

E-Contract under the existing UAE Laws

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A contract is an agreement between at least two parties over the terms and conditions that will govern their business relationship. There must be an offer, acceptance and consideration. It is usually a result of negotiations and back and forth over the subject matter, which the parties elect to document in a piece of paper to avoid any doubts over what was finally agreed upon. Today, such negotiations are often conducted via electronic means, such as e-mails, and the negotiations continue until the differences are narrowed down to what is referred to as an electronic contract. The question that concerns us all is whether an electronic contract is valid under the current state of the UAE law. This article will examine the validity of electronic contracts in relation to the UAE law and shed light on the applicable laws in this connection.

Under the UAE Civil Transactions Law, being Federal Law No. 5 of 1985, as amended (the "Civil Code"), a contract is formed upon the acceptance of an offer by the offeree. Article 125 of the Civil Code provides (translated): "A contract is the deliberate engagement of the offer which emanates from one of the parties, to the acceptance of the other party in a manner which produces judicial effects and creates mutual obligations on the two contracting parties. Yet more than two parties may also engage to produce judicial effects". The Civil Code further provides that certain kinds of contracts must be in writing in order to be valid. For instance, for the sale or purchase of a ship, the Civil Code specifically provided that the contract has to be in writing. This is equally true in the case of the sale of land or the contract of marriage, where such contract has to be in writing in order to be valid pursuant to the Civil Code. The aforesaid requirement pertains to the validity of such contracts and not only the proof of its terms as it is the case with other electronic contracts, as will be discussed hereunder.

Based on the above, contracts could in principle be concluded by the acceptance of an offer by the offeree, no matter how such offer was communicated or the acceptance of the offer was made, with the exception of those contracts, which the Civil Code has specifically states should be in writing in order to be valid. Article 130 of the Civil Code provides (translated): "A contract is concluded by the concurrence of the offer and the acceptance, subject to those cases where special conditions are required for its validity and which are provided for in the law". Nonetheless, another question arises in terms of the admissibility of such electronic documents in courts in the event of a dispute over its terms. There is no legal uncertainty if both parties recognise a contract and admit the same. The problem only arises when one party tends to deny the contract or dispute any of its terms.

Evidence in the UAE is governed by the UAE Law of Evidence, being Federal Law No. 10 of 1992, as amended (the "Law of Evidence"). Two categories of documents are recognized under the Law of Evidence; namely official and non-official documents. Under the Law of Evidence, a document, whether official or non-official, must be signed or stamped and copies of documents, whether official or non-official, are not recognised unless they are identical to their originals and the originals are available to compare with. The original will only be considered original if it is signed or stamped. A copy could be challenged by denying the signature or the stamp. If a copy is challenged, it must be examined with the original. But how about electronic documents and electronic signatures? Does the Law of Evidence address electronic documents and electronic signatures?

The answers to the above questions were negative few years back when electronic documents and electronic signatures were not addressed under the Law of Evidence. Nonetheless, the UAE federal and

local governments have realized such legal vacuum and acted on it. In particular, in 2002, his Highness Sheikh Maktoum Bin Rashid Al Maktoum, Vice President and Prime Minister of the UAE and Ruler of Dubai, issued a local law for the Emirate of Dubai, Law No. 2 of 2002 Concerning Electronic Transactions and Commerce (the "DETCL"). Under the DETCL, an electronic signature as provided for in the said law shall be regarded as adequate if the law requires a signature on a document. According to the DETCL, an electronic document or file shall be regarded as original if there is reliable technical evidence proving that it accurately reproduces the information originally created and it permits information to be presented on request. Pursuant to the DETCL an electronic document or signature may not be rejected just because it is electronic. Electronic information shall have legal validity and in judging this validity, certain requirements must be met such as:

- Reliability of keying in or creating, saving, presenting or sending processes;
- Reliability of the method in which information is secured;
- Reliability of the source of information;
- Checking the identity of the creator of the information;
- Any other relevant item.

It is presumed that a secured e-signature is reliable, and is that of the person involved and specifically approves the electronic document attached to it. It is further presumed that a secured electronic document has remained unchanged since its creation and is reliable. Even though it may involve one or more electronic communications, a contract may not be less valid or less legal. For purposes of concluding contracts, partial or total acceptance may be made electronically. An arrangement may be made by electronic devices (two or more information systems) without personal intervention. Such agreement shall be valid according to the DETCL.

At the federal level, as part of the Federal Government's efforts to regulate electronic transactions and boost user's confidence, His Highness Sheikh Khalifa Bin Zayed Al Nahyan, President of the UAE, has, in February 2006, issued Federal Law No. 1 of 2006 concerning Electronic Transactions and Commerce Law ("ETCL").

Chapter Four in the ETCL addresses electronic transactions and regulates the formation and validity of on-line contracts. Under Chapter Four, a contract will not lose its validity or enforceability for the simple fact that it was formed by one or more electronic messages. Further, an on-line contract may be concluded between two or more Automated Electronic Systems; without personal intervention, and such contract shall be valid by virtue of Article 12 of the ETCL.

Further, the ETCL has recognized electronic signatures and outlined the criteria according to which an electronic signature shall be regarded as equivalent to a handwritten signature.

Moreover, in an attempt to align the existing laws with the ETCL, His Highness Sheikh Khalifa Bin Zayed Al Nahyan, President of the UAE, has, in October 2006, issued Federal Law No. 36 of 2006 (the "Law") amending the Law of Evidence in Civil and Commercial Transactions promulgated by Federal Law No. 10 of 1992 (the "Law of Evidence"). Pursuant to the Law, electronic signatures shall have the same force and effect as other signatures mentioned in Law of Evidence provided they comply with the provisions of the ETCL. Further, electronic writing, communication, records and documents shall have the same force and effect as accorded to official and traditional writing and communication under the Law of Evidence provided they comply with the conditions and provisions of the ETCL.

It is evident from the above analysis that the problem lies in proving that transactions have occurred or in establishing evidence. As mentioned above, there is no legal uncertainty if both parties to a contract recognize its terms and admit the same. In other words, if both parties agree to the terms of a contract transacted electronically and recognize the same, the question of proof does not arise. The contract therefore will be a valid contract and both parties will have to adhere to the agreement they have made through electronic means irrespective of the fact that such a contract was concluded electronically and, in

most cases, an original, as in the context of the Law of Evidence, may not exist. The problem occurs when one party disputes any or all the terms of the contract, then the question in terms of the admissibility of electronic evidence arises.

It is also evident from the above legislative developments that there is a growing realisation in the UAE that e-commerce can only achieve its full potential if there is a modern legal infrastructure that can support the growth of e-commerce. As e-commerce is developing, it is creating new challenges to any legal system which needs to continue to develop a legal regime to cope with this fast growing area of e-commerce. Hence, I believe that the UAE legislators should continue to enact special laws, such as the DETCL and the ETCL or amend the existing laws, such as the Law to cope with the fast growing technology so it can play a competitive role in the digital economy.