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## THE ELECTRONIC CONTRACT: POST- PANDEMIC BOOM

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**Abstract:** Nowadays, in the face of constant social development and technological advances, virtual contracting has become the norm, hence the need to identify the electronic contract as part of daily life, where digital media have become the fastest communication mechanisms that foster the creation of commercial relationships over long distances without the need to be physically in the same place to carry out commercial transactions. Therefore, the need to carry out a study on the electronic contract, coupled with the fact that derived from the pandemic issue that affected society as a whole, it can be seen that marketing through electronic means increased.

**Keywords:** electronic contract, electronic media, formalization, consent.

## INTRODUCTION

In recent years, the electronic contract has had a significant rise, hence the need to know what it refers to; however, its understanding requires the study of various aspects that allow it to be identified as such. The electronic contract is a commercial agreement with principles and rules of formalization. From this, the analysis of these types of consensus, in order to understand the mechanisms through which they are formalized, and what they entail or involve.

The contracts were initially celebrated in a traditional way, that is, captured on paper, however, derived from technological development accompanied by the pandemic issue that led to the use of digital tools, an analysis must be carried out on this transition from the traditional contract. to the contract concluded by electronic means.

## THE ELECTRONIC CONTRACT

Contracts are the agreement of wills between two or more people in order to create or transmit rights and obligations. They emerge from Roman law as legal acts by expressing the consent of the parties, contracts that evolved from what was agreed upon through words, even the written and signed versions. With the passage of time, the ways of expressing consent change due to development and technological and social advances, since in ancient times the conclusion of contracts did not require major formalities (Campoli, 2004).

Likewise, it must be inferred that the general antecedents of electronic contracting are found in the international arena, since it is where the different operations with technology that use various electronic means begin, among them the use of the network called Internet stands out. Because the Internet is the main basis of electronic contracting, that is, it is a global means of computer telecommunications, which is made up of many channels that, in turn, are interconnected with each other, becoming the means of fastest communication in the entire history of humanity (Krafft, 2003).

In relation to contracts, it is important to refer to one of the great contractualists such as Thomas Hobbes (1651), who in his work *Leviathan*, part one, refers to what men call a contract as “the mutual transfer of rights.” (p.109). Thus, the figure of the contract involves the transfer of rights of the celebrating parties, better said, both contracting parties carry out a voluntary transfer of rights with the purpose of obtaining a benefit from the transmission, therefore, in the celebration of a contract the will prevails. of the parties to be established.

Consequently, a contract is that legal act in which the will is manifested and externalized in order to create the effects of rights and obligations, that is, the contract

is characterized by being the agreement of desires and interests, and it is the parties who They issue the declaration of their will or consent with it, otherwise, said legal act remains informal and therefore non-existent.

Now, and as it can be seen, currently the trend has been given to the celebration by virtual means, thus the electronic contract is defined as “Any contract in which the offer and acceptance are transmitted by means of electronic equipment. processing and storage of data, connected to a telecommunications network.”

It translates into those contractual relationships entered into by electronic means. The electronic contract, in the strict sense, deals with those contracts that are perfected through an electronic exchange of data from computer to computer, in other words, they are those contracts concluded by electronic means.

It must now be said that the electronic contract, according to López (2010), can be defined as that agreement of wills that is carried out through electronic equipment that allows the storage of data and is connected to a telecommunications network, which in The most important today is what is known as the Internet.

Therefore, the electronic contract can be defined as that agreement of wills, through which obligations are created or passed between two or more parties, captured and materialized through the use of electronic equipment or devices connected by a telecommunications network that allows the safeguarding of data, and the transmission of reciprocal information; thus allowing said legal act to be concretized and materialized electronically.

Electronic contracting has its own catalog of principles, developed mainly by doctrine based on supranational regulations, the regulations of international organizations,

laws adopted within states, judicial decisions and contracts concluded between individuals. These principles of electronic contracting become a guide that provides clarity to judges when faced with litigation where the claims revolve around a contract concluded by electronic means, and which usually generates doubts about its probative and substantial validity. (Cárdenas, 2016).

This way, as electronic contracts are perfected, their formalization brings with it the presentation of two major immediate problems. The first emerges at the moment in which the offer and acceptance occur, that is, the manifestation of consent, with this externalization the existence of the contract is generated and in turn the rights and obligations of the contracting parties are determined (Salomón, 2006). The problem of consent in electronic contracting materializes at the moment when said contract must be perfected, that is, the formalization of the electronic contract requires the externalization of the will of the parties, exactly where the main problem emerges, precisely because there must be certainty. in said demonstration knowing the means by which it is carried out.

Now, the second problem is the need to delimit the applicable laws in case of controversy, which implies knowing the place where the contract is concluded. The formation of the contract determines the place and time of birth of the obligation with the legal consequences that it entails (Aparicio, 2004). It is evident that since it is an electronic contract, its conclusion can be carried out over long distances, hence the need to establish at the time of its formalization the spatial delimitation in order to know both the corresponding jurisdiction and the regulations that will be applicable in cases of non-compliance.

Returning to the already mentioned problems faced by electronic contracting,

authors such as González-Echenique (2014) indicate that in electronic contracting the intervention of man's will can be, and in fact is in practice, replaced by the intervention of powerful computers that automate hiring.

What has been explained so far demonstrates that the formalization of an electronic contract, like that of a contract concluded in a traditional manner, requires perfection by complying with certain essential requirements, among which the main one stands out, the externalization of consent, which in This case is also about the one expressed by electronic means.

Authors such as Fortich (2011) consider that the formation of the contract by electronic means is permeated by a kind of formalization, since the speed of the virtual interaction could cause a contracting party to become obligated without being aware of the facts; Consequently, the electronic contract is created after following several steps or clicks, in which third parties such as certification entities or payment entities even intervene, so that there are no doubts about the acceptance of the contract and thus protect the electronic contractors.

In contrast to the above, the author Vega Vega (2005) does not seek to determine the validity of the electronic contract but rather to prove its existence by requiring a pre-established mechanism to prove its validity and be able to defend the interests of the consumer, and that is why it is established an indirect duality between form and evidence because the contract concluded by means that have an Internet connection does not adapt to the classic vision offered to specify contractual formalism.

Consequently, the importance of indicating the ways in which the consent of the parties is expressed by digital means, this for the purpose of formalizing the electronic contract, all this so that there is the will that they must

attend in the conclusion of an agreement in order to prove its existence and acquire the relevant validity.

At this point, it must be remembered that one of the main elements in the celebration of both traditional and electronic contracts is the manifestation of consent as the express will of the parties. The manifestation of consent is indicated as the ability of a person to acquire rights and at the same time be able to exercise them for themselves, as well as acquire obligations with which they must comply in the terms indicated for this (Alessandri & Somarriva, 1993). Given this, it is evident that the aptitude is closely related to the capacity of the parties, that is, the people who are party to the contract to be concluded. Capacity is an essential factor in the preparation of contracts, since without the capacity of both parties, obligations could not arise.

Consequently, consent is the agreement of two or more people about the same thing, which represents the result of two or more wills that come together, agree and express themselves. However, in the doctrine a distinction has emerged between these two figures. It is indicated that consent is necessarily a bilateral act, unlike will, which is a unilateral act. It is explained because a person can want alone, but cannot consent alone, because consent is the concurrence of wills (Vélez). This distinction between consent and will becomes relevant in the sense that, as stated, the will can be its own entity, that is, an individual conviction, while consent requires a mutual agreement between the convictions of two or more people to reach a consensus, an act from which rights and obligations arise, such as the contract.

Nowadays, when talking about the manifestation of consent but now specifically its externalization in the electronic contract, it must be mentioned that some authors such as Elías (2005) consider it a new modality of

consent and way of contracting by virtue of being a contract regulated depending on the medium through which consent is expressed, that is, electronic means. Therefore, by indicating the existence of an electronic contract that brings with it digital media, it is evident that the manifestation of consent will not be as in the contract that is traditionally known, that is, through autograph elements, but on the contrary, the electronic contract requires the use of technological means and equipment, through which consent must be expressed.

Given this dilemma between different authors considering the electronic contract as a different modality from the traditional one, they have highlighted two important distinctive characteristics of electronic contracting compared to the traditional one, which has two different characteristics. The first refers to the fact that they are contracts concluded without the simultaneous physical presence of the parties, so they are remote by definition, and the other is that they are concluded through telematic networks (Ontiveros, 2003).

These characteristics of the electronic contract definitely differentiate it from the traditional contract, since one of the determining factors of this type of contract is that it can be concluded at any time and space, because it is precisely a consensus of wills that is carried out by electronic media. However, another distinction that is important to indicate in this section is that which refers to computer contracting, which must not be confused with electronic contracting, since computer contracting has as its object and not as a means, computer equipment, computer programs, among others (Ontiveros, 2003).

Clarifying the previous statements, computerized contracting must not be confused with electronic contracting. The first has as its contract purpose all equipment

and programs in the IT field. The second is a contract that is carried out by electronic means, but its object is a consensus of wills acquiring rights and obligations. Consequently, while computer contracting deals with the act that involves computer equipment and programs, electronic contracting is considered as such because it is carried out through digital means. It is through these technological means that the consent of the parties must be expressed for the legal act to become valid.

The World Health Organization declared the public health crisis caused by COVID-19 a pandemic on March 11, 2020, a situation that has implied changes in the regulatory, institutional, political, economic and social spheres within the majority of the States. The pandemic has caused important changes in daily life, even internationally where hiring has also been affected in different countries (González & López, 2020).

In short, the pandemic caused important changes in the world of health, as well as in different areas. In Mexico, the strongest wave of said pandemic occurred in the period of 2020-2021, causing society to find itself at home, promoting the use of digital media both for communication and to carry out various academic and professional activities.

The COVID-19 pandemic caused society to consider the use of technological means for other areas of life, such as in contracting and electronic commerce. Electronic contracting or commerce does not represent a new source of obligation, but rather a form of expression of will derived from technological advances that today facilitate the electronic transmission of data messages, fundamentally streamlining legal transactions (Reyes Krafft, 2020).

In accordance with the above, the electronic contract preserves the essential elements of the contract that is traditionally known as embodied on paper, however, it diverges in relation to the means by which it is celebrated,

and consequently by which the consent of the parties is expressed. parties as an agreement of wills, using technological advances to do so.

It is important to consider that technology, despite being essential during the pandemic, for many represents a luxury that not everyone can access. Although science and technology are the key to facing challenges in health and economic recovery, during the pandemic the structural asymmetries and inequalities between developed and developing countries in this matter were evident (Hernández, 2020).

It is worth mentioning that technology was a very useful tool to cope with COVID-19, as it was used massively and on different devices or platforms. This boom in the use of digital media prompted by the pandemic was incorporated to remain in response to the comforts and facilities that I represent to the population.

Judgments and evaluations about the use of these new technologies oscillate, as is usual, between admiration for their efficiency and risk for their use. Companies that produce digital technologies see greater business opportunities for the future with the sale of devices and the supply of digital services of all kinds (Hualde, 2020). There are various points of view in relation to the increase in the use of technological means in terms of the risks and advantages they represent, mainly because what was initially called the new normal is here to stay, modifying and even improving various academic and work activities.

The pandemic brought negative events such as deaths, infections, job losses and impersonalization in negotiations over the use of technology; However, there are also positive ones such as the greater number of contracts made through technological means, time savings in negotiations due to the reduction in trips to the place to contract (Sanromán, 2021). Faced with the pandemic, the use of electronic contracting increased,

this because digital contracts are not only more hygienic than those on paper, they also involve less risk because they do not require physical contact for their conclusion. Digital contracts are easier to personalize, send, store, and find (Bennet, 2021).

However, means have not yet been designed to attest to the reliability and validity of the evidence present in the process. This can, ultimately, threaten the security and ethics of the evidentiary system, since we must not forget that the theory of the fruit of the poisoned tree expresses that legal evidence that emanates from illicit evidence cannot be valued, because it would contaminate the entire evidence. judicial process (Ibarra Suárez, 2017).

Confirming the above, Dr. Miguel Carbonell (2002) states that electronic means of communication have unprecedented importance today. He adds that it is important to have modern legal regulations in this field. The only way to produce legal certainty in this matter is to have a modern organization that promotes transparency and ensures the interests of all parties.

## METHODOLOGY

Various methods are used, such as analytical with the purpose of fragmenting the problem, deductive by relying on the specific observation of facts that allows creating theories, inductive for the purpose of identifying the essential element of the problem (Bonilla and Rodríguez, 1997). This with the intention of analyzing and identifying the transition from the electronic contract as it was traditionally concluded, that is, embodied on paper, to now form part of the contracts concluded by electronic means.

Another method worth highlighting is qualitative, as the method interested in capturing the social reality studied from the subject's perception of their own context,

the researcher induces the properties of the problem studied from the reality being examined (Bonilla and Rodríguez, 1997). Thus, through observation and study of the problem supported by the general theory of the contract, since it is a consensus of wills expressed by digital means.

Qualitative research according to Monje (2011) is characterized by the collection of data from the perspectives and points of view of the participants, their interactions and experiences of general issues, using techniques such as observation, interviews, surveys, document review, discussion in group, evaluation of personal experiences, recording of life stories, interaction and introspection with groups or communities. Its purpose is to reconstruct reality, as observed by those involved, which is why it is based on an interpretive perspective.

## **RESULTS**

With the transition from the contract concluded in a traditional way to that concluded by electronic means, it is essential to study the applicability of consent to prove that an act is carried out legally and without defects, for this reason it is very useful to have legislation on how to verify and feasibly prove said consent. Consent and the ways in which it is expressed within an electronic contract is very important, especially today where globalization and technology have become part of daily life in an insurmountable way, these technologies are used in everyday tasks, for example: interbank transfers, contracting of services, sales, investments, among others.

## **ANALYSIS**

The research analysis perspective is focused on electronic contracting. With technological advancement and the change caused by the SARS COVID 2019 pandemic, the celebration of commercial businesses gave way to virtual

platforms, a problem analyzed. Highlighting the urgent need to establish legal tools that provide certainty and legal security to the parties celebrating contracts. Revelation that changes the traditional way of expressing one's will in a document in a graphological manner, such as the handwritten signature.

## **CONCLUSIONS**

As observed in previous sections, electronic contracting determines the birth and modification of especially patrimonial rights and obligations, which is why its adequate regulation is required so that situations traditionally protected by the Mexican legal system are not violated (Ruiz, 2010). However, the increase in electronic contracting is driven by the social context and in turn by constant technological development, all of this, given that the law is closely related to human life, so the regulations must be modified, added or adapted to current events as latent social problems and possible to happen.

Thus, currently electronic media are used as a fundamental tool in various activities for the exchange of files, data and information, even to acquire rights and obligations such as the electronic contract. These digital tools have increased in recent times, especially in times of the pandemic.

## **LIMITATIONS**

Technology is constantly advancing and with it society is evolving, therefore, legal regulations are surpassed, making it necessary to update them in accordance with social changes, in order to identify and propose tools that allow achieving better administration and administration of justice, in order to avoid falling into defects of consent when entering into a virtual contract.

## RECOMMENDATIONS

When electronic contracts are established, it is clear that, like traditional or paper contracts, they are valid, as long as they have the essential elements and characteristics that allow them to demonstrate their authenticity, especially when expressing consent as the

mutual will of the parties. celebrants. In some legal systems, the electronic means through which the offer and its acceptance can exist in relation to contracts concluded through digital tools are established. Hence, social networks and messaging applications can even be used as a means to do so.

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