



THE APPLICABLE LAW TO ELECTRONIC FUNDS TRANSFER OPERATIONS-A COMPARATIVE STUDY

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Article history:	Abstract:
<p>Received: 28th April 2025 Accepted: 26th May 2025</p>	<p>The issue of the applicable law to electronic funds transfer (EFT) operations is one of the most debated topics in our time. As most means of transaction have shifted toward digitization, this transformation presents a set of challenges and difficulties that the world continues to face. Undoubtedly, the majority of countries, institutions, and banks across the globe have adopted electronic transactions, all interconnected through a single network — the electronic network.</p> <p>This shift, however, is not without legal and technical problems. From a legal standpoint, it is essential for legislators and legal systems to be present and proactive in addressing the issues faced by the parties involved in EFT operations. This can be achieved either through the enactment of more suitable laws or by concluding international agreements that offer better protection for both clients and banks.</p> <p>Despite the legal challenges posed by this subject, certain legal provisions have attempted to address these issues. However, such efforts remain limited and insufficient in keeping pace with digital transformation and advanced technological developments. The labor market continues to evolve, while the law often remains static — a disparity that inevitably creates a gap leading to problems and potential harm, especially to the weaker party. Therefore, the law must evolve and adapt in parallel with electronic advancements to effectively resolve these emerging issues.</p>

Keywords: Law to electronic funds transfer

INTRODUCTION

In recent years, there has been significant development in payment and money transfer methods, particularly with the widespread use of electronic means in conducting financial transactions. Electronic funds transfers (EFTs) have become one of the primary methods of financial dealings between individuals and institutions alike.

This advancement has contributed to streamlining procedures, expediting transactions, and reducing reliance on cash. However, it has also raised numerous legal issues, especially concerning the determination of the applicable law in cases involving a foreign element or legal disputes.

Electronic funds transfer (EFT) operations are characterized by their complexity in terms of the parties involved, the technical systems they rely on, and the multiplicity of potentially applicable legal frameworks. This complexity raises the question of which law is most suitable for resolving disputes arising from such operations—particularly when transfers occur between banks located in different countries or through cross-border electronic financial platforms.

If a civil liability claim arises from a breach in an electronic funds transfer and all parties involved are located within the same country, then the competent jurisdiction is that of the state in which the parties reside, and its national law shall be the applicable law. However, complications emerge when the parties are situated in different countries — which is often the case — where, for instance, the client may be in one country, the bank in another, and the beneficiary in a third. In such cases, the involvement of an intermediary bank becomes necessary.

If a dispute arises between the client and the bank, the matter may escalate and involve more than two parties. When the client and the bank disagree over which court has jurisdiction and which law is applicable, the procedural complexity of the case increases significantly.

SIGNIFICANCE OF THE STUDY

The importance of this study lies in addressing the issue of the applicable law to electronic funds transfer operations, with the aim of identifying the legal framework that governs such operations, uncovering gaps or inconsistencies in national legislations, and drawing upon comparative experiences to propose a clear legal vision that contributes to the protection of rights and the reinforcement of trust in electronic transactions.

Additionally, the study is significant for the following reasons:

- Highlighting the importance of addressing this topic from a legal perspective.
- Demonstrating its role in safeguarding rights and ensuring legal stability within the electronic environment.

Research Problem

The subject of this study raises several legal issues, including:

- How is the applicable law determined when the transaction involves a foreign element?
- What is the position of Iraqi law regarding the regulation of electronic funds transfers? Are there clear legal provisions that govern such operations?
- Can the principles of private international law (such as jurisdiction and conflict of laws) be relied upon to regulate these transactions?
- To what extent does the law provide protection for the weaker parties involved in the transaction, such as the client?

Research Structure

This study is divided into two main sections as follows:

Chapter One: Judicial Jurisdiction

Chapter Two: The Most Appropriate Connecting Factor

Chapter One

Judicial Jurisdiction

It is common for the bank and the client to agree in advance, through their contract, on the court to which they will refer in case of a dispute. However, if no such agreement exists and a dispute arises, they may subsequently agree on the competent court to resolve the dispute. The situation becomes more complicated if they fail to reach an agreement on the court's jurisdiction. To address this, we will discuss the matter in three main topics as follows:

First Topic

Jurisdiction of the Court in the Bank's Domicile

Article (15/1) of the Iraqi Civil Code stipulates that "An alien may be sued before the Iraqi courts if they are found in Iraq." Similarly, Article (29) of the Egyptian Civil and Commercial Procedures Law states, "The courts of the Republic have jurisdiction to hear lawsuits filed against a foreigner who has a domicile or place of residence in the Republic...". This criterion is considered a general rule for both international and domestic judicial jurisdiction. The courts of the state where the defendant's domicile or place of residence is located have jurisdiction to hear all disputes in which the foreign party is involved, regardless of the subject matter or cause of the lawsuit⁽¹⁾.

This includes that the defendant may be either a natural or legal person. Some scholars⁽²⁾ argue that this criterion has several considerations, including the idea that a party claiming a right against another person should seek them out and pursue their claim at their domicile or place of residence. Additionally, this criterion ensures the international effectiveness of judgments, as it facilitates taking necessary actions in the court located at the defendant's domicile. Furthermore, this criterion is based on practical considerations. Not adhering to it would place the defendant at the mercy of the plaintiff, who might intentionally file the lawsuit in a distant location from the defendant's residence, leading to excessive expenses and the burden of travel.

However, this consideration is not without criticism, particularly in cases where the client did not intentionally initiate the lawsuit. Even if the client is indeed entitled to the claim and has suffered actual harm, they may still bear expenses and exert considerable effort—expenses which may, in some cases, exceed the value of the claimed right. In such instances, the claimant is effectively placed at the mercy of the defendant. Accordingly, this consideration is unsound and, in our view, cannot be regarded as a valid argument. Furthermore, it should be emphasized that the defendant is typically the bank, which is the economically stronger party in contrast to the client, who is usually in a weaker economic position.

We similarly direct our criticism toward this criterion, as there may be no domicile in the state where the client resides. The bank may be located in one country while the client resides in another. If the domicile criterion is applied, it imposes additional burdens on the client, potentially leading to excessive costs and effort, or even adversely affecting the enforceability of the claimed right. Therefore, this criterion, in the context of electronic funds transfers, does not afford protection to the client. On the contrary, it may embolden the bank to act negligently or fail to fulfill its professional obligations, knowing that it has no domicile in the client's country, which would otherwise facilitate legal proceedings for the client.

¹) Mohammed Hussein Talayan, "Electronic Banking Transfer: A Comparative Study," Dar Al-Nahda Al-Arabiya, Cairo, 2017, pp. 771-772.

²) Abou El-Ala El-Nemr, *International Jurisdiction and the Enforcement of Foreign Judgments and Arbitral Awards in Egypt*, 2nd Edition, Dar Al-Nahda Al-Arabiya, Cairo, 2006, p. 47;

Ahmed Abdel-Karim Salama, *The Doctrine of International Civil Procedure*, 1st Edition, Dar Al-Nahda Al-Arabiya, 2000, p. 108;

Essam El-Din El-Qosbi, *Conflict of Legal and Judicial Jurisdictions in the Field of Electronic Commerce*, p. 1633.

Therefore, scholars of private international law tend to adopt the **will-based criterion**, which will be addressed in the second section.

Section Two

Jurisdiction of the Court Agreed Upon by the Parties

Article (32) of the Egyptian Code of Civil and Commercial Procedure provides: "The courts of the Republic shall have jurisdiction over the case, even if not originally competent, if the defendant explicitly or implicitly accepts their jurisdiction."

It is understood from the text of this article that the parties have the right to agree to confer jurisdiction on a court other than the one within whose territorial scope the domicile or residence of the defendant is located.

This criterion is considered an extension of the principle of **party autonomy**, whereby the parties enjoy the freedom to agree on conferring jurisdiction upon a specific court to settle an international dispute that may arise between them. A group of legal scholars maintains that, in order for such an agreement to be effective, there must be a genuine connection between the chosen court and the dispute at hand. Furthermore, the agreement must serve a legitimate interest and must not involve fraud or circumvention intended to evade certain legal rules⁽³⁾.

The Egyptian Court of Cassation has adopted this criterion, ruling that the provisions of Article (32) of the Code of Civil and Commercial Procedure indicate that the legislator has added a new criterion to the jurisdictional rules of Egyptian courts in hearing lawsuits. This new criterion is the **party autonomy** criterion, whereby the parties explicitly or implicitly agree to accept the jurisdiction of the Egyptian courts to settle a dispute, even if the dispute does not originally fall under the jurisdiction of these courts according to the specific criteria listed in Articles (28) to (31) of the aforementioned law. This is known as the "legal fiction of national jurisdiction"⁽⁴⁾.

We believe that the choice of jurisdiction should be based on the mutual agreement of both parties, the bank and the client, and should not be in the form of a condition imposed by the bank on the client. If it is in the form of a condition, the consent is invalid, and it cannot be considered an agreement. Furthermore, it may constitute an unfair term. Therefore, there must be a clear agreement on judicial jurisdiction, based on the mutual consent of both parties. The will of the client must be considered, as they are the weaker party in the electronic funds transfer process.

Section Three

The Criterion of the Place of Conclusion or Performance of the Electronic Funds Transfer Contract

Article (15/c) of the Iraqi Civil Code states: "A foreigner may be sued before the courts of Iraq ... if the subject of the litigation is a contract concluded in Iraq or required to be performed therein."

It can be understood from the above text that the contract must either be concluded within Iraq, performed in Iraq, or required to be performed in Iraq.

This criterion is based on a practical and realistic justification, as the court, according to this rule, is in a better position to adjudicate the dispute, especially if the contract was concluded or performed under the law of the court. Therefore, it is logical that the jurisdiction should be vested in the court of that judge, as it is more familiar with the nuances of the law and its interpretation⁽⁵⁾.

When this criterion is applied to electronic funds transfers, jurisdiction is established in the court of the country where the bank's headquarters, where the contract is concluded or executed, is located. Alternatively, if the performance occurs at the location of the beneficiary's bank, jurisdiction would lie with the courts of the country where either of the banks is located. This creates a burden for the claimant when they are in a country different from that of the bank, in addition to the fact that this criterion is difficult to apply to contracts concluded between the client and the bank via the internet, as it raises the issue of determining the place of contract formation. The material considerations underlying this criterion are not compatible with the reality of electronic commerce in general, and electronic funds transfer in particular.

We believe that the most appropriate criterion is the **party autonomy** criterion. However, if this is not available, the most suitable criterion would be the domicile of the weaker party in the contractual relationship, which is the client. This criterion offers more protection to the client, as it alleviates their effort and costs.

Chapter Two

The Most Appropriate Criterion of the Applicable Law

³) Ahmed Abdel-Karim Salama, *The Internet and Private International Law: Divergence or Convergence?*, paper presented at the Conference on Law, Computers, and the Internet, United Arab Emirates University, College of Sharia and Law, 3rd Edition, Volume I, 2004, p. 61;

Mohamed El-Roubi, *The Role of Party Autonomy in the Field of International Judicial Jurisdiction*, Dar Al-Nahda Al-Arabiya, Cairo, 2009, p. 113.

⁴) Appeal No. 15807 for the year 80 Judicial, issued on the session of 24/3/2014, available on the official website <https://www.cc.gov.eg/judgments#top>.

⁵) Ahmed Rashad Salama, *International Judicial Jurisdiction of Egyptian Courts*, p. 580.

After determining the competent court to hear the dispute between the client and the bank, the parties may also agree on the applicable law governing the dispute that has arisen between them. The applicable law may be the law of the court, the law of one of the parties, the law governing the contract, or the law of contract performance. We will detail this further as follows:

Section One

The Appropriateness of the Party Autonomy Criterion in Determining the Applicable Law for Electronic Funds Transfers

Article (25) of the Iraqi Civil Code, which corresponds to Article (19) of the Egyptian Civil Code, stipulates: The law of the state in which the common domicile of the contracting parties is located shall apply to contractual obligations if they have a common domicile. If their domiciles differ, the law of the state in which the contract was concluded shall apply, unless the parties agree otherwise or it is evident from the circumstances that another law is intended to apply.

It can be understood from this provision that, if the domicile of the bank differs from that of the client, and there is an agreement between the bank and the client regarding the law governing the dispute, such an agreement is legally valid according to the principle of party autonomy. The client and the bank may agree that, in the event of a dispute, the applicable law could be the law of the client, the law of the bank, the law of the beneficiary's bank, or another law, such as the law of the country where the bank is headquartered.

Despite the advantages that the **party autonomy** criterion offers to the contracting parties—most notably their prior knowledge of the law governing their relationship and the clear definition of their rights and duties under it—it has faced criticism. A significant criticism of this criterion is that it can result in an imbalance of power, particularly in international contracts where one party (usually the bank) imposes its terms. In the context of electronic funds transfers, the client enters into a contract with the bank under the pressure of needing the bank's services. The bank exploits this need by imposing conditions, such as specifying the law that is most advantageous to it, leaving the client, the weaker party, dissatisfied. This is considered a clear violation of the protections afforded by national legislation.

As a result, some scholars argue for excluding the law chosen by the parties in consumer contracts, considering that such a choice would lead to the application of a law other than the law of the consumer's habitual residence, thereby depriving the consumer of the benefits provided by the law of their usual domicile⁽⁶⁾.

However, there is another perspective, which is the complete elimination of the role of party autonomy in assigning the law governing contracts, with the aim of achieving the protection of the weaker party. In fact, the complete elimination of party autonomy could lead to results that contradict the goal of protection. In most cases, the contract imposes its will regarding the choice of the governing law, and the weaker party can only submit to this will⁽⁷⁾.

This applies in the case where the parties to the contract explicitly or implicitly agree on the applicable law. However, in the absence of such an agreement, Articles (25) of the Iraqi Civil Code and (19) of the Egyptian Civil Code provide two fallback criteria: the common domicile of the contracting parties and the place of contract conclusion. These provisions are applied in the order mentioned, meaning that the judge must first apply the law of the common domicile of the contracting parties. If the parties have different domiciles, the law of the country where the contract was concluded should be applied. The second criterion is used only if the first criterion does not meet the requirements of performance.

However, there is a doctrinal view that believes this exceptional solution established by the legislator does not align with international banking transactions. On one hand, these criteria are rigid, and on the other hand, they do not consider the unique nature of international banking transactions. The application of these two fallback criteria—the common domicile criterion and the place of contract conclusion criterion, in that order—assumes that the client is also domiciled in the country where the bank conducting the transaction is located, or that the contract was concluded at the bank's locations. This does not align with international banking transactions, especially electronic ones, which are conducted through electronic networks and from different locations around the world, without the constraints of spatial and geographical borders.

From the above, it is clear that electronic transfer contracts of an international nature, concluded electronically, are subject to the law of party autonomy, whether these contracts are concluded by network users and website providers, or by service-providing companies via the internet.

Section Two

The Criterion of the Place of Contract Conclusion or Performance

Paragraph (c) of Article (15) of the Iraqi Civil Code states: "If the subject of the litigation is a contract concluded in Iraq, or if it is to be performed, or if the dispute arises from an incident that occurred in Iraq."

In the absence of an explicit or implicit agreement by the parties, it is possible to resort to the criterion of the place of contract conclusion or performance. Some scholars argue that this criterion reflects a genuine connection between the

⁶) Khaled Abdel Fattah Khalil, *Consumer Protection in Private International Law*, Ph.D. thesis, Helwan University, Faculty of Law, 2000, p. 97.

⁷) Aadel Abu Hishima, p. 124.

law and the contract. It also ensures that the contracting parties can offer more detailed and applicable solutions than others. Additionally, it guarantees the contracting parties the advantage of prior knowledge of the law governing their contract, thereby providing the necessary legal protection and maintaining their expectations. This allows the parties to conclude their contract in a country that recognizes the validity of electronic signatures, as well as the legal validity of procedures carried out via computer screens⁽⁸⁾.

The question that arises is whether the applicable law is the law of the ordering bank or the law of the beneficiary bank?

To answer this question, some scholars propose a general principle, which is that the law of the beneficiary bank is the applicable law, with the exception being the law of the ordering bank. The prevailing legal and judicial view is that the involvement of two banks in executing the electronic transfer occurs from the moment the second bank accepts it, meaning the electronic transfer is considered completed when the amount is deposited into the beneficiary's account. The beneficiary bank expresses its consent at this point, and this view is supported by the economic function of the transaction and considerations related to spatial concentration and performance, all of which point to the application of this law, as well as the fact that all its consequences occur at this location⁽⁹⁾.

After addressing the jurisdictional and legal criteria for resolving the dispute between the bank and the ordering party, and discussing the law of party autonomy, as well as the law of the place of contract conclusion or performance, we have presented arguments that suggest narrowing the scope of these two criteria. However, applying the law of party autonomy and sometimes the law of contract conclusion or performance might impose a significant burden on the client, especially considering that the client is the weaker party both economically and technically. This burden may arise if the competent court is located outside the client's home country, and since we are seeking effective protection for the client, it seems imperative to provide an alternative approach.

Given the global trend toward electronic transactions, where most countries have adopted electronic systems, we propose a solution that could offer some protection to the client. Since the transfer is carried out via the electronic network, all procedures and the resulting effects should be managed electronically as well. This includes resolving the dispute electronically, regardless of whether the applicable law is that of the bank, the client, or another law. Similarly, the competent court should be determined, ideally, electronically, which would significantly reduce the burden on the client.

As global trends move toward electronic systems, and many countries have developed electronic judicial systems, it is reasonable to suggest that disputes involving international banking transactions be resolved electronically, especially when the bank and client agree on a specific jurisdiction. If the jurisdiction is located in a country other than that of the client, electronic litigation should be the norm. This would make it easier for the client to pursue their claim and reduce the effort and costs that might otherwise discourage them from pursuing the case.

In this context, we propose the creation of specialized electronic courts for electronic transactions. These courts would handle remote litigation, allowing all legal procedures, including pleadings and the issuance of judgments, to be conducted electronically. If the court rules in favor of the client, the judgment can be executed electronically by transferring the compensation amount directly into the client's account. This system would protect the client from any potential abuse of the bank's choice of applicable law and jurisdiction, and would reduce the effort and costs that might lead the client to abandon their claim. Some countries, like the UAE, have already implemented such electronic judicial systems.

CONCLUSION

In this study, we have attempted to address a topic that currently raises numerous issues in the labor market: the applicable law for electronic funds transfers, which is one of the fundamental pillars upon which the general policy for the protection of both the bank and the client is based. We have discussed in this study the key elements that contribute to the protection of the parties involved in the contractual relationship concerning electronic funds transfers, with a focus on both international and domestic jurisdiction, as well as the criteria for assigning the applicable law in case the parties agree on determining the applicable law or jurisdiction, or choosing it based on the contract's provisions and the place of its conclusion.

The study concluded with several findings and recommendations, as follows:

RESULTS:

1. **The applicable law on electronic funds transfer** is either a prior or subsequent agreement, left to the discretion of the parties.
2. **The difficulty in applying the criterion of the place of contract conclusion** lies in the burden it imposes on the plaintiff when they are in a country different from that of the bank. Moreover, this criterion is difficult to

⁸) Saleh Al-Manzlawy, *Dispute Resolution in Commercial Transactions via Electronic Communication Networks*, *Arab Lawyers Journal*, Issue 3, p. 327.

⁹) Akasha Mohamed Abdel Aal, *The Law of International Banking Operations: A Study on the Applicable Law for International Banking Transactions*, Dar Al-Jamia Al-Jadida, 2007, p. 265.

apply to contracts concluded between the client and the bank via the internet, as it raises the issue of determining the place of contract conclusion, which is based on material considerations that do not align with the realities of e-commerce in general and electronic funds transfers in particular.

3. **Electronic contracts for international funds transfer** concluded electronically are governed by the principle of party autonomy, whether these contracts are made by internet users, website providers, or service-providing companies.
4. **The default applicable law is the law of the beneficiary's bank**, with the exception being the law of the originator's bank. It is widely accepted in legal doctrine and practice that the involvement of two banks in executing an electronic transfer occurs from the moment the second bank accepts the transfer.

RECOMMENDATIONS:

1. It is essential for the Iraqi legislator to enact a specific law regarding electronic payment and transfer operations, considering their importance, interaction with modern times, and widespread usage.
2. Disputes should be resolved electronically, whether the applicable law is the law of the bank, the law of the client, or any other law, as well as the competent court. This would significantly reduce the burden on the client if the proceedings are conducted electronically.
3. Legal controls should be imposed on banks and standardized procedures for electronic funds transfers should be established, leading to better protection for clients, who are often the weaker party in electronic transfer operations.

REFERENCES:

1. Abu Al-Ala Al-Nimr, "International Jurisdiction and Enforcement of Foreign Judgments and Arbitration Awards in Egypt," 2nd edition, Dar Al-Nahda Al-Arabia, Cairo, 2006.
2. Ahmed Rashad Salama, "International Jurisdiction of Egyptian Courts."
3. Ahmed Abdel Karim Salama, "International Civil Procedure Law," 1st edition, Dar Al-Nahda Al-Arabia, 2000.
4. Ahmed Abdel Karim Salama, "The Internet and Private International Law: Divergence or Convergence," Research presented to the Conference on Law, Computers, and the Internet, United Arab Emirates University, College of Sharia and Law, 3rd edition, Volume 1 Research, 2004.
5. Adel Abu Hishima.
6. Akasha Mohamed Abdel Aal, "International Banking Operations Law: A Study on the Applicable Law for International Bank Transactions," Dar Al-Jamia Al-Jadida.
7. Issam Al-Din Al-Qasabi, "Conflict of International Legal and Judicial Jurisdiction in Electronic Commerce."
8. Khaled Abdel Fattah Khalil, "Consumer Protection in Private International Law," Ph.D. Thesis, Helwan University, Faculty of Law, 2000.
9. Mohamed Hussein Talayan, "Electronic Banking Transfers: A Comparative Study," Dar Al-Nahda Al-Arabia, Cairo, 2017.
10. Mohamed Al-Roubi, "The Role of Will in International Judicial Jurisdiction," Dar Al-Nahda Al-Arabia, Cairo, 2009.
11. Saleh Al-Minzalawi, "Settlement of Commercial Disputes via Electronic Communication Networks," Arab Lawyers Magazine, Issue 3.