison with Islamic Jurisprudence. Baghdad. 1963, P.83.

(60) Abdul Razaq Al Sanhoury. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit) in the Explanation of New Civil Law. part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004. p.206.

(61) Ismat Abdul Majeed Baker. The role of the scientific technology. op Cit. P.215.

(62) Ismat Abdul Majeed Baker. The theory of contract in the Arab civil laws. Scientific Books publishing house Beirut. 2015. P.155.

(63) Ismat Abdul Majeed Baker. The role of the scientific technology. op Cit. P.216.

References

First: The Legal Books in Arabic

- i. Abdul Majeed Al Hakim. The concise of the explanation of the general theory of obligations. Part one, sources of Obligations. a comparison with Islamic Jurisprudence. Baghdad. 1963.
- ii. Abdul Majeed Al Hakim. The Medium Commentary (Al Wasit) on the theory of contract, with the comparison and balancing between the theories of the western jurisprudence and their equivalent theories in the Islamic Jurisprudence and the Iraqi civil law. Part one. Conclusion of the contract. Al-Ahliyyah company for printing and publishing. Baghdad. 1967.
- iii. Abdul Razaq Al Sanhoury. The Medium Commentary on the elucidation of the New Civil Code (Al Wasit in the Explanation of New Civil Law). Part One. The theory of obligations in general. Sources of obligations. Contract-illegal act-Unjust enrichment-law. Al-Ma'arif Publishing house. Alexandria.2004.
- iv. Abdul Razaq Al Sanhoury. The sources of the rights in the Islamic jurisprudence a comparative study with the western jurisprudence. The harmony of the two contractual wills in the council of contract-validity of consent. Part Two. Al-halabi Juridique Publishing house. Beirut. 1998.
- v. Ahmed Salaman Shuhaib Al-Sa'adawi and Jawad Kadhum Jawad Sumaisem. The sources of Obligations, A comparative study with civil laws and Islamic jurisprudence. Second Edition. Zein juridique library. Beirut. 2017.
- vi. Dara'a Hammad, The general theory of obligations, Part one, sources of Obligations, Al-sanhoury Publishing house, Beirut, 2016.
- vii. Hasan Ali Al-Thannon and Mohammad saeed Al-Rahho. The nutshell in the general theory of the obligation. Part one, the sources of obligations, a comparative study with the Islamic and comparative Jurisprudence. First Edition. Dar Wael for printing and publishing. 2002.
- viii. Ismat Abdul Majeed Baker. The role of the scientific technology in the development of the contract. Scientific Books publishing house Beirut. 2015.
- ix. Ismat Abdul Majeed Baker. The theory of contract in the Arab civil laws. Scientific Books publishing house Beirut. 2015.

- x. Khalid Mamduh Ibrahim. The conclusion of the electronic contract a comparative study. Al-Fikr Al-Jamai'i Publishing House Alexandria. 2011.
- xi. Munther Al-Fadhel, The Medium Commentary on the explanation of the civil law, A comparative study between Islamic Jurisprudence and Arab and foreign laws, A study reinforced by opinions of both the jurisprudence and judiciary. Aras Publishing house, Erbil, 2006.

Second : The Legal Books in English

- i. John Cartwright & Simon Whittaker. The Code Napoléon rewritten, French contract law after the 2016 reforms. Hart Publishing Oxford. 2017.
- ii. John Cartwright, Stefan Vogenauer & Simon Whittaker. Reforming the French law of Obligations, Comparative Reflections on the Avant-Projet de Reforme du Droit des Obligations et de la Prescription (the Avant-projet catala) . Hart Publishing Oxford. 2009.

third: The Legal Books in French

- i. Alain Bénabent. Droit Civil Les Obligations. Troisième édition. Montchrestien Paris. 1991.
- ii. Annick Bateur. Droit Civil Des Obligations, Les Annales Du Droit. DALLOZ. . 2017.
- iii. Boris starck, Henri Roland et Laurent Boyer. Obligations 2. Contrat. Quatrième édition. Litec, Libraire de la cour de cassation. Paris.1993.
- iv. Corinne Renault-Brahinsky. Droit des Obligations. 16^e édition. Gualino. 2020.
- v. Francois Collart Dutilleul et Philippe Delebecque. Contrats Civils et Commerciaux . 6^e édition. Dalloz. 2002.
- vi. François Terré, Philippe Simler, Yves Lequette, François Chénéde. Droit Civil. Les Obligations. 12^e édition. DALLOZ. 2019.
- vii. Gérard Légier. Droit Civil Les Obligations. Treizième édition. Dalloz-Sirey.1992.
- viii. Jean Louis Halperin. The French Civil Code. Translated by Tony Weir. University College London (UCL) Press. 2006.
- ix. Philippe Malaurie et Laurent Aynès. Droit Civil. Les contrats spécieux. DEFRENOIS, Edition juridique associées. 2003.

- x. Stephanie Porchy-Simon. Droit Civil. 2^e anée .Les Obligations. Hypercours & Travaux dirigés. Dalloz. 2018.
- xi. Vincent Gautrais. Le Contract électronique international: Encadrement Juridique. 2^e édition. Academia Bruylant. 2003.

Fourth: The Laws

- i. The French law of Contract amended by the ordinance n° 2016-131 dated February 10, 2016, concerning reforms of the law of contract, general regime and proof of obligations. .
- ii. The Iraqi civil law No 40 of 1951.
- iii. The Iraqi law of electronic signature and electronic bargains No. 78 in 2012.

Fifth: The Legal Studies& Reports

- i. Dan E. Stigall. Iraqi Civil Law: Its Sources, Substance, and Sundering. Journal of Transnational Law & Policy. Volume 16. Number 1.2006.
- ii. Mustafa Mekki. France - The French Reform of Contract Law: The Art of Redoing Without Undoing. Journal of Civil Law Studies. Volume 10. Number 1. 2017.