

The Principle of Commencement of Proof by Writing in Algerian Civil Evidence Law:

Its Application to Real Property Transactions in the Context of Electronic Writing

– An Analytical and Critical Study–

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Abstract

The principle of commencement of proof by constitutes a significant exception to the general rule requiring written evidence in the Algerian civil law system. It permits the supplementation of incomplete written proof with witness testimony or presumptions when its three conditions, as stipulated in Article 335 of the Algerian Civil Code, are met. With the Algerian legislature's recognition of electronic writing under Law No. 05-10 of 20 June 2005 (Article 323 bis 1), followed by the regulation of electronic signatures and certification through Law No. 15-04 of 3 February 2015, it has become essential to examine the applicability of this principle to real property transactions, which are subject to strict formal requirements and mandatory registration procedures.

This study analyzes the compatibility of the principle's conditions with the nature of electronic instruments, focusing on practical challenges and legislative gaps in the field of property ownership. The methodology relies on textual, comparative, and applied critical analysis, drawing on legal texts, doctrine, and judicial precedents. The study concludes that the principle serves as a flexible bridge toward digitization but requires comprehensive legislative and technological development to achieve full effectiveness in real estate transactions.

Keywords: Commencement of proof by writing, electronic writing, real property transactions, Algerian civil evidence law, qualified electronic signature, electronic land registration.

Introduction

Proof forms the cornerstone of the civil legal system, as a right is not recognized unless supported by evidence before the court. The general theory of evidence affirms that "a right devoid of proof is worthless in the event of dispute" (Mekid, 2015, p. 150). In the Algerian context, written evidence occupies a preeminent position as the strongest form of proof, owing to the objective and formal guarantees it provides, which prevent subsequent disputes and facilitate the judge's ascertainment of truth. However, the Algerian legislator has not made writing an absolute rule but has introduced important exceptions that allow flexibility. The most prominent of these is the principle of commencement of proof by writing, enshrined in the second paragraph of Article 335 of the Civil Code, which authorizes proof by witnesses in matters that would otherwise require writing, provided there exists "any writing emanating from

the adverse party and such as to render the existence of the alleged act probable" (Algerian Civil Code, 1975, p. 151).

This principle, also referred to as the "beginning of written evidence," serves as a reconciling mechanism between the rigidity of formal writing requirements and the practical needs of parties, particularly in everyday transactions or cases involving loss of complete evidence. Its historical origins trace back to French legislation (Ordinance of Moulin, 1566, followed by the Ordinance of 1667), where witness testimony was originally the primary mode of proof until Louis XIV imposed the rule that transactions exceeding 100 livres must be proved in writing. The principle evolved into a flexible judicial tool, extended by French courts from matters of filiation to various fields (Al-Sanhuri, 2015, p. 414). In Egyptian law (Article 62), Syrian law (Article 56), and Lebanese law (Article 242 of the Code of Civil Procedure), the definition aligns closely with the Algerian text, reflecting the shared Franco-Roman legal heritage (Mekid, 2015, p. 152).

With the digital revolution and the proliferation of online transactions, the Algerian legislator recognized the need to modernize evidence rules. Law No. 05-10 of 20 June 2005 introduced a major amendment to the Civil Code, with Article 323 bis 1 stating: "Proof by writing in electronic form shall be deemed equivalent to proof by writing on paper, provided that the identity of the person from whom it emanates can be duly ascertained and that it is prepared and preserved under conditions ensuring its integrity" (Journal Officiel, 2005). Subsequently, Law No. 15-04 of 3 February 2015 regulated general rules on electronic matters and electronic signature certification, deeming a qualified electronic signature (Article 8) equivalent to a handwritten signature when it satisfies conditions of attribution, integrity, and durability (Journal Officiel, 2015, pp. 4–14). This development aligns with the UNCITRAL Model Law on Electronic Commerce (1996), which equates electronic and paper-based media (UNCITRAL, 1996).

Nevertheless, applying the principle of commencement of proof by writing poses a particular challenge in the domain of real property transactions, which are among the most significant legal acts due to their economic and social value. The Algerian legislator imposes absolute formal requirements for the transfer of real property ownership or the creation of real rights (Articles 324–326 of the Civil Code), necessitating an authentic deed issued by a notary or public officer, followed by mandatory registration in the land registry pursuant to Decree No. 76-63. Non-compliance results in absolute nullity. In the absence of a fully integrated electronic notarization and registration system (despite administrative platform capabilities), the question arises whether an informal electronic instrument (e.g., a digitally signed contract or signed email) may constitute commencement of proof by writing, supplement able by witness testimony in disputes over price, ancillary conditions, or loss of the authentic deed.

The central problem of the study is:

To what extent can electronic instruments qualify as commencement of proof by writing in proving real property transactions under Algerian civil law, and what are the critical and practical challenges impeding such application given the strict formal requirements and mandatory registration?

Sub-questions include:

Do the principle's conditions (written instrument, emanation from the adverse party, probability of the act) align with the nature of electronic media? Can an incomplete electronic instrument be supplemented to form complete proof capable of transferring ownership or establishing real rights? What is the position of Algerian jurisprudence compared to French and Moroccan experiences?

This analytical and critical study addresses these issues through three main sections: the first examines the nature and conditions of the principle; the second its application to real property transactions; and the third a critical analysis in the context of electronic writing. The methodology combines textual analysis of legislation, comparative examination with foreign laws, and applied critique based on Algerian doctrine and case law.

1. The Nature of the Principle of Commencement of Proof by Writing in Algerian Civil Evidence Law

1.1. The Concept and Historical Evolution of the Principle

1.1.1. Legal Definition

The second paragraph of Article 335 of the Algerian Civil Code provides that "any writing emanating from the adverse party and such as to render the existence of the alleged act probable shall constitute commencement of proof by writing" (Mekid, 2015, p. 152). Doctrine defines this principle as incomplete written evidence that remains at the preparatory stage until supplemented by witness testimony or presumptions to become full proof (Mekid, 2015, p. 153). Dr. Naïma Mekid emphasizes that "the principle of commencement of proof by writing possesses a distinctive feature that renders it particularly important, as it renders witness testimony admissible in legal acts exceeding the statutory threshold" (Mekid, 2015, p. 153).

1.1.2. Historical and Comparative Development

The principle originates from the French Ordinance of Moulin (1566), which curtailed the dominance of oral testimony, and was reinforced by the 1667 Ordinance introducing the term "beginning of proof by writing" (Mekid, 2015, p. 153). Jurist Pothier refined its conditions, insisting it must emanate from the party and partially encompass the act to be proved (Al-Sanhuri, 2015, pp. 414–415). In Egypt, the Court of Appeal defined it in 1945 as "a document emanating from the party against whom proof is sought, not constituting conclusive evidence... but rendering the act probable" (Mekid, 2015, p. 153). This definition aligns with the Algerian text, reflecting convergence among Arab legislations derived from French law (Brahimi, 2012, p. 97).

1.2. Conditions for the Existence of Commencement of Proof by Writing

The principle serves as an important exception to the rule of formal written proof in Algerian civil law, requiring the fulfillment of specific conditions for validity. These are enshrined in the second paragraph of Article 335, drawing from French and Arab doctrinal traditions. They comprise three fundamental elements: the existence of a written instrument, its emanation from the adverse party or their representative, and its rendering the alleged act probable. Each is examined below, with reliance on legal texts and doctrine, and a critical analysis of their application in traditional and modern digital contexts, where technological tools pose new interpretive challenges.

1.2.1. Existence of a Written Instrument

The principle requires a written document constituting a "writing" or "medium" bearing text, without mandating a specific form or formal signature, provided it can establish part of the alleged act (Mekid, 2015, p. 154). This condition encompasses any medium capable of recording writing, whether traditional paper or modern electronic, thereby extending the scope to include emails or digital files when integrity and identity verification conditions are met, as stipulated in Article 323 bis 1 of Law No. 05-10 (Belmami, 2009, p. 25). Doctrine confirms that the instrument need not constitute complete proof but merely a "beginning" rendering the act probable, as in a personal memorandum or incomplete receipt (Al-Sanhuri, 2015, p. 414).

Commencement of proof may be inferred from a set of interconnected documents, even if none alone suffices, as Mekid explains: "the written instrument refers to another... the two together constitute commencement of proof" (Mekid, 2015, p. 154). This inference relies on logical linkage, such as a chain of emails tracing agreement evolution, thereby strengthening probability. However, limitations exist: the existence of a lost instrument cannot be proved by witness testimony pursuant to Article 336/2 of the Civil Code, which requires the instrument to be physically present or otherwise established (Algerian Civil Code, 1975, p. 152). In digital contexts, this raises issues, as a deleted electronic file may be deemed "lost," yet recovery via forensic techniques could render it admissible as incomplete proof, subject to integrity verification (Belmami, 2009, p. 26).

Critically, this condition is flexible, allowing expansion of "writing" to digital media, as in French law, which equates electronic and paper writing. Nevertheless, Algerian legislation lacks precise guidance on handling digital alterations, potentially leading to disputes over electronic medium authenticity. For instance, if an email is modified, does it remain a "written instrument"? Doctrine proposes reliance on electronic certification certificates to ensure integrity, as per Law No. 15-04 (Algerian Republic, 2015, p. 10). Judicial practice, such as the Egyptian Court of Appeal's 1945 ruling, reinforces that the instrument must emanate from the party against whom proof is sought, underscoring the need for linkage to the adverse party (Mekid, 2015, p. 154). This condition safeguards against abuse but necessitates legislative refinement, such as blockchain adoption, to align with technological advancements.

1.2.2. Emanation of the Writing from the Adverse Party or Their Representative

The writing must emanate from the adverse party (claimant or defendant) or their legal or contractual representative, such as an agent or heir (Mekid, 2015, p. 155). This condition ensures the evidence is self-generated and not imposed, enhancing its credibility before the judge. Implicit emanation is accepted, including dictation, reliance on a receipt, or tacit acknowledgment, holding the party responsible for the content even without personal signature (Al-Sanhuri, 2015, p. 416). For example, if a party dictates message content to a secretary, it is deemed to emanate from them upon proof of dictation. Writings from third parties, such as a witness or unrelated individual, are disregarded, as the writing must originate "from the adverse party" to be persuasive (Al-Sanhuri, 2015, p. 415).

In digital contexts, this condition extends to electronic signatures, requiring identity verification through certification certificates, as provided in Article 323 bis 1 (Belmami, 2009, p. 25). An electronically signed email from the party qualifies as emanating from them, even

via a digital agent. Challenges arise in proving emanation amid hacking or digital theft, allowing judges to reject the writing if linkage to the party is not conclusively established (Law No. 15-04, 2015, p. 8). Critically, the condition balances flexibility and protection but demands advanced verification tools, as in the French model relying on "qualified electronic signatures" to establish emanation. Doctrine affirms that emanation may be "direct or indirect," broadening application to agents (Brahimi, 2012, p. 97). This renders the condition decisive in real property disputes, where evidence from non-parties is rejected to prevent forgery.

1.2.3. Rendering the Existence of the Alleged Act Probable

This condition is assessed by the trial judge with full discretionary power, provided the inference is stronger than mere possibility and inapplicable to categorical denial of the act (Mekid, 2015, p. 156). It requires the writing to render the act "imminent" or "likely to have occurred" based on circumstances, as where a memorandum indicates partial price payment in a sale, making full sale probable (Al-Sanhuri, 2015, p. 417). The principle's effect extends to universal and particular successors, subject to compliance with other evidence rules (Mekid, 2015, p. 157). Digitally, a chain of emails may render the act probable by demonstrating agreement evolution, though the judge must verify chain integrity (Belmami, 2009, p. 26).

Critically, the condition grants judges broad discretion, risking inconsistency, particularly in digital disputes where assessing "probability" is complex. Doctrine recommends supplementary presumptions, such as access logs or digital certificates, to reinforce evaluation (Brahimi, 2012, p. 98). Comparatively, the French approach (Article 1347) allows contextual probability assessment with stronger technical safeguards. This condition renders the principle effective against loss or incompleteness but requires judicial training in technology to avoid bias. In conclusion, these three conditions form a solid foundation for the principle, necessitating adaptation to modern means to ensure evidentiary justice.

2. Application of the Principle of Commencement of Proof by Writing to Real Property Transactions in Algerian Civil Evidence Law

2.1. Formal Requirements for Real Property Transactions and Their Limits

Real property transactions—such as sales, mortgages, donations, and partitions—are subject to absolute formal requirements under Articles 324–326 of the Civil Code, necessitating an authentic deed issued by a notary or public officer, followed by mandatory registration in the land registry pursuant to Executive Decree No. 76-63 of 25 February 1976 (Brahimi, 2012, p. 97). Non-compliance results in absolute nullity, rendering informal instruments ineffective for transferring ownership (Brahimi, 2012, p. 98). Nevertheless, this formality does not preclude informal or electronic instruments as incomplete evidence in disputes over material facts (e.g., price, delivery, or ancillary conditions) (Mekid, 2015, p. 158). In non-transferring transactions (e.g., long-term leases or promises of sale), informal evidence is fully admissible (Algerian Civil Code, 1975, p. 151).

2.2. The Principle's Role as a Flexible Exception in Real Property Evidence – Practical Cases and Doctrinal and Judicial Analysis

2.2.1. Practical Application Cases



In cases of loss of the original authentic deed or its nullity for formal defects (e.g., absence of signature or registration), or in disputes over unregistered price portions, incomplete receipts, personal memoranda handwritten by the debtor, endorsements on debt instruments, or non-conforming copies of authentic deeds qualify as commencement of proof by writing (Mekid, 2015, pp. 154–155). In non-transferring real rights transactions (e.g., long-term leases, usufruct, or promises of sale), informal or electronic instruments constitute incomplete proof supplementable by witnesses or presumptions to establish the obligation (Al-Sanhuri, 2015, p. 420).

Practical example: If a seller sends a signed email confirming partial price receipt in exchange for a promise of sale, the email constitutes commencement of proof by writing if it establishes "probability" and emanates from the adverse party, supplementable by witness testimony to prove the full agreement in a real property dispute (Heddar, 2016, p. 28). Inventory records, account books, or data submitted to the land registry may also serve as commencement of proof, even if from unrelated proceedings (Mekid, 2015, p. 155). In attachment cases (Article 333), the principle establishes personal obligations without transferring ownership (Brahimi, 2012, p. 100).

2.2.2. Judicial and Doctrinal Precedents and Expansive Application

Algerian courts have extended the principle to real property in attachment, testamentary, or possession disputes, treating land registry data or investigation records as "commencement of proof by writing" (Belmami, 2009). Doctrine affirms that the principle does not independently transfer ownership but aids in proving material facts or personal obligations, with effects extending to universal and particular successors within transferable limits (Mekid, 2015, p. 160). An informal deed void for lack of signature, if handwritten by the debtor, constitutes full commencement of proof (Al-Sanhuri, 2015, pp. 422–423). This expansion reflects the principle's flexibility against real property formality rigidity, particularly in rural areas dominated by customary dealings (Brahimi, 2012, p. 101). Judicially, as in Supreme Court decisions, the principle is rejected where the transaction contravenes the rule against contradicting or exceeding writing (Article 334) (Algerian Civil Code, 1975, p. 152). This analysis highlights the principle's reconciling role in reducing nullity in real property disputes while preserving registration safeguards (Mekid, 2015, p. 159).

3. Application of the Principle of Commencement of Proof by Writing under Electronic Writing to Real Property Transactions – An In-Depth Analytical and Critical Study

3.1. The Legal Framework for Electronic Writing in Algeria and Its Compatibility with the Principle's Conditions

3.1.1. Law No. 05-10 and Article 323 bis 1

Law No. 05-10 equated electronic and paper writing subject to identity verification and integrity conditions (Journal Officiel, 2005), opening the door for signed emails, digital contracts, or electronically signed text messages to constitute commencement of proof by writing. This amendment responds to the UNCITRAL Model Law but lacks detailed implementation in real property matters (Journal Officiel, 2005).

3.1.2. Law No. 15-04 and Qualified Electronic Signature



The law recognizes qualified electronic signatures as full proof, establishing a centralized certification system under the Ministry of Justice (Journal Officiel, 2015, pp. 6–8). It enables proof of "emanation from the adverse party" via certification certificates, strengthening the principle in digital contexts (Journal Officiel, 2015, p. 10).

3.2. Compatibility of the Principle's Conditions with Electronic Writing in the Real Property Context

3.2.1. Electronic Medium as Commencement of Proof

Electronic media qualify as "written instruments," with digital emanation accepted upon proof of linkage to the party via signature or digital certificate, and "probability" assessed from digital file content (e.g., incomplete registered electronic contracts) (Mekid, 2015, pp. 156–157). In real property, signed emails suffice as commencement of proof for incomplete sale promises (Heddar, 2016, p. 30).

3.2.2. Practical and Technical Challenges

Challenges include difficulties in full electronic registration, cyber risks to signatures, lack of integration between notarization and land registry platforms, and limited access in unmapped areas (Journal Officiel, 2015, p. 12). Digital fraud raises questions about "integrity" (Article 323 bis 1), undermining judicial confidence (Belmami, 2009).

3.3. In-Depth Critical, Comparative Analysis and Future Proposals

Despite legislative progress, the Algerian system remains transitional and incomplete. Law No. 15-04 lacks specific implementing texts for electronic real property notarization, unlike France's Ordinance 2016-131 introducing fully electronic authentic deeds via platforms like Infogreffe and Actes en ligne with qualified signatures ensuring absolute integrity (French Republic, 2016). Morocco succeeded with Law No. 53-05 and the 2020 electronic notarization law, establishing a national certification authority and e-notaire platform linking notaries directly to the land registry (Moroccan Kingdom, 2005). The European Union's eIDAS Regulation (910/2014) governs qualified signatures across borders with high security levels, enabling electronic application of the principle in real property without risks (European Union, 2014).

Critically, the Algerian application suffers from:

- **Implementation gap:** Absence of decrees specifying digital security standards for real property instruments, rendering the principle ineffective in disputes (Journal Officiel, 2015, p. 13).
- **Security risks:** Potential digital forgery or hacking, weakening "probability" in the judge's view, especially in high-value real estate (Heddar, 2016, pp. 45–50).
- **Social inequality:** Limited access to qualified signatures in rural areas or among digitally illiterate individuals, deepening urban-rural divides (Brahimi, 2012, p. 102).
- **Judicial scarcity:** Rarity of judgments accepting electronic instruments as commencement of proof in real property due to nullity fears, as seen in some Supreme Court decisions (Belmami, 2009).

This deficiency limits the principle's role as a digital bridge, perpetuating reliance on paper despite partial digitization. To overcome this, proposals include developing an integrated



system with advanced security protocols such as blockchain for land registration, and pilot projects in selected provinces (UNCITRAL, 1996).

Conclusion

The principle of commencement of proof by writing in Algerian civil evidence law represents a flexible and effective tool enabling integration of modern technologies into proof of real property transactions, particularly under electronic writing recognized since 2005 and regulated in 2015. The study demonstrates that the principle's conditions align principally with electronic instruments' nature, rendering informal digital documents incomplete proof supplementable in price disputes or cases of authentic deed loss. The principle mitigates the rigidity of strict formal requirements in real property acts without abolishing them, preserving land registration safeguards.

However, application faces substantial challenges: legislative gaps in implementing texts, technical difficulties concerning integrity and cyber threats, limited rural penetration, and insufficient training for notaries and judges. Compared to international experiences, the Algerian system appears relatively delayed.

The study proposes:

- Enactment of a specific law on electronic real property notarization integrating qualified electronic deeds with mandatory electronic registration.
- Establishment of a unified national platform linking the Ministry of Justice, land registry, banks, and notaries.
- Activation of qualified electronic signatures among all notaries with official, free or subsidized certification certificates.
- Intensive judicial training on assessing "probability" in digital instruments, including issuance of a judicial guide.
- Pilot projects in selected provinces (e.g., Algiers and Oran) with annual evaluation and result dissemination.
- Enhanced international cooperation with UNCITRAL, the European Union, and Maghreb states for expertise and standard exchange.
- Mandatory inclusion of a course on "digital evidence in real property" in law faculty curricula.

Through these comprehensive reforms, Algeria can transform the principle into a genuine lever for real property digitization, achieving balance between legal security and economic efficiency, and contributing to a modern digital economy that protects rights, facilitates transactions, and attracts foreign investment. Future studies are invited to monitor judicial application post-completion of the legislative framework, with emphasis on artificial intelligence as a future tool for verifying digital instrument integrity. Success in this field is not merely technological advancement but a strategic step toward a modern state grounded in comprehensive digital justice.



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