

## Conflict of Laws and the Subject of Electronic Commercial Contracts Concluded Between Professionals

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### Abstract:

Electronic commercial contracts concluded between professionals have emerged from the third industrial revolution, which is primarily based on the use of computers and the spread of internet networks. These contracts raise numerous issues in the field of private international law. The most significant of these is the problem of legislative jurisdiction regarding the determination of the applicable law. Undoubtedly, identifying this requires referring to the conflict of laws rules established by legislation in alignment with the realities of the physical world. However, applying these rules to the electronic environment raises the question of whether they can adequately determine the applicable law.

**Keywords:** International electronic commercial contracts, conflict of laws, principle of party autonomy, rigid conflict of laws rules, flexible conflict of laws.

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### Introduction:

Resolving disputes arising in international private relations, including contractual relationships, requires the application of conflict of laws rules to determine the applicable law. In this context, it should be noted that legislation has worked diligently to establish a set of provisions that promote international transactions and facilitate the movement of capital across borders, thereby supporting the policy of opening national markets to foreign investment.

Legislative interests have included granting parties the authority to determine the applicable law, considering it a primary criterion upon which judges ultimately rely. However, due to potential legislative gaps that may arise if parties do not specify the applicable law, legislation has sought to incorporate

fallback provisions for judges to apply if the initial assumption is not realised.

However, as these studies relate to international contracts concluded in a physical environment, the emergence of new contracts that rely wholly or partially on electronic means — known as electronic commercial contracts — has created a legislative gap regarding the applicable law for these contracts.

In this context, it became necessary to extend the application of the established classical rules of international private law to the regulation of international commercial contracts concerning electronic commerce<sup>1</sup>. The research problem is therefore clear: to what extent can the traditional rules governing conventional international commercial contracts be applied in the electronic world?

This research paper will address this issue by employing analytical and descriptive methodologies to describe the relevant data and information, analyse legal texts and scholarly opinions on the matter, and determine their capacity to accommodate the realities of the electronic environment. A comparative approach is also necessary, involving the referral to relevant foreign legal texts, to find solutions to the dilemma raised by the third industrial revolution.

In order to answer the aforementioned question, a dual approach is required, dividing the topic into two sections: the first dedicated to studying the capacity of the principle of party autonomy to resolve disputes arising from electronic commercial contracts; and the second focused on clarifying the applicability of fallback provisions to electronic commercial contracts.

### **Section One: The Capacity of the Principle of Party Autonomy to Resolve Disputes Arising from Electronic Commercial Contracts**

Party autonomy is well recognised as playing a significant role in contractual matters, and international law seeks to grant parties the ability to determine the applicable law for their contractual obligations. While this issue has been raised in the context of conventional international commercial contracts, what scope is there for applying it to electronic commercial contracts?

#### **Subsection One: The Concept of the Principle of Party Autonomy in the Context of Electronic Commercial Contracts Concluded Between Professionals**

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<sup>1</sup>- Amer Mahmoud Al-Kaswani, *Commerce via Computer: A Comparative Study* 1st ed., Al-Thaqafa Publishing, Amman, Jordan, 1429 AH (2008 AD), p. 253.

The rule that makes international commercial contracts subject to the principle of party autonomy is one of the most important rules established by conflict of laws principles in most legal systems. Despite its stability in doctrine and jurisprudence and its adoption by national and international legislation, disagreement remains regarding the meaning of the principle of party autonomy. Three main perspectives have emerged on this issue.

The first perspective narrows the scope of this principle, limiting it to national laws issued by states that enjoy this status according to the provisions of public international law<sup>2</sup>. This was affirmed by the French Court of Cassation in its ruling of 21 June 1950, which stated: 'Every international contract is necessarily subject to the law of a specific state.'

Many international agreements have adopted this approach, including the 1955 Hague Convention on the sale of goods, which sets out this principle in its second article.

The second perspective, on the other hand, advocates granting full freedom to contracting parties in choosing the applicable law for their contract. This freedom should not be limited to the domestic law of a specific state, but rather parties may agree to subject their contractual relationship to universal rules, such as customary practices established among groups operating in the field of electronic commerce and model contracts issued by specialised bodies encompassing prevailing customs in the relationships to be regulated<sup>3</sup>.

Many international agreements have adopted this view, including the 1961 Geneva Convention on International Commercial Arbitration, which states this in Article 7, and the Rome Regulation on the applicable law of contractual obligations (Rome I), which takes a similar approach in Article 3(1).

Alongside these two perspectives, a third, more moderate viewpoint has emerged. This calls for contracting parties to be granted the freedom to choose the applicable law for international commercial contracts concluded through traditional or electronic means. This freedom should be based on the parties' rights, as established by conflict of laws rules, and in respect of their expectations. However, this perspective also imposes limits on this autonomy to ensure that it does not result in the evasion of mandatory provisions of the

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<sup>2</sup>- Suleiman Ahmed Mohammed Fadl, *Disputes Arising from Electronic Commerce Contracts in the Context of Private International Law*, Thesis submitted for the Doctorate degree, Faculty of Law, Ain Shams University, Cairo, 2011, p. 157.

<sup>3</sup>- Salah Ali Hussein, *The Applicable Law on International Electronic Commerce Contracts* 1st ed., Arab Renaissance House, Cairo, 2012, p. 461.

chosen laws<sup>4</sup>.

This perspective attempts to balance the freedom of parties to choose the applicable law for their contract with the establishment of this freedom on sound foundations. This is reflected in the Rome Convention of 1980 regarding the law applicable to international sales of goods, specifically in Article 7, paragraph 1<sup>5</sup>.

Regarding the position of the Algerian legislator in this context, it is noteworthy that the term “law” has not been explicitly defined. However, by referring to the term used in Article 18 of the Civil Code<sup>6</sup>, which is “law” (Loi), and comparing it with the term “rules of law” (Règles de droit) found in Article 1050 of the Code of Civil and Administrative Procedure, it becomes clear that the term “law” refers to domestic law issued by a state. Conversely, the term “rules of law” encompasses a broader interpretation, including international commercial law in the context of conventional international contracts and electronic commercial law in the context of electronic contracts. Thus, the Algerian legislator has assigned jurisdiction in the field of contractual obligations to the law chosen by the contracting parties, provided that this law is that of a state, as long as the dispute is brought before judicial bodies.

Given that, under Article 18 of the Civil Code, the Algerian legislator requires the parties to choose the domestic law of a specific state, there has been debate among scholars as to whether the parties have the freedom to choose any law, or whether they must select a law connected to the contract. Opinions on this matter vary; some scholars advocate granting parties complete freedom to select the applicable law, provided this choice is legal, does not conflict with public order, and is not made with fraudulent intent. Meanwhile, another viewpoint asserts that parties should not be allowed to choose a law entirely disconnected from the contract. The connection between the contract and the principle of party autonomy justifies the selection of the applicable law. It seems that the Algerian legislator has adopted the latter view, as the aforementioned article requires that the chosen law must be connected to the contract or the parties.

It is noteworthy that the Algerian legislator has restricted the freedom of

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<sup>4</sup>- Saleh Al-Manzalawi, *The Applicable Law on Electronic Commerce Contracts*, 1st ed., New University Publishing House, Al-Azareeta-Alexandria, 2008, p. 274.

<sup>5</sup>- Lazhar Ben Said, *The Legal System of Electronic Commerce Contracts*, 1st ed., Houma Publishing, Algeria, 2012, p. 194.

<sup>6</sup>- Law No. 05-10 dated 13 Jumada al-Awwal 1426 AH (June 20, 2005), amending and supplementing Ordinance No. 75-58 dated 20 Ramadan 1395 AH (September 26, 1975) concerning the Civil Code, Official Gazette, No. 44, 2005.

parties in choosing the law governing their contract, requiring a genuine connection between the chosen law and the parties or the contract. These provisions were introduced in the context of international commercial contracts concluded through traditional means<sup>7</sup>. However, some have rejected this approach for electronic commercial contracts, arguing that such contracts necessitate freeing the parties' choice from all constraints. The rationale is that establishing a connection in these contracts is not feasible due to the nature of electronic communication networks, which imply that the contract connects with all countries simultaneously upon its conclusion, given the global openness of networks. Moreover, the differing means of contracting in the two types of commerce makes it inappropriate to compare traditional international commercial contracts with electronic international contracts, as electronic contracts are concluded via electronic networks that are not confined to the territory of any single state and are not subject to the jurisdiction of any particular country, unlike conventional international contracts where conflicting laws can be determined<sup>8</sup>.

While some argue against restricting the freedom of parties to choose the law governing electronic contracts, others maintain that a connection between the chosen law and the contract should still be required, at least for partial electronic commercial contracts, due to the significant relationship of the contractual bond in the state of performance. Another scholarly perspective justifies this requirement for a connection based on the notion that although the internet connects all countries, the degree of connectivity varies, and this variance can be measured through the application of general rules governing contracts between absent parties, as well as specific rules that define the location of sending and receiving data messages.

### **Subsection Two: How Parties Choose the Principle of Party Autonomy in Electronic Commercial Contracts**

Legal systems recognize the autonomy of contracting parties to choose the law governing their contractual transactions. This choice may be explicit or implicit, which will be specified further.

#### **First: Explicit Choice of Law in Electronic Commercial Contracts**

The principle of party autonomy serves as the optimal means to resolve conflict of laws issues in electronic commercial contracts. The effectiveness of

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<sup>7</sup>- Mohammed Mahmoud Ali, *The Impact of Electronic Commerce on International Conflict of Laws*, Arab Renaissance House, Cairo, 2013, p. 395.

<sup>8</sup>- Suleiman Ahmed Mohammed Fadl, *Previous Reference*, p. 168.

this principle is enhanced when the applicable law is expressly chosen by the parties through the inclusion of a specific clause known as the legislative jurisdiction clause, which specifies the law applicable to any future disputes that may arise between them<sup>9</sup>.

The chosen law can be determined by the parties relying on one of the standard contracts commonly used in electronic commerce, which often includes a legislative jurisdiction clause. This is evident in the model contract from the French Chamber of Commerce and Industry for electronic transactions, published in October 1998, which states in its second clause under the title (Loi applicable) that the contract is governed by French law.

The explicit choice of the applicable law in electronic contracts concluded online can occur either by including the legislative jurisdiction clause on the supplier's website or through the exchange of emails between the parties after agreeing on the essential matters related to the contract<sup>10</sup>.

While the general principle is that the parties should agree on the choice of law at the moment of contract formation through an explicit condition included in the original contract terms or through a separate agreement, this agreement can be deferred to a later time. Additionally, the chosen law can be amended at any stage, provided that such changes do not affect the validity of the contract that was originally governed by the previous law or harm the rights of third parties acting in good faith who based their expectations on the previously chosen law.

### **Second: Implicit Choice of Law in Electronic Commercial Contracts**

When parties do not explicitly specify the applicable law for an international contract, the law that is most closely related to the contract, based on its circumstances, will be applied. This is determined by the judge examining the dispute, who seeks to uncover the parties' implicit intentions.

The application of the implicit will of the parties is supported by various international agreements, such as Article 3(1) of the Rome Regulation on contractual obligations and Article 7(1) of the Hague Convention concerning the law applicable to international sales of goods, concluded on December 22, 1986.

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<sup>9</sup>- Ahmed Al-Hawari, *Electronic Commerce Contracts in Private International Law*, Proceedings of the Conference on Electronic Banking Business between Sharia and Law, Vol. 4, 11-9 Rabi' al-Awwal 1424 AH (May 12-10, 2003), Dubai Chamber of Commerce, p. 1654.

<sup>10</sup>- Sami Mustafa Farhan, *Conflict of Laws in International Trade Contracts: A Comparative Study*, Thesis for obtaining a Doctorate degree in Law, Faculty of Law, Ain Shams University, Cairo, 2006, p. 159.

Most Arab legislations have adopted this approach, including Article 20 of the Civil Code, Article 19 of the Egyptian Civil Code, and Article 2 of the Egyptian Draft Electronic Transactions Law<sup>11</sup>

Although the Algerian legislator has not explicitly defined this, some believe that it does not lean towards adopting implicit will due to the practical difficulties that judges face when discerning the implicit intentions of the parties involved. However, it is noteworthy that the legislator used the phrase ‘the law chosen by the parties’ in Article 18 of the Algerian Civil Code, a flexible term that can carry multiple meanings.

Legislation has empowered judges to uncover the parties’ implicit will, and scholars and courts have identified various indicators that can reveal it. These include the language of the contract, the currency used for payment, the parties’ shared nationality, domicile, jurisdiction clause and place of performance. The place of performance is particularly important as it is the actual location where the contractual relationship produces its effects<sup>12</sup>.

When applying these indicators, judges often combine multiple indicators to ascertain the parties’ intentions. While these indicators are generally mentioned in relation to international contracts concluded through traditional means<sup>13</sup>, some scholars argue that they can also be relevant for contracts concluded via the internet. Nevertheless, a clear connection must exist between the electronic marketplace in which goods or services are offered and the applicable state law.

## **Section Two: The Capacity of Fallback Rules in the Physical Realm to Resolve Disputes in Electronic Commercial Contracts**

The inability to determine the applicable law according to the principle of party autonomy necessitates reliance on fallback rules, which can be either rigid or flexible. This issue will be examined by first addressing the capacity of rigid conflict of laws rules in the physical realm to resolve disputes in electronic commercial contracts (Subsection One), followed by an analysis of flexible conflict of laws rules (Subsection Two).

### **Subsection One: Rigid Conflict of Laws Rules and the Applicable Law for**

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<sup>12</sup>- Article 2 of the Egyptian Draft Law on Electronic Transactions states: "The law of the state where the common domicile of the contracting parties exists applies to contractual obligations under this law if they share a domicile; if they differ, the law of the state where the contract was made applies, unless the parties agree otherwise."

- Adel Abu Hashima Mahmoud Houta, *Electronic Information Services Contracts in Private International Law*, 2nd ed., Arab Renaissance House, Cairo, 2005, p. 89.

<sup>13</sup>- This position (Sultan Abdullah Mahmoud Al-Jawari) is cited by Salah Ali Hussein, *Previous Reference*, p. 468.

## **Electronic Commercial Contracts**

When the applicable law for contractual obligations is not specified by the parties, the judge must rely on rigid rules derived from indicators based on the contractual relationship itself. These rigid rules include common nationality, common domicile, place of conclusion, and place of performance. It should be noted that these rules relate either to the parties or the contract.

### **Branch One: Rigid Conflict of Laws Rules Related to the Parties and the Applicable Law for Electronic Commercial Contracts**

The rigid conflict of laws rules associated with the parties include the common domicile and nationality rules. In this regard, legislation differs on which rule takes precedence. While some prefer the common nationality rule, others favour the common domicile rule. The Algerian legislator has adopted the latter view<sup>14</sup>, believing it to be more valid as it reflects the law that the parties expect to apply to their transactions.

Although the concept of domicile is clear in ordinary transactions, it raises multiple issues in the context of electronic commerce conducted online. This is because transactions over this network rely on email addresses, which do not provide a clear indication of the actual address. There are websites with addresses that superficially seem linked to specific countries, yet they may lack a physical presence in the conventional sense<sup>15</sup>. Additionally, some addresses do not correspond to specific countries, such as those ending with “.com” or “.org”.

Thus, it is clear that electronic addresses lack geographical specificity. This led the United Nations Commission on International Trade Law to acknowledge the limited value of localisation in electronic addresses<sup>16</sup>. This was also confirmed by Article 5(6) of the United Nations Convention on the Use of Electronic Communications in International Contracts.

However, some scholars reject this rule due to the rarity of parties having matching domiciles in international contracts<sup>17</sup>. Even if the parties do share a

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<sup>14</sup>- Article 2/18 of the amended and supplemented Civil Code states: "In case this is not possible, the law of the common domicile or common nationality applies."

<sup>15</sup>- Amr Abdel Fattah Ali Younis, *Legal Aspects of Electronic Contracting in the Framework of Civil Law*, Thesis submitted for obtaining a Doctorate degree in Law, Faculty of Law, Ain Shams University, 1430 AH (2009 AD), footnote p. 359.

<sup>16</sup>- Suleiman Ahmed Mohammed Fadl, *Previous Reference*, p. 204.

<sup>17</sup>- This position (Nafeh Bahar Sultan) is cited by Khalid Sabri Al-Janabi, *Consent in Electronic Commerce Contracts: A Comparative Study*, 1st ed., Qandeel Publishing and Distribution, Amman, Jordan, 2013, p. 164.

domicile, this may be accidental or an intentional attempt to exclude a specific law from application.

While one perspective dismisses the use of this rule<sup>18</sup>, another permits it, suggesting that addressing the challenges should involve consulting modern technology experts. Additionally, some propose resolving the issue of the parties' domicile in electronic contracts when it is not specified by referring to the email address from which the message was sent. Notably, some countries, such as France, are working to determine internet addresses. France has established a company known as AFNIC (Le Nommage) to undertake this task, alongside its role in providing companies with web addresses ending in '.fr' and issuing certificates confirming the ownership of registered trademarks in the trade register.

Referring to the Convention on the Use of Electronic Communications in International Contracts, it is evident that this convention defined the concept of the place of business in Article 4(f), using it as a basis for determining the location of parties in electronic transactions. The convention considers any place where a party maintains a non-transitory establishment for conducting economic activities, excluding the temporary provision of goods or services from a specific location. Article 6 assumes that the place designated by the parties is their place of business, unless another party can prove that the specified place does not have a place of business. If the parties do not designate their places of business, or if there are multiple places of business, the convention considers the place of business for a legal entity to be the one most closely connected to the transaction. For a natural person without a place of business, their location is determined by their habitual residence.

Therefore, it is clear that the domicile of the parties in the electronic realm is determined according to the concept of domicile in the physical world, not by the electronic address. Therefore, to overcome the issues raised by domicile, the parties should specify their places of business.

Despite attempts to find a solution to the domicile problem in the electronic realm, it should be noted that this rule is generally not favoured in either the physical or electronic domains. This is because it does not reveal the law most closely connected to the relevant transaction, and such a coincidence is rare.

Regarding the common nationality rule, while some national legislations rely on it as a criterion for determining the applicable law, it is a criticised

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<sup>18</sup>- Nabil Zaid Muqabla, *The Legal System of Electronic Information Services Contracts in Private International Law: A Comparative Study*, 1st ed., Al-Thaqafa Publishing and Distribution, Amman, Jordan, 1430 AH (2009 AD), p. 124.

approach that is difficult to apply to international contracts, let alone electronic commercial contracts. This is because establishing the nationality of the contracting parties requires verifying their identities, a matter that is often not addressed in electronic commercial contracts. The difficulty in applying this rule stems from the weak connection between this law and the contract.

### **Branch Two: Rigid Conflict of Laws Rules Related to the Contract and the Applicable Law for Electronic Commercial Contracts**

Rigid conflict of laws rules related to the contract include both the place of conclusion and the place of performance. Due to their importance, both will be discussed.

#### **First: The Capacity of the Place of Conclusion Rule to Determine the Applicable Law in Electronic Commercial Contracts**

The place of conclusion rule is one that legislations, including the Algerian legislator, rely on to determine the applicable law for contractual obligations. This rule applies when the parties do not explicitly specify the applicable law or when it is not possible to uncover the implicit will of the parties.

Reliance on this rule is due to several considerations, the most important of which is its ease of identification as the first manifestation of the parties' intentions. It indicates a genuine connection between the chosen law and the contract, ensuring uniformity in the legal solutions applied to contractual relationships. These relationships are governed by a single law in both form and substance, which protects the parties' expectations and provides them with legal certainty due to their prior knowledge of it<sup>19</sup>.

However, despite the validity of the arguments presented by supporters of assigning the contractual relationship to the law of the place of conclusion, this remains a criticised approach. Contracts may be concluded under circumstances that do not establish a genuine and serious connection between the contractual relationship and the governing law. This is particularly evident in electronic commerce transactions, where a person contracts via their personal computer while travelling between countries<sup>20</sup>. Furthermore, applying this rule may undermine the legal certainty sought by the parties, since contracting online implies that the contract is connected to all countries involved at the time of conclusion, making it challenging to determine the precise location where the contract was concluded. Furthermore, in electronic

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<sup>19</sup>- Salah Ali Hussein, Previous Reference, p. 482.

<sup>20</sup>- Salah Ali Hussein, Previous Reference, p. 483.

commerce, the contract originates from one location, is processed by the receiving computer and ultimately transmitted to the recipient — all of which occur in different locations<sup>21</sup>.

The criticisms do not stop there; they also extend to the unsuitability of the theory adopted by domestic legislation to determine applicable contractual obligation law. According to this theory, the place of conclusion is determined by the time of conclusion, in accordance with internal legislation and its legislative policy. Some have proposed overcoming this issue by granting parties the authority to agree on the place of conclusion and specify whether it is the place of sending or receipt<sup>22</sup>. In the absence of such an agreement, they propose adopting a dual theory that separates the time of conclusion from its place. This is because the techniques used to transmit data messages between different communication systems record the moment the data message becomes readable by the recipient without indicating the geographic location of the systems involved.

Thus, according to the dual theory, the place of conclusion of the contract is determined by the place of business of the sender or recipient, depending on the theory adopted by national law when regulating contracts between absent parties. This theory is enshrined in the model law for electronic commerce and has been adopted by many Arab legislations<sup>23</sup>. According to this theory, the time at which the contract is concluded is determined differently from the place at which it is concluded. If the parties do not agree on the place of conclusion, in legislations that adopt the theory of acceptance by sending, the applicable state is that in which the sender's place of business is located. If the sender has multiple places of business, the place most closely connected to the transaction or the main place of business is considered. If there is no place of business, it is presumed that the place where the message was sent is the sender's residence. Conversely, for legislation that adopts the theory of acceptance by receipt, the applicable state is where the recipient's place of business is located. Similarly, if the recipient has multiple places of business, the place most closely connected to the transaction or the main place of business is considered. If the recipient has no place of business, it is presumed that the place where the message was received is their residence. These solutions are the same as those provided by the Convention on the Use of Electronic Communications in International Contracts.

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<sup>21</sup>- Cf. Jerome Huet, *Legal Aspects of Electronic Commerce: An International Approach*, Les Petites Affiches, No. 116, September 26, 1997, p. 6.

<sup>22</sup>- Saleh Al-Manzalawi, *Previous Reference*, p. 418.

<sup>23</sup>- Article 18 of the Jordanian Electronic Transactions Law, Article 15 of the Bahraini Electronic Transactions Law.

### **Secondly, the Place of Performance Rule and the applicable law for electronic commercial contracts.**

Some legislation has relied on the place of performance rule to determine the applicable law when it is not explicitly specified by the parties, or when it is not possible to ascertain their implicit will. Although this rule is not explicitly mentioned in Article 18 of the Algerian Civil Code, judges can still rely on it to resolve disputes in international commercial contracts. This is because it is one of the principles of private international law that can be invoked if no specific provision exists, as stated in Article 23 bis 2 of the Code<sup>24</sup>.

However, the application of the place of performance rule can be problematic in the electronic realm due to the differences between the characteristics of the virtual internet community and those of the physical community<sup>25</sup>. While the former is divided into network regions for communication, the latter is divided into known territories in the real world based on geographical pillars.

Despite the challenges facing the place of performance rule in electronic commercial contracts<sup>26</sup>, some scholars believe that these difficulties can be overcome for partial electronic contracts by determining the place of performance based on material elements, such as the place of delivery of goods or the place of service provision. However, this cannot be applied to total electronic contracts due to the difficulty of determining it; this varies depending on the location of the upload site at the time of execution, the location of the service provider, the hosting location where the upload occurs and the location of the buyer's computer<sup>27</sup>.

Due to its complexity<sup>28</sup>, the majority of scholars argue for the necessity of resolving this issue by granting the parties the authority to determine the place of performance of the contract, even if it is not the same place where consultations or uploaded files were received. However, if the parties do not specify the place of performance<sup>29</sup>, the judge may consider that performance took place at the user's residence, which can be determined by referring to the information filled out by the buyer on the website, which often includes specific details about their residence.

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<sup>24</sup>- Article 23 bis 2 of the amended and supplemented Civil Code states: "The general principles of private international law apply to matters not addressed in the specific articles on conflict of laws."

<sup>25</sup>- This position (Regarde Bariatti) is cited by Salah Ali Hussein, Previous Reference, p. 485.

<sup>26</sup>- Suleiman Ahmed Mohammed Fadl, Previous Reference. p. 201.

<sup>27</sup>- Lazhar Ben Said, Previous Reference, p. 210.

<sup>28</sup>- Saleh Al-Manzalawi, Previous Reference, p. 421.

<sup>29</sup>- Hossam Osama Mohammed, International Jurisdiction of Courts and Arbitration Bodies in Electronic Commerce Disputes, 1st ed., New University Publishing House, Al-Azareeta, 2009, p. 119.

## **Section Two: Flexible Conflict of Laws and the Applicable Law for Electronic Commercial Contracts**

The idea behind distinguishing performance as a conflict of laws rule is to treat contracts individually and determine the applicable law for each one according to the legal weight and practical importance of the performance. In other words, it is based on the primary obligation in the contract. Despite there being multiple obligations within a single contract, one of these obligations distinguishes the contract and expresses its essence. This should be relied upon to determine the applicable law. As performances vary across all contracts, it is only natural that solutions should differ based on the primary obligation in each contract, and consequently the law governing it. For instance, a transportation company's contract with a shipper is governed by the law of the state in which the carrier conducts its main activity, as the carrier is the debtor of the distinguishing performance, unlike the shipper, whose performance is merely a neutral act. Similarly, a sales contract is governed by the law of the state in which the seller's main establishment is located, since the seller's performance constitutes the distinguishing performance.

Due to the importance of this rule, Professor Jean-Baptiste defined it as 'the performance that allows for the description of the contract and distinguishes it from other contracts'. Meanwhile, Professor Van Overstraeten defined it as 'the performance by which the payment of the monetary counterpart is obligatory'.

It is clear that the distinguishing performance rule is characterised by its simplicity and suitability for various types of contracts. Due to these characteristics<sup>30</sup>, it is recognised by most legal systems and international agreements, including the 1955 Hague Convention on the Law Applicable to International Sales of Goods and the 1986 Hague Convention on the Law Applicable to International Sales Contracts, as well as the Rome Regulation on the Law Applicable to Contractual Obligations.

However, scholars differ in their views on the applicability of the distinguishing performance theory in the realm of electronic commercial contracts, with some supporting it and others opposing it<sup>31</sup>. Each doctrinal position has attempted to justify itself. Those who support the theory have relied on multiple arguments, the most important of which is its flexibility, allowing the judge to connect the dispute with the law of a closely related

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<sup>30</sup>- This includes German, Swiss, and French jurisprudence. Refer to Salah Ali Hussein, Previous Reference, p. 490.

<sup>31</sup>- Adel Abu Hashima Mahmoud Houta, Previous Reference, p. 106.

state. This position has been reinforced due to the European approach to electronic commerce leaning towards this theory<sup>32</sup>, even though it has not established any rule regarding private international law.

According to this logic, if the parties do not agree on the applicable law, contracts concluded online between the provider of material intended for upload and the company responsible for processing and uploading the material to the website are governed by the law of the state where the company's headquarters or centre is located, as it is the debtor of the distinguishing performance<sup>33</sup>.

Contracts in which the sale is delivered through the internet, such as software sales contracts, are governed by the law of the place where the supplier's establishment is located at the time the contract is concluded. This is due to the large number of buyers accessing the supplier's website from various countries and the difficulty of being aware of the laws applicable to all buyers. Thus, contracts concluded by Amazon, known for selling books online in exchange for the agreed payment, are governed by the law of the selling company, as it is the one providing the distinguishing performance in the contract, considering that the element of loading or delivery is the distinguishing performance<sup>34</sup>.

However, despite the support of the majority of scholars for this direction and its application by judicial bodies<sup>35</sup>, some critics believe that its application in electronic commercial contracts is not without criticism. The most important of these criticisms is that this theory relies on the idea of geographical bases, which do not align with the nature of transactions conducted over the internet, as these transactions transcend geographical boundaries. This does not allow for a specific place to be determined for the performance of the contract in total electronic commerce contracts, nor does it allow for such determination in partial electronic commerce contracts, where the internet is used as a means of communication and negotiation regarding the contract's terms<sup>36</sup>.

When contracting through the internet, the contract is connected to all countries involved simultaneously.

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<sup>32</sup>- The European directive issued on June 8, 2000, concerning electronic commerce implemented the distinguishing performance criterion in Article 2/c, defining it by the place of establishment of the online service provider, considering it as the place where the latter conducts its economic activities on a permanent and stable basis.

<sup>33</sup>- Suleiman Ahmed Mohammed Fadl, Previous Reference, p. 210.

<sup>34</sup>- Mohammed Ahmed Ali Al-Mahasneh, Conflict of Laws in Electronic Contracts: Towards a System of Unified Substantive Rules, Comparative Study, 1st ed., Al-Hamid Publishing and Distribution, Amman, Jordan, 1434 AH (2013), p. 129.

<sup>35</sup>- Saleh Al-Manzalawi, Previous Reference, p. 344.

<sup>36</sup>- Suleiman Ahmed Mohammed Fadl, Previous Reference, p. 212.

The theory itself has been criticised for assuming that each contract is linked to a single place of performance, even though it may give rise to two main obligations. This is unacceptable because contracts can be complex, making it difficult to identify the distinguishing performance. Obligations arising from such contracts may be of equal importance, meaning any of them could be considered the distinguishing performance. For example, in barter contracts online, one party may provide images, while the other provides data to complete them. In such cases, identifying the legal act that distinguishes the contract can be challenging<sup>37</sup>.

In response to criticisms of this theory, its proponents have referenced the European Court of Justice's definition of a 'stable establishment' as the effective exercise of economic activities through fixed equipment and tools for an indefinite duration. According to this definition, the location of the seller's establishment is determined by the use of a website to conduct its activities. If the seller has multiple establishments, the one considered is the one linked to the distinguishing performance in the contract, i.e. the goods intended for sale<sup>38</sup>.

The establishment through which the seller conducts their activities can be identified by requiring them to disclose their geographic address on their website, as mandated by Article 5(b) of the European Directive on Electronic Commerce. If the supplier or seller fails to comply with this obligation and conceals the geographical address of their establishment, the law of the user's country will apply, since the user is the creditor of the distinguishing performance.

While the distinguishing performance rule helps judges address the vast majority of practical scenarios without undermining individuals' expectations, it, like other legal concepts, may not be able to address all situations. Therefore, there are some exceptional cases where it is impossible to determine what is meant by the distinguishing performance. In such cases, the circumstances of the contract may indicate that another law is more closely related to the contractual relationship. In these instances, the law most closely connected to the circumstances of the contract is recognised<sup>39</sup>, rather than the law determined by the distinguishing performance theory based on the inherent nature of the contract.

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<sup>37</sup>- Suleiman Ahmed Mohammed Fadl, Previous Reference, p. 212.

<sup>38</sup>- Mohammed Ahmed Al-Mahasneh, Previous Reference, p. 131.

<sup>39</sup>- Hisham Ali Sadiq, *The Applicable Law on International Trade Contracts*, 2nd ed., University Thought House, Al-Azareeta, Alexandria, 2001.

### **Conclusion:**

The aforementioned study clearly shows that international electronic commerce contracts concluded between professionals in the virtual field raise a legislative jurisdiction issue regarding the applicable law. To determine this law, one must refer to the rules of conflict of laws. However, since these rules were established based on the realities of the physical world, they require adaptation for application in the electronic realm, granting parties the option to agree on the applicable law governing their disputes. Where the parties remain silent and it is impossible to determine their implicit will, recourse to alternative conflict of laws rules is necessary. These rules may be rigid for some legislation and flexible for others. Finding solutions for applying these alternative rules would involve granting the parties authority to determine their domicile, given that domicile cannot be established in the electronic realm due to the internet's lack of geographical basis.

For this reason, the parties must define the place of conclusion by adopting the duality theory. This allows the place of performance rule to address issues relating to partial electronic commerce contracts adequately, while still permitting the parties to determine the applicable law regarding the place of performance.

Regarding rigid conflict of laws rules, despite their advantages, the flexible rules known as the distinguishing performance rule require parties to specify what constitutes the distinguishing place.

In order to avoid the issues raised by the conflict-based approach, scholars have proposed an alternative in the form of material rules for electronic commerce contracts. This alternative is known as electronic substantive law and is characterised by its technical specificity and evolving technological terminology, which are necessary in order to keep pace with developments in these contracts.

### **The most important recommendations are:**

Elevating the role of will in international electronic commerce contracts by obliging parties to specify the applicable law.

Requiring parties to determine their domicile, given the impossibility of doing so based on the realities of the virtual world.

- Adopting the duality theory to resolve the issue of the place of conclusion by considering it to be the domicile of either the sender or the recipient, depending on the theory relied upon by each piece of legislation.
- Obligating parties to specify the place of performance for total electronic commerce contracts.
- The necessity of holding seminars and meetings in this field, involving information technology specialists and legal professionals, to develop effective solutions.

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