

Electronic Arbitration Agreement in Disputes of E-Commerce Contracts

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Received: 10-08-2025

Accepted: 10-10-2025

Published: 01-06-2026

Abstract:

The growth of Internet use is one of the most distinctive features of the globalization era we live in, whether in terms of the number of emails exchanged, the number of web pages available on the network, the number of users, or the various commercial activities connected to the Internet such as e-commerce and related contract formation. These developments have raised very important and complex legal issues, as current laws have become insufficient for application in the Internet environment, especially due to the increasing disputes, particularly in e-commerce contracts. Among the methods to resolve these disputes, electronic arbitration has emerged as a modern approach to settle them, responding to the specific characteristics of the electronic environment.

Keywords: Contracts, e-commerce, disputes, electronic arbitration

Introduction:

Information and communication technology has opened wide horizons for individuals, culminating in the emergence of the Internet as a vast network of interconnected computers around the world. It has enabled people, regardless of their locations, cultural backgrounds, or languages, to access and freely exchange information without any regard to geographic boundaries or artificial barriers between countries and peoples. It did not stop there; after transitioning from a network used primarily for military and academic purposes to widespread public use, it became more than just a means of exchanging or obtaining information—it also became a means for concluding contracts of various kinds.

This has created a world where communication technologies have erased national borders and where globalization culture prevails in many fields, including economic activities. A new environment emerged, providing users with advanced means to advertise goods and services and to contract and sometimes execute these contracts. Merchants found their demand, or rather their dream, realized with e-shopping and virtual exhibitions. Thus, information technology has impacted not only the location of commerce but also the means by which commerce is conducted. Contracting through the Internet, generally called e-commerce, has become common and a real phenomenon.

The scientific revolution in modern technologies has contributed to new concepts that were previously unknown, such as the information society, knowledge economy, and e-commerce, which is also a product of this technical revolution. The appearance of the Internet and its extension into the commercial field have led to fundamental changes in the business environment.

Undoubtedly, this new means—the Internet—and the ease it has brought to transactions have imposed themselves on the law, making it necessary to search for ways to address and regulate them to keep this phenomenon within its legal and legitimate framework. This has led many legal scholars to attempt to identify the problems of this type

of transaction, the forms of disputes that arise because of the environment in which they occur, and to propose suitable solutions.

Contracts concluded via the Internet mostly have an international character, as the Internet is an international network connecting most countries and has no defined borders. Since the parties to these contracts are located in different countries and because these transactions affect international commercial interests, the international character of these transactions on the one hand and their execution over the Internet on the other raise many important legal and practical problems that require in-depth research and focus.

Practical experience has shown that the e-commerce participant often does not realize the importance of the issue of the applicable law to the electronic contract until an actual dispute arises. Then the question of how to resolve the dispute and what the applicable law is becomes relevant. These questions stir dormant thoughts and give rise to many legal and practical problems. International contracts are governed by known and established approaches in private international law. The question is: are these approaches (meaning conflict of law rules) suitable for application in the field of e-commerce? Or does the special nature of this commerce, carried out via computers and the Internet, require new rules appropriate to the nature of this trade and its special characteristics?

From this standpoint, electronic arbitration has appeared as a modern method to resolve disputes arising from the use of the Internet in electronic transactions in general and e-commerce in particular. Electronic arbitration responds to the specific characteristics of the electronic environment and offers a solution to many obstacles it raises. Accordingly, many platforms have been established to assist in resolving disputes through electronic arbitration, which has gained a prominent position making many parties turn to it for its many advantages.

This explains the inclusion of arbitration clauses in contracts of an international nature in general and e-commerce contracts in particular, where it has become a common clause in most of them. Based on this,

the following issue arises: what is the legal nature of the electronic arbitration agreement in disputes concerning e-commerce contracts?

To answer this question, we follow the following plan:

First Section: The Nature of E-Commerce and Its Contracts

In this section, we will discuss the concept of e-commerce in the first subsection and the concept of e-commerce contracts in the second subsection.

Subsection One: The Concept of E-Commerce

Part One: Definition of E-Commerce:

E-commerce today is considered the backbone of the contemporary and future economy. The conjunction of the word commerce with the adjective "electronic" means that the method of conducting economic activity has changed; it is now carried out using multiple and diverse electronic means that are continuously evolving—from the use of the telephone to the Internet and mobile phones. The Internet is considered one of the most important of these means (mr, 2006).

In fact, there is no precise and agreed-upon definition yet, due to the variety of entities and forums that have provided these definitions, as well as the type of technology used in this type of commerce. Thus, formulating an exact definition of e-commerce seems a challenging task. Although the term is widely used, no consensus exists on a single definition.

However, we can present the most important definitions of e-commerce, attempting to cover or deepen the different dimensions of this concept as follows:

E-commerce emerged in the 1980s and developed within the American system under the concept of electronic data interchange, which means the automatic processing of the entire commercial process without human intervention according to a standard level (mohamed el-sayed, 1-3 may 2000).

We can mention the definition of the World Trade Organization, which adopted it in a statement following the conference it held in May 1998 concerning e-commerce. It defined e-commerce as: "An integrated set of operations covering the production, promotion, sale, and distribution of products through communication networks and

tools such as telephone, fax, television, and the Internet network (mohamed ahmed, 2000). " It is also the commerce that includes three different types of transactions: providing Internet services, electronic delivery of services (i.e., delivering service products to consumers in digital form), and using the Internet as a channel for service distribution, through which goods are purchased via the network but delivered afterward to the consumer in a non-electronic form (abdel fattah bayoumi, 2002).

To define e-commerce, two trends appeared: one narrow, restricting it to buying and selling through computers; the other broad, as in Articles 1 and 2 of the 1996 UNCITRAL Model Law on Electronic Commerce, which defined e-commerce as all commercial exchanges based on information exchange through a wireless communication network, whether via the Internet or other wireless communication means such as fax, telex, or telephone, or the conclusion of commercial deals of sale and purchase using electronic means (mamdouh, 2000).

Another definition considers e-commerce as opening a fast electronic channel to complete commercial transactions without restriction of time or place, meaning access to multiple and diverse markets at minimal costs (abu al-wafa, 2000,issue 1). It was defined in the Egyptian draft law on e-commerce as the exchange of goods and services through an electronic intermediary, i.e., any commercial transaction conducted remotely using an electronic means (khaled hamdi a. r., 2006).

It should be noted that e-commerce is characterized by the absence of paper documents, relying instead on electronic messages as a means of exchanging data. It is linked to commercial activities with a broad concept that does not limit it to commercial transactions according to the narrow definition known to domestic legislation but includes all economic activities even if they lie outside this concept (farouk, 2002).

From the various definitions addressing electronic commerce, we deduce that this term has two parts: commerce, which means a wide range of activities such as exchanging goods and services, after-sales

services, advertising, marketing, dealing with financial assets, and banking operations like money transfers, auctions, tenders, and many other types of economic transactions; and the word electronic, which is used to indicate the medium in which commerce takes place—a medium composed of advanced technical equipment for processing, storing, and transmitting transaction data using remote communication mechanisms such as telephone, fax, or other networks like the Internet. Thus, electronic commerce includes a wide range of activities and involves not only performing commerce on a contingent basis with known commercial parties but also conducting commercial activity in an open environment such as the Internet.

Branch Two: Characteristics of Electronic Commerce

Electronic commerce is characterized by a set of features represented as follows:

- **The Global Nature of Electronic Commerce:**

E-commerce activities have a global character; they do not recognize spatial or geographical boundaries. Any commercial activity offering goods or services on the Internet does not necessarily mean moving to a specific geographic area. Establishing a commercial website on the Internet allows even a small company owner to penetrate markets and Internet users worldwide (ibrahim, 2003).

- **Absence of Paper Transactions in E-Commerce Deals:**

The absence of paper transactions means there is no physical written document for the contract; instead, it is recorded on an intangible medium because the means of conclusion is a non-paper method. Completing a full commercial deal—from negotiation, contracting, payment, to receipt—electronically happens without exchanging any paper documents. This supports the goal of e-commerce, which is to create a paperless society. Hence, problems arise in proving transactions and contracts, documenting rights and obligations, verifying the validity of signatures, and protecting intellectual property rights. Therefore, many international organizations and governments have legislated special laws on e-commerce granting legal status to electronic records, electronic contracts, electronic

signatures, and the fulfillment of electronic payments (ahmed abdelkarim, 1-10 may 2000).

- **Anonymity of Parties:**

E-commerce transactions take place between parties who may be separated by thousands of miles and may differ in time zones. Consequently, the lack of sufficient information about the parties may create negative issues such as providing false information, stolen credit cards, or misuse of information during transactions. This raises concerns about privacy and confidentiality. However, advancements in modern technology will surely provide security, reliability, integrity, and honesty in commercial dealings over the Internet (khaled mamdouh, 2008).

- **Improvement of Work Quality and Type:**

E-commerce helps improve the quality and type of work. It assists companies and institutions in managing their operations more effectively and accurately, reducing the time required to process information and data, making interpretation more precise and effective, and eliminating wasted time in institutional work (ibrahim, 2003).

- **Communication Between Parties by Voice and Image Without Barriers:**

Modern technologies allow immediate communication by voice and image without barriers or restrictions, which will increase the volume of e-commerce (omar hassan, 2003).

Subsection Two: Concept of E-Commerce Contracts

Branch One: Definition of E-Commerce Contracts:

E-commerce contracts do not differ from traditional commercial contracts in terms of their content or scope. The real difference lies in the way these contracts are concluded. The peculiarity of defining e-commerce contracts lies in their electronic nature or, in other words, the means by which these contracts are concluded, which is audiovisual communication over an international remote communication network (omar hassan, 2003).

Several definitions have appeared for electronic contracts, e-commerce contracts, or contracts concluded via the Internet (all terms meaning the same), which we will attempt to review below:

Referring to Article 2(a) of the 1996 UNCITRAL Model Law on Electronic Commerce, it defines an electronic contract through the definition of a data message as information created, sent, received, or stored by electronic, optical, or similar means, including, but not limited to, electronic data interchange, email, telegram, or telex. Legal scholars have also defined an e-commerce contract as one involving the exchange of messages between buyer and seller, which are preformatted and electronically processed, creating contractual obligations (osama abdelhalim, 2008).

It has also been defined as contracts concluded over the Internet. Undoubtedly, the conclusion of contracts in this form has a specificity that makes them distinct from other contracts and gives them a special nature because they are concluded electronically with parties located remotely (osama, 2003). Some define an electronic contract as negotiations that end with the complete agreement of two valid wills using modern communication means (mohamed hussein, 2003).

The electronic contract means a contract concluded via the Internet. It is an ordinary contract but acquires its electronic character from the way it is concluded or, in other words, from the means through which it is concluded. This contract arises from the meeting of offer and acceptance thanks to communication between the parties using audiovisual means over an open international remote communication network. The predominant characteristic of this type of contract is that the parties communicate using telecommunication and remote information exchange technologies, particularly the global information network "the Internet," without the need for parties to physically move or meet at a specific place (bashar mahmoud, 2006).

Branch Two: Characteristics of E-Commerce Contracts:

E-commerce contracts have a set of characteristics represented as follows:

- **E-Commerce Contracts Are Electronic Contracts:**

There is no dispute that contracting over the Internet is a form of electronic transaction, given the medium and environment in which it takes place. The Internet, as the newest electronic communication medium, uses computers with complex electronic environments connected via communication networks, either through telephone lines or satellites. Both depend on technological techniques based on wired or wireless links that encode digital data in audio, video, text, or numeric form. Everything that passes through the Internet, including words, images, and sounds, consists of data requiring technical and engineering support to analyze and display on device screens in a form users can interact with (omar khaled, 2007). Therefore, e-commerce contracts are electronic contracts in both technical and legal senses.

Since these contracts are concluded via the Internet, they provide the contracting parties with many advantages, such as ease and speed of communication, the ability to study the terms and conditions freely and calmly without pressure or influence from the other party, as is the case with the actual physical presence of the contracting parties. Because when we are dealing with electronic contracting, the contracting parties are not seated in the same place (shahata gharib, 2008).

- **E-commerce contracts are contracts concluded remotely by electronic means:**

The electronic contract is concluded without the physical presence of its parties; therefore, it belongs to the category of contracts concluded at a distance, which is its prominent feature, as it takes place between two parties who are not gathered in a real contractual meeting. The European Directive No. 97/07 defined remote contracting in its Article 2 as: "Remote contracting is any contract concerning goods and services concluded between a supplier and a consumer within the framework of a system for selling or providing services at a distance, organized by the supplier who uses one or more

remote communication techniques to conclude the contract (mohamed hassan, 2006).”

- **E-commerce contracts are commercial contracts:**

This is naturally so. A large part of the jurisprudence relied on the electronic nature of the contract in defining the electronic contract, thus naming it the e-commerce contract due to this dominant characteristic (mohamed hussein, 2003), since electronic commerce is the fertile field where electronic contracts appear particularly as one of the most important means of such commerce.

- **E-commerce contracts are international contracts:**

International contracts have a special nature. Comparative national legislations have granted them privileges that exclude them from the scope of national contracts. Jurists differ on the criterion to be followed to determine the international nature of a contract. A contract is considered international according to the legal criterion if it includes a foreign element related to the conclusion, execution, domicile, or nationality of the contracting parties. That is, a contract is considered international if its legal elements are connected to more than one legal system. Since e-commerce contracts are concluded within the Internet network, which is a global communication network, they are characterized by an international nature. Some jurists even hold that e-commerce contracts are always international, arguing that the means used in negotiation, conclusion, or execution are international means (manani, 2009).

Section Two: Electronic Arbitration as a Means of Resolving Disputes in E-Commerce Contracts

In this section, we will discuss the definition of electronic arbitration in the first requirement and the electronic arbitration agreement in the second.

Subsection One: Definition of Electronic Arbitration

Branch One: Origin of Electronic Arbitration

Arbitration is an old method, and in its primitive form, it was the adopted means to resolve disputes between parties. The earliest judicial function was an arbitration function, but its importance increased recently after the establishment of the United Nations in

1945 (sami mustafa, 2001). International arbitration is considered a legitimate method under international public law, traced back to the Hague Convention of 1899 concerning the peaceful settlement of disputes. It offers a solution imposed on disputing parties by prior consent, reducing the parties' involvement in the resolution. The main role of international arbitration in dispute resolution is that of a third-party perspective. Arbitration flourished with the development of international economic relations, where parties found it a specialized judiciary to resolve disputes arising from international contracts due to its simplicity, speed of procedures, flexibility, and confidentiality (nouri marwa, 1992).

Virtual shopping centers on the Internet have acquired an international and global nature. Businessmen worldwide began concluding various electronic contracts directly on the Internet. Due to the international nature of electronic shopping, many issues arise regarding the precise enforcement of contract terms, respect for intellectual property rights, costs, time, and others. Thus, it can be difficult to enforce such rights through national courts or even traditional arbitration. Traditional dispute resolution methods needed development to suit the new form of commerce. Consequently, the global e-commerce market necessitated turning to arbitration as a means to resolve disputes arising from this commerce, but it had to be done with a new approach fitting the technological revolution in modern communication means. Hence, electronic arbitration became the appropriate method to achieve this goal (murad mahmoud, 2010).

Arbitration adopted as a method to resolve disputes arising from electronic dealings cannot be traditional arbitration confined by geographic restrictions, even if the place is agreed upon (mohamed saeed, 2009). Rather, it must adapt to the nature of electronic dealings and the medium through which they occur. Since the electronic medium — represented by the Internet — is used to conclude and execute electronic dealings, any dispute resolution arising from this dealing must logically be conducted using the same medium and environment (sami abdel-baqi, 2004).

From the above, we conclude that electronic arbitration is a method aimed at resolving issues related to relationships between two or more persons by an arbitrator or arbitrators who derive their authority from a special agreement between the parties and make their decision based on this agreement without being authorized by the state for this task (fawzi muhammad, 2009). Since the essence of electronic arbitration is the exploitation of the Internet to resolve disputes arising from legal acts concluded through it, consistent with the nature and specificity of these acts, we can define electronic arbitration as arbitration conducted via the Internet, according to special rules, without the need for the disputing parties and arbitrators to meet in a specific place (issam abdul fattah, 2009).

Branch Two: Characteristics of Electronic Arbitration

Electronic arbitration is the procedure where all its steps are conducted electronically on the Internet, starting from filling out the consent form for arbitration via the network, exchanging electronic messages and documents, hearing experts, to issuing the electronic arbitration award. Electronic arbitration has several advantages that ensure its continuity and widespread spread today, especially in e-commerce transactions, where the parties' will dominates the organization of their relations. It is worth noting that electronic arbitration, as an advanced form of traditional arbitration, enjoys the same advantages as traditional arbitration, as well as additional advantages due to its electronic form. The most important advantages of electronic arbitration are:

- **Speed and Ease of Electronic Arbitration Procedures:**

This feature is one of the main contributors to the spread of electronic arbitration. It is characterized by ease and simplicity, as parties to the dispute are not obliged to physically attend before arbitrators but can participate in arbitration sessions via electronic communications. This feature is also clearly reflected in the awards issued by electronic arbitration entities, which are easily issued due to the simplicity of procedures relying on electronic exchange of dispute documents (mohamed hussein, 2003). This strongly motivates parties to choose

no other method for resolving e-commerce disputes due to the speed of dispute resolution (amira hassan, 2012).

- **Reducing Litigation Costs and Expenses:**

This is achieved by using various means that allow audio-visual tools to hold arbitration sessions live for the parties and experts, reducing travel and transportation costs (issam abdul fattah, 2009).

- **Convenience:**

Electronic arbitration is characterized by convenience, unlike traditional courts or arbitration bodies. Arbitration is available 24 hours a day, seven days a week. This feature enables the parties to send emails or communicate at any time without the burden of travel. It also allows them to conduct electronic arbitration from anywhere without restriction, enabling parties and arbitrators to communicate directly without physically being in the same place (hesham & ibrahim abdrahman, 2002).

Also, one of the most important advantages shared by both electronic arbitration and traditional arbitration is the preservation of dispute confidentiality, which is considered a significant guarantee in the field of international commercial relations due to the impact of preserving professional, economic, or technological secrets on the continuity of activity, to the extent that some companies prefer to forfeit their rights rather than expose their secrets before the judiciary (abu al-heja, 2009).

Subsecion Two: Electronic Arbitration Agreement

Branch One: Conclusion of the Electronic Arbitration Agreement

Electronic arbitration initially depends on an agreement concluded between its parties, then proceeds through certain procedures until a ruling is issued by the authority entrusted with arbitration. Electronic arbitration must be based on an agreement between its parties to resolve any disputes that may arise between them through arbitration in an electronic manner. This agreement is usually concluded electronically, where electronic messages are exchanged first among the parties themselves, then between them and the electronic arbitration center by filling out a special electronic form used by some arbitration centers operating via the Internet. Arbitration is then

conducted through a series of procedures carried out electronically (mohamed abdelaziz, 2011).

While resorting to arbitration has become increasingly common in international trade conducted through traditional means because of its speed and ease, away from the complicated and lengthy procedures before ordinary courts, resorting to electronic arbitration in e-commerce is more appropriate because it aligns with the nature of this commerce—speed in conclusion and execution, especially regarding contracts concluded and executed over the Internet. In this regard, the electronic arbitration agreement does not differ from the ordinary arbitration agreement except that it is concluded through electronic media and modern communication networks (amir faraj, 2009).

An arbitration agreement is an agreement whereby the parties commit to submit disputes that have arisen or may arise in the future in their relations to arbitration, the procedures of which are conducted fully or partially over the Internet or other modern communication means without the physical presence of the arbitration process parties in one place (jaafar dheeb, 2014). The parties to the arbitration agreement enjoy the same freedom in determining the law applicable to the subject of the agreement. If the parties do not choose the rules applicable to the dispute's subject, the arbitrator decides those rules. According to Article 17 of the electronic court's regulations, the arbitrator must select the law that governs the dispute based on the closest and most reliable connections (lazhar, 2012).

In all cases, whether the law governing the subject of the agreement is chosen by the parties or by the arbitration tribunal, public order laws and texts must be observed. This was affirmed by Article 5, paragraph 2 of the New York Convention (new york convention on the recognition and enforcement of foreign arbitral awards, 1958), which states that recognition and enforcement of an arbitration award may be refused if the award contradicts the public order of the country where enforcement is sought. This restriction on the parties' freedom to choose the applicable law rules must naturally also be applied in electronic arbitration.

Branch Two: Form of the Electronic Arbitration Agreement

It is acknowledged that the contract is the main instrument in international commercial exchange processes, relying on paper supports that embody its physical existence. Handwriting forms the main axis of international commercial exchange, including the negotiation phases and contract terms. Although technological developments have introduced faster means such as fax and others, the paper support still retains its presence despite these new means. However, informatics has brought a real revolution to these traditional concepts of written documents by transforming them from handwritten documents into electronic documents, thanks to the fusion of informatics and wireless communication means (amir faraj, 2009). Analyzing the laws regulating the conditions for the existence of an arbitration agreement reveals that these laws fundamentally require, like any contractual condition, the necessity of consensus between the two parties on this agreement. Regarding whether this consensus alone suffices or if it must be in writing, different legislations have diverged into two directions:

- **The first direction:** Represents the liberal approach that does not impose a specific form for the arbitration clause, meaning writing is not required for its validity. This is the approach of the Geneva Convention on International Arbitration (the european convention of geneva ,concerning international commercial arbitration, 21/4/1961), which requires the arbitration agreement to be in writing but states in Article 2 that an unwritten arbitration clause is valid if concluded between parties whose domestic law allows the arbitration agreement not to be in writing, thus referring the matter of form to domestic laws.
- **The second direction:** Requires the arbitration agreement to be in writing according to traditional arbitration rules. According to the Model Arbitration Law (model law on arbitration issued by the united nations , 1985), the arbitration agreement must be in written form, and similarly, the New

York Convention on International Arbitration requires this agreement to be in writing.

For the written evidence to be legally valid, it must include a written record of a legal act and be signed by the person to whom the evidence is attributed. Thus, the elements of written evidence are writing on one hand and signature on the other. Referring to the purpose behind requiring writing, it is essentially related to evidence primarily. Therefore, based on this purpose, the required form (abu al-hija, 2011) of the document is determined in terms of evidence, not merely formality. Since the traditional concept of a written document means a paper document written by hand, the development of modern communication means has given a new and expanded concept of the written document, including electronic message exchange, telegraph, telex, fax, email, and other continuously evolving (mohamed saeed, 2009) modern communication means. Accordingly, some scholars advocating the acceleration of procedures believe that the written form is fulfilled by electronically exchanged data over computer networks or other contemporary communication means, provided they allow recording or registering the agreement on media accessible for later reference (issam abdul fattah, 2009).

In general, the electronic document must include the names of the parties to the dispute and the text of the arbitration agreement itself in terms of offer, acceptance, and conditions contained therein. This information must be electronically stored in a way that allows the right of access, review later, and use as evidence to prove the validity of the arbitration agreement, and it must be impossible to forge or modify its content (amal, 2015).

Conclusion:

What has driven e-commerce to develop and grow to its current level is the many advantages it offers, including significant savings in time- and distance-related costs. Additionally, it promises the opening of new markets and the creation of business sectors compatible with this type of commerce. The question often raised concerns the future of e-commerce and the possibility of resolving disputes arising from it. Many jurists have settled on the necessity of seeking more flexible

means adapted to the nature of e-commerce, where the role of the contracting parties' will is prominent, thus overcoming the problems of conflict of laws and jurisdiction determination. On this basis, electronic arbitration has emerged as an effective mechanism to resolve disputes in e-commerce contracts.

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