

THE EVIDENTIAL WEIGHT OF THE ELECTRONIC DOCUMENT UNDER JORDANIAN LAW: AN OVERALL COMMENT

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ABSTRACT

It is submitted that electronic commerce has become factual truth as it creates legal relations among persons, whether they are natural or juristic persons. It has become an important part of internal and international trade when merchants negotiate and conclude contracts without regard to their place of residence. The conventional written document which is deemed the most important instrument that performs an evidential role in conventional contracts is disappearing in this cyberspace commerce. This phenomenon has led to the generating of an alternative instrument, which is the electronic document that performs the same evidential role as the conventional document. This article analyses the evidential weight of the electronic document in Jordanian Law and the extent to which this document satisfies the basic requirements to achieve its evidential role. It also discusses the simultaneous extent of compliance of Jordanian Electronic

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Transaction Law (JETL)¹ to the international criteria and the internal conventional criteria.

Keywords: evidential weight, conventional document, official document, normal document, electronic document, electronic signature, authentication.

KEBERATAN KETERANGAN DOKUMEN ELEKTRONIK DI BAWAH UNDANG-UNDANG JORDAN: SATU KOMEN MENYELURUH

ABSTRAK

Dihujahkan bahawa perdagangan elektronik telah menjadi satu hakikat kerana ia mewujudkan hubungan undang-undang di kalangan manusia, sama ada orang sebenar atau orang di sisi undang-undang. Ia telah menjadi bahagian penting perdagangan domestik dan antarabangsa apabila pedagang berunding dan menandatangani kontrak tanpa mengambil kira tempat kediaman mereka. Dokumen bertulis konvensional yang dianggap instrumen paling penting melakukan peranan keterangan dalam kontrak konvensional sedang menghilang dalam perdagangan ruang siber. Fenomena ini telah membawa kepada penjaan instrumen alternatif, iaitu dokumen elektronik yang melakukan peranan keterangan yang sama dengan dokumen konvensional. Makalah ini menganalisis keberatan keterangan dokumen elektronik dalam Undang-undang Jordan dan takat dokumen ini memenuhi syarat asas untuk mencapai peranan keterangannya. Ia turut membincangkan takat

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Jordanian Electronic Transaction Law (JETL), 2001 (Act No. 85 of 2001).

*kepatuhan Undang-undang Urus Niaga Elektronik
Jordan kepada kriteria antarabangsa dan kriteria
konvensional domestik.*

Kata kunci: keberatan keterangan, dokumen konvensional, dokumen rasmi, dokumen biasa, dokumen elektronik, tandatangan elektronik, pengesahan.

INTRODUCTION

Jordanian Civil Law which provides the basic foundation that regulates contracts and financial transactions in Jordan does not contain rules regulating the issue of evidence. For the purpose the legislature in Jordan has passed Act Number 30 of 1952 which is named Jordanian Evidence Law (JEL). Amended in 1961 and 2005 it incorporates the basic rules that regulate the evidential methods to prove contracts, and divides documents into three categories; official documents, normal (ordinary) documents and the unsigned documents² each having different evidential weight.

In respect of the electronic field, Jordanian Electronic Transaction Law (JETL) regulates the issues which relate to evidential matters in electronic contracts. This law admits the electronic document as a method of proof and bestows it with evidential value, similar to conventional documents. But it does not specify to which category of the conventional documents it belongs. In other words, as JEL divides the conventional documents into three categories and each of them having different evidential value, how is the electronic document to be categorized?

This article is divided into two parts; the first discusses the conventional document, its categories and the evidential value of each category and a comparison with the electronic document. The second part discusses the evidential value of the electronic document in the light of JETL with a comparative element in the light of some international laws.

² See Article 5 of JEL.

THE EVIDENTIAL WEIGHT OF THE CONVENTIONAL DOCUMENT

Article 13 (c) of JEL invites us to discuss the conventional document and its categories. This is because it includes the electronic document and compares it with the conventional document. It provides that “1- Fax messages, Telex messages and Email messages have evidential weight equal to that of a normal document.”³ But this provision does not define a normal document and leaves it to the general rules. So, what is a normal (ordinary) document? And what is the evidential weight of this document? To answer these questions, it is important to discuss the conventional document and its three categories; the official document, the normal document and the unsigned papers, and to achieve the purpose of the study, it is important to discuss the evidential weight of each of them.

The Official Document

Articles 6-9 of JEL regulates ‘official documents’ in Jordan⁴ but does not provide them any direct definition. However we find the definition of this term in similar laws such as The United Arab Emirates Evidence Law⁵ which defines it in Article 7 (a) as “documents in which a public official or person entrusted with a public duty shall register all acts performed by him or articles given to him by concerned parties according to the legal requirements and within the limits of his authority and

³ Article 13 (c) of JEL.

⁴ Likewise, Egyptian Law and United Arab Emirates Law regulate the official document. For Egyptian Law, see Articles 10-13 of Egyptian Proof Law, 1968 (Act No. 25 of 1968). For United Arab Emirates Law, see Articles 7-10 of United Arab Emirates Federal Law on the Issuance of the Evidence for Civil and Commercial Transactions, 1992 (Act No. 10 of 1992).

⁵ Article 7 (a) of United Arab Emirates Federal Law on the Issuance of the Evidence for Civil and Commercial Transactions, 1992 (Act No. 10 of 1992). This Article conforms to Article 5 (1) of Syrian Evidence Law, 1947 (Act No. 359 of 1947), Article 8 of Kuwaiti Evidence Law, 1980 (Act No. 39 of 1980), Article 10 of Egyptian Proof Law and Article 98 of Yemeni Evidence Law, 1992 (Act No. 21 of 1992).

jurisdiction.”⁶ According to this definition and to the rules which regulate the official document in JEL, it has to comply with three conditions⁷ otherwise it is not considered an official document.⁸

Firstly, the document must be ratified by a public official. Therefore, the document bears the seal of an official authority and, consequently, the document becomes proof against all parties.⁹ But this does not mean that the public official has to write the official document by himself. It may be written by the party who issues the document or by a printer. The role of the public employee is to verify and ratify the document by a specific seal and retain it in the official records¹⁰ provided that the public official is a person employed by the public authority to perform official duties. He may be eligible for fees such as the notary public or he may not get fees such as the marriage official.¹¹

⁶ Although JEL does not contain a direct definition of this term, its provisions contain the mentioned definition indirectly.

⁷ See Article 6 of JEL. See the explanation in ‘Abbās al-‘Ubūdy, *Sharḥ aḥkām qānūn al-bayyināt*, 1st edn, (‘Ammān, Dār al-Thaqāfah lil-Nashr wal-Tawzī‘, 2007), at 101. See also Muflīḥ al-Qudāh, *al-Ithbāt fī al-mawād al-madaniyyah wal-tijāriyyah ṭebqan li qanūn al-ithbāt al-ithādy; dirāsah muqāranah*, (United Arab Emirates, n.p., n.d), at 77-78. See also Muḥammad Ḥosaīn Maṣṣūr, *Mabādi’ al-qānūn*, (al-Iskandariyyah, Dār al-Jāmi‘ah al-Jadīdah, 2006), at 383. See also ‘Abd al-Raḥmān ‘Abd al-‘Azīz al-Qasim, *al-Ithbāt wal-tawthīq amām al-qadhā’*, (al-Riyaḍ, Maṭba‘at al-Sa‘ādeh, 1983), at 72. See also Aḥmad Ibrāhīm, *Turuq al-ithbāt al-shar‘iyyah ma‘ bayān ikhtilāf al-mathāhib al-fiḥriyyah*, 3rd edition, edited by Waṣīl ‘Alā’ al-Dīn, (n.p., n.p., 1985), at 69.

⁸ See Article 6 (b) of JEL. See also Muflīḥ al-Qudāh, *al-Bayyināt fī al-mawād al-madaniyyah wal-tijāriyyah; dirāsah muqāranah*, 1st edn, (‘Ammān, Dār al-Thaqāfah lil-Nashr wal-Tawzī‘, 2007), at 85.

⁹ Muḥammad Fawwāz al-Maṭālqah, *al-Wajīz fī ‘uqūd al-tijārah al-iliktrūniyyah*, 1st edn, (‘Ammān, Dār al-Thaqāfah lil-Nashr wal-Tawzī‘, 2008), at 193.

¹⁰ Muḥammad Ḥasan Qāsim, *Qānūn al-ithbāt fī al-mawād al-madaniyyah wal-tijāriyyah*, (Bayrūt, Manshūrāt al-Ḥalabi al-Ḥuqūqiyyah, 2007), at 150. See also Muḥammad Fawwāz al-Maṭālqah, *supra* note 9 at 193.

¹¹ Muflīḥ al-Qudhāh, *supra* note 8 at 79. See also Riḍā al-Muzghani, *Aḥkām al-ithbāt*, (al-Mamlakah al-‘Arabiyyah al-Su‘ūdiyyah, Ma‘had al-Idārah al-‘Āmmeh, 1985), at 174.

Secondly, the public official has to be authorized and be competent to ratify that document. He is competent when the action of ratification comes within the scope of his work in respect of the type of the paper used, the place where he works and the time at which the document is ratified.¹² Otherwise, the document is not considered official and the employee is considered a normal person.¹³ For example, the Notary Public, in respect of jurisdiction, must practice at a specified place and he is not allowed to practice in another place.¹⁴ Likewise, in terms of type of work he is authorized to authenticate contracts and other related transactions.¹⁵

The third condition stipulates that the public official has to take into account the legal positions which vary according to the type of document.¹⁶ Consequently, the employee has to follow required procedures during ratification. These procedures, as mentioned earlier, differ according to the nature of the document. For example, he has to make sure of the legal capacity of each party, their consent, their identification and he has to make sure that the document does not contain any abrasion, etc.¹⁷ When the employee completes these procedures, he has to mention, in writing, some information such as the name of the witnesses, the date on which the document is approved, the name of the parties, the name and the nickname of the employee, the place where the parties live and so on. After that, he has to read the written scripts on the parties. Then the parties have to sign the document. Finally, if the procedures are completed, the public official should retain the document according to the serial number in the assigned archives.¹⁸

¹² °Abbās al-°Ubūdy, supra note 7 at 102-103. See also Mufliḥ al-Quḍāh, *al-Ithbāt fī al-mawād al-madaniyyah wal-tijāriyyah ...*, supra note 7 at 80-81. See also, °Abd al-Raḥmān °Abd al-°Azīz al-Qasim, supra note 7, at 72-73.

¹³ °Abbās al-°Ubūdy, supra note 7 at 102-103. See also Mufliḥ al-Quḍāh, supra note 7 at 80-81. See also °Abd al-Raḥmān °Abd al-°Azīz al-Qasim, supra note 7, at 72.

¹⁴ See Article 5 of the Notary Public Code, 1952 (Act No. 11 of 1952).

¹⁵ See Article 6 of the Notary Public Code, 1952 (Act No. 11 of 1952).

¹⁶ Mufliḥ al-Quḍāh, supra note 7 at 77-78.

¹⁷ Muḥammad Fawwāz al-Maṭāḥ, supra note 9 at 196.

¹⁸ *Ibid*, at 196-197.

The Evidential Weight of the Official Document

Article 7 (a) of JEL provides that “The official exhibit shall be proof against all parties by virtue of its contents recorded by the official within the limits of his duty, or signed by the concerned parties in his presence unless it appears to have been forged by illegally designed methods.”¹⁹ Thus, the official document is proof against each person whether this person is a party in the document or not.²⁰ Additionally, the party who clings to the official document is not required to prove it, but the party who claims that it is not true has to prove his claim.²¹ Take note that, the only method to deny the truth of the official document is by contesting that it is forged.²² Hence, if the other party claims that the official document is forged, and the court accepts his proof, its evidential value is destroyed because of forgery. But if the court judges that the official document is not forged and it is sound, its evidential weight remains as proof against all parties.²³

It is relevant that there is a difference between the information which is verified and recorded by the public official himself such as the identities of the parties and the information which is mentioned in front of him but he is not in a position to verify such as the event of delivery of the subject matter in the sale contract. The first information takes the official character and it is not denied except by contesting its forgery. But the other information is not subject to official verification and the contrary may be proved by the normal methods of evidence.²⁴

¹⁹ Article 7 of JEL. It conforms with Article 8 of UAE Evidence Law, 1992 (Act No. 10 of 1992), Article 11 of Egyptian Proof Law, 1968 (Act No. 25 of 1968), Article 6(a) of Syrian Evidence Law, 1947 (Act No. 359 of 1947), Article 9 of Kuwaiti Evidence Law, 1980 (Act No. 39 of 1980), Article 10 of Bahrain Evidence Law, 1996 (Act No. 14 of 1996).

²⁰ Mufliḥ al-Quḍāḥ, *supra* note 7 at 384.

²¹ Mufliḥ al-Quḍāḥ, *supra* note 8 at 85.

²² Mufliḥ al-Quḍāḥ, *supra* note 7 at 92. See also Riḍā al-Muzghani, *supra* note 11, at 187. See also Aḥmad Ibrāhīm, *supra* note 7, at 71.

²³ Muḥammad Ḥasan Qasim, *supra* note 7 at 218-219. See also Naṣr Farīd Wāṣil, *Nadhariyyat al-daʿwa wal-ithbāt fī al-fiqh al-islāmī*, 1st edn, (al-Qāhirah, Dār al-Shurūq, 2002), at 122.

²⁴ ʿAbbās al-ʿUbūdy, *supra* note 7 at 106-107.

The Normal (Ordinary) Document

It is the document which is equivalent to the electronic document in its evidential weight.²⁵ It is defined as the document which contains the hand-written signature or the seal or the fingerprint of the person who issues it but does not have the character of an official document.²⁶ It does not have this character because it is written and regulated by the individuals themselves without authentication of a public official.²⁷

In contrast to the official document, it is not subject to any condition.²⁸ Nevertheless, it should contain two elements; it must be in writing and must be signed.²⁹

The writing element is essential in the normal document. The provisions of the law do not require specific conditions or forms for this element. But the jurists propound that the writing has to be stable and serious.³⁰ Therefore, the material which is used for writing has to be constant such as the ink. Likewise, the material which is used to be written on also has to be constant such as the paper, leather, wood or any other similar materials.³¹ This means that the purpose of writing is not the writing itself, but it is to create a medium containing the conditions and the provisions of the contract. This concept renders the term of “writing” wide enough to contain writing which is concluded electronically.³² This trend is in line with the international commercial conventions which regulate international commerce.³³

²⁵ By virtue of Article 13 (c) of JEl which is mentioned above.

²⁶ See Article 10 of JEL.

²⁷ ʿAbbās al-ʿUbūdy, *supra* note 7 at 112.

²⁸ ʿAbbās al-Ṣarrāf and Jorj Ḥazbūn, *al-Madkhal ila ʿilm al-qānūn*, (ʿAmmān, Dār al-Thaqāfah lil-Nashr wal-Tawzīʿ, 2008), at 238. See also Muḥammad Ḥosain Maṣṣūr, *supra* note 7, at 386.

²⁹ Muḥliḥ al-Qudāh, *supra* note 8 at 93-94.

³⁰ ʿAbbās al-ʿUbūdy, *supra* note 7 at 113.

³¹ ʿAbbās al-ʿUbūdy, *supra* note 7 at 113. See also ʿAṭa ʿAbd al-ʿĀṭy al-Sunbāṭy, *al-Ithbāt fī al-ʿuqūd al-iliktrūniyyah*, (al-Qāhirah. Dār al-Nahdhah al-ʿArabiyyah, 2008), at 214.

³² ʿAbbās al-ʿUbūdy, *supra* note 7 at 113-114.

³³ See Article 2 of New York Convention of 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See also Article 1 (c) of Convention on the Limitation Period in the International

Further, it is not a condition for the writing to be concluded by the hand of the person who issues the document. But it is permitted to be concluded by a printer or by another person or by any other reasonable method. It is also permitted to be concluded in any language. Furthermore, it is permitted to be concluded by symbols that are agreed upon between the parties.³⁴ Thus, the freedom of writing is an important principle in the normal document. It can be written without any condition or restriction. It can also be written without the presence of any witness.³⁵

The element of signature is an important element in the normal document. Although Jordanian Civil Law lacks a definition of conventional signature, this term is defined by some jurists as “a sign or a mark or a written statement used by the person to express his consent on a legal disposal.”³⁶ This means that the signature is used to determine the identity of the signer.³⁷ It also indicates the authenticity of the attribution of the written script to the person who issued it. This element is evidentially important because it is a link between the script and the person who issued that script.³⁸

Actually, the evidential weight of the normal document depends on the existence of the signature element. This leads some Arabic jurists to name this document the signed document.³⁹ Therefore, if the document

Sale of Goods of 1974. See also Article 13 of United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980. See also Article 3 of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the “Rotterdam Rules” of 2008. See also Article 1 (I) of United Nations Convention on the Carriage of Goods by Sea - the “Hamburg Rules” of 1978. See also Article 9 (2) of United Nations Convention on the Use of Electronic Communications in International Contracts of 2005. See also Article 6 of UNCITRAL Model Law on Electronic Commerce of 1996.

³⁴ Mufliḥ al-Quḍāh, *supra* note 7 at 99. See also Muḥammad Ḥasan Qasim, *supra* note 10 at 221.

³⁵ Muḥammad Ḥasan Qāsim, *supra* note 10 at 221.

³⁶ Ramadhān Abu al-Su‘ūd, *‘Usūl al-ithbāt fī al-mawād al-madaniyyah wal-tijāriyyah*, (Bayrūt, al-Dār al-Jāmi‘iyyah, 1993), at 270. See also ‘Abbās Al-‘Ubūdy, *supra* note 7 at 114.

³⁷ ‘Abbās al-‘Ubūdy, *supra* note 7 at 114.

³⁸ ‘Abbās al-‘Ubūdy, *supra* note 7 at 116. See also Mufliḥ al-Quḍāh, *supra* note 7, at 99. See also Muḥammad Ḥasan Qāsim, *supra* note 10 at 226.

³⁹ Ridhā al-Muzghani, *supra* note 11, at 194.

does not contain the issuer's signature, it will not be considered a perfect proof even though it is written by him. In this case the evidential weight of the document is equivalent to the evidential weight of the unsigned papers.⁴⁰

The Evidential Weight of the Normal Document

The normal document has evidential weight against the party who signs it unlike the evidential weight against a foreign party (third party).

The Evidential Weight of the Normal Document against the Party who Signs it

Although the normal document has evidential weight against the party who signs it,⁴¹ this party may ratify or he may deny it.⁴² If he ratifies the document, its evidential weight remains against him whether the document is written by his hand or by any other method. The evidential weight of the normal document becomes, after the ratification, equivalent to that of the official document. This means, the party cannot deny its content except by contesting its forgery.⁴³ But if he denies that the document is issued by him or the signature does not belong to him, the document loses its evidential weight. Then, the burden of proof is placed on the other party who has to prove the attribution of the document to the issuer.⁴⁴ The denial has to be concluded expressly indicating the insistence of the

⁴⁰ Mufliḥ al-Qudāh, supra note 7 at 99.

⁴¹ Article 11 (a) of JEL.

⁴² ʿAbbās al-ʿUbūdy, supra note 7 at 118.

⁴³ Muḥammad Ḥasan Qāsim, supra note 10 at 236. See also Ridhā al-Muzghani, supra note 11, at 199.

⁴⁴ See Article 11 (1) of JEL which conforms with Article 14 of Egyptian Proof Law, 1968 (Act No. 25 of 1968), Article 11 (1) of United Arab Emirates Federal Law on the Issuance of the Evidence for Civil and Commercial Transactions, 1992 (Act No. 10 of 1992), Article 150,151 of Lebanese Civil Procedure Law, 1983 (Act No. 90 of 1983) and Article 13 of Bahrain Evidence Law, 1996 (Act No. 14 of 1996)to. See also the explanation of this Article in Mufliḥ al-Qudāh, supra note 8 at 97.

denier. If it is not expressed and decisive, he may not be allowed to continue its denial⁴⁵ since silence, according to Arabic jurists, is not a denial but is an acknowledgment.⁴⁶ This is because silence is considered as a form of implied ratification.⁴⁷

The Evidential Weight of the Normal Document against a Third Party

The meaning of the third party here is any person who may be influenced by the legal disposal proven by the normal document.⁴⁸ Accordingly, it can be concluded that the third party is either the universal successors or the particular successors or the creditors.⁴⁹

JEL bestows the normal document evidential weight against the third party provided that the normal document contains a specified date.⁵⁰ This is the date when changes occur to the rights of the third party.⁵¹ The law is interested in this issue because the third party does not participate to specify the date of the normal document. Namely, the date in the normal document is specified by the parties, but not by a public official as an official document, and also without intervention of the third party. This may allow the parties to collude against him.⁵² Thus, the

⁴⁵ Muḥammad Ḥasan Qāsim, *supra* note 10 at 238.

⁴⁶ °Abbās al-°Ubūdy, *supra* note 7 at 118. See also Mufliḥ al-Quḍāh, *supra* note 8 at 97.

⁴⁷ Muḥammad Ḥasan Qāsim, *supra* note 10 at 236. See also °Abbās al-°Ubūdy, *supra* note 7 at 118. See also Naṣr Farīd Wāṣil, *supra* note 23, at 116.

⁴⁸ Mufliḥ al-Quḍāh, *supra* note 8 at 99. See also °Abbās al-°Ubūdy, *supra* note 7 at 119. See also Nabīl Ibrāhīm Sa'd and muḥammad Ḥosaīn Maṣṣūr, *Mabādi' al-Qānūn*, (Bayrūt, Dār al-Nahdhah al-°Arabiyyah lil-Ṭibā'ah wal-Naṣr, 1995), at 397. See also Muḥammad Ḥosaīn Maṣṣūr, *supra* note 7, at 387. See also °Abd al-Raḥmān °Abd al-°Azīz al-Qasim, *supra* note 7, at 84.

⁴⁹ °Abbās al-°Ubūdy, *supra* note 7 at 119.

⁵⁰ See Article 12 (a) of JEL which conforms with Article 15 of Egyptian Proof Law, 1968 (Act No. 25 of 1968) and Article 154 of Lebanese Civil Procedure Law, 1983 (Act No. 90 of 1983).

⁵¹ Ridhā al-Muzghani, *supra* note 11, at 203.

⁵² *Ibid*, at 203. See also °Abbās al-°Šarrāf and Jorj Ḥazbūn, *supra* note 28, at 238. See also °Abd al-Raḥmān °Abd al-°Azīz al-Qasim, *supra* note 7, at 85.

legislature requires the date to be specific in order to protect the third party from being cheated, which may be intended by one of the parties to the contract or by both of them. For example, suppose that the seller sells a movable thing to the buyer, and before delivery he sells it again to another buyer. The second sale is invalid as long as the date of the first sale is specified in the sale document. Namely, the date specified in the first sale is proof against the seller and the buyer in the second sale. Thereby, the first contract is valid and the second is cancelled.⁵³

Thus, the provisions render the evidential weight of the normal document against the third party equivalent to its evidential weight against the parties in all points except for the date of disposal. Consequently, the law binds the parties to write the date in order to protect the rights of the third party.⁵⁴ The date is valid under JEL in the following cases: 1- when the notary public approves it, 2- if the content of the document is proved in another official document and bears a date, 3- if it is approved by the court or by an official employee or 4- if one of the parties dies.⁵⁵

The Unsigned Papers

The unsigned papers are the third category of the conventional documents in JEL. They are regulated by Articles 15-19. They are divided into three sections: businessmen's ledgers, domestic papers and indication by the creditor on the debt bond by his handwriting establishing the quittance of the debtor. Each section has specific rules. But what concerns us here is all of these sections are not considered perfect proof because they are, originally, not intended to perform evidential role and they do not contain

⁵³ Muḥammad Ḥasan Qāsim, *supra* note 10, at 245.

⁵⁴ Ridhā al-Muzghani, *supra* note 11, at 203-204. See also Nabīl Ibrāhīm Sa'd and muḥammad Ḥosaīn Maṣṣūr, *supra* note 48, at 397. See also Muḥammad Ḥosaīn Maṣṣūr, *supra* note 7, at 387.

⁵⁵ See Article 12 (b) of JEL which conforms with Article 15 of Egyptian Proof Law, 1968 (Act No. 25 of 1968), Article 109 of Yemeni Evidence Law, 1992 (Act No. 21 of 1992), Article 12 (a) of United Arab Emirates Federal Law on the Issuance of the Evidence for Civil and Commercial Transactions, 1992 (Act No. 10 of 1992). and Article 14 of Bahrain Evidence Law, 1996 (Act No. 14 of 1996).

signatures.⁵⁶ Nevertheless, JEL gives them limited value in evidence within certain controls.⁵⁷ Thus, the evidential value of these papers do not attain the value of normal or official documents, but they have value of a lesser degree attached to them.⁵⁸

THE EVIDENTIAL WEIGHT OF THE ELECTRONIC DOCUMENT IN (JETL)

Article 7 of JETL provides, “A- The electronic records, contracts, messages, and signatures shall be considered to produce the same legal consequences resulting from the written documents and signatures in accordance with the provisions of the Laws in force in terms of being binding to the parties concerned or in terms of fitness thereof as an evidential weight.”⁵⁹ Additionally, Article 11 of this law provides, “An electronic record may be retained if any legislative provision in force stipulates the retention of a written document for the purpose of documentation, evidence, auditing or any other similar objective, unless legislation thereafter stipulates that the record must be retained in writing.”⁶⁰ It is obvious that these Articles give evidential value to the electronic document by equalizing them with conventional documents.⁶¹ Article 11 excludes the cases in which the legislation may stipulate that the record “document” must be retained in conventional writing but not in electronic means. In this case, the electronic document should not take the place of the conventional document. For example, the contract of marriage in Jordanian Law should be authenticated by an official

⁵⁶ Muflih al-Quḍāh, *al-Bayyināt fī al-mawād al-madaniyyah wal-tijāriyyah*; ..., supra note 8, at 127. See also ʿAbbās al-ʿUbūdy, supra note 7, at 128.

⁵⁷ See Article 15-19 of JEL.

⁵⁸ Muflih al-Quḍāh, *Al-bayyināt fī al-mawād al-madaniyyah wal-tijāriyyah* ..., supra note 8, at 127. See also ʿAbbās al-ʿUbūdy, supra note 7, at 128.

⁵⁹ Article 7 of JETL.

⁶⁰ Article 11 of JETL.

⁶¹ Bashshār Maḥmūd Dūdīn, *al-Itār al-qānūny lil-ʿaqd al-mubram ʿabr shabakat al-internet*, 1st edn, (ʿAmmān, Dār al-Thaqāfah lil-Nashr wal-Tawzīʿ, 2006), at 235-236.

document.⁶² If this contract is concluded without official document, the spouses and the witnesses are punished according to the provisions of the penal code⁶³ and each liable to a fine of one hundred Jordanian dollars.⁶⁴ Thus, this Law binds the parties to use conventional document in their contract i.e. the electronic document cannot substitute the conventional document.

Thus, JETL provides evidential weight to the electronic document. But to activate this evidential weight, the following requirements must be satisfied:

Requirement of the Electronic Document

Article 8 of JETL provides: “A- The electronic record shall fulfill its evidential weight and shall have the strength of the original copy if it fulfills the following conditions: 1. That the information stated in that record may be retained and stored and may be referred to at any time. 2. The possibility of retaining the electronic record in the form it had been generated, sent, received or in any form that may prove that it accurately represents the information stated in the record during the generation, sending or receiving thereof. 3. That the information stated in the record is enough to verify its origin, receiving and sending parties and the date and time of sending and receiving.” Accordingly, three conditions are applicable to the electronic record:

Firstly, the information stated in that record may be retained and stored and may be referred to at any time. This condition is required to refer to the electronic script when the need arises. There are several electronic media that enable the parties to retain and store the electronic document. For example, the parties may retain it in Digital Video Disk (DVD) or in compact disk(CD) or in hard disk drive(HDD). They may also retain it on the internet. But the last medium (the internet) may be subject to some risk such as theft or destruction by hackers.⁶⁵

⁶² See Article 17 (b) of Jordanian Personal Status Law, 1976 (Act No. 61 of 1976).

⁶³ See Article 279 of Jordanian penal code, 1960 (Act No. 16 of 1960).

⁶⁴ See Article 17 (c) of Jordanian Personal Status Law, 1976 (Act No. 61 of 1976).

⁶⁵ Muḥammad Fawwāz al-Maṭālqah, *supra* note 9, at 213-214.

Secondly, the electronic document should be retained in the form it had been generated, sent, received or in any form that may prove that it accurately represents the information stated in the record during the generation, sending or receiving thereof. This condition is required to ensure the security of the stored information i.e. this condition is set to ensure that there is no change takes place in the electronic script in the period between storing and referring to that script.⁶⁶ This security may be ascertained, in the electronic document, by technical and electronic systems. These systems show the position of the script, any changes made to them and they show the time at which changes, if any, were made. In addition, electronic programs have been developed to enable the parties to convert the changeable script to unchangeable script. This system is known “processing document image.”⁶⁷

Thirdly, the information stated in the record should be enough to verify its origin, receiving and sending parties and the date and time of sending and receiving. This condition is achieved when the electronic script is readable. It is readable when it is written by known letters or symbols.⁶⁸

To ensure that these requirements are achieved, the Jordanian legislature regulates the issue of authentication in Article 30 and Article 32 of this law. The former Article provides, “A- For the purposes of verification that the electronic record has not been altered for a specific period of time, the record shall be considered as authenticated from the date of verification thereof if the verification is done through the approved authentication procedures or the commercially acceptable authentication procedures agreed upon by the pertinent parties. B- For the purposes of considering the authentication procedures commercially acceptable, the commercial circumstances of the parties to the transaction should be taken into consideration when these procedures are applied. These circumstances shall include the following: 1- The nature of the transaction, 2- The level of acknowledgment of each party to the transaction, 3- The volume of similar commercial transactions to which each party has been connected, 4- The availability of alternative procedures which one of the parties refused to use, 5- The cost of the alternative procedures, and 6-

⁶⁶ *Ibid.*, at 212.

⁶⁷ Bashshār Maḥmūd Dūdīn, *supra* note 61, at 231-232.

⁶⁸ *Ibid.*, at 233.

The customary procedures for such a transaction.”⁶⁹ Article 32 assumes that the electronic record has not been changed since the date of the authentication procedure. It provides, “A- Unless proven otherwise, it is assumed that: 1- The authenticated electronic record has not been altered or modified since the date of the authentication procedures.”⁷⁰ Besides that, Section B of the same Article indicates the importance of the authentication of the electronic record. It provides, “B- If the electronic record or signature was not authenticated, it shall not have any legal effect.”⁷¹ This means that authentication is an important procedure to give evidential weight to the electronic document. In other words, the electronic document does not have any value in evidence if it is not authenticated. The previous two Articles (30 and 32) show how the electronic signature is authenticated.⁷² Beside these Articles, Article 33 also plays an important role in this field. It provides, “The electronic record or any part thereof that carries an authenticated electronic signature shall be deemed an authenticated record for the whole record or that part as the case may be, if the signature was generated during the validity of the approved authentication certificate and was verified through compliance with the general identification number indicated in that certificate.”⁷³ This means that the electronic document is authenticated if the electronic signature on which it is signed is authenticated. The electronic signature, by the virtue of this Article, is authenticated if two conditions are fulfilled; firstly, if the signature is produced during the validity of the approved authentication certificate, and secondly, if it is identical to the general identification number indicated in that certificate. Signature being the cornerstone of a document, the legislature regulates electronic signatures since these are alternatives in electronic forms to conventional signatures.⁷⁴ But what is the electronic signature? And to what extent does this signature achieve the evidential role? And how is it authenticated? The following sections answer these questions.

⁶⁹ Article 30 of JETL.

⁷⁰ Article 32 of JETL.

⁷¹ Article 32 of JETL.

⁷² Bashshār Maḥmūd Dūdīn, *supra* note 61 at 236.

⁷³ Article 33 of JETL.

⁷⁴ Khālīd Mamdūḥ Ibrāhīm, *Hujjiyyat al-barīd al-iliktrūny fī al-ithbāt*, 1st edn, (al-Iskandariyyah, Dār al-Fikr al-Jāmi‘y, 2008), at 201-202.

Definition of the Electronic Signature

Article 2 of JETL defines the electronic signature as, “Electronic, numeric or photonic data or others taking the shape of letters, numbers, symbols, or signs, or the like in a data message or added or related thereto, having a shape identifying the person who timed or distinguished it from others for reasons of the person’s signature and the approval of content.”⁷⁵ It is noticed that this definition aims at achieving two goals. The first goal relates to the formation of the contract whereas the definition dedicates the e-signature to express the consent of the signer. The second goal relates to the evidence where it aims at distinguishing the identity of the signer and attributing the written script to him.⁷⁶ But the definition overlooks the procedures of its issuance and the procedures of its authentication which are usually concluded by a competent party.⁷⁷

The Evidential Weight of the Electronic Signature

Article 7 of JETL which is mentioned above reaffirms that the electronic signature has evidential weight equivalent to that of the conventional signature. This rule achieves the goals of JETL law because the recognition in the electronic signature is the most important factor which leads to the acceptance of the electronic contracts which are concluded via modern electronic media. Additionally, Article 10 of JETL provides the following, “A- When legislation, in force, requires a written signature on the document or provides consequences for lack of signature, that requirement is met by the presence of the electronic signature on the electronic record. B- The validity of the signature shall be proven and attributed to the person signing the electronic record when there is a method to identify that person and to indicate his approval of the information contained in the electronic record that carries his signature, if that method is reliable for this purpose in light of the circumstances relating to the transaction, including the parties’ agreement to using this

⁷⁵ This definition is close to the definition of the UNCITRAL Model Law. See Article 2 of the UNCITRAL Model Law on Electronic Signature which was issued in 2001.

⁷⁶ Bashshār Maḥmūd Dūdīn, *supra* note 61 at 246.

⁷⁷ *Ibid.*

method.”⁷⁸ This Article emphasizes that the electronic signature fulfills the requirement of the legislation which requires a conventional signature i.e. this provision substitutes the conventional signature by the electronic signature in electronic means. This confirms the previous rule in Article 7 which provides evidential value equivalent to the conventional signature. But Section B of Article 10 provides that the method of attribution of the electronic signature to the signer should be reliable in the light of the circumstances surrounding the transaction. The electronic signature, by virtue of this section, is reliable if there is a method that defines the identity of the signatory and indicates his consent. In that case, the prior agreement between the parties is a reliable method to perform these roles. The prior document is useful to bestow evidential value on the electronic signature.⁷⁹ Further, there is another reliable method to ensure the consent of the party and to attribute the electronic signature to him. It is when the party joins his information system with a net administrated by a third party and this third party issues a certificate attributes the electronic signature to the signer.⁸⁰

Authentication of the Electronic Signature

The electronic signature is authenticated via certificates issued by an authorized body.⁸¹ These certificates prevent each party from denying their signatures and, consequently, preventing any of them from denying the data message wholly.⁸² They also lead to the identification of the person and provide his personal information which leads to inform each party, in advance, if the other party has legal capacity to form the contract or not.⁸³

Article 31 of JETL mentions the attributes which should be available in the electronic signature in order for it to be authenticated. It

⁷⁸ Article 10 of JETL. It conforms to Article 7 of UNCITRAL Model Law of 1996.

⁷⁹ Bashshār Maḥmūd Dūdīn, *supra* note 61, at 264-265.

⁸⁰ *Ibid.*, at 265.

⁸¹ Iymān Ma'mūn Sulaymān, *Ibrām al-'aqd al-ilikrūny wa ithbātuh*, (al-Iskandariyyah, Dār al-Jāmi'ah al-Jadīdah lil-Nashr, 2008), at 307.

⁸² *Ibid.*, at 327.

⁸³ *Ibid.*

provides, “If as a result of applying the authentication procedures in use, it becomes evident that these procedures were approved or commercially accepted or agreed upon between the parties, the electronic signature shall be considered as being authentic if it has the following attributes: 1- If it is unique in its connection to the pertinent person, 2- Sufficient to identify its owner, 3- Generated in a manner or means specific to that person and under his control, and 4- Connected to the record related thereto in a way that does not allow modification to that record after signing such without altering the signature.”⁸⁴ This means that the electronic signature is considered authenticated when it has the four characteristics mentioned in the previous Article.⁸⁵ But, by virtue of Article 33 of JETL which is mentioned above, the electronic signature has to be generated during the validity of the approved authentication certificate and verified through compliance with the general identification number indicated in that certificate. This begs the question: who is the certification service provider in Jordan?

Certification Service Provider

Article 2 of JETL defines a Certification Service Provider as the Competent Licensing Authority which is authorized to issue a certificate for the purpose of verifying the electronic signature of a specific person in accordance with the approved authentication procedures.⁸⁶ Additionally, the UNCITAL Model Law on Electronic Signature defines it as “a person that issues certificates and may provide other services related to electronic signatures.”⁸⁷ These definitions show that the Certification Service Provider is a public or a private entity that works under the supervision of the government.⁸⁸ The main function of this authority is to issue the Authentication Certificate⁸⁹ to prove the attribution of the electronic

⁸⁴ Article 31 of JETL.

⁸⁵ Bashshār Maḥmūd Dūdīn, *supra* note 61 at 266.

⁸⁶ See Article 2 of JETL.

⁸⁷ Article 2 of the UNCITAL Model Law on Electronic Signature of 2001. This definition conforms to the definition of this term in the United Arab Emirates Law. See Article 2 of Electronic Transaction and Commerce Law for the Government of Dubai 2002, (Act No. 2 of 2002).

⁸⁸ Khālīd Mamdūh Ibrāhīm, *supra* note 76, at 208.

⁸⁹ Iymān Ma'mūn Sulaymān, *supra* note 83, at 320.

signature to the signatory. This occurs via approved authentication procedures which are done to confirm the authenticity of the signature.⁹⁰

The legal systems which issue specific laws to regulate e-commerce usually determine the body which is authorized to issue these certificates.⁹¹ Unfortunately, JETL does not determine a specific authority to issue them. This shows an obvious vacuum in this law i.e. this law does not establish or determine a specific body to issue these certificates. Nevertheless, Article 34 of this law provides that general bodies which are reliable, but not specialized, can issue these certificates. It provides, “The authentication certificate that indicates the general identification number shall be approved in the following cases: A- If it is issued by a competent or licensed authority, B- If it is issued by a competent or licensed authority in another country recognized by Jordan, C- If it is issued by a governmental department or institution or body legally authorized for this purpose, and D- If it is issued by a body which the transaction’s parties agreed to approve.”⁹²

The researcher believes that it would have been better if the Jordanian legislator had established a specific body to specially perform this function following examples set by Egyptian Law and Tunisian Law. But Section (d) of the previous Article may fill this vacuum because it allows the parties to agree on a body that authenticates their signatures, i.e. the parties, by the virtue of this section, can agree to resort to any body, such as the Chamber of Commerce, to authenticate their electronic signatures and, consequently, to bestow evidential value on them.

On the other hand, the researcher believes that the Jordanian legislator has been successful when it accepts certificates which are

⁹⁰ Khālīd Mamdūh Ibrāhīm, *supra* note 76, at 210.

⁹¹ For example, Egyptian Electronic Signature Law established a specific body named Information Technology Development Agency (ITIDA) to implement this mission. Also, Tunisian Law established the National Digital Certification Agency to implement this mission. For Egypt see Article 2 of Egyptian Electronic Signature Code, 1965 (Act No. 15 of 2004). For more information about this agency see <<http://www.itida.gov.eg/En/Pages/home.aspx>> (accessed 11\11\2010). For Tunis see Article 8, 9 of Tunisian E-Commerce Code, 2000 (Act No. 83 of 2000). For more information about this Agency see <<http://www.certification.tn/index.php?id=4>> (accessed 11\11\2010).

⁹² Article 34 of JETL.

issued by a competent authority in another country.⁹³ This is because of the international nature of contracts concluded on the internet which may involve parties from more than one jurisdiction. Therefore, if Jordanian Law had failed to recognize foreign certificates, it would have placed a severe restriction on electronic trade within Jordan only. Jordanian Law, in this respect keeps pace with the international conventions such as the UNCITAL Model Law on Electronic Signature⁹⁴ which equalizes between the certificate which is issued by the national authority and the certificate which is issued by foreign authority.⁹⁵ Not only Jordanian Law is guided by this convention, but other Arabic Laws also follow its guidelines such as Egyptian Law, Tunisian Law and the Law of the Emirate of Dubai.⁹⁶

CONCLUSION

JETL provides evidential value to the electronic document directly in Article 7 and indirectly in Articles 10 and 11. But this law overlooks the setting of a specific criterion to determine that evidential value. However Article 13 (c) of JEL equalizes electronic documents to normal documents. This provision takes the middle position with reference to evidential value. This means, the evidential value of an electronic

⁹³ Section (b) of Article 34 of JETL.

⁹⁴ Not only the UNCITAL Model Law on Electronic Signature regulates this issue, but other International Conventions regulate it. See Article 7 (a) of European Directive for Electronic Signatures, 1999 (Act No. 93 of 1999).

⁹⁵ Article 12 (b, c) of this law provides: "B. A certificate issued outside [the enacting State] shall have the same legal effect in [the enacting State] as a certificate issued in [the enacting State] if it offers a substantially equivalent level of reliability. C. An electronic signature created or used outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic signature created or used in [the enacting State] if it offers a substantially equivalent level of reliability."

⁹⁶ See Article 22 of Egyptian Electronic Signature Law, 1965 (Act No. 15 of 2004), Article 23 of Tunisian E-Commerce Law, 2000 (Act No. 83 of 2000) and Article 26 of Electronic Transaction and Commerce Law for the Government of Dubai 2002, (Act No. 2 of 2002).

document does not carry the same weight as an official document but, at the same time, its value is not as low as an unsigned paper.

Accordingly, as the electronic document takes the place of the normal document in respect of evidential weight, it is concluded that the electronic document has evidential weight against the party who signs it unlike the evidential weight against a third party.

In respect of the party who signs it, the electronic document is proof against him. Nevertheless, this party may approve or deny the attribution of that document to him. If he approves it, its evidential weight becomes equivalent to that of the official document. Then, he is not allowed to deny it. But if he denies that he issued the electronic document, the document loses its evidential weight and the burden of the proof is placed on the other party who has to prove the attribution of the document to the issuer.

With respect to the third party who is defined above, the electronic document has evidential weight towards him provided that the electronic document contains a specified date. This date, as mentioned before, is provided here to protect the third party from the parties who may collude against him.

But to achieve the evidential purpose of the electronic document, it has to contain the two elements which are considered the cornerstones in normal documents; the writing and the signature. Both of these elements take the electronic form here, and both of them should be authenticated, or else, by virtue of Article 32 (b), they do not have evidential weight. They are authenticated in the light of Articles 30-34 of JETL which are mentioned above. In this connection, by virtue of Article 33, the electronic document is authenticated wholly if the electronic signature is authenticated. Hence, JETL renders the authenticated electronic signature sufficient to bestow authentication of the whole document. But this law does not specify the competent body authorized to authenticate electronic signatures unlike jurisdictions such as Egypt and Tunisia. This discloses an obvious legal vacuum in Jordanian Law.