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THE EFFECTIVENESS OF THE ELECTRONIC SIGNATURE IN ESTABLISHING PAYMENT BY ELECTRONIC CHEQUE BETWEEN EVIDENTIARY REQUIREMENTS AND PUBLIC ORDER REGULATIONS: A COMPARATIVE LEGAL ANALYSIS

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ABSTRACT

The use of the Internet opens up huge horizons for commercial transactions, but at the same time it carries with it risks that may threaten the values and rights of individuals. Perhaps the most important of them appears in the creation of legal proof of the existence of those transactions concluded over the network, the content of which contains all the elements required by law, therefore, the problems of legal proof of electronic transactions - including the electronic check - are at the forefront of the challenges facing these transactions, given that the existing rules of proof did not know of the supports on which the written writing of the transactions was recorded except the paper support (official and customary documents).

The importance of developing an appropriate legal framework to regulate all issues of electronic evidence has increased, which sets the legal conditions and technical and technical controls to create evidence of an electronic nature, capable of proving the existence of these transactions, its content is to ensure the integrity of the information exchanged, as well as determining the identity of the parties to the transaction. There is no doubt that achieving that goal depends on creating a safe environment within the validity of the expression of the contractual will, which guarantees the safety of the documents exchanged from any modification or distortion of their content.

KEYWORDS

Electronic Signature, Electronic Check, Legal Proof of Electronic Transactions, Parties to The Transaction

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Introduction:

The crisis of the law of evidence actually goes back to scientific development. This means that scientific reality has influenced the means of evidence adopted, whether legally or by agreement. It is no longer possible for men of law to ignore the research and scientific developments effective in social relations, and the law is no longer allowed to deny the modern scientific outputs. Since the success of the legal rule requires keeping pace with modern developments, the law is carried to reframe its relationship with scientific requirements so that science becomes in a complementary relation with the law.

From here, we propose the following problematic: To what extent is the electronic cheque effective to protect its parties?

And based on the dialectic of the law keeping pace with scientific developments, we will study the probative value of the electronic signature of the electronic cheque and its strength as a proof in evidence, whether in the presence of an agreement on organizing its probative value or in the absence of an agreement on that, and the extent of the connection of the electronic signature for the electronic cheque to public order, and the mechanism of saving the electronic cheque and the extent of its probative value in evidence.

Research Plan:

First Requirement: The probative value of the electronic signature in proving payment by the electronic cheque.

Second Requirement: The extent of the connection of the electronic signature of the electronic cheque to public order.

Third Requirement: The mechanism of saving the electronic cheque and the extent of its probative value in evidence.

First Requirement :The probative value of the electronic signature in proving payment by the electronic cheque

And we will discuss this probative value in the case of the existence of an agreement between the parties (First Section), as well as in the case of the absence of an agreement (Second Section).

First Section:

The probative value of the electronic signature in case an agreement exists between the parties

The question arises about the extent of acceptance of the electronic signature of the electronic cheque in evidence if there is an agreement between the parties allowing the acceptance of such a signature in the area of the electronic cheques between them?

There is no doubt that answering this question is of great practical importance, as saying by the validity of the agreement organizing the issue of evidence means – legally and practically – accepting electronic cheques in evidence. The answer is basically tied to whether the rules that organize the subject of evidence in general are related to public order or not, as saying they are related to public order makes the agreement contrary to its provision void; on the other hand, saying that evidence rules are not related to public order makes the agreement contrary to its provision valid and binding on both parties of the agreement (Sabri, 2001, p.13).

These agreements, from a traditional point of view, aim to get free from the neck of the principles of evidence by the traditional written proof and go forward to the wide space where the probative value of the proof is subject to the agreement and to the judge's discretionary power. So, the goal of the evidence agreement is to determine the evidence that is acceptable in evidence, regardless of the value of the electronic cheque under dispute, and the impact of the agreement may extend to determining the value of the agreed upon proof and its probative value in evidence. The parties may work to apply such agreements to electronic cheques and consider the electronically signed proof as a means to prove legal acts accomplished using modern communication means.

They may even equate the ordinary signature and the electronic one so that they give the electronic proof the same value as the written proof in terms of the effects arising from the latter (Al-Okaili, 1998, p.367). In this context, an important principle was issued by the French Court of Cassation, which affirms, on the one hand, the non-connection of substantive evidence rules to public order, thus allowing the parties to agree to violate them, and, on the other hand, recognizes the validity of the electronic signature in evidence when there is an agreement to accept it, even if there is an obligation to provide evidence written by hand.

Thus, it becomes clear that it is possible to accept the electronic cheque as a proof of evidence through the agreements that modify the methods of evidence, although the acceptance of the electronic cheque in evidence is only valid in cases where the contracting parties can set a framework to regulate their upcoming transactions, which is rare in ordinary dealings via electronic means and through the internet where the parties do not know each other except regarding the cheque subject of the transaction. This makes the acceptance of the electronic cheque in evidence questionable, especially in the absence of legislative texts that regulate this probative value.

And although the parties may agree to accept the electronically signed cheques as a means of evidence between them, if the agreement contains arbitrary terms and contradicts the principles of evidence, we see that the judge is not obliged to accept these agreements. Also, this agreement should not go so far as to deprive one of the parties from his right to evidence (Radwan, 1998, p.87).

In the end, we can say that the general rules organizing evidence, whether under exceptions mentioned in national legislation or according to the principle of freedom of evidence in commercial matters, remain unable to absorb the rulings of electronic signature as a means to recognize the validity of the electronic signature. They are not sufficient as a basis to frame evidence through electronically signed cheques; they all remain partial solutions, and their acceptance or non-acceptance and value estimation depends on the discretionary power of the judge. Such a situation creates an atmosphere of lack of confidence and affects the stability of electronic transactions that are conducted using modern communication means.

Therefore, it has become necessary to adapt the rules of evidence to the requirements of electronic commerce through legislative intervention, based on which the electronic signature will be granted full probative value in evidence equal to that recognized for the traditional signature. This makes the parties to electronic cheques made over the Internet know in advance the value of the proof at their disposal and are not surprised by the judge's rejection just because it is an electronic proof. In addition to providing a sufficient amount of trust and credibility in the electronic signature by searching for the mechanisms that guarantee this, this sends confidence and reassurance in the people dealing with it on the one hand, and makes it equal to the ordinary signature and helps the growth and prosperity of commerce on the other hand.

Second Section:

The probative value of the electronic signature in case there is no agreement between the parties

No doubt that electronic cheques, as part of electronic commercial transactions, are subject to special rules in evidence, which are different from those applicable to civil transactions. These rules are based on mutual trust between merchants and the speed in concluding deals (not restricting commerce or hindering its development).

Therefore, the Algerian legislator, like other legislators, adopted the freedom of evidence in commercial matters and contracts that do not exceed the prescribed threshold for evidence by witness testimony (Hammoud, 2005, p.61). Accordingly, we will discuss the general rule in the field of electronic cheque, which is the freedom of evidence, and how far it encompasses the electronic signature, or in other words, the possibility of accepting the electronic signature to prove the electronic cheque as part of electronic commercial transactions.

In such electronic cheques, the principle of freedom of evidence prevails, which is dictated by the very nature of electronic commerce, distinguished by speed, as well as the elements of trust and security. This gives the parties the freedom to prove these cheques by all means of proof—except for what is excluded by a special text—even if the proof goes against or exceeds what is established in writing. This returns to the nature of electronic cheques and their requirements for precision, speed, and trust. Requiring electronic writing for proving acts would hinder the interests of those dealing and the development of commerce. Therefore, the contracting party over the internet can use the electronic cheque recorded on a non-paper medium, even though this document does not reach the level of written proof, and may not even fulfill the requirements of written evidence. There is no concern or risk in this because the matter is in all cases subject to the judge's discretionary power, who may accept that electronic document if he is convinced of it as an indication among the indications proving the existence of the electronic cheque and defining its content, or he may disregard it if he doubts it.

However, this principle is not absolute; rather, there are some exceptions to the scope of freedom of evidence in commercial transactions. What are these exceptions? We will discuss some of these exceptions to the principle of electronic-free evidence in electronic commercial transactions:

First: The freedom of electronic evidence is only established between merchants regarding electronic commercial acts

This rule is applied only to electronic transactions between merchants concerning their commercial dealings. If the merchant engages in acts outside the scope of commercial acts, then this rule does not apply, as he is subject to the evidence system according to the general rules (Al-Miliji, 2000, p.133).

Second: The freedom of electronic evidence is not applied to all electronic commercial acts

There are certain electronic commercial acts that the legislator obligates to be written—electronically—because of their importance and seriousness on the one hand and to protect the public interest. This is the case, for example, with the mortgage on commercial assets, the sale contract of a ship, and its lease (Al-Miliji, 2000, p.135).

Third: Mixed acts

That is, where one of the parties is a merchant and the other is not, here the merchant, in proving his claim, is required to use the ordinary means of proof stipulated by civil law rather than the principle of freedom of evidence in commercial law. Thus, writing becomes required, whereas the non-merchant party can prove his claim against the merchant by all means of evidence, whatever the value of the act, even if it exceeds the threshold for proving by testimony (Lotfi, 2000, p.9).

However, we see that leaving the matter to the judge's discretionary authority in evaluating the electronic cheque makes things depend primarily on probability and deduction, in which points of view differ and understanding varies. This may lead to threatening confidence in transactions via the internet.

In conclusion, the area of acceptance of the electronic cheque in evidence, through the principle of electronic freedom of evidence in commercial matters, is not only a limited field, but also of limited strength and has not yet reached the level of complete written proof. Therefore, there must be a vigilant legislative intervention that raises the status of electronic documents in electronic evidence and grants them the status of full proof.

Second Requirement: The extent of the connection of the electronic signature for the electronic cheque to public order

Due to the absence of a clear legislative text that previously recognizes the validity of the electronic signature for electronic cheques, the parties have resorted to investing in the principle of freedom of will and that the contract is the law of the contractors (Civil Code Algeria: Art. 106 – Civil Code France: Art. 1134 – Civil Code Egypt: Art. 147), to conclude agreements recognizing the validity of the electronic signature for the electronic cheque. So, how valid are these agreements? And how valid are agreements regarding recognition of the validity of the signature?

To answer, we explain that the rules of electronic evidence are divided into two parts: Formal rules (First Section) and Substantive rules (Second Section).

First Section: Formal rules

Related to the procedures followed for presenting electronic evidence means established by the legislator to serve justice and achieve it, which guide litigation procedures and are binding on both parties and the judiciary alike. The parties cannot impose procedures other than those specified by law, and judges cannot apply procedures not stipulated by the legislator, even if there is an agreement between the parties (Aloui Al-Abdlaoui, 1981, p.50). There is no dispute about the connection of the rules of this type to public order. An example is the rule that requires witnesses to give verbal testimony.

Second Section: Substantive rules

These are rules that define the different means of evidence and the value of each means, the circumstances in which each can be considered, the burden and subject of proof. It is about these rules that there was disagreement about whether they relate to public order or not, and consequently, whether it is permitted to agree on violating them or not. We will discuss the positions of French and Arab doctrine and judiciary (represented by Algeria, Egypt, and Jordan) as follows:

First: French law

French doctrine defined two conflicting opinions in this matter. The traditional opinion considered that parties' agreements regarding evidence are not permissible, since the judiciary is subordinate to the state and cannot be adjusted by anyone. But it then settled on the view that these evidence rules are not related to public order, and thus agreements to violate them are permissible (Aloui Al-Abdlaoui, 1981, p.50). French court judgments oscillated between the old and new views but recently stabilized on the modern view, which holds that the substantive rules of evidence are not related to public order (Lucas, 1987, p.147). This appeared in a principle by the French Court of Cassation that an agreement modifying the rules of written evidence is valid (Cass. Soc, 1965), and another principle where the court ruled that evidence rules do not concern public order but concern the private interests of parties (Cass. Civ. III, 1997).

Second: Algerian law

The legislator sees that substantive evidence rules address burden and subject of proof, means and cases of use, and their value in evidence, and show the subject of proof and which party bears the burden (Algerian Civil Code, Art. 323). The Algerian legislator has given electronic evidence the same status as written paper evidence in the latest amendment according to Article 323 bis 1. These substantive rules are usually complementary and not related to public order; they relate directly to the disputed financial rights, which can be disposed of, renounced, or settled (Bin Said, 2018, p.66).

However, for some transactions, the legislator, due to their importance, made property transfers, real rights and others, as stated in some special laws and Article 324 bis 1 of the Civil Code, only provable by

formal writing. Also, transactions exceeding one hundred thousand dinars outside commercial matters cannot be proved by witness testimony (Algerian Supreme Court, 1983, p.65)[*].

Third: Egyptian law

Most doctrine in Egypt holds that substantive rules of evidence are not considered public order, so one may agree to violate them, as these rules are closely linked to the right itself, and any waiver or amendment affects the right, and therefore, a person has the right to waive or amend and, naturally, to prove it (Nash'at, 1972, p.415). Egyptian courts supported doctrine and settled on the rules of evidence not being public order; thus, agreements to violate them, explicitly or implicitly, are valid.

Fourth: Jordanian legislation

The Jordanian legislator regards agreements on substantive rules aiming to amend subject, burden, or means of proof as not related to public order, so agreements to violate them are valid unless related to public order.[*]

Jordanian courts have ruled that substantive rules are not of public order, as the Court of Cassation settled the validity of special agreements for means and burdens of proof and facts to be proved, except agreements related to marriage, death, and lineage, and official document powers and others. Therefore, substantive rules are not public order and may be violated by agreement, considering them the rights of the parties.

Based on what has been said above, nothing prevents parties from agreeing in advance to recognize the electronic signature as evidence for proving the existence of remotely made electronic cheques, and the court may then not require written documents as proof, while the other party, if silent, is considered to have implicitly waived the objection based on the rule that requires written evidence is not of public order (Sebaei, 2001, p.1033 and after).

Third Requirement: **The mechanism of saving the electronic cheque and the extent of its probative value in evidence**

There is no doubt that the Algerian legislator, and comparative legislations, have not set up a comprehensive regulation governing electronic cheques, which leads to some difficulties when trying to use them in practice. This also produces certain fears related to the formal aspects of creating these cheques and to the process of saving them, which brings some difficulties that have not yet found a satisfactory answer.

Even though there is a clear difference between electronic and paper cheques, which is essentially based on the guarantees—of technical nature—that surround the electronic cheque and how much trust these guarantees give. Also, the presumption of reliability of the electronic signature gives a great deal of trust to documents accompanied by this signature (al-Jamal, 2006, p.75).

Generally, saving electronic cheques should protect their integrity, so they should be saved correctly to be considered complete evidence. This means the saving process must guarantee that the saved cheque is a true translation of the will of the concerned parties, which calls for saving the electronic signature. The truth carried by the electronic cheque must be always retrievable at any moment.

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[*] The rule requiring written evidence is not a matter of public order, as parties may waive this protection. This was confirmed by the Supreme Court in its decision issued on November 5, 1983, No. 28537, Judicial Bulletin, No. 43, p. 65, which stated that:"*The requirement of written proof when the value of the legal act exceeds 1, 000 DZD, in accordance with Article 333 of the Civil Code, is not of public order, and the parties may expressly or implicitly waive it, meaning that judges may not raise it on their own motion."*

[*] The Jordanian legislator has recognized the application of electronic signatures in proving banking transactions. According to the Jordanian Banking Law No. 28/2000, Article 922, paragraph (b), states that:"*Notwithstanding any provision in any other legislation, proof in banking cases may be established by all means of evidence, including electronic data or data generated by computer systems or telex correspondence."*

Furthermore, paragraph (e) of the same article stipulates that:"*All banking operations and financial activities are considered commercial acts by their very nature, regardless of the status of the client, contractor, or party dealing with the bank, whether civil or commercial, and are therefore subject to the applicable commercial law rules."*

Accordingly, the Jordanian legislator categorizes banking transactions and disputes as commercial acts by their inherent nature, and thus permits proving them through all means of evidence. Consequently, all electronically signed evidentiary instruments are deemed valid in establishing commercial banking operations. It would not be acceptable to authorize such means of proof in banking transactions while rejecting them in other commercial dealings, as both share the same commercial nature.

Additionally, Article 72(c) of the Securities Law No. 123/97 provides that:"*Notwithstanding any provision in any other legislation, proof in cases may be established by all means of evidence, including electronic data or data generated by computers, as well as telephone recordings, telex, and fax devices."*

This clearly indicates that the law has permitted proof in securities-related cases through all means of evidence, including electronically signed documents. Therefore, if such cases may be proven using all means of evidence, then, a fortiori, commercial transactions may also be proven by all evidentiary means, including electronic documents.

Since electronic cheques are saved on an electronic medium from their creation, this guarantees their preservation, but there are many difficulties facing the saving of these cheques, mainly because of suspicion about the possibility of tampering with the electronic medium on which the cheques have been saved, as well as the grave risk of incompatibility among different computer programs and hardware (Montaser, 1981, p.56).

Given that electronic cheques, in most cases, are issued by ordinary individuals – unless issued by a government entity – they need a reasonable amount of trust to facilitate circulation.

According to Article 323 bis 1 of the Algerian Civil Code (Algerian Civil Code, Article 323 bis 1), Article 13 of the Jordanian Evidence Law, Official Gazette of Jordan (Jordanian Judgment, No.1108, published 17 May 1952 p.200)[*]), and Article 15 of Law No.15 of 2004 on organizing electronic signatures and establishing the Information Technology Industry Development Authority in Egypt (Law 15 of 2004 on Electronic Signature, Article 15)[*], electronic cheques have the same probative value as paper cheques, so the rules of evidence apply to them. Electronic cheques are considered among the electronic documents originally intended to prove a specific event; they show the drawer's obligation to pay a sum of money to the beneficiary and his promise of payment upon presentation. Thus, electronic cheques are meant to prove electronic commercial transactions, which are characterized by being concluded remotely (al-Awaadi, 2005, p.98).

It is also required, for the validity of the probative value of electronic cheques, that they remain within the purpose for which they were created as an obvious condition. Electronic writing means symbols expressing the clear wish to issue the electronic cheque without ambiguity. Without electronic writing, the electronic cheque cannot exist legally, as electronic writing is a necessary element for the existence of the electronic cheque; the electronic cheque is nothing but an electronic document, and the word"document" necessarily means there is writing, as the word does not apply to spoken statements, as long as the aim of preparing the cheque is to have a piece of evidence ready to prove the said monetary obligation. Therefore, it must be established correctly to ensure its survival over time (Hejazi, 2002, p.165).

The writing in the electronic cheque is not just any writing; it has a special meaning: the electronic writing must be directed at a specific legal event, generating a right for the person entitled to hold the electronic cheque as evidence, until the electronic cheque gains the description of evidence in the judicial understanding (Abu Zaid, 2002, p.153 and after).

On the other hand, as previously made clear in this study, the electronic signature is an essential condition for the validity of electronic cheques; indeed, the electronic signature is the most important condition for the electronic cheque, as without it, the cheque cannot be attributed to its source. Electronic cheques containing electronic writing without a signature are nothing but electronic documents lacking the acceptance of the drawer as to the cheque's content and his consent to the obligation mentioned. Additionally, the signature is a safety valve for electronic cheques. Therefore, the electronic cheque must be electronically signed to play its role as a modern method of electronic payment related to remote, intangible science (al-Dessouki, 2001, p.52). From this standpoint, most legislations have established the principle of equality between the electronic and paper cheque, and have given the electronic cheque the same probative value as the paper cheque.

Finally, in light of legislative recognition of such probative value, the establishment of equality between electronic and paper cheques has become a reality. The electronic cheque, from now on, enjoys the rank of the paper cheque in evidence, which means the electronic cheque bears the same restrictions existing on the paper

[*] Article 13/3 of the Jordanian Evidence Law and its Amendments, Law No. 30 of 1952, published in the Jordanian Official Gazette (Judicial Rulings, Issue No. 1108, 17 May 1952, p. 200), provides that:

(a)"Subject to the provisions of this paragraph, fax messages, telex communications, e-mails, and similar modern means of communication shall have the same evidentiary force as ordinary documents if accompanied by a testimony from the sender confirming issuance thereof, or by a testimony from the recipient confirming receipt thereof, unless proven otherwise."

(b)"E-mails shall have the same evidentiary force as ordinary documents without requiring such testimony, if the conditions stipulated under the effective Electronic Transactions Law are fulfilled."

(d)"Computer-generated outputs, if certified or signed, shall have the evidentiary force of ordinary documents unless the attributed party proves that he/she neither generated, certified, nor signed them, nor authorized anyone to do so."

[*] Article (15) of Law No. 15 of 2004 on the Regulation of Electronic Signature and the Establishment of the Information Technology Industry Development Authority, published in the Egyptian Official Gazette, Issue No. 17 (Supplement D), dated 22 April 2004, provides that:

"Electronic writing and electronic documents, within the scope of civil, commercial, and administrative transactions, shall have the same legal evidentiary force as official and private documents under the provisions of the Law of Evidence in Civil and Commercial Matters, provided that they meet the conditions stipulated in this law and comply with the technical and technological requirements specified in its Executive Regulations."

(') Abdel Hadi Fawzi Al-Awaadi, The Legal Aspects of E-Mail, 1st Edition, Dar Al-Nahda Al-Arabiya for Publishing and Distribution, Cairo, 2005, p. 98.

cheque in terms of evidence. Thus, there should be no erasure, deletion, or overwriting in the electronic cheque, as all of the above constitutes a defect affecting the integrity of the electronic cheque and renders its probative value in electronic evidence invalid.

Conclusions

In the end, we can summarize that the electronic signature is accepted for proving electronic commercial transactions that are based on the principle of freedom of evidence, including electronic cheques, whatever their value, due to the accuracy and reliability of the electronic signature, in addition to the speed which characterizes it. The courts should accept this signature and not hinder its application, as long as the law has opened the way for all means of proof in electronic commercial transactions, for the permissibility of the parties agreeing to violate the substantive evidence rules, guided by many comparative legislations and modern doctrinal opinions. However, the matter truly requires a clear legislative intervention to resolve the ongoing controversy about the extent to which the electronic signature is connected to public order, so that the electronic signature has full probative value for proving electronic cheques, and so individuals can agree to rely on it for evidencing the validity of electronic cheques as one of the most important electronic commercial documents, which are paved to dominate in the coming future, so reliance on them becomes one of the main electronic payment methods.

- Obtained results:

1. The elements of proof – writing, signature, saving, and authentication – have become created by modern techniques in a non-material, intangible environment due to the merging of technology”computer" and the communications sector”internet, " which has contributed to increasing the use of the electronic cheque in commercial transactions with high safety, speed, and confidentiality, which are the most important requirements of commercial activity.

2. The emergence of the electronic cheque was associated with the emergence of electronic commerce as an advanced means of payment. It depends basically on the electronic means that gave it a kind of privacy in issuance, proof, and circulation, which has made it legally valid for proof and settlement in countries that acknowledge the authenticity of electronic documents and their signature.

3. The recognition of the principle of equality between electronic and paper cheques has become a reality. The electronic cheque from now on enjoys the same status as the paper cheque in proof, which means the electronic cheque carries the same restrictions as the paper cheque regarding evidence. Thus, there should be no erasure, deletion, or overwriting in the electronic cheque, as all of these constitute a defect affecting the integrity of the electronic cheque and destroy its probative value in electronic evidence.

- Recommendations:

1. We propose that the legislator issues special laws regulating the use of electronic cheque by creating a special law for electronic transactions, which would address the aspects of dealing with electronic cheques and consider the privacy that the electronic cheque enjoys, and its immaterial nature.

2. Recommendation of the importance of inviting the legislator to formulate a general theory for evidencing the electronic cheque concluded over the internet, so that it is within an integrated legal framework for electronic transactions that organizes all relevant legal issues, and incorporates all issues connected to evidencing electronic cheques, not just relying on the general rules which do not fit the nature of electronic documents, so that this occurs according to unified legal rules and principles, enabling the absorption of all scientific developments in contracting systems and forms of writing or signature, while not ignoring the adaptation of general rules to face these modern developments.

3. Securing the necessary infrastructure for providing electronic signature services, including encryption software specific to electronic signature and advanced protection programs, to protect users from fraudulent techniques that affect the privacy and confidentiality of the electronic signature.

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