Formation of Electronic Contracts of Sale and its Impact on Iraqi Traditional Commercial Contracts

By

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Declaration

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Signed: ……

(MOHANAD HAMAD AHMED)

Date : …….

Dedication

To my parents, who sacrificed too much for this moment

To my brothers and sisters, who supported me

To my supervisors, who made this possible

To my friends and students

To my home country

'Iraq'

Mohanad

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Abstract

The internet has become a tool for performing contracts in commerce and accordingly, the contract formation process has experienced some significant developments. Generally, these electronic contracting practices have not yet received appropriate treatment in Iraqi law. Consequently, this thesis argues that some traditional contract rules, especially those in the Iraqi Civil Code (ICC) and the Iraqi E-signature and Transactions Act (IESTA), are currently insufficient for regulating legal agreements resulting from new contracts.

Although not wholly comparative research, the analysis of the Iraqi law herein will however be accompanied by analysis of Sharia doctrines. Consequently, this thesis fundamentally considers the ICC, the IESTA and Sharia law, but also considers other jurisdictions to a limited degree. The rationale for this is to weigh how other jurisdictions have been successfully dealing with electronic contract formation. The primary objective is to scrutinise the likelihood of embracing appropriate foreign laws for adaptation as suitable amendments of Iraqi law. Sharia law dates back over 1400 years and some of its rules are nowadays inapplicable. The most appropriate example is the Maliki's view, which makes it mandatory for the offeree to accept or reject the offer instantly when the offer reaches him, this view is now in applicable. However, the majority of these rules are still in force. In Iraq, applying the traditional rules of contract formation is out-of-date and such rules are inappropriate for adjudicating disputes arising from the electronic contracting process.

This thesis recommends that the Iraqi law must become more efficient and more easily applicable to regulate electronic contracts. In particular, the Iraqi legislature should revise the ICC and IESTA as regards contract formation rules to provide legal certainty in electronic contracting. Accordingly, ICC articles 82, 87 and 88 should be updated to take into consideration the unique nature of contracts formed over the internet. It should also treat new means of communication independently, taking into consideration the different nature of each means, for instance, the postal rule fits to contracts conducted by email, but it does not fit to those conducted by phone calls.

List of Abbreviations

ICC	Iraqi Civil Code
ECC	Egyptian Civil Code
JCC	Jordanian Civil Code
KCC	Kuwaiti Civil Code
IESTA	Iraqi E-Signature and Transactions Act
CISG	The Vienna Convention on International Sales of Goods
CUECIC	The Convention on the Use of Electronic Communication in International Contracting
UPICC	Unidroit Principles of International Commercial Contracts
MLEC	UNCITRAL Model Law on Electronic Commerce
ECIC	Electronic Commerce International Commission
B2B	Business-to-Business
B2C	Business-to-Consumer
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer

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Chapter One

Introduction

1.1. Summary of the topic

The Iraqi Civil Code (ICC) is the civil law in Iraqi region dated back to 1953.[1] Since this code is old and issued when new communication means such as email, chat rooms, and other new tools were not invented yet, this code therefore unintentionally created a problem relating to applying traditional provisions in contract law to these new types of contracts or so-called 'electronic contracts'. However, this problem remained invisible for long time until the last few years, when the introduction and use of electronic contracts (hereafter e-contracts) became manifest. E-contracts have had a positive impact on commerce and upon traders, as they have accelerated daily transactions by enabling the instant conclusion of contracts between persons situated in different countries. Consequently, new technology has improved the growth of commerce but also brought legal challenges to Iraq's existing legal system. A significant new legal research discipline has evolved as 'cyber law' or 'internet law'.[2] New legal contractual relations have arisen between different parties in different countries simply by clicking on a computer keyboard. Although traditional contracting forms have not completely disappeared, they are still used but mostly in electronic forms.

Traditionally, consent to enter into a contract between two parties was reached in each other's presence. This idealised 'face-to-face' transaction model does not accommodate e-commerce transactions using the Internet. Consequently, when communications between two contracting parties are carried out using electronic means, the parties are usually far apart and therefore uncertainties regarding the legality of the expression of consent by any of the parties may arise prior to the formation of the legal electronic transaction.[3] In the case of online contracts, it is possible that sometimes the exchange of offer and acceptance may not reach the intended

[1] First and foremost, as regards the Iraqi region, it is indisputable that laws exist to resolve disputes among people. Iraq is considered as one of the places where laws were first drafted. For example, the Code of Hammurabi (c1754 BC) is a well-preserved Babylonian law from ancient Mesopotamia (Iraq). Laws however need to be updated continuously. The Iraqi Civil Code, first drafted in 1951 and entering force on 9 August 1953, is the civil legislation still applied in Iraq with some modifications since then. This code was promogulated in the body of laws and regulations in the official journal named *al-Waqa'ea al-Iraqia* no. 3015 on 9 August 1951, p 243.

[2] The author will analyse these terms in chapter 2 of this thesis.

[3] Steven Gallagher, 'E-Commerce Contracts: Contracting in Cyberspace A Minefield for the Unwary', (2000) 16(2) Computer Law & Security Review 101; Guenter Treitel, *The Law of Contract* (10th edn, Sweet and Maxwell 1999) 16.

recipient. There is also the issue of the meaning of the terms 'dispatch' or 'received'.[4] There is a possibility that a message sent through the Internet may be altered and by the time it is received may be incomprehensible, or its meaning may be different from what was intended.[5] What this means is that when the acceptance is sent through the Internet it may be illegible when the offeror receives it or it may not arrive at all. Unless the acceptance has been clearly received by the offeror, questions as to when the contract is concluded may arise. In law, the communication method used to convey the offer and acceptance also determines the time the contract is concluded. That is, parties who are instantly connected with each other, for example on an internet-phone, can offer and accept instantaneously, just as with face-to-face transactions. On the other hand, if the communication of offer and acceptance is delayed, as can often be the case with email, such contracts are more like traditional contracts concluded between absent parties.[6]

Consequently, the provisions that will be addressed by this thesis include contracts *inter praesentes* which have a different moment of conclusion than contracts *inter absentes.* The work will assess how to adapt or adjust the contract and finally apply the proper provision for each type. However, any conclusions need to be governed by legal rules to resolve disputes arises from identifying the types of these new forms of contracts, and despite the Iraqi Electronic Signature and Transactions Act (IESTA) 2012 purporting to address electronic transactions, it pays little attention to electronic contracts (e-contracts), particularly their conclusion.[7] So, it is important first to consider the legality of Internet communication as a method for expressing consent in the light of conventional Iraqi and Islamic contractual rules. This clarifies whether or not such consent between contracting parties is valid or not. Additionally, contracting parties can programme their computers enabling the expression of consent through an offer and acceptance without any direct human interference.[8] Consequently,

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[4] *Henkel v Pape* (1870) LR 6 Exch 7; *Bruner v Moore* [1904] 1 Ch 305; *Cowan v O'Conner* (1888) 20 QBD 640 at *642; Brinkibon v Stahag und StahlwarenhandelsgesellschaftmbH* [1983] 2 AC 34, [38]; Simone Hill, 'Flogging A Dead Horse - The Postal Acceptance Rule and Email' (2001) 17 Journal of Contract Law 2; Paul Fasciano, 'Internet Electronic Mail: A Last Bastion for the Mailbox Rule' (1997) 25 Hofstra Law Review 971.

[5] Justin Hogan-Doran, 'Jurisdiction in Cyberspace: The When and Where of On-line Contracts' (2003) 77 Australian Law Journal 377.

[6] Technically, servers and clients are *processes, not* discrete pieces of machinery. Frequently their separation is only logical. David D Clark and Marjory S Blumenthal, 'The End-to-end Argument and Application Design: The Role of Trust' (2011) 63 Federal Communications Law Journal 357, 359.

[7] Najla'a Hasan and Abdul-Rasoul Abdul-Ridha, 'The development of Iraqi legal position in the Electronic Signature and Transactions Act, (2013) 2(21) Journal of Babylonian University Literature Studies 341.

[8] Simon Jonesand Nabarro Nathanson, 'Trading on The Internet: Contracting in Cyberspace', (1997) 8(3) Practical Law for Companies 41*,* 43; Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 Melbourne University Law Review 179, 197.

there is uncertainty as to whether offer and acceptance can be communicated electronically in the absence of human involvement as computers can sometimes erroneously express consent when none was intended.[9] Consequently, there is a need to discuss whether contracts formed under such circumstances can be considered to be legally binding and also whether the owner of the faulty computer should be made responsible for the error.

1.2. Aims and Objectives

This research aims to establish a legal basis for the new generation of e-contracts of sale concluded over the internet. Some of the existing rules of ordinary contracting theory have become unsuitable to regulate such contracts and their implications. The main aim of this research thesis is to critically analyse Articles 82, 87 and 88 of the Iraqi Civil Code (ICC) to assess their suitability for application to e-contracts. According to this main aim, the objectives are:

- Discuss the current concept of '*meeting of contract'* according to the ICC, Article 82 and its suitability for online contracts;
- Critically analyse the contract formation process in terms of performing offer and acceptance in e-commerce, in particular, issues with electronic agents and with distinguishing 'offers' from 'invitations to treat' and 'subject-matter'.
- Critically analyse ICC Article 87 and 88 as regards the time of conclusion of contract in terms of how the offeror can become aware of an acceptance sent by electronic means;
- Propose legal reform or amendments to the existing texts to accommodate the special characteristics of e-contracting.

Most importantly, there is a general absence of online contracting case law in Arabian countries, but especially in Iraq, upon which the author can rely to present a consistent and comprehensive legal analysis and propose solutions to the legal problems and challenges. As a result, some non-Arabic cases will be discussed to assess whether this will impact on the traditional legal terminology used by Iraqi law and if there is a need for any changes.

[9] Aron Zysow, The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law' (1985) 34(1) Cleveland State Law Review 69; Treitel (n 3) 10.

1.3. Scope and Limitations

In the main, this thesis researches the formation of e-contracts of sale, as this is one of the most important stages of contract that identifies the process of contracting. Since contracts *inter praesentes* and contracts *inter absentes* are confined to exist in the sale with no similar distinction present in other contract types, it is therefore rational for the thesis to be restricted to the scope of sales. It is worth mentioning that contracts discussed in this thesis are commercial national contracts of unlimited monetary value concluded within the Iraqi region. Additionally, such contracts include business-to-business (B2B), business-to-consumer (B2C), consumer-to-business (C2B) or consumer-to-consumer (C2C) contracts.

Moreover, the scope of the thesis includes the conclusion of electronic contracts as a mixture and result of several stages, such as the invitation to treat, negotiation, the meeting of contract that includes offer and acceptance and the option granted to the parties by *Sharia* law, which is the option of meeting of contract '*Khayar al-Majlis'*.[10] As regards the types of e-contracts, this research considers contracts concluded using any new means of communication such as email, chat rooms and new phone generations that definitely differ from classic telephones. These new phone generations have multiple applications other than phone calls such as email, video conferencing, and chat programs. However, some parts of the thesis will focus on website contracts through which it can be difficult to distinguish between offer and invitation to treat and to apply ICC Articles 82 and 87. Consequently, two proposed approaches can be posited in this context:

1. Applying existing traditional contract law rules to e-contracts by giving the court discretionary powers to modify these rules to be compatible with e-contracts and their legal framework;
2. Amending or modernising the existing rules of contract law to accommodate the special characteristics of the Internet, because the Internet is of a special nature requiring there to be special legal rules to regulate its use for contracting.

It can be clearly seen that the first approach is excluded from the scope of this study because it will argue that the Iraqi contract law cannot accommodate some features of e-contracts. Additionally, the ICC is not drafted to authorize the courts to enact new rules or modify existing ones. Their role is confined solely to applying them. The study will delve into the formation of

[10] As shown in Chapter 3 herein.

e-contracting, including the stage of meeting of contract and its option. Furthermore, this study will examine the issues of electronic agents, the distinction of 'offer' from 'invitations to treat,' and will also examine subject-matter. Acceptance forms, incorporation of terms and conditions, and the determination of contract conclusion time are also included. Overall, the critical analysis conducted herein aims to assist the Iraqi legislature by recommending changes on the basis of reasoned, evidence-based argument. Finally, this study does not include consideration of contractual concepts such as consideration, implementation of e-contract, legal capacity of the parties, burden of proof, rights and duties of the parties or the place of contracting.

1.4. Research Problems

This thesis primarily focuses on studying, analysing and interpreting ICC Articles 82, 87 and 88, to clarify whether they can be applied to e-contracting or whether gaps exist. According to some scholars and practitioners, traditional Iraqi, and especially the aforementioned Articles, is old and therefore inadequate to regulate all aspects of e-contracting.[11] Specifically, according to some writers, the ICC is incapable of addressing the legal issues arising from the technology revolution.[12] Consequently, this thesis seeks to examine whether such hypotheses are true.

One problem is that Article 82 indirectly mentions the contract *inter praesentes* by stating that:

> contracting parties have an option after the offer until the end of the meeting; where the offeror has withdrawn his offer before the acceptance has been expressed or where either contracting party utters a saying (statement) or makes an act (gesture) which indicates rejection, then the offer will be void and any acceptance uttered thereafter shall be disregarded.[13]

In this context, the word 'meeting' is vague and obscure[14] because it does not specify which

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[11] Judge Shihab Ahmed Yasin 'Civil Courts Wait for E-contracts' (Iraqi Federal Judicial Authority, Republic of Iraq 2014) 2 available at <www.iraqja.iq> accessed 12 October 2017; Enas Mohammed Radhi, 'Legal Challenges to Resolve Electronic Contracts Through Internet and the Practice of Iraqi Law' (University of Babylon Law School, Iraq,) 5 available at < www.uobabylon.edu.iq> accessed 12 October 2017; Hasan and Abdul-Ridha (n 7) 12; Tariq Q Ajeel, 'Electronic Session of Contract, Study for the UAE Electronic Transactions Act' (Conference of Electronic Transactions and Government, Dubai 19-20 September 2009) 299 <http://slconf.uaeu.ac.ae/slconf17/arabic/prev/conf2009.asp> accessed 12th October 2017. For an analogy with the Egyptian Civil Code see Dr Mohammed Ibrahim Abul-Haija, *E-commerce Contracts* (Dar Al-Thaqafa, Amman, Jordan, 2005) 19; Mamdouh Mohammed Khairi, *Problems of E-sale via Internet in Civil Law* (Dar Alnahda Al-Arbia, Cairo- Egypt, 2000) 98. Abdul Ilah Aldewachi, 'The Technology of Communications and Information are the Sources of International Structure (2000) 1 (4) Journal of Computer Researches Bahrain 48.

[12] Yasin (n 11) 2; Hasan and Abdul-Ridha (n 7) 16; Radhi (n 11) 5; Ayser Sabri Ibrahim, 'The Conclusion of Contract by Electronic Way and its Vindication, Iraq and Egypt' (MSc Thesis, University of Alexandria, Egypt 2012) 12-13; Dr Mohammed Ibrahim Abul-Haija, *Contracting of Sale via Internet* (1st edn, Amman, Jordan 2005) 77. Nazar H Aldamlouji, 'Contracting by Internet' (MSc Thesis, Mosul University Iraq, 2002) 49.

[13] Article 82 of the ICC.

[14] Dr Akram M Hussien and Ikhlas A Rasool 'Notices in Iraqi Civil Code' (2002) 14 Al-Rafidain Journal for Legal Rights 12; Aldamlouji (n 12) 48; Hasan and Abdul-Ridha (n 7) 9. For more about these two types of contract see: Dr Mohammed S Abdullah, 'The Meeting of Contract', (MSc Thesis, University of Mosul, 2005).

type of meeting and whether it covers only actual meetings, presumed meetings or both.[15] Consequently, more in-depth research into legal and Islamic jurisprudence is required to interpret this term with greater certainty.

Another example of a research problem this thesis seeks to resolve is that Article 87 states that:

> 1- the contract *inter absentes* is concluded in the place and at the time when the offeror becomes aware of the acceptance unless an explicit or implicit agreement or legal text indicates otherwise 2- It is imposed that the offeror becomes aware of the acceptance in the place and at the time when he receives it.[16]

The text of this provision is also unclear. For example, 'contract inter absentes' is not clearly defined.[17] Even more importantly, Article 87 indicates that awareness of acceptance by the offeror is a precondition for concluding contracts. Consequently, the problem of whether or not this precondition can apply to e-contracting requires more rigorous analysis herein.[18] As mentioned previously, the ICC is old and has thus incorporated Article 87 to regulate contracts *inter absentes*, which at the time of drafting, represented postal service contracts.[19] Postal service delivery may be proved simply by the addressee's signature, which also proves their awareness of acceptance; a key requirement to conclude the contract *inter absentes*.[20] The ability to apply this condition to e-contracting is questionable however, as it is difficult to conceive how an offeror can become aware of an acceptance while using electronic means.[21] Sometimes, it appears difficult to distinguish between contracts that are conducted between attendees than those which are conducted between absentees, specifically if the contracting

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[15] Dr Abdulmajeed Alhakeem, Abdulbaqi Albakri and Mohammed. T. Albasheer, *Nadhariyat Aliltizam Fi Alqanon Almadani* (1st part, Baghdad University Publications, Iraq, 2011) 11; Abdullah (n 14) 66; Dr Muhammed S Rushdi, *al-Ta'aqud Bi Wasa'el al-Ittisal al-Hadeetha* (Scientific Council for Publishing, Amman, Jordan 1998) 25; Awaz S Dizai, 'The Obligation of Transparency in Contracts' (PhD Thesis, Baghdad University, Iraq, 2000) 14; Aldamlouji (n 12) 50.

[16] Article 82 of the ICC

[17] Abdullah (n 14) 105. Also see Iraqi Court of Cassation (1990) Decision No. (364/88). See for comments on this decision, Dr Abdul Kadir Al-Far, *The Sources of Obligation*, (Dar Al-Thaqafa Library, Amman, Jordan 1998). Dr Hasan A Althannon 'Lectures in the Iraqi Civil Law (Baghdad University Publications, 1972) 30-35.

[18] Abdullah, (n 14) 167; Ajeel (n 11) 307 Hussien and Rasool, (n 14) 12.

[19] Dr Ismat Abdul-Majeed, *The Effect of Scientific Evolution on Contract* (Encyclopaedia of Iraqi Laws Publications, Baghdad 2007); Dr Jalil Al-Sa'idy, *Problems of Contracting via Internet* (Al-Sanhori Library Publishing, Baghdad 2007) 78-79; Dr Abbas al-Oboodi, *Al-Ta'aqod a'an Dhareeq Wasa'el al-Ettesal al-Fori* (Dar al-Thaqaffah, Jordan 1999) 56; Rushdi (n 15) 27-28.

[20] See Al-Oboodi, (n 19) 50 and Abdul-Majeed (n 15) 44; Al-Sa'idy (n 19) 86. Abdulmajeed Alhakeem, *al-Mojez fi Shareh al-Qanoon al-Madan*y (Baghdad University Publications 2007) 39. For the Egyptian Civil Code see Muneer Mohammed Al-Janbehi and Mamdouh Mohammed Al-Janbehi, *Legal Nature of Electronic Contract* (Dar Al-Fikr Al-Jami'e, Alexandria- Egypt, 2006) 133.

[21] Ibid, 90-95. see also J Al-Aubodi, 'Contracting by Correspondence and the Contradiction About It' (2001) 29 Journal of Comparative Law 52, 70-75; Abdul-Majeed (n 19) 29. Al-Sa'idy (n 19) 10.

parties use modern communication means,[22] which might lead to confusion about whether Article 82 or 87 apply.[23]

A final example problem is that posed by Article 88, which states that 'contracting using the phone or any similar means is considered to have occurred between attendees in relation to time and between absentees in relations to place'.[24] However, the Article fails to clarify 'any similar means'. This is especially problematic when new means of communication have emerged.[25] As such, this will also be subject to in-depth analysis.

1.5. Research questions

Following on from identifying the core problems for this study, the main research question that can be posed is:

- To what extent are the Iraqi traditional contract rules, with respect to Articles 82, 87 and 88 of the ICC suitable for application to e-sales?

Therefore, the sub-research questions are as follows:

- To what extent can the Islamic concept of '*meeting of contract*' be applied to e-contracting?
- To what extent can the traditional rules of offer and acceptance, particularly the rules of agency, rules distinguishing offers from invitations to treat, and the subject-matter, be applied in the electronic contracting process?
- How shall the offeror become aware of either the incorporated terms on websites, or of an acceptance sent by electronic means according to ICC Article 87?

As regards the meeting of contract, a contract is legally concluded when the contracting parties are physically present in the same place, or if they are in different places, they can use a suitable method of communication to convey the offer and acceptance such as postal letters or

[22] This would be more illustrated and exemplified in chapter 2.

[23] Al-Aubodi (n 21) 80; Decision No. 54/3/6 Jeddah, Saudi Arabia (14-20 March 1990) re contracting by modern communications methods (1990) 6(2) Journal of Islamic Jurisprudence 785; Dr. Wahba Alzuhaili, *Alfiqh Alislami Wa Adilatuhu* (Part 4, 4th edn, Dar Alfikr Almoasir Press Damascus 1997), (Part 4, 4th edn, Dar Alfikr Almoasir, 1997) 951; Dr Sameer Hamid Al-Jammal, *Contracting via Modern Communication Techniques, A Comparative Study* (1st edn, Dar Al-Nahda Al-Arabia, Egypt, 2006) 122.

[24] See Salman Bayat, *Iraqi Civil Judiciary,* (Part 1, Baghdad University Publications, 1962) 86.

[25] The contract, according to Jordanian Civil Law, is concluded at the time the offeror has knowledge of the acceptance, while the place of its conclusion is the place that the addressee of the offer issues his acceptance (the place of the acceptance). This is the view adopted by the Jordanian Cassation Court. See Cassation Rights No. 364/88, (1990) Lawyers Union Journal 1338.

messengers.[26] If both parties meet up in the same location, the concept of 'meeting of contract' is easily established. However, if they are at different locations during the conclusion of the contract, then an issue arises as to whether the concept of 'meeting of contract' can be legally applied.[27] Consequently, it is important to have discussions on the applicability of the concept of 'meeting of contract' in face-to-face transactions and transactions between absentee parties. As for Internet transactions, there are doubts as to whether or not the concept of 'meeting of contract' is applicable to electronic contracts.[28] It is not clear whether electronic transactions are similar to face-to-face transactions and thus validate the concept of 'meeting of contract' or whether they should be deemed to be non-face-to-face transactions and as such require different legal consideration.[29]

As regards traditional rules of offer and acceptance, the servers on interactive websites can be programmed to conclude transactions with prospective customers by responding automatically to their orders without any human intervention.[30] Under Iraqi and Islamic contractual rules, for a transaction to be legally concluded there must be expressed consent by both parties. This gives rise to the question of whether or not it is legally valid for consent to be issued automatically by computers without any direct human intervention. Furthermore, it is also debated whether or not the programmed computers are considered as legal persons. As computers comprise both hardware and software it would be hard to imagine how the idea of legal personality can be applied when the hardware and software may be located in several locations and its maintenance carried out by different persons.[31] Furthermore, if the programmed computer is deemed as a legal person then it too would have rights and obligations.[32]

Likewise, it is doubtful whether the contents of websites comply with the rules of an offer, but

[26] Emiliano Gala, 'Contracts by Correspondence', (1906) 4(6) Michigan Law Review 466-468.
[27] Nasser Hamudi, *Lectures in the Law of Civil Contract* (Publications of Al-Halabi Al-Huquqia, 2008) 93.
[28]Jaber Al-Shafiy, *Majless al-Aqd fi al-Figh al-Eslamy wa al-Qanoon al-Wadhei* (Dar al-Jamea'a al-Jadeedah, Alexandria, 2001) 545.
[29] Susan Rayner, *Theory of Contracts in Islamic Law* (Graham and Trotman 1991) 112. See also Dubai Contract Code 1971, Article 7 (2).
[30] Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 (1) International Journal of Law and Information Technology 45.
[31] Tom Allen and Robin Widdison, 'Can Computers Make Contracts?' (1996) 9 (1) Harvard Journal of Law and Technology 42; S Middlebrook and John Muller, 'Thoughts on Bots: The Emerging Law of Electronic Agent', (2000) 56 Business Lawyer 341,348.
[32] Automated agents function with no direct involvement of humans or others and have some type of control over their action and interior situation; 'pro-activeness agents' basically do not act in response to their situation, they are able to demonstrate goal-directed conduct by taking the initiative. See M Wooldridge and N Jennings, 'Intelligent Agents: Theory and Practice', (1995) 10(2) Knowledge Engineering Review.

rather are simply an invitation to treat.[33] The distinction is crucial, because if the website content is an offer to contract, then a contract is concluded as soon as a visitor to that website gives their acceptance.[34] However, if the content is merely an invitation to treat, a positive response by the visitor means only that they are making an offer, and the owner has to accept the offer before a contract can be concluded.[35]

As for subject matter, Iraqi and Sharia laws have expressly provided the conditions that subject matter must be determined and seen to render a contract legal. In e-commerce, the applicability of these two requirements is questionable. The purpose of specifying these conditions is to avoid uncertainty or risk that may give rise to disputes following the conclusion of contracts.[36] The foundation for this is derived from the Prophet stating 'Do not sell what you do not have'.[37] This appears to deal with not just non-existent subject matter, but is also applicable to situations where the subject matter is not shown to the purchaser before the transaction is concluded.[38] Furthermore, Prophet Muhammad also prohibited all sales that contain uncertainty, and if during the conclusion of a sales contract the article being sold is absent, uncertainty is present during the contracting process.[39]

With regards to the awareness of the offeror about acceptance**,** there are concerns about the enforceability of the standard terms and conditions that have been incorporated into online contracts using websites.[40] Under the general rule of mutual consent, for the aforesaid terms and conditions to be legally enforceable they must be made known to the other party and he must give his consent prior to the formation of the contract.[41] To be precise, if those terms and conditions are not obviously made known to the other party prior to the formation of the contract, the terms and conditions may not be binding upon him.[42]

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[33]Edwin Peel, *The Law of Contract* (13th edn, Sweet & Maxwell 2011) 72; Max Young, *Understanding Contract Law* (Routledge-Cavendish 2010) 60.
[34] The distinction between 'offer' and 'invitation to treat' is discussed thoroughly in Chapter 4 herein
[35] R Julia-Barcelo, 'Electronic Contracts: A New Legal Framework for Electronic Contracts: The EU Electronic Commerce Proposal', (1999) 15 (3) Computer Law & Security Report 147, *153*
[36] Al-Aubodi (n 21) 103.
[37] Narrated by Abu Dawud. See Mohammad Ibn Othaimeen, *al-Sharh al-Momtea Ala Zad al-Mostagnea* (Volume 8, Dar Ibn al-Jozi, Dammam, Saudi Arabia 2004) 128.
[38] Muhammed Labib Shanab, *Legal Principles: Introduction to Legal Studies and the General Theory of Obligation* (1st edn, Dar Al-Nahda Al-Arabia, Beirut 1970) 319.
[39] Muhammad Sa'eed Al-Ramlawi, *al-Ta'aqod be al-Wasa'el al-Mostahdatha fi al-Fiqeh al-Esslami,* (Dar al-Fekr al-Jama'ei, Alexandria, Egypt 2006) 390.
[40] Graham Smith, *Internet Law and Regulation* (3rd edn, Sweet and Maxwell London 2002) 456:
[41] Robert A Hillman and Jeffrey J Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 New York University Law Review 429, 480.
[42] Issues regarding incorporated terms and conditions are discussed thoroughly in Chapter 5.

1.6. Methodology

The research is a critical analytical study of Iraqi contract law and Sharia law. It will use the legal doctrinal method and will adopt a black letter standard legal analysis which relies on scrutinizing the primary sources of the ICC and Sharia law, court decisions (if available) and, to a strictly limited extent, some other foreign jurisdictions to illustrate whether there are any gaps and/or shortcomings in the Iraqi legal system. Since this thesis adopts the black letter doctrine legal analysis it will then not dedicate a separate chapter for literature review as it will be integrated within chapters and discussions. Moreover, it will also explore whether there are any additional provisions that the Iraqi Civil law does not provide for and consider whether it would be necessary to suggest amendments and/or additions. Furthermore, as it is necessary to refer to many Arabic sources, official translations will be relied upon, however where these are not available, some unofficial or personal translation might be used. As for the texts of the ICC and Egyptian Civil Code (ECC) reliance will be on the available English translation. Accordingly, the relevant primary sources that will be critically examined are:

a) **The Iraqi Civil Code**: the research will analyse the relevant Iraqi legal texts by using official legislative, judicial and jurisprudential interpretations.[43] Additionally, the research shall use, in case of the absence of any provision in Iraqi laws, some subsidiary methods including discussions on custom, Sharia and principles of equity. It was decided to apply this approach because it is consistent with Article 1 of the ICC, which states that:

   > in case of absence of any applicable legislative provisions in the law, the court shall adjudicate according to custom; in the absence of custom then in accordance with the principles of the Islamic Sharia which are most consistent with the provisions of this law but without being bound by any specific school of thought; and otherwise in accordance with the principles of equity.[44]

b) **Sharia law**: according to ICC Article 1, it is mandatory to apply Sharia law in the case of absence of any provisions in the ICC. However, it is not necessary to be bound by any specific school of thought. Consequently, while this certainly reveals the distinct connection between the ICC and Sharia law, it also shows the necessity of studying Sharia law as a tool to analyse and understand the ICC. Accordingly, the discussion will cover Hanafi, Shafi'i, Maliki and Hanbali doctrines in an attempt to identify and

[43] According to the first paragraph of Article (1) which states 'the legislative provisions shall apply to all matters covering these provisions in letter trend and content'.
[44] The second paragraph of Article (1).

assess which particular doctrine is adopted by Iraqi contract law, the rationale behind it, and to specify which doctrine(s) were ignored and why.

Sharia law usually refers to the law of Islam, which has several primary, secondary and supplementary sources. The primary sources are the *Qur'an*[45] and Prophetic Traditions (*Sunnah*).[46] The secondary sources are the Consensus (*Ijma*)[47] and Analogy (*Qias*).[48] The supplementary sources can be controversial. These include: Preference (*Istihsan)*;[49] Consideration of Public Interest (*Maslaha)*;[50] Custom and others.[51] If there is no provision in all of the above sources, then the jurist must find a solution according to diligence (*Ijtihad)*, which means that the jurists must do their best to deduce a solution for the new cases from the above-mentioned sources using relevant experience and wise mind. The deduced provision should be capable of providing a solution to the case, without contradicting any of the abovementioned sources, and it is important to declare that most issues regarding the process of contracting are found in the dominion of this last source (diligence).[52]

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[45] The *Qur'an* is the holy book and foremost source of Islamic Law. It contains the speech of God revealed to the Prophet Mohammed (PBUH) and conveyed by continuous testimony. See: Jalal Addin Al-Soyouti and Abdul-Rahman Bin Abi-Bakr, *Al-Itqan Fi Ulom Al-Qur'an*, *Part I* (King Fahad Assembly Publications, 2008) 8; Kamali Mohammed Hashim, *Principles of Islamic Jurisprudence (*Revised edn, Islamic Texts Society Cambridge 1991) 14.

[46] '*Sunna'* means the Prophet's words, actions and decisions issued from him during his life to settle disputes, set rulings and implement the *Qur'an*. See: Parvis Owsia, *Formation of Contract, a Comparative Study under English, French, Islamic and Iranian Laws,* (Graham and Trotman, London 1994) 69.

[47] '*Ijma'* means the convergence of opinions of Muslim Scholars in a particular age after the death of Prophet Mohammed (PBUH) on points of behaviour or legal questions, however, it must be accorded to evidence from the *Qur'an* and *Sunna*. See Rahman Ghazi Shamsur, *Islamic Law as Administered in Bangladesh* (Islamic Foundation, Bangladesh 1981) 21-22.

[48] *Al-Qiyas* simply means to apply a provision dedicated to a specific case on another case having no provision as both have the same reason or purpose. See Waleed Ibrahim, *al-Qiyas in Islamic Law, A Brief Introduction*, (Alfalah Consulting 2011) 10. Also see Reuben Levy, *Introduction to the Sociology of Islam* (Williams and Norgate, London 1933) 236-237.

[49] '*Istihsan'* literally translates to 'to consider something good'. Islamic scholars may use it to prefer particular Sharia law judgements over other possibilities. It is one of the legal thought principles that underlies personal interpretation. Classical jurists have argued with *Hanafi* jurists over this principle in adopting this method as a secondary source. See Shafique Virani, *The Ismailis in the Middle Ages: A History of Survival, A Search for Salvation* (Oxford University Press 2007) 156.

[50] '*Al-Maslaha*' means 'considerations that secure a benefit or prevent harm but, simultaneously, harmonious with the objectives of Sharia'. See Abu Hamid Mohammed Al-Ghazali, *al-Mustafa min Ilm al-Usul Volume 1* (Al-Maktabah al-Tijariyyah Cairo 1937) 139-140 wherein he explains the definition's objectives as '*protecting the five essential values, namely religion, life, intellect, lineage and property'.*

[51] To know more about these other methods see: Abdulrahman Alzaagy, 'Electronic Contract: a Study of its Application in the light of Islamic Law with Particular Reference to Saudi Arabia Case' (PhD thesis, University of Aberystwyth 2009) 40-45.

[52] Othman Ibn al-Salah al-Shahrazouri, *Adab al-Mufti wal Mustafti* (1st part, 1st edn, Dar Alkitab Alarabi, 1987) 21-25.

c) **Other jurisdictions** would be involved to a restricted extent in cases of a need for a solution for specific matters having no indications in the abovementioned laws. On the one hand, Egyptian law, specifically Articles 91, 94, 97 and 98, will be used as a benchmark to support the discussion in areas where Iraqi Law is silent, and to illuminate the path of the study where it represents a good case to add vital input to the field of contracting. This is for two reasons. Firstly, as previously mentioned, the ECC is one of the historical sources that inspired the ICC. Secondly, the ICC, Article 1(3) has obliged Iraqi courts to refer to judicial decisions and jurisprudential opinions of other countries whose laws are in conformity with Iraqi Code. As such, due to the obvious similarity between the ICC and ECC, it becomes logical to consult the latter to deduce any possible solutions to problems facing the Iraqi legal system. On the other hand, other jurisdictions may be consulted very restrictively, for instance English, American and European Union laws. The same is to be said for the conventions of United Nations that are pertinent to the topic of this research, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (CUECIC), UNCITRAL Model Law on Electronic Commerce (MLEC), and Unidroit Principles of International Commercial Contracts.

As for the structure of the thesis, it will be structured thematically, which means that in each chapter, the position of Iraqi and Sharia laws will be discussed and if necessary will be followed by discussion of Egyptian law. This will enable points of convergence and divergence, advantages and disadvantages, weaknesses and strengths can be brought out, as well as areas in Iraqi law that need improvement, also the lessons that these laws could learn from each other, if any, will be highlighted. Additionally, as an overseas researcher conducting PhD study in the United Kingdom, it might be expected to benefit to a restricted extent from English law and jurisprudence in concluding e-contract, as it is considerably richer than that of Iraq.

1.7. Original Contribution to Knowledge

To the knowledge of the researcher no research of this nature has been conducted before. The researcher has thoroughly read the literature pertinent to the formation of contracts in the Iraqi law and found that it covers other aspects of the Iraqi Civil Code (ICC) such as consideration, parties' capacity, parties' rights and obligations after the conclusion of the contract, and some other contractual issues. However, this literature does not cover discussion specifically on

Articles (82), (87) and (88) of this code and their suitability to apply on electronic contracts. The existing literature does not discuss the issue of formation of electronic contracting process, in particular, the issue of the moment the e-contract is concluded. Therefore, the original contribution to knowledge in this thesis is that it has firstly attempted to fill this gap by discussing and analysing the abovementioned articles regarding forming electronic contracts and specifically the time of concluding such new types of contracts. Filling this gap would help to improve Iraqi e-contracting processes by suggesting appropriate legal provisions, amendments and/or additions to current Iraqi law. This would also provide the legislative authorities in Iraq with critical, analytical and conclusive perspectives and solutions regarding the formation of electronic contracting process. This finally will help the authorities and law-making commissions and provide them with an ample and comfortable basis to improve the law and regulations that govern electronic contracting.

1.8. Organisation of the Thesis

For the purpose of covering the issues and topics of contract formation process, this thesis is divided into six chapters. Chapter 1 is the introductory chapter that contains: topic summary: thesis aims and objectives; thesis scope and limitations; research problems; research questions; research methodology; contribution to knowledge and thesis organisation.Whilst chapter 2 contains an introduction to the main definitions but also encompasses a summary for the issues and problems that are to be thoroughly analysed and criticized in the forthcoming chapters. Chapter 3 examines the topic of meeting of contract '*Majlis al-Aqd'* and its applicability to e-contracts. It also scrutinizes the option stemming from that meeting known as the option of meeting of contract '*Khayar al-Majlis'* and also examines that option's applicability to e-contacting. Chapter 4 researches and critically analyses two main topics. Firstly, the use of electronic agents and whether they are in fact agents or mere tools. Secondly, the distinction between offers and invitations to treat in the e-contracting process. It also covers additional issues such as silence and subject-matter in e-contacting. However, chapter 5 addresses the core issues in the thesis, namely the forms into which electronic acceptances are shaped. In the first part, the issues surrounding incorporating terms and conditions in e-contracting also receive detailed critical study. The second part critically examines the moment at which e-contracts are concluded with regard to the principal relevant theories and the various modern or newly invented means of communication. Finally, chapter 6 includes the overall conclusions from the research and makes recommendations for change.

Chapter Two

Conceptualising Legal Issues in Electronic Contract of Sale

2.1. Introduction

The modern world has witnessed enormous development in communications technology to the extent that communications tools have become indispensable to modern living. This development has presented tools that were originally confined to the telephone, fax and telex, but when the internet was invented it became the easiest medium for transferring and exchanging information, turning the world into an electronic global village.[53] This digital world has provided facilities for shopping through the internet; the consumer can enjoy this from the comfort of his home, all he needs is a computer, a browser and an internet connection.[54] Additionally, it has delivered great value to businessmen as it is no longer necessary for them to travel to meet their agents, partners and other businessmen as they can instead contact them by Skype, email and other electronic communication methods.[55] E-contracts are different to traditional contracts in terms of the mediums of communication that play a crucial role in electronic commerce (e-commerce). Iraq, like many other countries, witnessed a digital revolution which meant that it should adapt its legal system to be compatible with these developments. Commonly, e-contracts of sale are concluded between distanced parties, such as a business and a consumer, termed B2C contracts. Accordingly, this has motivated jurists to determine the legal nature of e-contracts of sale, i.e. whether they are contracts *inter praesentes* or *inter absentes*.[56]

This chapter is dedicated to examining e-contracting in terms of definitions and legal issues through two sections. The first will seek to define e-contracts and e-commerce, as these definitions differ according to legal perspective. The second will highlight some legal issues regarding e-contracting to be discussed in greater depth in the forthcoming chapters.

2.2. Internet and e-commerce: definitions

First and foremost, the word 'internet' is a combination of two English words, 'international

[53] Roger Leroy Miller and Gaylord A Gentz, *Law for Electronic Commerce* (Thomson Learning London 2007) 7. David I Bainbridge, *Introduction to Computer Law* (Pitman London1996) 23.
[54] Elinor Harris Solomon, *Electronic Money Flows: The Moulding of a New Financial Order* (Kluwer Academic Press 1999) 39.
[55] Lance Loeb, *Your Rights in the On-line World* (Osborne McGraw Hill 1995) 17.
[56] Ajeel (n 11) 297

network' or 'interconnected networks'.[57] It means international network communications. In 1969, when the internet was first created, the intention was to use it for military purposes and to create a transnational communication line throughout the world.[58] During its development in the 1970s, the notion of 'e-commerce' arose. This is a well-known phenomenon but defining it can be more problematic.[59] It was first shaped by the United Nations Commission on International Trade Law (UNCITRAL) through the Model Law of Electronic Commerce in 1996.[60] Even though 'e-commerce' was not defined in this law, it did describe examples of the way to use e-commerce to conclude e-contracts.[61] The Internet has also been described as:

> a world-wide electronic system for the exchange of information accessed through computers in conjunction with the telephone system. Persons wishing to impart information or to advertise on the Internet can do so by establishing for themselves a web site. Access to the information available at a web site is gained by callers accessing a relative web address.[62]

In contrast, 'e-commerce' is defined by the World Trade Organization (WTO) as 'the process of producing, promoting, selling and allocating products by using a communication network'.[63] This definition appears convincing as it does not confine e-commerce to the internet, but covers situations where commerce is undertaken through other types of communication network.[64] Additionally, 'e-commerce' is defined by the European Union (EU) as all actions performed by e-means, whether between commercial projects and consumers or among them individually and governments.[65] However, it is questionable whether it is legally valid to contract within e-

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[57] F Farrell, 'The Internet Doing Business in Cyberspace' (weblocator.com 2000) <, www.weblocator.com/attorny/mnlfrankfarrell > accessed 10 April 2018.

[58] In 1969, the American Ministry of Defence asked computer specialists to find a means to liaise with unlimited computers without depending on a single computer to control traffic, as a single computerised unit can be prone to a nuclear attack. See Miller and Gentz (n 53) 4. See also Clive Gringras, *The Laws of the Internet* (Butterworths London 1997) 2.

[59] D Poyton, 'Electronic Contracts: An Analysis of the Law Applicable to Electronic Contracts in England and Wales and its Role in Facilitating the Growth of Electronics' (PhD thesis, University of Aberystwyth, 2004) 17.

[60]The Model Law was issued under General Assembly Resolution 51/162 of 16th of December 1996 which consists of 17 Articles divided into two parts: the first deals with e-commerce in general whilst the second deals with specific facets of it <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm> accessed 23 June 2016.

[61] UNCITRAL Model Law, Article 2(1).

[62] *Shetland Times Limited v Wills* [1997] SLT 669, para 3 *per* Lord Hamilton.

[63] See World Trade Organization, October 2003 on the website: www.wto.org. accessed 11 April 2017.

[64] Examples include Minitel in France and Prestel in England. See Dr Khalid Mamdouh Ibrahim, *The Conclusion of E-contract* (2nd edn, Dar Al-Fikr Al-Jami'I 2011) 43.

[65] See Ravi Kalakota and Andrew B Whinston, *Frontiers of Electronic Commerce* (Addison Wesley 1996) 225. In France, the 230/2000 Act concerned with e-signatures has no definitions for such a notion. However, a report created by a committee presided over by Sir Lorentz for the French Ministry of Economy in January 1998 does give the following definition: 'e-commerce is a body of electronic transactions linked with commercial actions between several projects or between the projects and individuals or between these projects and administrative foundations'. This report therefore adopted an expanded concept of e-commerce by including banking actions in the e-commerce on the grounds that such actions encourage to conclude e-transactions by using e-payment systems. This law did not appear by coincidence in France as the manifestation of Minitel in France in the mid-1980s is seen as the pillar of e-commerce there. See Dr Usama Abulhasan Mujahid, *The Privacy of Contracting through Internet* (Dar Al-Nahda Al-Arabia 2000) 25.

commerce in the light of Iraqi and Sharia laws. Even though the Iraqi Electronic Signature and Transactions Act (IESTA) 2012 does not provide a definition for e-commerce,[66] scholars have defined it to be any transactions conducted by digital processes through the internet as commercial actions conducted by international network connected electronically through computers.[67] E-commerce can thus be defined as commercial actions where offer and acceptance are exchanged, and the consent issued, online. This does not extend to delivery, which is usually performed by offline facilities.[68]

For transactions, the general rule under Sharia is that first of all, they must be permitted under Islamic law. As such, transactions and commercial practices, if not banned by Sharia, will be considered legitimate. When it comes to habits and customs that the Iraqi people have become used to, these are usually not banned unless disallowed by the Lawgiver.[69] This principle is practical, as it shows that all human transactions, dealings and habits in the course of their daily lives are lawful under Islamic jurisprudence so long as there are no direct rules that expressly invalidate them. As such, all new matters will be deemed to be legitimate under the law unless new evidence show the opposite. [70] Secondly, it is evidently clear under the Sharia law that the general public are immensely interested in e-commerce and therefore it should be considered as a lawful means to conduct business. Thus *Al-Maslaha* or 'consideration of public interest' means the interest that seeks a benefit or prevents harm but which is simultaneously harmonious with the objectives of Sharia.[71] Online business transactions have become a new economy that is not constrained by local, state or international boundaries and their popularity is on the rise.[72] Thirdly, the legality of carrying out business transactions using e-commerce

[66] Iraq Electronic Signature and Transactions Act (IESTA) 2012. Neither does the Egyptian E-signature Act (EESA) no15/2004.
[67] For the first definition see Charles Trapper, *Electronic Commerce Strategy* (Harper Collins Publisher, USA, 2000) 5. And the second see Ravi Kalakota and Andrew B Whinston, *Electronic Commerce: A Manager's Guide* (Addison Wesley 2002) 3.
[68]Ahmed Abdul-Kareem Salama, *Qualitative Private International Law 'Electronic- Touristic- Environmental'* (1st edn, Dar Al-Nahda Al-Arabia 2002) 19.
[69] See generally SO Hassan, 'Islamic Law and Middle Eastern Legal Institutions' unpublished manuscript for a seminar at Columbia University School of Law 1970, on file in the Columbia Law Library) 45-107, 156-186
[70] Ibn Taimyya, 'Fatawi' (Legal Decisions) in Ibn Qassem Abdulrahman (ed) *Legal Decisions Volume 29* (al-Resalah, Beirut 1997) Volume 29, 226. Ibn Taymiyya is a Sunni Islamic scholar, the full name of this scholar is Taqī ad-Dīn Ahmad ibn 'Abd al-Halim ibn 'Abd as-Salam Ibn Taymiyya, known as (Ibn Taymiyya). He was born in 1263 in Harran-Turkey nearby for the borders with Syria. Even though he is deemed a member of the Sunni Hanbali school established by Ibn Hanbal, he called to return to the Islamic sources to pursue religious decisions without adherence to the opinions of the Sunni four schools of thoughts. He died at the age of 65 in confinement in Damascus in 1328.
[71] Se Al-Ghazali (n 50) 139-140. Also, Al-Ghazali construes the objectives in the previous definition as protecting and securing the five essential values, namely religion, life, intellect, lineage and property.
[72] See Ashely Kluver, *Electronic Commerce, Sales Tax, and the Implications for Missouri* (Institute of Public Policy University of Missouri, 2007) 1

has been endorsed by a collective decision of Sharia scholars in 'The extension of electronic commerce and the attitude of Islamic legislation.'[73] As e-commerce is in compliance with the principles and rules of Sharia it is permissible under Islam.[74] Therefore no Islamic legislature has banned the use of the Internet for commercial transactions as long as they comply with the general legislative rules.[75]

To sum up, it can be said that despite the various attempts to define e-commerce at the international level, no similar trend can be seen within the Iraqi or Egyptian legislatures, as both have not yet identified what the concept means. Since the mission of legislation is not basically creating definitions, then such a position for the Iraqi and Egyptian legislators could be viewed positively, as it allows the inclusion of future e-transactions within the meaning of e-commerce.

2.2.1. The concept of electronic contract of sale: definitions

Generally speaking, it is noticeable that many statutes (including those enacted in Iraq) do not offer legal definitions of many of their key concepts. This approach leaves room for practioners, scholars and other stakeholders to undertake this task. However, this task is eventually falls to jurists, scholars and commentators to discuss the various provisions of legislation. Consequently, to define e-contracts of sale, it is necessary to understand the meaning of the words 'contract' and 'sale'.

2.2.1.1. The definition of 'contract'

In Arabic, the word 'contract' is *aqd,* which literally means to 'tie' or 'link' things together, for example linking two parties together in a transaction.[76] In Sharia, the word *uqud* (plural of *aqd*) is mentioned in the *Qur'an* in the context of provisions related to the fulfilment of contracts.[77] According to the related verse in the *Qur'an*, Muslims are obliged to fulfil the terms of their contracts.[78] Similarly, the Civil Code of the Ottoman Empire*,* or *Majallat Al-Ahkam*

[73] A seminar held on the 23rd of March 2000 at Saleh Kamel Centre for Islamic Economy, Al Azhar University.
[74] Quoted from Muhammad Al-Sanad, *al-Ahkam al-Faqhiya lel Ta'amolat al-Electroniyya*, (Dar al-Warraq Publisher, Riyadh 2004) 167.
[75] It has also been noted that specific terms and conditions are required for a contract to be validly concluded and it is therefore essential to study such conditions and examine their applicability to electronic contracts. Hence, chapter 4 discusses both the elements of the legal capacity of parties and the subject matter of contract and then examines its legality and applicability to electronic contracts.
[76] The same as saying 'tying the rope' or in Arabic 'aqd alhabl' when it is tied correctly. See Mohammed ibn Abi Bakr Al-Razi, *Mukhtar alSihah* (1st edn, Dar al-Turath al-Arabi, no year) 186.
[77] *Surat Al-Ma'ida*, Chapter 5, verse 1
[78] Verse 1, *Surat Al-Ma'ida*.

Al-Adliyah (the Majelle), included a definition for 'contract' as 'the undertaking of an obligation by the contracting parties to perform a certain specified subject matter; it is tying the offer with the acceptance'.[79] An important point to note is that the vast majority of Muslim jurists are of the view that the contract of sale should be used as the standard for all types of contract.[80] An earlier thorough study of the contract of sale has established the broad and essential rules that can be used for all other contracts in general.[81] The *Qur'anic* verse, 'God has made sale lawful and interest unlawful' provides authority for the assertion in the preceding sentence.[82] As such, sale has become the prime example for valid contracts, whereas the payment and collection of interest has become the model for invalid contracts.[9] In addition, the contract of sale forms the essence of Islamic jurisprudence from which the different categories of contract have been greatly developed. All these other types of contract, even though legal institutions in their own right, are interpreted based on a sales contract as a model and at times have even been described as a kind of sales contract.[83] One of the most important principles is found in the *Qur'anic* command, 'O ye who believe! Fulfil your contracts'.[84] This statement governs the inviolability of all kinds of contracts whether private, public, civil or commercial. An important point to note here is that the Islamic law of contract does not discriminate between Muslims and foreigners or non-Muslims. For that reason, the Muslim community has a duty to abide by their contractual obligations, irrespective of whether they are concluded with Muslims or non-Muslims.[85]

According to the ICC, the word 'contract' is 'the connection of an offer issued by one of the parties with the other party's acceptance in a way that establishes a legal consequence on its subject matter'.[86] The narrow nature of this definition has led some Iraqi scholars to provide

[79] '*Majallat Al-Ahkam Al-Adliyah* is the civil code of the late Ottoman Empire and it was a codification of the Hanafi doctrine and opinions by a committee which worked for 21 years to accomplish that mission in 1876. The code has 1851 Articles in 16 books. It was stopped from being applied by the fall of this empire in 1924.
[80] Such as a lease contract and some other types of contract that are excluded from the scope of this research.
[81] Dr Abdullah (n 14) 33.
[82] Hussein Hassan, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality', (2002) 13(3) Journal of Islamic Studies 258.
[83] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 2002) 151-152
[84] Chapter 5, verse 1.
[85] Ali Abdullah Yusuf, *The Holy Qur'an Text. Translation and Commentary* (Dar al-Arabia, Beirut 1964) 238.
[86] ICC Article 73 was issued on 9 August 1951 in the Journal of Al-Waqa'I Al-Iraqia, Vol 3015, 243 and came into force in 1953. This article was literally taken from Article 262 of *Murshid Al-Hairan*. See Basha Muhammad Qodri, *Morshed al-Hairan ela Ma'arefet Ahwal al-Ensan* (2nd edn, Dar al-Farajani, Cairo 1983) 49. Even though the ECC has not defined such term, one jurist defined 'contract' as 'linking the parts of legal act: offer and acceptance'. See Ahmed Ibrahim Pak, 'Contracts, Conditions and Options' (1934) 1 Journal of Law and Economy 644.

more detail to the term 'contract'.[87] For example, some jurists believe that a contract is no more than assembling two identical determinations to arrange legal consequences whether to establish, transmit, modify or terminate an agreement.[88] According to this point of view, it is unreasonable to differentiate between the contract, which includes the determinations of the parties on one hand, and transmitting, modifying or terminating the obligation on the other hand, as these all are included within the term 'contract'.[89]

Others believe that certain conditions must exist to say that a contract has been concluded. First, there must be at least two parties seeking to conclude a contract. Second, the contracting parties must intend to make *legal* actions. Otherwise, it cannot be said that a mere invitation from a friend to attend a feast or provide a lift which is subsequently accepted, can be construed as a contract. This is, of course, because of the lack of an intention to draw any legal effect or inference from such actions.[90] A remarkable view analyses that the ICC adopts the substantial features of contract derived from Sharia law but simultaneously ignores the personal features of contract.[91] The latter refers to the fact that the contract creates only personal obligations upon the parties and this feature is absent in the ICC while the substantial feature of the contract creates its effect not upon the parties, but upon the subject of the contract.[92] The aforementioned ICC Article 73 states clearly that the contract establishes its effect in the subject of the contract'. The contract should have a subject matter.[93] This subject matter must be legitimate and, in general, in existence at the time of forming the contract.[94] Therefore if an agreement is between two or more parties who intend to make legal actions on a specific subject matter, then it can be said that this agreement is a contract according to the Iraqi and Sharia laws. Examples of such agreements include sale or tenancy.[95]

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[87] This is the specific meaning of the word contract, however, contract in its general meaning denotes every obligation that a person is committed to perform, whether or not unilateral or bilateral, or religious commitment such as vow or worldly such as sale. Zaidan Abdul-Kareem, *Al-Madkhal le Derasa al-Shariah al-Islamiya*, (al-Resalah Institution Beirut 1982) 285.

[88] Doi Abdur Rahman, *Shariah: The Islamic Law* (Ta Ha Publishers London 1984) 355.

[89] Dr Abdul-Razzaq A Alsanhori, *Al-Waseet Fi Sharh Alqanon Almadani, Masader al-Iltizam* (1st part, al-Ma'arif Press 2004) 118-119.

[90] See Alhakeem, *et al* (n 15) 23.

[91] Abdullah (n 14) 83.

[92] See G H Taha, *The Summary of the Theory of Obligation: The Sources of Obligations* (Baghdad University Press 1971) 25.

[93] Alhakeem, *et al* (n 15) 24; Taha (n 92) 27.

[94] Sulaiman Al-Joroshy, *Nadatiah al-Aqd we al-Khiyarat fi al-Figh al-Esslamy al-Mogaran* (Dar al-Kotob al-Watanyya Libya 2003)128; Alsanhori, *Masader al-Iltizam* (n 89) 118.

[95] Additionally, this term has been defined by Article 1101 of the French Civil Code as 'an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something'. The EU Brussels Regulations 2011 proposal, Article 2(a) describes the contract by its effect rather than its

2.2.1.2. The definition of 'contract of sale'

In Sharia, the Holy *Qur'an* and *Sunna*[96] have acknowledged the validity of sales as permissible and lawful forms of transactions. They explicitly state that 'Allah has permitted sale',[97] but require taking a witness when concluding a contract; 'take witness whenever you make sale'.[98] Likewise, Prophet Mohammed (PBUH) had encouraged his companions to adhere to honesty when concluding their transactions, by stressing that 'the traders shall be called at the day of judgement as guilty except those who were honest'.[99] However, it is important to note that Sharia scholars do not agree about the definition of the 'sale contract'. For example, within the *Hanafi* doctrine, some jurists point out that 'sale' denotes the process of exchanging things of financial value between parties.[100] This might suggest that 'barter contracts' could also be included within the meaning of this concept.[101] Other *Hanafi* jurists suggested that the concept of 'sale' may be summarized as the consent of the parties over that sale.[102] Another *Hanafi* jurist rejected this definition, arguing that it is confusing and unreasonable as it amalgamates the sale and its main element, the consent.[103] As such, it is incorrect to rely on 'consent' as a criterion for defining 'sale contract', because even donations to charities are consensual transactions, but could not be described as 'sales' because even though there is money paid, there is no subject matter returned between the parties.[104]

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meaning. It states that 'contract means an agreement intended to give rise to obligations or other legal effects'. See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 Final 284 (COD), this proposal was abandoned due to lack of political consensus. In England, the contract was defined with close wording to the Iraqi definition as 'the expression by two or more persons of a common intention to affect their legal relations' but agreement as thus defined has a meaning wider than contract which includes transactions of other types than contract as we commonly use the term. See the *dicta* of Lord Blackburn in *Brogden v Metropolitan Railway Company* 2 App Cas 666, [691]. The House of Lords apparently shows (Appeal Cases, 1877, vol. vii, 98, 106) that Lord Coleridge, CJ and Brett, J., had in deciding verdict in the joining Pleas used language proposing that a mentally uncommunicated consent might create an enforceable agreement. Lord Selborne had dissented on such a proposition, and Lord Blackburn was very fully and decidedly opposed. See William R Anson, *Principles of English Law of Contract and of Agency in its Relation to Contract* (10th edn, Clarendon Press 1903) 3.

[96] It means what the prophet Mohammed (PBUH) has said or acted explicitly or implicitly.

[97] *Surat al-Baqara* Chapter 1, verse 275.

[98] Ibid, verse 282.

[99] Mohammed I Altirmithi, *Al-Jami', chapter of sales, section of traders, 3rd part* (Dar Ihia'a Alturath Alarabi Press) hadith no 1210.

[100] Abdullah (n 14) 34.

[101] Kamaladdin M Alsewasi, *Sharh fath alkadeer* (4th part, 2nd edn, Dar Alfiqr 2006) 455; Zainaddin Ibn-Najeem, *Albahr alraiq, Sharh kanz aldaqaiq* (5th part, Dar almarifaa Press, 2006) 257; Mohammed A Ibn-Abdeen, *Hashiat radd almuhtar ala aldurr almukhtar* (4th part, 2nd edn, Dar Alkitab Alarabi 1966) 503.

[102] Alsewasi (n 101) 455; Ibn-Najeem (n 101) 257; Ibn-Abdeen (n 101) 503.

[103] Alsewasi (n 101) 455.

[104] Also, marriage contracts are excluded from being sale contracts because the dowry is not counted as a price or a compensation for marrying women but as a life partner. This was confirmed in the Holy *Qur'an* which states 'and give the women [upon marriage] their [bridal] gifts graciously'. *Surat al-Nisa* Chapter 4.

Meanwhile, *Maliki* jurists adopt two conceptions of the 'sale contract'. The first is a wide concept which portrays 'sale' as any contract that is based on obligations exchanged between the two parties, which includes donation contracts.[105] However, this concept is clearly inaccurate, as it allows the inclusion of donation contracts within this meaning. Their second concept is more restrictive than the first, as it depicts 'sale' as any contract which comprises obligations created between the parties under a condition that both obligations are not gold or silver.[106] Thus, the narrow definition seems like the wide definition but prevents the consideration from being gold or silver.[107] *Shafi'i* jurists have also defined 'sale contract'. According to Al-Nawawi, the concept of 'sale' means the exchange of money or the like between the parties.[108] This could be criticised for allowing other forms of transactions, such as loans and tenancy contracts, to be included within this definition, as the former amounts to no more than simply exchanging money between the two parties, and the latter no more than the paying of rent to dwell in the rented property. Such dwellings, according to the *Shafi'i* school of thought, are evaluated in the same way as money.[109]

To sum up, it could be said that Sharia scholars have agreed about the meaning of the sale to be a financial exchange for money or things. This includes barter contracts. They have also agreed to exclude other forms of transactions, such as loans, charities, marriage, donations and lease contracts from the 'sale' category. However, some have restricted the sale with some conditions, while others differed about whether the agreement between the parties to end the contract should be considered as a new contract or it is just annulling the old one. For example,

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[105] The ICC considers the donation as a uniliteral contract, and has regulated it in 25 Articles, from A. 601 to 625, under the name of 'contract of donation'. See among Maliki jurists, Mohammed Alkhurashi, *Ala Mukhtasar Saydi Khalil* (5th part, Dar Alfikhr Press, Cairo no year) 4; Mohammed A Aldusouki, *Hashiat Aldusouki* (3rd part, Dar Alfikr Press, no year) 2.

[106] Alkhurashi (n 105) 4; Also see Aldusouki (n 105) 4.

[107] Another *Maliki* jurist identifies sale as the contract of financial exchanges conducted on a thing or benefit permanently. This suggests the exclusion of other forms of contract such as charities (because it does not require the exchange of things) and lease/tenancy contracts (because these contracts are temporary and not permanent). See Mohammed Sh Alkhateeb, *Mughni almuhtaj ila marifat maani alfadh alminhaj*, (2nd part, Mustafa albabi alhalabi Press,1958) 2-3.

[108] Clearly, this definition is similar to the definition of the first group of the *Hanafi* jurists. See Yahia Ibn Sharaf al-Nawawi, *Rawdat al-Talibeen wa Umdat al-Mufteen* (3rd edn, 3rd part, al-Maktab al-Islami Press 1991) 339.

[109] Due to such criticism, al-Nawawi has added another condition to his definition of 'sale contract', namely the transfer of ownership between the two parties. Accordingly, the meaning of sale is the exchange of money or the like in a manner that passes the ownership between the parties. See Muhiyaddin Sh Alnawawi, *al-Majmu: Sharh al-Mohathab* (1st edn, Dar al-Fiqr Press 1996) 144. Furthermore, within the *Hanbali* school of thought there are different views of what the term 'contract' means. Some say that the sale is a contract of exchanging financial value of a thing or interest with another thing permanently, which means excluding the loan and usury contracts. Another Hanbali jurist describes the sale as the contract of exchanging things that have financial values between the contractual parties in a way that grants a full ownership to the buyer in terms of the transferred property. See Monsour Y Albahouti, *Kashaf alkina'a* (3rd part, Dar Alfikr Press 1981) 146; Abdullah Ozjan, 'Time Scale in Sale Contracts' (PhD Thesis, School of Islamic Studies, Umm al-Qura' University, Saudi Arabia 1989) 25.

Maliki[110] and some *Hanafi*[111] scholars believe that this new or amended agreement is a 'new converse contract', since in this scenario, the buyer becomes the purchaser and the purchaser becomes the buyer. Overall, it seems that no vital differences are shown between the definitions provided by the different *fiqh* schools, since sale is no more than the exchange of goods or services for a reasonable amount of price in a legally and customarily permissible manner.

As for the definition of contract of sale, the ICC describes the concept as follows: 'the sale is exchanging a thing with another and both are financially valuable'.[112] However, it could be argued that this text seems to be defining barter contracts instead of sale contracts, as both involve the handover of things from one party. However, the consideration in sales is to be only money, while in barters, the consideration can be things of monetary value. Interestingly, despite the fact that the ECC does not include a definition for the general term 'contract', it defines 'sale contract' in a more accurate way than the ICC. It states that 'the sale is a contract through which the seller is committed towards the buyer to transfer the property of a thing or another financial right for a sum of money'.[113] It is worth mentioning that the latter definition may fill the gaps that exist in the Iraqi text for two reasons. Firstly, it has depicted the sale not only as a contract that transmits the right of ownership to the new owner, but also transfers the other rights stemming from the right of ownership such as the intellectual property rights.[114] Secondly, this definition has, in contrast with the Iraqi text and Sharia jurisprudence, asserted explicitly that the price must be in the form of money. This is indeed what distinguishes sales contracts from other forms of contracts such as barter and money exchange contracts.[115] Consequently, it can be argued that the aforementioned ICC definition for 'sale' requires to be inclusive of all elements of the sale process, and of course to be distinguishable from other similar forms of contracts.

Similarly, the English law has also defined the contract of sale in the Sale of Goods Act 1979, s2 as 'a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price'. Other subsections mention that: (2) There may be a contract of sale between one-part owner and another; (3) A contract of sale may be absolute or conditional; (4) Where under a contract of sale the property in the goods is

[110] Aldusouki (n 105) 155.
[111] Ibn-Najeem (n 101) 102.
[112] Article 506 thereof.
[113] Article 418 of that Code, no 131, issued in 1948.
[114] Dr Omar Mo'min, *Lessons in the Named Contracts: Sale and Barter Contracts* (1st part, Egyptian Universities Libraries Consortium, Cairo 2011) 26-27.
[115] Ibid, 28.

transferred from the seller to the buyer the contract is called a sale; (5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell; (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. Furthermore, the Consumer Rights Act 2015 has stated a definition for the contract of sale as 'the contract through which the trader transfers or agrees to transfer ownership of goods to the consumer, and the consumer pays or agrees to pay the price'.[116] It can be noted that the proposal for the Brussels Regulations 2011, Article 2, has stated a definition close to the latter definition as paragraph k thereof has mentioned the following; 'sales contract means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority'.[117] Having provided different views about the meaning of the term 'contract' and 'sale contract', it is important now to discuss the notion of 'e-contract'.

2.2.1.3. The definition of 'electronic contract'

As mentioned before, a contract indicates a commitment undertaken by the contracting parties and accordingly becomes enforceable by law.[118] An e-contract seems not too different to the classic contract, the mere difference being the medium used in its conclusion.[119] Accordingly, since the electronic aspect is the key in differentiating between e-contract and paper contracts, the question arises as to which part should be electronic, the offer, the acceptance or both?

Two arguments are made to answer this question. The first grants the so-called 'electronic' feature to the contract when any part of it is performed electronically under a condition that this electronic part is fundamental to convey the will of the party to the other to fulfil the

[116] See Chapter 2 Goods; S5 therein.
[117] The concept of 'contract of sale' has also found an echo in the French Civil Code in Article 1582, which states that 'the sale is an agreement by which one person is bound to deliver a thing, and another to pay for it.
[118] Hasan A Deveci, 'Cash Back Deals: Con or Contract' (2009) 15(3) Computer & Telecommunications Law Review 60.
[119] Some believe that even the structure, nature and elements of e-contract amounts to no more than a physical contract with an extra element, which is the remote linking between offer and acceptance when a consumer tries to contract with a professional companies or persons. Additionally, the means used in such contracting has a crucial role in determining the type of conclusion and the type of contract starting from the negotiations stage till the conclusion of that contract. See Dr Mamdouh M Khairi, *Distance Action in Civil Law: Electronic Work from Home- a Comparative Study* (Dar al-Nahda al-Arabia, Cairo, Egypt 2004) 93.

contract.[120] For instance, if a company has advertised for sale a product whereby the user can recognise the product description online but the latter then physically approaches another branch of the company to contract with, then this contract is not an e-contract but a paper contract.[121] However, this opinion can be criticized as most contracts are not usually devoid of electronic elements and subsequently partially contracting by electronic means is not enough to brand it as an e-contract. Additionally, this view has omitted the determination of the criterion that should be used to identify the 'fundamental part or action' that should be undertaken electronically. Admittedly, this might be difficult, specifically because contracts vary in their constituent parts and therefore considering the priorities in advance can certainly be a difficult task.[122] The second argument provides that an e-contract may not be called as such unless *all* its parts are performed electronically.[123] This opinion is easy to criticize on the grounds that applying it may portray most e-contracts to be non-electronic, because one or two aspects have not been performed electronically. In addition, it may be inappropriate to deny the electronic feature in a contract that is mostly concluded by electronic means except for one or two steps concluded physically. On the balance of probabilities, it is suggested that the best way to solve these arguments is to select the act of acceptance as the determining factor. If the act of acceptance is undertaken electronically, then the contract can be deemed to be an e-contract. The rationale behind this is that any contract cannot be concluded without an acceptance to the initial offer, i.e. the offer alone is insufficient for the conclusion of the contract.

It is a fact that the e-contracting process includes many characteristics such as using e-money[124]

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[120] This opinion was accepted by the Geneva Roundtable Commission from 2 to 4 September 1999, with the support of University of Geneva, as they split the contracts performed partially by electronic means from the fully electronic ones into separate categories for discussing the issues regarding e-commerce and internet. The chairman, Professor Andreas Bucher, University of Geneva, Professor Katharine Boele-Woelki, University of Utrecht, assisted by assist. Patrick Wautelet, Catholic University of Louvain and others. See Catherine Kessedjian 'Electronic Data Interchange, Internet and Electronic Commerce', (Conference Paper 7, Hague Conference on Private International Law, April 2000) 19. See also Mustafa Ahmed Abu-Amro, *The Session of Contract in Online Contracting Framework: A Comparative Study* (Dar Alkitab Alarabi, 2008) 27.

[121] Mujahid (n 65) 134; Abu-Amro (n 120) 28. Among the Arabic laws that attempted to put a criterion which recognises electronic contracts is the Jordanian E-transaction Law no. 85 2001 which mentions in defining the e-contract: 'the agreement concluded by electronic means fully or partially'.

[122] Mujahid (n 65) 134; Abu-Amro (n 120) 28.

[123] Dr Muslih Ahmed Altarawna and Noor Hamad Alhajaya, 'Electronic Arbitration' (2005) 2 Journal of Law, Al-Bahrain University 205.

[124] E-money is virtual money and is the same as paper money and coins but with an international and global nature. See Paul Timmers, *Electronic Commerce: Strategies and Models for Business to Business Trading* (Wiley Publishing 2001) 178. It is also classified into two types: (a) digital money numbered on the basis of serial numbers issued by banks to their clients as a facility to make them capable of purchasing through the internet See Oliver Hanse and Susan Dionne, *The New Virtual Money – Law and Practice* (Kluwer Law International 1999) 136; (b) E-wallets, which are close to tangible wallets as a means of keeping Credit Cards, Personal ID and E-money,

paid with bank cards,[125] e-gold,[126] e-documents,[127] and e-signatures.[128] It can also include electronic funds transfer by SWIFT[129] or through the Bolero Project, which appeared first in 1992 as a project owned jointly by SWIFT and Direct Transmission Club. The former is a financial communication global banking network owned by banks. Its purpose is to securitise payment correspondences and establish secure programmes for e-commerce documents to be exchanged through channels. Added to that, this project enables the parties to send information and data to each other securely.[130] Despite this, the acceptance still seems the main pillar of any contract to which an electronic feature can be attributed, as the payment characteristics previously described can also be used in paper contracts. When defining online contracts, one should not expect to encounter any unique issues. If any peculiarities should arise, they are usually procedural rather than substantial from the perspective of contract law. In addition to that, writers and scholars tend to use either 'electronic contracts' or 'online contracts' when they deal with the different legal issues that are related to contractual procedures undertaken via the Internet.[131] There is no doubt that the Internet is a potent electronic means for concluding contracts using emails or other protocols.[132] The main differences between online contracting and email contracting is that the latter is not instantaneous and not always done online.[133]

Generally speaking, the technologically neutral descriptions of online contracts relate to

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which the consumer is able to empty or re-load in a hard disk in a personal computer. See Patrick Frazer, *Plastic and Electronic Money* (Wood Head–Faulkner 1985) 15.

[125] Ibid,12 -plastic cards issued by specialised banks and companies for their clients as alternatives to money such as Visa Card, Master Card and Carrier-Card.

[126] Meaning real gold, stored in a bank, and turned into digits to be added from one client's account to another. It can also be treated the same as money and has monetary power. See Anon, 'E-Gold, What is E-gold?' (21 March 2015) <www.e-gold.com> accessed 20 June 2016.

[127] IESTA 2012, Article 1(9) defines e-documents as 'papers and documents that are initiated, integrated, stored, sent or received whole or in part by electronic means including exchanging data electronically, by email, telegram, telex or copy-telegram that carries an e-signature'.

[128] ibid, defines e-signature as 'a personal signal undertakes a form of letters, numbers, symbols, signals, sounds or other, having a personal mode so as to be related to the website and certified by the certification commission'.

[129] An abbreviation of Society for Worldwide Interbank Financial Telecommunication.

[130] See Ibrahim (n 64) 78.

[131] For example, Juliet M Moringiello and William L Reynolds use the term 'electronic contracts' in their electronic case law survey (cases between 2004-2010) The series of cases is available through the following link <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 14 June 2017. Conversely, many writers frequently use the term 'online contracts'. For example, see Karen A Shiffman, 'Replacing the Infancy Doctrine Within the Context of Online Adhesion Contracts' (2012) 34 Whittier Law Review 141; William J Cordon, 'Electronic Assent to Online Contracts: Do Courts Consistently Enforce Click-wraps Agreements?' (2004) 16 Regent University Law Review 435; Hasan A Deveci, 'Consent in Online Contracts: Old Wines in New Bottles' [2007] Computer and Technology Law Review 1.

[132] Glatt (n 30) 34.

[133] The point regarding whether electronic messages and especially emails are instantaneous or not would be thoroughly illustrated in chapter 5.

instantaneously contracted paperless agreements through the use of a communication method that does not require the physical presence of either contract party and in most situations, one of the parties does not have the opportunity to negotiate with the other on the terms and conditions of the contract.[134] This comprehensive definition may include a broad range of current online contracting methods and certainly includes those conducted via the Internet and will certainly include all future new methods. In the EU, the E-commerce Directive provides no direct conception of online contracts. However, clear reference to 'online contracts' was made in the Directive as part of the wider and broader concept of Information Society Services as recital 21 of the Directive, which mentions that: 'the coordinated field covers only requirements relating to on-line activities such as online information, on-line advertising, on-line shopping, on-line contracting'. Moreover, and more explicitly, the Directive also denotes that the term 'online contracts' can include activities like selling goods and their delivery online; as recital 18 provides specifically that: 'Information Society Services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods'. However, this is done without mentioning websites explicitly. [135]

In many countries, 'electronic or online transactions' are the more commonly used terms as compared to 'electronic or online contracts'.[136] Perhaps it is no use to differentiate between the two terms for it is clear that the term 'transaction' is a broader concept and certainly includes, from the legal point of view, binding contracts. However, some laws prefer the term 'automated transactions' and provide a more technical definition that is able to tackle the contractual process on websites.[137] For instance, the United States Uniform Electronic Transactions Act (UETA) 1999 Article 2(2)[138] and the Uniform Computer Information Transactions Act (UCITA) 1999 Article 102(7).[139] Both mention the following identical definition: "[A]

[134] Donnie L Kidd and William H Daughtery, 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions' (2000) 26 Rutgers Computer & Technology Law Journal 215.
[135] Jane Kaufman Winn and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' (2002) 27 European Law Review 567.
[136] Such as the US and other common law countries, see Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press 2009) 30.
[137] See Brian D McDonald, 'The Uniform Computer Information Transactions Act' (2001) 16 (1) Berkeley Technology Law Journal 461.
[138] The Uniform Electronic Transactions Act (UETA) is one of the several United States Uniform Acts proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Forty-seven states, the District of Columbia, and the U.S. Virgin Islands have adopted the UETA. Its purpose is harmonising state laws concerning retention of paper records and also confirming the validity of electronic signatures. Available on: http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf accessed 18 May 2018.
[139] The Uniform Computer Information Transactions Act (UCITA) is a proposed state contract law developed to regulate transactions in computer information products such as computer software, online databases, software

transaction conducted or performed in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction".

Sales transactions carried out on websites are usually called web contracts by writers and academics.[140] Websites offering goods or services are known as electronic marketplaces, of which Amazon and eBay are well known examples. Therefore, electronic marketplaces may be defined as websites that allow businesses and consumers to sell their goods and services wherein the transactions are managed electronically without requiring the contracting parties to be physically present. For example, eBay portrays itself as 'the world's online marketplace, enabling trade on a local, national and international basis, it offers an online platform where millions of items are traded each day'.[141] However, it can be argued that using the electronic marketplace to conclude online contracts may give rise to many questions regarding the legal status of the contracting parties, such as whether or not they are consumers or were trying to conclude commercial transactions. The unique characteristic of electronic marketplace transactions gives rise to a lack of clarity, including questions over the categorisation of the particular online contract as B2B, B2C or C2C contracts.[142] It may be beneficial to differentiate between two types of electronic marketplace. The first type is operated and managed by the marketing and sales departments of the manufacturers themselves.[143] They sell their products on websites bearing their domain names that are normally their trade name as well.[144] The

access contracts or e-books. It was originally drafted over a four-year period from 1996-1999. It is destined for consideration by all fifty state legislatures, the District of Columbia and the American Territories. UCITA has become one of the most controversial uniform commercial laws. Since 2000 libraries have joined with a diverse coalition of partners including retail and manufacturing concerns, consumer advocates, insurance and financial institutions and other non-profits in mounting strong opposition wherever UCITA has been considered. Available on: http://www.ucitaonline.com accessed 18 May 2018.

[140] This denotes narrowly the sale transaction itself which occurs on a website but does not include the wider notion of online contracts over the internet – these are referring to as click-wrap and browse-wrap agreements.

[141] See generally Ebay.com <http://pages.ebay.co.uk/aboutebay.html > accessed 10 July 2017.

[142] Christine Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14 Lex Electronica 1

[143] Two categories of online contracts can be concluded over such websites, namely B2B and B2C, as governed by EU Regulations and Directives. These are: European Parliament and Council Directive 2000/31/EC of 8 June on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market [2000] OJ 178/1 (E-commerce Directive); European Parliament and the Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64 (Consumer Rights Directive); European Parliament and Council Regulation 2008/593/EC of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ 177/6 and 1215/2012 EU Brussels | Recast Regulations on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ 12/1. The European Commission is currently working on updating the E-commerce Directive (Action 9 of the Digital Agenda for Europe).

[144] Such as www.hp.com, www.dell.com, and www.apple.com

second type is most pertinent and is the more problematic one, those which act as facilitators between sellers and buyers.[145] These second website types are different from the first because transactions undertaken using them may include three contracting parties, in that as well as a seller and a buyer, there will also be the forum provider or marketplace operator.[146] As regards the use of these websites, it appears that two online contracts are concluded. The buyer and seller conclude a contract, i.e. a contract whereby the buyer agrees to buy an item offered for sale by the seller on the website. There is also another contract between the buyer and the seller with the service provider in which the parties agree to abide with the website's terms and conditions of use, an agreement otherwise known as the user agreement.[147] In this scenario, the website operator makes their profit by obtaining a commission from the seller and as such is deemed to be the third party in the contract.[148]

It is important to note that there are some jurisdictions that use the term 'distance contracts' rather than 'electronic contract'.[149] For example, in the United Kingdom, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 provide that:

[d]istance contract means a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.[150]

The same position is adopted by the European Directive of 2011/83 which gives an identical definition that places weight on the means of that communication.[151] Accordingly, it can be

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[145] Andres Guadamuz, 'eBay Law: The Legal Implications of The C2C Electronic Commerce' (2003) 19 Computer Law & Security Report 468.
[146] Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet' (2009) 27 Pennsylvania State International Law Review 609.
[147] *Sayeedi v Walser* 15 Misc 3d 621, 835 NYS 2d 480 NY 2007.
[148] There is potential for a third category of online contracts to exist on websites: online C2C contracts.
[149] As regards French law, it has not given any definitions for e-contracts. See Dr Usama Abulhasan Mujahid, *The Mediate in e-transactions, according to the most recent legislations in France, Egypt, Jordan, Dubai and Bahrain*, *1st part* (Dar Al-Nahda Al-Arabia 2007) 134.
[150] See Article 5 of these regulations, which came into force in 13th June 2014, after which date and according to Article 2 thereof the Consumer Protection Regulations 2000 would be suspended. The suspended Consumer Protection (Distance Selling) Regulations 2000 and the Financial Services (Distance Marketing) Regulations 2004 have stated an identical text in Article 3(1) thereof. Also, some foreign laws have defined the distant contract, such as section 20 of the Quebec Consumer Protection Law in Canada which has defined it as 'Remote-parties contract is a contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer, which is addressed to one or more consumers, nor at the time of acceptance, provided that the offer has not been solicited by a particular consumer'. See comments on this: Margaret Eldridge, *Security and Privacy for E-Business* (John Wiley Publishing New York 2001) 8.
[151] See Consumer Rights Directive 2011/83/EU Article 2(7). This Directive which, *inter alia* repealed Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. While the repealed

noted that some laws have defined distance contracts instead of e-contracts. The usage of the term 'distance contracts' leads to the question of whether it has the same meaning as 'electronic contracts'. In attempting to answer this, some argue that without doubt, the term 'electronic means' represents a broad criterion that can include a wide range of distance contracting.[152] Others believe that the two concepts have the same meaning; they both mean an agreement by which an offer and an acceptance are met on goods and services through international networks of remote communication using audio-visual mediums.[153] This thesis adopts the view that the scope of distance contracts is wider than e-contracts because whilst any electronic contract is certainly a distance contract, the reverse is not true. In other words, the category of distance contracts includes not only electronic contracts but also includes other forms of contracts that cannot be considered as electronic contracts. A good illustrative example is a contract concluded by post, which is a distance contract but cannot be counted as an e-contract because of the absence of the electronic element, as no aspect of its conclusion is electronic.[154]

The term 'e-contract' is defined explicitly in Iraqi law, while some other Arabian laws only referred to it implicitly.[155] In fact, the IESTA 2012, Article 1, not only gives a definition for e-

directive of 1997 mentions that: 'any contract concerning goods or services made between a supplier and a consumer within the framework of a system of remote-selling or service-providing organized by the supplier which, for this contract, uses exclusively one or more remote communication technique until the closing of the actual contract'. It also stated a definition for communication means as 'any means which without the physical and simultaneous presence of the supplier and consumer may be used for closing a contract between parties'. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

[152] See Faye Fangfei Wang, *The Law of Electronic Transactions: Contemporary Issues in the EU, US and China* (Routledge London 2010) 52. Also see generally, Andrew D Murray, 'Entering into Contracts Electronically: The Real W.W.W' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet: A Framework for Electronic Commerce* (Hart Publishing Oxford 2000) 17, 23

[153] See Directive 97/7/EC which emphasizes that 'any contract … within the framework of a system of remote-selling … which, for this contract, uses exclusively one or more remote communication technique …'. See also Ibrahim (n 64) 72.

[154] See American definitions for e-contract such as 'an e-contract is the contract that underlies exchanges for mails between the seller and the buyer based on previously organised and electronically processed forms, which establish contractual commitments'. See M S Baum and H Perritt, *Electronic Contracting, Publishing EDI Law* (Wiley Law Publications 1991) 6.

[155] Among the former category, the Jordanian E-transactions Act no. 85 2001 has explicitly defined the e-contract as 'an agreement concluded by electronic means as entirely or partially'. However, the Tunisian E-exchanges and E-commerce Act no. 83 2000 did not define the e-contract explicitly but only tacitly; it has rather explained some concepts regarding e-contracting such as e-exchanges as 'such exchanges conducted by electronic documentations' and e-commerce as 'commercial operations conducted by electronic exchanges'. While the Law of Emirate of Dubai for E-transactions and E-commerce no. 2 2002 has put definitions for e-transactions and e-commerce, when the former defined as 'any dealing, contract or agreement concluded or implemented fully or partially by electronic correspondences' whilst the later defined as 'electronic transactions enrolled by electronic correspondences'. It is seen that both of the Tunisian and Emirate legislators have not created explicit definitions for e-contract but rather their definitions for e-transactions tend to cover and include the e-contract as to be concluded by electronic correspondences. See the comments on these laws: Dr. Shihata Ghareeb, *The Electronic Contracting in Arabic legislations* (Dar Al-Nahda Al-Arabia 2005) 30.

transactions[156] but also expresses the electronic contract as 'the connection of an offer issued by one of the parties with the other party's acceptance in a way that originates a legal consequence on its subject matter, which is performed by electronic means'.[157] It can be observed that this definition adds an important element to the general definition of contract; that being the medium used for the conclusion of the contract.[158] Perhaps more important is the technology-neutral flexibility of the language used in the text, it however still needs more neutrality to cover all types of electronic contracting means.[159] In the case of the IESTA 2012, its provisions do not utilise the language of 'online contracts' for it uses the term 'electronic contract' instead. Despite this, it is indisputable that contracts concluded on online websites fall within the term 'electronic contracts'. The Act's definition for electronic contract is technologically more neutral as it merely states that an electronic contract is concluded after the exchange of offer and acceptance through the electronic means, without limiting the meaning of 'means'.[160] The IESTA 2012 also indirectly tackles the critically important issue of the acceptance that is electronically performed when it defined the e-contract as the *connection* of an offer with an acceptance.[161] Besides that, it also identified the vital feature that distinguishes it from conventional contracts, i.e. the use of electronic means.[162] As such, the acceptance of such a definition by the Iraqi legislature would be most appropriate. From the discussion of the definition above it appears that the definitions, especially the statutory definitions, have tried as much as possible to be technologically neutral. This thesis supports this approach.

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[156] IESTA 2012, Article 1(6) mentions that 'E-transactions are requests, documentations and transactions conducted by electronic means'.
[157] Ibid, Article 1(10) thereof.
[158] Ibrahim (n 12) 6-7.
[159] IESTA 2012, Article 1(7) defines 'E-means' as 'electric, magnetic, optical or electromagnetic devices, equipment, tools or any other similar means utilised to originate, process, exchange and restore information'. Again, communication mediums were defined in the United Kingdom by The Financial Services (Distance Marketing) Regulations 2004, Article 2(1) as follows 'durable medium means any instrument which enables a consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'.
[160] IESTA 2012, Article 1(1) states that "the connection of an offer issued by one of the parties with the other party's acceptance in a way that originates a legal consequence on its subject matter, which is performed by electronic means'.
[161] IESTA 2012Article 1(10).
[162] Ibrahim (n 12) 7. Furthermore, the Egyptian E-signature Act no. 15 2004 provides no definition for e-contract but instead the draft of its E-commerce Act provides such a notion as: 'any contract in which showing the will of one or both parties; or managing the negotiation and exchange of documentations; have been fully or partially conducted by an electronic medium'. This draft was created in 2001 by a board comprising of numerous specialists through several diverse Egyptian ministries. It was additionally formed by Ministry of Justice upheld by the Information Centre Technical Board. However, this proposition is still pending. See Ibrahim (n 12) 7.

2.2.2. Methods of conclusion of e-contracts

Internationally, a number of preferred methods can be said to be in use for the conclusion of commercial e-contracts. Firstly, there is the exchange of email, wherein offer and acceptance are exchanged via electronic correspondence between two computers that pass through not less than one internet service provider (ISP). It appears that there is a clear agreement with regards to the validity of email communications.[163] The similar UK stance is illustrated by the *Bernuth Lines Ltd v High Seas Shipping Ltd*, wherein the court held that although the system treated the email in question as spam, nevertheless it represents a valid method to communicate acceptance.[164]

Secondly, Electronic Data Interchange (EDI) is a technological method that allows a party to electronically send information as well as legally pertinent 'documents' to another party which is then processed in the recipient's information system.[165] The aforesaid technology utilises standard electronic formats which, in the present context, act as a substitute for hard copies of invoices and purchase orders.[166] These standard formats are comprised of data elements that the receiving computer can read and use, and, in most cases, purported 'free text' elements which the computer cannot directly process, but which can be displayed, printed or viewed by the recipient. EDI can be used in a variety of contexts to avoid relying on paper documentation. These include methods to communicate information on bills of lading, transfers of securities and letters of credit.[167] Currently, many EDI exchanges have no intention to control when or if a general commitment to buy or sell is present between the trading partners. Instead, they spell out the terms, conditions and limitations under which the EDI system can be used to offer or

[163] In *Rosenfeld v Zerneck* 4 Misc. 3d 193, 776 NYS 2d 458 (Sup.Ct. Kings Co., NY, 4 May 2004) the Supreme Court of New York upheld that e-mail is a valid means to form acceptance though this court had dismissed the claim of the plaintiff due to the fundamental terms of such case. Additionally, it was found by the High Court of Singapore in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] SGHC 58 that a lease contract has resulted from the exchange of e-mails; see also *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2. The South African Labour Court decreed that email and SMS as means of communications are adequate as written documents in *Jafta v Ezemvelo KZN Wildlife* (D204/07) [2008] ZALC 84. In England, in *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] 1 WLR 2397 CA (Civ Div) the Court of Appeal upheld that the malfunction of an e-mail takes place when it is sent but not entering the recipient's mailbox.

[164] *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2005] EWHC 3020 (Comm); [2006] 1 All ER (Comm) 359. See also Wang (n 153)

[165] S*ee* Michael S Baum, 'Legal Issues in Electronic Data Interchange' (1991) 322 Practising Law Institute 575, 579-80

[166] See Charles Mooney Jr., 'Beyond Negotiability: A New Model for Transfer and Pledge of Interest in Securities Controlled by Intermediaries' (1990) 12 Cardozo Law Review 305, 307.

[167] Most current EDI transactions are commercial in their nature, likely involving big companies on one or both sides of the transaction. EDI environments also mostly involve ongoing relationships between companies engaged in a supply or familiar contract that amplifies over time. However, the innovation of technology may likewise be utilised for separated or discontinuous exchanges between individuals who have no direct prior dealings. Ibid.

accept orders and also define the legal consequences for the parties to the trading agreement.[168] Due to the commercial character of EDI, it has not been significantly affected by consumer protection regulation. The evolution of EDI law occurs mainly in commercial experimentation and the development of a model for trading partner contracts in their pursuit of an optimal contract structure that EDI can use.[169] The courts have dealt with very few cases of disputes in EDI relationships.[170] However, computer systems which include EDI can be devised to circumvent the problem that neither party will be aware of any failed communication, at least indirectly. The design element involves an automatic confirmation of receipt of the message.[171] If the system has such a capability, it justifies the application of the 'in-person' rules. If receipt verification is built into the ordinary system, the sender will immediately know whether his message has been received or not. Subject to the verification form, the sender can ascertain whether the information message was distorted or intact. In such a situation, the sender can immediately rectify any ambiguities or failures. For that reason, the courts should implement the 'in-person' rules that for acceptance to be effective it must be received.[172]

Thirdly, through conversation (chatting) or video conferences, the term 'conversation' might lead to some confusion about its meaning when used in this context. It does not mean the literal oral conversation or 'chatting' that seems at the first glance. Conversation, as a contracting method, is most likely to commence depending on writing which might later transform into a real conversation; so that this service transforms into a real phone service.[173] An Internet user can speak to the other person by means of writing, however, to operationalise the conversation system, the two parties must be contacted with one of the service's devices, so that each party can write his/her ideas in part of the conversational page. At the same time, it is possible for the other party to write his/her ideas in the same page in a sequential way. Therefore, the exchange of ideas between the two parties can happen simultaneously. It is also possible that the computer or phone can be provided with digital cameras that enable the acquisition of

[168] See generally Benjamin Wright, *EDI and American Law*: *A Practical Guide* (Electronic Data Interchange Association 1989).
[169] See for example, American Bar Association, 'The Commercial Use of Electronic Data Interchange-A Report and Model Trading Partner Agreement' (1990) 45 Business Law 1645, 1721 (hereinafter *Electronic Data Report*) citing Model Electronic Data Interchange Trading Partner Agreement and accompanying commentary (hereinafter *ABA Model Agreement).*
[170] See *Shell Pipeline Corp v Coastal States Trading, Inc.,* 788 S.W.2d 837 (Tex. Ct. App. 1990).
[171] Raymond T Nimmer, 'Electronic Contracting: Legal Issues' (1995) 14 John Marshall Journal of Computer and Information Law 211, 216.
[172] The most developed type of electronic contracting is electronic data exchange (EDI), which allows the contractual partners to exchange archives and documents electronically.' Baum and Perritt, (n 155) 2.
[173] Mahmud Ab-Alraheem Al-Shareefat, *Agreement in Contracting Through Internet: A Comparative Study*, (Dar Al-Hamed for Publishing and Distributing, Amman, 2005) 16.

images or even video conferencing. Consequently, contracting can be concluded through audio-visual communication.[174]

Fourthly, websites can also be utilised in many ways and they are generally classified as 'passive' or 'interactive'.[175] In the present context, the term 'passive' refers to websites that are restricted to the provision of information to the viewer. Examples include: product advertisements; product ranges and price lists, contact persons and addresses. The term 'interactive' refers to websites that permit a greater degree of interaction with website visitors and usually allow the visitor to place their orders.[176] Such websites may also offer a 'personalised' shopping experience through the use of 'cookies'[177] that keep personal use information that in turn enables the website's software to target advertising through the utilisation of the user's profile.[178] These latter 'interactive websites' may be further classified as follows:

1- Click-wrap agreements: where the consumer provides assent to the terms of a contract by clicking on the 'I agree' or 'I accept' button on the website. Terms are displayed on the screen and are available to be read by the consumer before clicking on the acceptance button. If the consumer does not agree, the website will not accept the consumer's order.[179] Moreover, accepting the terms of online agreements means making an explicit selection, which is a prerequisite for purchasing goods and services

[174] Ibrahim (n 12) 132.
[175] Poyton (n 59) 15-16.
[176] This might encompass the directing of automatic responses to approve the receipt of orders, the tracking of orders, and in many situations the automatic provision of the service, information or data product ordered. See Shop@aol.co.uk; http://www.shoppinga.olc.o.uk.
[177] According to 'Netscape', cookies are a 'general mechanism which server-side connections can use to both store and retrieve information on the client side of the connection'. Or, again a little bit of information sent from a website and put away on the client's PC by the user's web browser while the client is perusing. Cookies were intended to be a trusted component for websites to remember pre-stated data, (for example, items included in the shopping basket in an online store) or to record the client's perusing actions (including clicking specific buttons, logging in, or recording which pages were visited previously). They can likewise be utilised to recall self-assertive pieces of data that the client already placed into the fields of transaction format, for example, names, locations, passwords, and debit card numbers. See Jey Kesan and Rajiv Shah, 'Deconstructing Code' (2004) 6 Yale Journal of Law and Technology 277
[178] For example, `virtual shopping centres' with virtual shop associates to manage you around the website with a human guiding face, giving the client a more well-known shopping knowledge. Indeed 'science fiction' based devices, for example, a couple of exhibitions through which the wearer can access the systems including the Internet, which are worked by voice summons or even eye movement, are technologically on the horizon (Tomorrows World, BBCJune 2001). Science or fiction?
[179] *Stomp, Inc v Neat, LLC* 61 F Supp. 2d 1074, 1080 n.11 (CD Cal 1999); Mark E Budnitz, 'Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?' (2000) 16 Georgia State University Law Review 741.

on the internet.[180]

2- Browse-wrap agreements: unlike click-wrap agreements, the terms are not displayed on the computer screen but appear in the form of a hyperlink, and the customer's assent is obtained implicitly while navigating the website.[181] Accordingly, it is debated whether such implicit consent could be validly obtained through browse-wrap agreements.[182] It is submitted that the mode of assent depends on how the terms and conditions are arranged and shown on the website, and also accepting the terms and conditions may be demonstrated by conduct[183] or be collected the first time that users enter the website.[184]

3- Shrink-wrap agreements: this category refers to software product contracts commonly used in agreements of software licences where the assent is somewhat less explicit. Terms and conditions in this category are invisible until users commence installing the software on smartphones and computers or tear open the shrink-wrapped package.[185] In other words, it is only once the purchaser pays for the product that the the terms of the contract are accessible to view.[186]

[180] See for example, *iLAN Sys, Inc v NetScout Serv Level Corp* 183 F. Supp. 2d 328, 330 (D Mass 2002) which addresses click-wrap agreements contained in the purchased software. See also Smith (n 40) 357.
[181] R Mann and J Winn, *Electronic Commerce* (2nd edn, Aspen 2005) 275*;* Wang (n 153) 4-5.
[182] See for example *Aral v Earthlink Inc* 134 Cal App 4th 544 (2005) but note that the clause was held unenforceable on other grounds; *Hubbert v Dell Corp* NE2d, 2005 WL 1968774. The US District Court in *Southwest Airlines* summarizes the recent American legal situation that the validity of a browse-wrap license stands for whether a website user has a constructive, realistic and precedent knowledge of the terms and conditions of a site pre-using the website. Furthermore, the court added that browse-wrap agreements seem to be unenforceable once the website fails to provide adequate notice of the terms to the extent that prevents the actual or constructive knowledge. See *Southwest Airlines Co v Boardfirst LLC* Civ Act No 3:06-CV-0891-B (ND Texas, 12 September 2007) 9.
[183] *Specht v Netscape* 306 F.3d 17 (2d Cir 2002).
[184] *Ryanair v Billigfluege.de* [2010] IEHC 47.
[185] *ProCD, Inc v Zeidenberg,* 86 F.3d 1447, 1449 (7th Cir 1996).
[186] It is worth mentioning that there is almost no agreement among the opinions of courts regarding whether shrink-wrap agreements should be valid and enforceable. Though courts tend to accept such agreements without prior disclosure in the US, a stricter approach has been adopted by the Uniform Computer Information Transactions Act (UCITA) 1999 s209. This states that if consumers have no chance to review the products before the payment, they can return them to the merchants. However, UCITA is not adopted widely in the US. In contrast, in the EU, there is also an inclination to disclose the terms and conditions prior to such agreements, and this was confirmed by the EC Directive on Electronic Commerce 2000, art10; EC Distance Selling Directive 1997, art 5 (replaced by the EC Directive on Consumer Rights 2011 art.8); and EU Directive on Unfair Commercial Practices 2005, in general. In *Klocek v Gateway, Inc* 2000 US Dist Lexis 9896, 104 F. Supp. 3d 1332 (D Kan, 16 June 2000) the court held that shrink-wrap agreements do not pass as binding contracts.

2.3. Legal issues regarding the formation of e-contracts of sale

The Internet is commonly described as global and sometimes as borderless, and it is contended that both attributes are the same. The Internet is now one of the most important tools that is used for many types of transactions, be it for business purposes or other fields of interaction.[187] It enables the provision of a variety of important services that include using email to conduct financial and banking transactions, sales and purchases of goods from websites or "virtual shops and stores".[188] It has made it possible for Internet users to purchase goods from specialised websites selling goods online (virtual shops).

The contract is concluded after an offer by the online purchaser receives an acceptance of the offer by the owner of the website. In this situation, the electronic contract is deemed to have been lawfully concluded and as a result the purchaser must pay the agreed price using one of the common payment methods used in e-commerce.[189] There are two main Internet methods to communicate and interact between people and they are through the use of email or websites. From a legal point of view, the two methods are extraordinarily different from each other.[190] In actual fact, there is significantly less legal uncertainty and contentions associated with using email communications than for website communications.[191] That said, the conventional rules in Iraqi national as well as the international law of contract appear to hamper their application of e-contracts.[192]

2.3.1. Issues regarding the meeting of contract in e-contracts

A contract shall be valid when the consent or offer and acceptance is communicated to each party by the other. However, the question arises as to how long the offer should remain open. Must the acceptance be made immediately after an offer is made or can it be accepted as and

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[187] Wolfgang Kleinwachter, 'WSIS and Internet Governance: The Struggle Over the Core Resources of the Internet' (2006) 11 Communications Law Journal 1.

[188] Ihab Al-Dassouki, *Economic and Financial Dimensions of Electronic Commerce and Its Application in Egypt* (Report introduced to the Information Centre and Supporting Decision Making in the Presidency of the Egyptian Ministerial Committee 2001) 6.

[189] Notwithstanding the aforementioned, in general, Internet usage is still restricted in scope and narrow in most of the Arab Countries, especially in Iraq, whether in the context of contractual relationships or other applications. One of the prominent Arab Countries using the Internet world is the UAE. In October 1999, the Government of Dubai announced the opening of the first free Internet zone, costing US$ 200,000,000 as the first step of the project, as the first Arabic initiation to patronise e-commerce. This project was called 'Dubai Internet City', when most of its parts were accomplished. The City is consisting of the first Academy dedicated to internet science. The overall budget of the project of Dubai City of Internet is US$1billion. For more information, see, http://www:dubaiinternetcity.com.

[190] Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate Farnham, UK 2006) 383.

[191] Dan Jerker B Svantesson, 'The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know about the Internet' (2005) 13 International Journal of Law & Information Technology 39.

[192] Karen Mills, 'Effective Formation of Contracts by Electronic Means: Do We Need a Uniform Regulatory Regime?' (Conference Paper, World Summit in Information Technology, Tunis, November 2005).

when the offeree wishes? This matter has been addressed partially by Iraqi law under the concept of 'meeting of contract', an important Islamic commercial doctrine, that is derived from Sharia law. As such, unless it has been otherwise agreed, in order for the contract to be legally concluded, the offer and acceptance must be effectively communicated during the contracting parties' 'meeting of contract'.[193] The requirement of 'meeting of contract' under the Islamic legal system is for the determination of the period during which an offer remains legally valid for acceptance. In practice, it is not possible for the offer and acceptance to be concurrently or simultaneously communicated. Therefore, to give time for the offer and acceptance to be communicated, the 'meeting of contract' was created and the offer will remain valid for acceptance so long as the contracting parties continue to meet and neither an explicit nor implicit rejection of the contract has been made.[194] Conventionally, a contract is legally concluded when the contracting parties are physically present in the same place, or if they are in different places, they can use a suitable method of communication to convey the offer and acceptance such as using letters or messengers.[195] If both parties meet up in the same location the concept of 'meeting of contract' is easily established. But, if they are at different locations during the conclusion of the contract, then the issue of whether the concept of 'meeting of contract' can be legally applied will arise.[196] Therefore it is important to have discussions on the application-related issues of the concept of 'meeting of contract' in face-to-face transactions and in transactions between absentee parties.

Recent technological developments have given more legal concerns to twenty-first century contracting parties. Many current methods of communication have enabled them to instantaneously communicate with one another and as such, the offer and acceptance can be immediately communicated to the other party.[197] However, not all methods of communication are instantaneous, and sometimes delays in the dissemination of an offer and its receipt may occur.[198] As a result, there have been debates over whether a contract concluded using modern forms of communication can be compared to that in a face-to-face transaction or a contract

[193] Ajeel (n 11) 297.
[194] A D Al-Kasani, *Bada'e al-Sana'e fi Tarteeb al-Shara'e Vol 6* (Dar al-Kotob al-A'lmiya, Beirut 1997) 539.
[195] Gala (n 26) 466.
[196] Hamudi (n 27) 93.
[197] For more information see (UK) Department of Trade and Industry, *Building Confidence in Electronic Commerce- A Consultation Document* (1999) URN 99/642, 15.
[198] For example, an e-mail has a chance of being delayed, lost, or even becoming scrambled and nonsensical because of the packet switching technology used. For more discussion of 'packet-switching' see Chris Reed, *Internet Law: Text and Materials* (Butterworth London 2000) 10-14.

made between two parties *in absentia*.[199] In the light of Internet-based transactions, there are now questions about the applicability of the concept of 'meeting of contract'. As such, there is a need to ascertain whether an electronic contract can be legally formed under Iraqi law and, more importantly, under the Islamic concept of 'meeting of contract'.[200] It has been argued that the option of 'meeting of contract' is not limited to just face-to-face transactions.[201] It has been suggested when an acceptance is made between parties in non-face-to-face transactions, the offeree has the option to revoke the contract at any time prior to him leaving the place where the offer was received. Similarly, the offeror can revoke the contract at any time before the offeree leaves the place where the offer was received.[202] As for Internet transactions, there are doubts as to whether or not the concept of 'meeting of contract' is applicable to electronic contracts.[203] It is not clear whether electronic transactions are similar to face-to-face transactions and thus validate the concept of 'meeting of contract', or whether they should be deemed to be non-face-to-face transactions and as such require different legal consideration.[204] Even though the parties are not together in one place, it is contended that the conclusion of contracts using the internet is similar to face-to-face transactions.[205] Just like other methods of communication such as the telephone, the Internet can deliver instantaneous communications between the parties. As the offer and acceptance are communicated to the intended recipient the moment they are sent, it is contended that this should be deemed to be similar to face-to-face transactions. Incidentally, in the context of instantaneous communication between contracting parties, there are basically no differences between the telephone and website software except that the software is programmed in such a way that it deals with the online customers immediately on behalf of the website trader.[206]

Nevertheless, the drawing of parallels between transactions carried out using the telephone and those using websites give rise to some problems. When communication is conducted through the telephone, the parties are to be deemed as if they are in a face-to-face meeting, albeit they are using handheld units that have computer capabilities. The conversation is in real time and

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[199] Mohmed Hamid, 'Mutual Assent in the Formation of Contracts in Islamic Law' (1977) 7 Journal of Islamic and Comparative Law 51.
[200] Such legal issues would be discussed thoroughly in chapter 3.
[201] Ali Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud Vol 1* (2nd edn, Dar al-Bashair al-Eslamyya Beirut 2002) 1093.
[202] Monther Al-Fadhel, *al-Natharyyah al-A'mmah lel el-Tezam Vol 1* (Dar al-Thaqafah, Amman, Jordan 1996) 136-137.
[203] Al-Shafiy (n 28) 545.
[204] Rayner (n 29) 112. See also Dubai Contract Code 1971, Article 7 (2).
[205] Poyton (n 59) 123-124.
[206] John W Carter, *Carter on Contract* (Vol 1, Butterworths Lexis Nexis, Sydney 2002) paras 03-360, 03-390.

allows the parties to immediately negotiate the deal, amend its terms and, if they are inclined to, come to an agreement.[207] In comparison, website software cannot negotiate contracts with customers, amend the terms and conditions or, in other words, it cannot do anything other than what it was programmed to do by the programmer.[208] It must be taken into consideration that the Internet is a multi-purpose transmission basis and infrastructure, not a communication medium, technology method or place. 'This Internet that everyone is talking about is, fundamentally, nothing more than a gigantic global machine designed to move zeroes and ones from one place to another'.[209] Even though there is an instantaneous connection via the Internet, the websites are usually programmed in such a way that they deal with customers without any direct human involvement.[210] Therefore, it is correct to assert that there is no direct communication between the contracting parties in transactions using websites as compared to that of face-to-face transactions. As such, there are doubts over the applicability of the 'meeting of contract' concept in website transactions. It is worth noting that this trend is in conformity with the decision of Islamic Fiqh Assembly 1990, in which it was indicated that when there is a conclusion of contract between absent parties, or in other words, not existing in one place where one cannot see or hear each other directly, and the medium of communication between them is either a written letter, messenger, telegraph, telex, fax, or computer screen, in all cases, the contract is counted to be concluded as a contract inter absentes.[211]

Likewise, in the case of email transactions, when the parties communicate offer and acceptance between each other there may be an inherent delay. As a result, the contracting parties may not have knowledge of the offer and acceptance as soon as they are received.[212] This scenario is similar to that of contracting between absentees and therefore it seems the utilisation of the concept of 'meeting of contract' in contracts concluded using email is doubtful as it is not practical to determine the rule of 'meeting of contract'. When there is instant written communication between the contracting parties such as via telex or Internet chatrooms, it is arguable as to whether these kinds of methods of communication will be classified as face-to-

[207] Problems of delay aside - it remains unclear *what* must be instantaneous. In *Brinkibon and Entores,* the term is used indiscriminately and refers to the communication *process, the method* and the *devices* used by the parties. Yohai Benkler; *The Wealth of Networks* (Yale University Press 2006) 408.
[208] See David G Post, *In Search of Jefferson's Moose, Notes on the State of Cyberspace* (Oxford University Press 2009) 86.
[209] Ibid.
[210] Douglas E Comer, *Computer Networks and Internets with Internet Applications* (4th edn, Prentice Hall, New Jersey 2004) 422.
[211] Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).
[212] This approach is applied also on fax and telegram communications. Mahmood S Al-Adawi, *Nadhariyyat al-Aqd fi al-Shariyya al-Esslamyya* (Modthakerat Ustanl 1998) 18.

face transactions or contracting between absentees.[213] It is an accepted principle that in face-to-face transactions the offer and acceptance are received by the parties instantaneously, but if the telex method is used it is not necessarily the case. It is quite possible that one of the parties is not at the telex machine to immediately read the information that has been relayed. In view of the preceding discussions, it is arguable that the use of the telex or other similar form of written communication does not mean that the communication is 'instantaneous'.[214]

2.3.2. The validity of offer and acceptance when electronic means are used for communication

The agreement between the parties is considered to be legally concluded when a firm offer by one party is clearly accepted by the other. In Sharia, in principle, matching offer and acceptance does not require formality, rather they are merely means to discover the inner will and consent of the parties prior to their entering into a legally binding transaction.[215] As such, the offer and acceptance method enables a decision to be made as to whether an agreement has been reached freely.[216] In the field of electronic contracting, a comprehensive examination of the legitimacy of Internet transactions involves examining commercial websites that serve as 'shop displays' and 'shop selling', thus combining advertising with sales. Under these circumstances, the first question to ask is whether pre-programmed software can accurately be described as acting as an electronic agent. The next thing to consider is whether or not the website's content is an 'invitation to treat' or an 'offer'. A further consideration is whether or not a click on a button validly shows the website user's consent to incorporating terms and conditions, and whether or not the buyer is able to validly return purchased items and thus rescind the original transaction with or without responsibilities.[217]

2.3.2.1. Expressing consent using electronic agents

In electronic transactions, pre-programmed computers can send or respond to emails. On

[213] In terms of chatting, the real-time communication is observed as a telephone or a facsimile instrument due to the ability of the parties to send and receive most electronic files, specific documents, photos, or even voice chatting could also be delivered. Likewise, 'Internet phone' and 'Internet Screen Meeting' may be counted as same as chatting. Furthermore, EDI and Web-based means of communications may fall within the real-time means category, this is attributed to their capability to deliver messages instantaneously. Still, email is not measured as an instantaneous communication technique at the present. see Murray (n 153) 18. See also, the judgment of Denning LJ in the case of *Entores Ltd v Miles Far East Corporation* (1955) 2 All ER 493 at [3]

[214] Hugh Beale, *Chitty on Contracts*: *General Principles* (Vol 1, 32nd edn, Sweet & Maxwell 2017) 2-045.

[215] Shamsaddin al-Sarkhasi, *al-Mabsut* (Volume 13, Dar al-Marifa'Beirut 1993) 46.

[216] Rudolf Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems* (Volume 1 Oceana Publications 1968) *77;* Beale, *Chitty on Contracts* (*General Principles*) *Volume 1* (n 215) para 2002.

[217] Discussed thoroughly in chapter 4.

interactive websites, the servers can be programmed to conclude transactions with prospective customers by responding automatically to their orders without any human intervention.[218] Under Islamic contractual rules, for a transaction to be legally concluded, consent must be expressed by both parties. This therefore gives rise to the question of whether consent issued automatically by computers without any direct human intervention is legally valid. In other words, it is doubtful whether such interactions between a natural person and a computer can create binding transactions in Islamic law.

It has been suggested that a possible solution to the above-mentioned problem is to consider the programmed computer as a legal person and then use that presumption to develop a new theory of liability.[219] However, the proposed solution is not appropriate, as computers do not have self-consciousness and as such it is improper to treat it as a legal person. Even though a programmed computer has the ability to act autonomously, it is incapable of making a conscious moral decision by itself.[220] Furthermore, even if the programmed computers are legal persons, the question remains as to whether or not the software or hardware should be considered as 'electronic agents'. As computers are made up of hardware and software it would be hard to imagine how the idea of legal personality can be applied when the hardware and software may be located in several locations and its maintenance is carried out by different persons.[221] In addition, if the programmed computer is a legal person then it would have rights and obligations. It would then be legally liable for its actions and could potentially sue others for negligence, which in any case is not viable. From a legal point of view, legal personality cannot be conferred upon any entity that cannot bear financial responsibility. In general, programmed computers cannot bear financial duties and therefore cannot hold legal personalities.[222]

Another way to approach the issue of responsibility is to treat the computer as a legal agent and then use the rules of agency for electronic transactions. That is 'when a principal uses a computer in the same manner that it uses a human agent, then the law should treat the computer

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[218] Glatt, (n 30) 45.
[219] Allen and Widdison (n 31) 34-35; For further discussion on the issue of conferring legal personality onto electronic agents see Francisco Andrade, Paulo Novais, Jose Machado and Jose Neves, 'Contracting Agents: Legal Personality and Representation' (2007) 15(4) Artificial Intelligence and the Law 361-367, and Restatement (Second) of Contracts, 211(1) (1979).
[220] Benjamin Wrinn and Jane Kaufman Wright, *The Law of Electronic Commerce* (3rd edn, Aspen 2000) 2.05.
[221] Allen and Widdison (n 31) 42; Middlebrook and Muller (n 31) 348.
[222] Automated agents function with no direct involvement of humans and have some type of control over their action and interior situation; 'pro-activeness agents' basically do not act in response to their situation, they are able to demonstrate goal-directed conduct by taking the initiative. See Wooldridge and Jennings (n 32)

in the same manner that it treats the human agent'.[223] The third view is that if the computer is conferred a legal personality, the proposed solution is invalid and not enforceable. One of the principles of the agency rule is that mutual consent must be present between the agent and the principal for the establishment of a legal agent-principal relationship.[224] Consequently, it would be absurd to believe that during the processing of a transaction the computer is able to give its consent. According to this third view, software agents cannot be sued for they do not owe any fiduciary duties and also do not have any personal interests.[225]

Since a computer is a machine that can be programmed to act within pre-determined limits, it cannot give its own consent and is also not a legal person. It therefore cannot be an agent. As for the concept of a software agent, it is not meant to be used in the legal sense, but rather imply, by analogy, the general idea that the software does things according to what it is programmed to do.[226] As a result, there is a need to examine the topic of electronic agents and thoroughly discuss the various views.[227] There is no legal problem with the validly concluded contract if the concealed intention is reflected in the manifested expression of consent. However, the problems can be immense if differences arise between the apparent expression and the actual consent of the contracting parties.[228]

2.3.2.2. The distinction between an offer and an invitation to treat in e-contracts

In the conventional method of entering into a contract, it normally starts with a pre-contractual step when one party invites a second party to make a deal, which is called the 'invitation to treat', after which the second party makes an offer. The contract is concluded once the offer is accepted, but only if both parties have mutually agreed upon a valid consideration.[229] Under

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[223] Hugh Beale, *Chitty on Contracts Specific Contracts* (Volume 2, 28th edn Sweet and Maxwell 1999) 31-001; John P Fischer, 'Computers as Agents: A Proposed Approach to Revised UCC Article 2'. (1997) 72(2) Indiana Law Journal 557

[224] Jean-Francois Lerouge, 'Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level, (2002) 18(2) John Marshall Journal of Computer and Information Law 473, 474.

[225] Raymond T Nimmer, 'Transactions on the Global Information Infrastructure: Electronic Contracting: Legal Issues', (1996) 14 John Marshall Journal of Computer & Information Law 211. John Sommer, 'Against Cyber Law' (2000) 15(3) Berkeley Technology Law Journal 1178.

[226] Glatt (n 30) 49; Middlebrook and Muller (n 31) 342.

[227] Discussed thoroughly in chapter 4.

[228] New Zealand Law Commission, *Report 50: Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC Wellington 1998) para 58; Karl D. Belgum et al (1999), 'Legal Issues in Contracting on the Internet', *Information Strategy: The Executive's Journal 15 (4), 21-27.*

[229] It is worth stating that some claimed that consideration, as a condition of a valid contract formation, occurs only in the common-law regime. See Deveci, Consent in Online Contracts (n 132) 1. The author states 'It is basic, black letter law that there are three stages to a contract: the invitation to treat, the offer and the acceptance. In

the normal circumstances, the previously mentioned steps are clearly distinct from each other and does not give rise to any issues.[230] However, in online contracting practices, it is not so clear-cut for there may be slight differences, especially if the contracts are concluded using websites.[231] It is doubtful whether the contents of the websites comply with the rules of an offer or rather constitute an invitation to treat.[232] This distinction is crucial because if the content of the website is an offer to contract, then a contract is concluded as soon as the visitor to the website gives his acceptance.

However, if the content of the website is an invitation to treat, a positive response by the visitor of the website would mean that he is making an offer and the owner has to accept the offer before a contract can be concluded.[233] In the case of an absolute offer, its concept is different from that of an invitation to treat in terms of the validity of the offer to conclude a contract when it is unequivocally accepted. Based on the validity of the offer, it is uncertain whether the offeror is legally allowed to revoke the offer before the acceptance is made.[234] In online transactions, such a scenario can happen when, for instance, an email offering to sell certain goods or services is sent to a group of clients and subsequently the offeror wishes to revoke it.[235]

2.3.3. Issues relating to the subject matter in e-contracts

Other than studying the matter of the contracting parties' legal capacity, another obligatory and significant element of a valid contract is the existence of subject matter. Just as no valid contract is formed if any of the parties lacks legal capacity, similarly no valid contract is formed if there is no legal subject matter. Consequently, it is important to study this issue in light of the Iraqi and Islamic rules and to examine the issue of subject matter in e-contracts.[236] The study on the

common law, but not in civil law, there is also the requirement of consideration: representing the value (financial worth) of an exchange in the bargain'.

[230] Nevertheless, according to common law, it could be problematic sometimes to differentiate between an offer and an invitation to treat as the only principle, for such a distinction between them is primarily predicated upon the party's intention. See Peel (n 33) 11, 12; Robert Upex and Geoffery Bennett, *Davies on Contract* (10th edn, Sweet and Maxwell 2008) 8. Even the ICC does not specify any definition or clarification of the term 'invitation to treat', 'offer' or 'acceptance', with the exception of Article 79, which explicitly mentions that an offer can take any form that plainly shows the party's intention to create a valid offer, such as writing, speaking or gesticulating.

[231] Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 24.

[232] Peel (n 33) 72; Young (n 33) 60.

[233] Julia-Barcelo (n 35) 153.

[234] Discussed thoroughly in chapter 4.

[235] T Noeding, 'Distance Selling in a Digital Age' 1998 (3) Communications Law 85.

[236] Frank H Easterbrook, 'Cyberspace and the Law of the Horse' (1996) University of Chicago Legal Forum 207, 214; Raymond Nimmer, 'Through the Looking Glass: What Courts and UCITA Say about the Scope of Contract Law in the Information Age' (2000) 38 Dusquene Law Review 255-312.

issue of subject matter in e-contracts will be examined in the following two sub-sections:

2.3.3.1. The requirement of subject-matter to be in existence

Subject matter is related to the intention of creating a contract.[237] In a sales contract, the subject matter consists of the item and its selling price. The variety of subject matter that can form the subject of contracts is almost infinite and may include contracts for the sale of land, or the provision of services such as medical examinations or surgeries. However, under Iraqi legal and Islamic doctrines not all types of subject matter are appropriate for forming a valid contract. In fact, certain items are deemed to be illegal and cannot be lawfully traded. Therefore, any contract wherein the subject matter is unlawful is legally not valid. For example, if the subject matter is alcohol, which is a banned item for Muslims under Islamic doctrine, any contracts involving the trading of alcohol will be deemed to be invalid contracts.[238]

Iraqi and Sharia laws have listed the conditions of the subject matter that make a contract valid. The purpose of specifying these conditions is to avoid uncertainty or risk that may give rise to disputes following the conclusion of contracts.[239] On the issue of the requirement for the presence of subject matter when contracts are concluded, Islamic jurists have not reached a consensus. One legal opinion says that there must be a subject matter at the point when a contract is formed, and has used the analogy of selling fruits that have not yet appeared on the tree.[240] To support this contention, jurists have used the Prophetic tradition about Hakeem Ibn Hezam[241] who sought the advice of the Prophet. Hakeem inquired the following from the Prophet; 'A man asked me to sell him something that I do not own, should I buy it from the market?' The Prophet replied 'Do not sell what you do not have'.[242] It is contended however, that if this legal approach is implemented it will hamper the development of e-commerce in the long-term. This is because a lot of electronic transactions are service-related and as such the services have not yet been provided. As such, if the aforesaid legal approach is implemented,

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[237] Muhammad Yousef Musa, *al-Amwal wa Nadharryyat al-Aqd fi al-Figh al-Esslami* (Dar al- Fikr al-Arabi Cairo 1996) 281.
[238] Chapter 5 'al-Mai'da' verse 93: "ye who believe! Intoxicants and gambling.....are an abomination of Satan's handiwork, eschew such abomination that ye may prosper'. Yusuf (n 85) 270-271
[239] Al-Oboodi (n 19) 103.
[240] Abdul-Kareem (n 87) 307-309.
[241] Hakeem Bin Hozam Bin Khawild bin Asst Bin Abdul Faze, one of the Prophet's companions, Khadeja Bint Khuwailid's brother son, born in Mecca, died aged 120 years, in 54 at Medina. He joined Islam on the Fatah day and has about 40 narrations from the Prophet (See Tahzeep Al Tahazeep 2/447, and Alasab 2/349). Also, according to the ICC, Article 128 it becomes clear the necessity that the object is described very accurately in a way that negates any considerable ignorance.
[242] Narrated by Abu Dawud. See Ibn Othaimeen, (n 37) 128.

the electronic transactions will be invalid as the services were not in existence when the contract was concluded.[243] Consequently, it is vital that the issues should be discussed thoroughly before a decision is made with regards to its implementation.[244]

2.3.3.2. The requirement that the subject-matter to be determined

Under the general rules, since the ultimate objective of the existence of subject matter is that of dispute avoidance, then the object of a contract must be identified or identifiable, legitimate and in existence or can exist.[245] Similarly, the same conditions must be present in electronic contracts and it is immaterial whether such contracts are conducted using email or websites. Consequently, in an electronic contract, a fairly detailed description of the object and a digital image of the object can be determined or seen on the website.[246] Alternatively, the contracting party may receive an email that contains the type, detailed descriptions and all other relevant information. The description process is part of the contractual process and the seller is obliged to guarantee the quality and legitimacy of the object, including the correctness of the described object. This is also normally stipulated in the contract.[247] Products purchased over the Internet, unlike purchases made in local retailers, are not physically seen when the online transaction is concluded. It is a legal requirement that the subject matter of online contracts must be sufficiently ascertained and identified so that the exact producer they are purchasing is apparent to the online purchaser before the contract is concluded.[248] However, since the products are not physically shown to the purchaser when the contract is formed, upon the receipt of the product the purchaser can change their mind and withdraw their consent. This concept accepts the fact that no matter how accurate and sufficient the description is, it cannot substitute an actual physical inspection of the product before the contract is finalised.[249]

From a juristic point of view, if the subject matter (tangible goods) is not shown to the

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[243] Ramadan Ab-Assoud, *The General Theory of Obligation: Sources of Obligations* (Dar Al-Matbuat Al-Gameia Alexandria Egypt 2002) 144.

[244] Discussed thoroughly in chapter 4.

[245] Abdul-Kareem (n 87) 307.

[246] Musa (n 238) p 281; Bashar Al-Momni, *Moshkelat al-Ta'aqod abr al-Enternet* (A'alam al-Kotob al-Hadeeth, Jordan 2004) 66.

[247] According to ICC, Article 128 it becomes clear the necessity that the object is described very accurately in a way that negates any considerable ignorance.

[248] Several e-commerce regulations emphasised this matter and mandate e-dealers to provide clients with an adequate and precise description of the nature, value and form of the supplied goods or services. See Ab-Assoud (n 244) 144. Internationally, the UNCITRAL Model Law on Electronic Commerce, Article 16(1) and (2) mandates the stating of the nature, price, quantity and other associated and significant components regarding the description of the subject of contract before the implementation of the contract.

[249] Osamah Mojahed, *al-Ta'aqod abr al-Enternet* (Dar al-Kotob al-Qanooniyya Egypt 2002) 70; Al-Oboodi, (n 19) 103.

purchaser, but it has been sufficiently defined, the contract will still be invalid.[250] The foundation for this juristic approach is derived from the Prophet's saying 'Do not sell what you do not have',[251] for it appears to deal with not just the subject matter that is non-existent, but is also applicable to the situation whereby the subject matter is not shown to the purchaser before the transaction is concluded.[252] Furthermore, Prophet Muhammad also prohibited all sales that contain uncertainty and if during the conclusion of a sales contract the article being sold is absent, uncertainty is present during the contracting process.[253] However, this approach can limit commercial activities carried out on the Internet because only photographs of the subject matter are displayed on computer screens and the goods for sale are not physically present in front of the purchaser during the conclusion of the contract.[254] In addition to that, the parties to the contract are more often than not great distances apart and not together when the contract is being concluded.[255] Furthermore, if the subject matter is not presented to the purchaser during the formation of the contract, Sharia provides an option to the purchaser to revoke the contract even after they have received the purchased article.[256] Bearing in mind that it is mandatory under the ICC, Article 1286 to write the contract in an official document. For instance, the pertinent provision regulating the contracts of mortgage insurance- this contract may not be performed until after being registered in the cadastre.[257] This could be known in Sharia law as the term of the option of meeting. Furthermore, there are other options to terminating the contract in Sharia law, such as the option of defect, where the contractual party has the right to rescind the contract if a defect is unearthed in the subject matter, the option of withdrawal, which applies when one or both of the parties instruct in the contract that he/she can revoke that contract within a specific period of time.[258] Now that the purchaser has the option to revoke the contract, the question that then arises as to within what timeframe the option to revoke the contract must be exercised before no longer being exercisable. [259]

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[250] Muhiyaddin Sh Al-Nawawi, *Mughni Almuhtaj ila Marifat Maani Alfadh Alminhaj Part II* (Mustafa Albabi Alhalabi Press, Egypt 1958) 286.
[251] Narrated by Abu Dawud. See Ibn Othaimeen (n 37) 128.
[252] Shanab (n 38) 319; Al-Joroshy (n 94) 175.
[253] Al-Ramlawi (n 39) 390.
[254] Al-Joroshy (n 94) 176. Husain Abdu-Qader Ma'ruf, 'The Idea of Formality and its Applications in Contract' (PhD Thesis, Law School, Bagdad University, 2004) 4; Anwar Sultan, *Nominate Contracts (selling and bartering contracts)* (2nd edn, Dar Al-Thakafa Publishing Cairo 1952) 35; Jameel Al-Sharqawi*, Nullification of the Legal Act Theory* (Cairo University Publishing, 1956) 310.
[255] Discussed thoroughly in chapter 4.
[256] For further information, see Al-Joroshy (n 94) 171-203 and Al-Ramlawi (n 39) 374-407.
[257] See the ICC, Articles 1286 to 1294.
[258] See Al-Joroshy (n 94) 171-203 and Al-Ramlawi (n 39) 374-407.
[259] Discussed thoroughly in chapter 4.

2.3.4. Issues regarding the forms of acceptance in e-contracts

In conventional contracts, the parties to the contract will affix their signature onto the relevant paper documents to express their consent to be bound by the terms and conditions in the contract. However in online contracts, the conventional paper-based contracts are replaced by electronic versions known as 'click-through agreements'. When a click-through agreement is used, the online purchaser has to indicate their consent to be bound by the terms of the contract by clicking on the on-screen button that will usually read in terms of 'I agree' or 'I accept'. It is uncertain whether or not a click on such a button represents a legally valid expression of the purchaser's consent to enter into a binding contract. One of the general principles for the conclusion of a contract is that no formalities are needed. As such, signature is not a precondition for enforceability.[260] In spite of this assertion, the presence of a signature activates a specific line of analysis. This can be seen in cases involving incorporation procedures, i.e. the steps required in order to make the terms become a part of a contract, as they can be divided into two categories, those with or without a signature.[261] If the document bears a signature, the signatory is bound, and it is immaterial whether they have read or understood the terms contained therein. Another requirement of incorporation is notice.[262] 'Notice' is a common requirement for all websites, except for incorporation of terms using signature, which must be reasonable.[263] If the provisions are exceptionally onerous then even more notice is needed. In web-based transactions, other than the requirements of notice and signature, it is implicit that the terms must also be made available to counter technology-specific challenges.[264]

In addition to the aforementioned discussion, another essential condition for a valid contract requires that the acceptance shall conform to the offer in all aspects, including the incorporation of the terms and conditions.[265] As such, any amendment of the terms and conditions of the sales contract will give rise to a new offer.[266] Consequently, if an offer containing all the pertinent terms and conditions has been emailed to the other party and it has been accepted without any

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[260] *Chapelton v Barry Urban District Council* [1940] 1 KB 532; *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379; *Flood v Anchor Line* [1918] AC 837, 844

[261] David I Bainbridge, *Introduction to Information Technology Law* (6th edn, Pearson Education 2009) 319.

[262] *Interfolo Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

[263] Malcolm Clarke, 'Notice of Contractual Terms' (1976) 35 Cambridge Law Journal 51, 72.

[264] Elisabeth Peden and John W Carter, 'Incorporation of Terms by Signature: L'Estrange Rules!' (2005) 21 Journal of Contract Law 1, 15; *Pollstar vs Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000); *Caspi v Microsoft Network LLC* 723 A 2d 528 (NJ Super CAD 1999); Ronald J Mann and Travis Siebeneuche, 'Just One Click: The Reality of Internet Retail Contracting' (2008) 108 Columbia Law Review 984, 991, 1003.

[265] Given the difficulty of labelling individual acts as offers or acceptances, 'assent' is a neutral term describing contractual intention *in general.* Al-Kasani (n 195) 537; Albahouti, (n 109) 1377.

[266] Melvin A Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stanford Law Review 211-259.

amendments to the terms and conditions, the legality of the said terms and conditions of the contract is indisputable.[267] However in Internet transactions, there are concerns about the enforceability of the standard terms that have been incorporated into online contracts using websites.[268] Under the general rule of mutual consent, for these terms and conditions to be legally enforceable, they must be made known to the other party, who must then give consent prior to the formation of the contract.[269] To be precise, if those terms and conditions are not obviously made known to the other party prior to the formation of the contract, the terms and conditions may not be binding. Furthermore, under the legal concept of acceptance, acceptance is an expression of consent by the offeree to the offeror to enter into a legal contract.[270] There are doubts as to whether it is possible for silence to signify acceptance. Put another way, if an offer is sent via email to a person who has indicated that they are interested in concluding a deal, but the offeree did not respond to the offer, can the contract be deemed to have been concluded based on his silence, thus taking the failure to respond as a silent or implied acceptance?[271]

2.3.5. Issues regarding the time when e-contracts are concluded

Since the Internet is borderless, this gives rise to questions as to when and where a contract is considered to have been irrevocably concluded and this in turn gives rise to the question about the validity of the contract.[272] The general rule is that a contract is concluded when an offer is matched by an acceptance between the parties.[273] However in the case of online contracts, it is possible that sometimes the exchange of offer and acceptance may not reach the intended recipient, and there is also the issue of the meaning of the terms 'dispatch' and 'received'.[274]

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[267]Michael Chissick and Alistair Kelmann, *Electronic Commerce: Law and Practice* (3rd edn, Sweet and Maxwell 2003) 97.

[268]Smith (n 40) 456; Joel Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153(6) University of Pennsylvania Law Review 1951.

[269]Hillman and Rachlinski (n 41) 480; James R Maxeines 'Standard Terms Contracting in the Global Electronic Age; European Alternatives' (2003) Yale Journal of International Law 119.

[270] L E H, 'Offer and Acceptance: Silence as Acceptance' (1933) 31(7) Michigan Law Review 991-992; Owsia (n 46) 785.

[271] Discussed thoroughly in chapter 5.

[272] For example, P Goodrich, 'The Posthumous Life of the Postal Acceptance Rule' (Working Paper 127, Benjamin N Cardozo School of Law 2005) page?

[273] The classic rules on formation are clear: a contract is concluded when an acceptance becomes effective. Effectiveness may be tied to receipt (the receipt rule) or to dispatch (the exception rule which is called the postal rule as we shall see in chapter 5). See *Henthorn v Fraser* [1892] 2 Ch 27; *Dunlop v Higgins* (1848) 1 HLC 381; *Adams v Lindsell* (1818) B & Ald 681.

[274] *Henkel v Pape* (1870) LR 6 Exch 7; *Bruner v Moore* [1904] 1 Ch 305; *Cowan v O'Conner* (1888) 20 QBD 640 at *642; Brinkibon v Stahag und StahlwarenhandelsgesellschaftmbH* [1983] 2 AC 34 at 38. Hill (n 232); Fasciano (n 4)

There is a possibility that a message sent through the Internet may be altered and by the time it is received it may be incomprehensible or its meaning may be different from that what was originally intended.[275] What this means is that when the acceptance is sent through the Internet it may be illegible when the offeror receives it, or it may not arrive at all. As such, the question as to whether or not a valid contract has been concluded arises. Unless the acceptance has been clearly received by the offeror, the aforementioned questions as to when the contract is concluded may arise. The communication methods used to convey the offer and acceptance also determine the time at which the contract is deemed to have been concluded. Parties who are instantly connected with each other to enable the offer and acceptance understand the intentions of their opposite contracting parties the moment they are expressed; as with the Internet-phone, such methods of communications are treated as face-to-face transactions. On the other hand, if the communication of the offer and acceptance is delayed, as is often the case in email, such types of communication are more like traditional contracts that have been concluded between absent parties.[276] The focus in this section shall examine the moment at which an online contract is considered to be legally binding.

For example, if an offeror based in Baghdad sends his offer using email to a party based in another city, subsequently the latter accepts the offer and sends his acceptance to the offeror via email. In this scenario, the exact point in time when the contract is deemed to have been concluded is difficult to determine. Is it when the offeree accepts the offer or when the offeree communicated his acceptance to the offeror? Or is it when the acceptance reaches the offeror notwithstanding whether he knows of the acceptance or not? It could alternatively be when the offeror became aware of the acceptance.[277] Ascertaining when a contract is formed is important for the purpose of determining whether the parties to the contract can retract their communication before the contract is legally enforceable.[278] That is, if a contract is considered to be concluded the moment the offer is accepted, then it is not possible to withdraw the offer when it has been accepted. However, if the contract is considered to be concluded only when the offeror knows of the acceptance, there is a possibility that the offeror can retract the offer

[275] Hogan-Doran (n 5)
[276] Technically, servers and clients are *processes, not* discrete pieces of machinery. Frequently their separation is only logical. Clark and Blumenthal, (n 6) 359.
[277] These questions are addressed in chapter 5 as it is dedicated to study the time of conclusion of e-contract.
[278] Although emails cannot be recalled back to the sender, however, in Outlook applications it is easy to withdraw an email from the receiver's inbox who has not yet opened it. See <https://support.office.com/en-gb/article/Recall-or-replace-an-email-message-that-you-sent-35027f88-d655-4554-b4f8-6c0729a723a0> accessed 27 August 2017

if the retraction is made before he has received the acceptance.[279] Similarly, the offeree can also retract his acceptance before the offeror become aware of it.[280]

Thus, it is important to ascertain when a contract becomes legally enforceable so as to avoid potential disagreements. In face-to-face transactions, it is not a problem.[281] However, when contracting is concluded between absentees it is difficult to determine when the contact is concluded. In these types of contract, the parties experience a time lapse between when the offer is sent until it is received, as well as between when the acceptance is sent back and is actually received. Consequently, this gives rise to disputes regarding which exact point in time the contract became binding. Jurists have referred to four main theories to establish the time a contract is concluded between absent parties. These are the declaration, mailbox, receipt and receipt with knowledge theories.[282] It is important to note that when the parties use email, a non-instantaneous means of communication, questions arise as to which of the four aforementioned theories can give an appropriate approach to determine exactly when a contract is deemed to have come into legal existence. It can be seen that each theory has its own advantages and disadvantages when applied to contracts *inter absentes*.[283]

2.4. Conclusion

This chapter examined the principal definitions and legal issues in electronic contracts. From the discussion, it can be seen that the definitions can be different when viewed from the legal perspective and it is also difficult to agree on a uniform concept of e-commerce. Furthermore, there must be not less than two parties to a contract, both parties must have legal intention to enter a contract and there must be a legitimate and existing subject matter for the contract to be concluded. The validity of contracts within e-commerce was discussed and as it is generally accepted that habits and customs are not banned unless they are disallowed by the Lawgiver,

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[279] A Contract may be as a result from a non-binding offer if it achieved all its terms and conditions. However, if that declaration is addressed to all people generally, then this demonstration is deemed not an offer, but an invitation to treat, as he/she has advertised his/her goods on a premeditated basis. As a result, the ICC, Article 80 (2) requires that offering items with price and all other declarations associated to exhibitions or demands directed to the public or to individuals, it is not considered, in the case of doubt, as 'offer' but as an invitation to treat'.

[280] There is another legal impact resulting from setting the time of conclusion of contract, namely, setting the time of conveying the possession and ownership of the purchased item to the buyer and accordingly in cases where the item is rapidly losing its value, whether the buyer or seller should be held legally liable for such a drop-in value. See, Al-Oboodi, (n 19) 173-176 and Al-Dobaiyyan, *Al-Ejab wa al-Gobol been al-Figh wa al-Qanoon* (Al-Rashid Publishing Riyadh 2005) 106-107

[281] Muhammad Shalabi, *Mabadi Alta'aqud* (Dar al-Nahdha al-Arabiyya 1983) 421.

[282] We shall discuss the meaning of these four theories in chapter 5. For the current meaning, see Al-Oboodi (n 19) 164-166; Abdullah (n 14) 177.

[283] Ajeel (n 11) 297; Al-Oboodi, (n 19) 166. Also Ibrahimm Donmez, *Majellat Mojamma'a al-Figh al-Esslamy* (1990) Vol 2, 6th edn, *Journal of Mojamma'a al-Figh al-Esslamy 33* cited after Al-Dobaiyyan (n 281) 109-124.

and *Al-maslaha*, such contracts should be treated as a valid means of conducting business. It was shown that the terms 'electronic contracts' and 'online contracts' were used interchangeably when addressing issues linked to e-commerce. However, it has been established that while every online contract is an electronic contract, not every electronic contract is an online contract. Similarly, in some countries the terms 'electronic', 'automated' or 'online transactions', or even 'distance contracts' are more commonly used than 'electronic' or 'online' contracts.

It was contended that there are two types of electronic websites; the first type being directly run by the sales and marketing department of the manufacturers. They sell their products bearing their domain names and trade names. The second type, which are more problematic, facilitate sales and purchases between sellers and buyers. Transactions using these websites involve three contractual parties, namely the seller, buyer and website operator. Consequently, two contracts may be concluded. The first is that between the seller and their buyer while the second is between both the buyer and seller with the service provider, whereby the buyer and the seller agree to be bound by the terms and conditions of the particular website (the user agreement).

It was concluded that computer systems can be programmed to deal with the problem that both contracting parties may not have been aware of any failed communications. The design element involves the automatic verification of all messages that have been received. If such a facility is built into a system, then it justifies the application of the 'in person' rules. Subject to the nature of the verification form, the sender can also ascertain whether the information was distorted or intact. If there is no verification or the information was distorted, the sender can make the necessary rectifications. According to the above-mentioned issues, amendments proposed in chapter 6 shall be imposed to the ICC in order to be equivalent with the current electronic revolution.

Chapter Three

The Concept of Meeting of Contract and Its Application to Electronic Contracts

3.1. Introduction

Typically, a contract is valid when the consent or acceptance matches the terms of the offer.[284] However, a question that arises as to how long an offer should remain open. Must the acceptance be made immediately after an offer is made or can it be accepted as and when the offeree wishes? This matter has been addressed partially by the ICC using the concept of 'meeting of contract', a concept inherited from Sharia law.[285] The ICC addresses many legal issues including the formation of contracts and as such it has a total of 1,383 articles. On the matter of formation of contract, it is mainly and indirectly derived from Sharia. It includes, among others, the Islamic term '*meeting of contract'*, a description that is tailored, *inter alia*, for offer and acceptance which then leads to the conclusion of a contract. As such, it is one of the stages for the formation of a contract.[286] The reason behind that is that the ICC has two main historical sources: Sharia law and Egyptian Civil Code. Regarding the Sharia, the ICC, specifically the formation of contract, has been taken from the *Mejelle*, and the latter is the codification of the *Hanafi* school, which is one of the four main doctrines in Sharia law. However, even the ICC is mainly predicated on the *Hanafi* doctrine, but the other three doctrines are also involved according to the suitability of the particular issue, and choosing a specific doctrine also depends on the desire to facilitate the modern life of people.[287] As such, unless it has been otherwise agreed, in order for the contract to be legally concluded, the offer and acceptance must be effectively communicated during the 'meeting of contract'.[288]

Recent technological developments have provided more legal concerns to twenty-first century contractors. Many current methods of communication have enabled the contracting parties to instantaneously communicate with each other and as such the offer and acceptance can be

284 Gala (n 26) 466-468.
285 Ajeel (n 11) 296.
286 See: *The Explanatory Memorandum of Iraqi Civil Code* commenting on Articles (2) and (3), 1. Saleh Nabil, 'Definition and Formation of Contract under Islamic and Arab Laws' (1990) 5 (2) Arab Law Quarterly 101-116.
287 Article 1/2 of the ICC states: "in case of absence of any applicable legislative provisions in the law, the court shall adjudicate according to custom; in the absence of custom then in accordance with the principles of the Islamic Sharia which are most consistent with the provisions of this law but without being bound by any specific school of thought; and otherwise in accordance with the principles of equity".
288 Ajeel (n 11) 297.

immediately communicated to the other party.[289] However, not all methods of communications are instantaneous and sometimes delays in the dissemination of offers and their receipt may occur.[290] As a result, there have been debates over whether a contract concluded using modern forms of communication can be compared to that in a face-to-face transaction or a contract made between two parties in absentia.[291] In the light of Internet-based transactions, there is a need to ascertain whether an electronic contract can be legally formed under the ICC and, more importantly, under the Islamic concept of 'meeting of contract'.

This chapter examines the concept of meeting of contract as a component of contract formation, by examining its origins in Sharia in the context of definitions, types and options. This chapter will also critically examine whether or not this idea is appropriate for application in e-contracts. The focus of this chapter is on Sharia law, as the ICC has only mentioned 'meeting of contract' once, without further defining it or giving further details of the term, thus making it vague and obscure.[292] As a result of this lack of clarity over the meaning of the term in the ICC, there is a need to conduct an in-depth research using Sharia views to assist in interpreting the term.

2. The definition of 'meeting of contract'

The term 'meeting of contract' in Sharia law means the meeting whereby an offer remains legally valid for acceptance.[293] In practice, it is not possible for the offer and acceptance to be concurrently or simultaneously communicated. Therefore, to give time for the offer and acceptance to be communicated, the 'meeting of contract' was created and the offer will remain valid for acceptance so long as the contracting parties continue to meet and no explicit or implicit rejection of the contract has been made.[294] Consequently, meeting of contract differs from the notion of meeting of minds. This is because the latter stands for the parties' intentions,[295] while the meeting of contract however stands for the time and place of the meeting rather than intentions. For instance, if two parties are negotiating regarding a transaction and the offeree refuses the offer, then no meeting of minds has occurred. There has

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[289] DTI, *Building Confidence in Electronic Commerce- A Consultation Document* (n 198) 15; *Fed Crop Ins. Corp. v. Merrill,* 332 U.S. 380 (1947)*;* see also Major John J Siemietkowski *et al*., 'Contract and Fiscal Law Developments of 2001 'The Year in Review' (2002) Journal of Army Law 132

[290] For example, an e-mail has a chance of being delayed, lost, or even becoming scrambled and nonsensical because of the packet switching technology used. For more discussion of 'packet-switching'. Reed (n 199) 10-14.

[291] G Basque, 'Introduction to the Internet' in E Mackaay, D Poulin and P Trudel (eds) *The Electronic Superhighway,* (Kluwer Publishing 1995) 22.

[292] As we shall see later in this chapter.

[293] Hamid (n 200) 51.

[294] Al-Kasani (n 195) 539.

[295] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 Harvard Law Review 457.

however been a meeting of contract which existed since the offer was issued and directed to the offeree and ended by the latter's refusal. Conventionally, a contract is legally concluded when the contracting parties are physically present in the same place, or if they are in different places,[296] they can use a suitable method of communication to convey the offer and acceptance such as using telephone, letters or messengers.[297] If both parties meet up in the same location the concept of 'meeting of contract' is easily established. However, if they are at different locations during the conclusion of the contract, then the issue of whether or not the concept of 'meeting of contract' can be legally applied will arise.[298] Therefore, it is important to have discussions on the application-related issues of the concept of 'meeting of contract' in face-to-face transactions and transactions between absentee parties.

A modern jurist, Sanhuri, said that the 'meeting of contract' theory is a unique Islamic idea and many Islamic jurists have focused their studies on it. It has, in turn, given rise to many differences among them with regards to its definition.[299] It is important to note here that the early jurists did not come out with a general definition for the concept of 'meeting of contract'. Recently however, a few definitions have been articulated, but it appears that all of them have their fair share of criticisms.[300] Contemporary Islamic jurists have contended that the 'meeting place' is a vital contractual stage, because it is 'the place where the contract is concluded as well as where the offer and acceptance met'.[301] The key element of this definition is 'the place' where both contracting parties meet to conclude the contract.[302] This approach is supported by some literature from the *Hanafi* school, for it states that 'the place of the contract is where the offer and acceptance are expressed, however if the place is changed during the negotiations, the contract is not concluded'.[303] Additionally, in the Shafi'i doctrine, in the context of illustrating the meaning of 'separation between the parties', it is provided that it means 'physical separation, so that one party's voice cannot be heard by the other. As was narrated by *Nafi*, that *Ibn Omar*, if he bought something, he used to walk for a few steps after buying it to become mandatory, then he returns'.[304] Also, it is stated that 'under the condition of the

[296] R Austen-Baker, 'Gilmore and the Strange Case of the Failure of Contract to Die After All' (2002) 18 Journal of Contract Law 1.
[297] Gala (n 26) 466.
[298] Hamudi (n 27) 93.
[299] AbdulRazzaq A Alsanhori, *Masadir al-Haqq Fi Alfiqh Alislami* (part 2, Dar al-Fikr, 1955) 2–15.
[300] For further information, see al-Shafiy (n 28) 86-98.
[301] Ali Qara'a, *Lessons in Islamic Transactions* (1st edn, Dar al-Kitab, no year) 112.
[302] A contemporary researcher believes that the four Islamic schools of thought (*Hanafi, Shafi'I, Maliki* and *Hanbali*) consider the place to be a critical element in the meeting of contract; Alsanhori, *Masader al-Iltizam* (n 89) 2–15.
[303] AlKasani (n 195) 137.
[304] Abu Ishaq A. Alshirazi, *Almohadhab* (1st part, 2nd edn, Dar Almarifaa Press 1959) 264–265.

unification of the place, if the parties were contracting while they were walking, or even if they were on the same animal, and the acceptance were offered at this time, the contract is invalid because of the differentiation of the place of the meeting. However, it should be noted that some, such as *Al-Tahawi*, validated the contract saying if the party provided his/her acceptance immediately to the offer. However, no doubt, that if they were walking continuously, the acceptance would be provided in a different place'.[305]

However, some jurists have rejected the notion that the *Hanafi* school has espoused the place as an element to define the meeting of contract and have said that such an approach is simply a single and random sample of this school. They added that to truly illustrate the *Hanafi* school's concept of the 'meeting place', it is important that a comprehensive approach is adopted, i.e. all the relevant texts must be considered, rather than only a few of them.[306] *Hanafi* jurisprudence failed to prove that the meeting of contract is (or requires) the unity of place in two instances: firstly, when the offeree accepts the offer while walking. Thus, although the place is physically changed, the contract is concluded. Secondly, if there is evidence that one or both parties have disengaged, then the meeting ends even though the parties are still located in the same place.[307] Moreover, it is said that if the meeting of contract is purely a unit of place, then time should not have an impact upon it. However, time has a great influence upon the meeting, as any delay of acceptance for a long time may terminate the meeting of contract.[308]

In the same context, the *Maliki* doctrine considers that a contract of sale is concluded if the acceptance is expressed in the same meeting of contract provided there is no interval. If the acceptance is delayed until after the meeting has ended, no contract is concluded. According to the *Hanbali* doctrine, the meeting of contract should be in one place,[309] for if one party is so far from the other so that their voices, without the use of any devices, cannot be heard by the other, then no contract is concluded.[310] However, other modern Muslim jurists have a different opinion about what the 'meeting of contract' means because their focus is on the element of 'time' not 'place'. This group of jurists are of the opinion that the meeting of contract begins from the moment the offer is issued and it remains valid throughout the negotiating period, provided that there is no disengagement or objection from any of them.[311] The third

[305] Alsewasi (n 101) 78.
[306] For more details see Ibn-Najeem (n 101) 293; Ibn-Abdeen (n 101) 513.
[307] Abdullah (n 14) 34
[308] Ibn-Najeem (n 101) 293; Ibn-Abdeen (n 101) 513
[309] Mohammed A Alhattab, *Mawahib Aljalil*, (part 4, 2nd edn, Dar Alfikr Press 1978), 240.
[310] Moaffaq addin A Ibn Qudama, *Almughni* (part 4, Dar Alkitab Alarabi Press 1972) 8.
[311] Dr Abdulsattar Abu Raghda, *Choice and Its Effect in Contracts* (1st part, 2nd edn, Maqhawi Press 1985) 118. Also, Dr Shafeeq Shihata, *The general theory for obligations in the Islamic legislation*, (part 1, Dar Ihia'a al-Turath al-Arabi 1988) 138.

jurisprudential trend defines the meeting of contract as 'a situation whereby the contracting parties remain in negotiations in order to conclude a contract, where the issuance of an offer and acceptance must be known by the other party'.[312] This approach clearly focuses on the element of 'the two parties being engaged in negotiating the offer'. In other words, such a point of view adopts the concept that the meeting of the contract is a 'unit of engagement'.

From the above discussion, it can be concluded that all the views share a similar approach, i.e. there is a need to define the concept and to do it in such a way that it combines the element of place, time and engagement of the parties, and the latter means that the meeting of the contract is not hindered by any obstacles.[313] However, more emphasis and importance should be placed on the time rather than the place of the meeting, and the concept of place itself should not be narrowly construed, for it should have a wider meaning and should include both actual place and presumed place.[314] This conclusion may be supported by adopting a comprehensive approach to the *Hanafi* jurists' conceptualisation of the meeting of contract; it is important to consider all relevant texts, and not just a few of them. In detail, the *Hanafi* School of Thought has failed to prove that the meeting of contract is (or requires) a unit of place in two instances: firstly, when the offeree accepts the offer while walking, although the place is physically changed, the contract is concluded.[315] Secondly, if there is evidence that one or both parties have disengaged from the process, then the meeting ends, even though the parties are still located in the same place.[316] This means that the meeting of contract is not purely a unification in place, then time should not have an impact upon it since the delay of acceptance for a long time may terminate the meeting of contract.[317]

In the *Mejelle*, Article 181 defines the parties' ' meeting of contract' as 'the meeting that is held for the formation of a contract'. Many jurists are of the view that this definition is basically insufficient and requires further elaboration.[318] Another definition has provided additional details and clarification, as it says that in the concept of 'meeting of contract', the timespan

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[312] Dr Abdulnasir T Alattar, *Theory of obligation: resources of obligation*, (Alsaada press 1975), 61. Also see Mustafa Alzarka, *General Jurisprudential Introduction* (1st part, Alifba press 1968), 348.

[313] Dr Mohammed N Almaghribi, *The theory of contract in the Islamic jurisprudence*, (Dar Alnahda Alarabia press 2003) 51. Also see Hasan and Rasoul (n 7) 12.

[314] Abdulathem D Albaka'a, 'The Theory of the Right of Reversal in the Contract of Sale in Islamic jurisprudence' (PhD Thesis, School of Islamic Sciences Baghdad University 1997) 86. See also what was mentioned earlier about technology-neutrality in page 30 of this thesis.

[315] AlKasani (n 195) 137.

[316] Ibn-Najeem (n 101) 293.

[317] Ibn-Abdeen (n 101) 513.

[318] It is clearly seen that the meeting of contract is not purely a unit of place as confirmed by the Ottoman Mejelle, which states in Article 181 that 'the meeting of sale is the meeting that aims to the purpose of concluding a sale contract'. See also Ali Hayder, *Durr alhukkam fi sharih majallat alahkam, Sellings*, (Dar Alkutub Alilmiya Press, 1991) 132.

begins after the offer has been issued and the parties are together negotiating to conclude a contract without any distraction caused by matters that are unrelated to the contract.[319] It has also been defined as the state wherein the contracting parties are engaged to conclude a deal.[320] When the 'meeting of contract' was first conceptualised, it was meant to benefit both contracting parties. As such, the offeree has a period of time (during the 'meeting of contract') to consider the benefits of the offer and is not pressured to make a hasty decision. This concept also allows the offeror to know with certainty whether or not the offeree has accepted his offer and thus a contract is concluded before both contracting parties go their separate ways from the 'meeting of contract'.[321] The application of the 'meeting of contract' concept in Islamic commercial doctrine is subject to the absent parties' agreement to extend the duration for which the offer remains valid and any acceptance must be confirmed within the said period. If there is no agreement, the Islamic 'meeting of contract' concept cannot be applied. Therefore, if a specified timeframe is given for acceptance and if the deadline is reached before the contracting parties leave the 'meeting of contract', any acceptance after the timeframe will be invalid. Similarly, the contract shall be considered to have been legally concluded even if the contracting parties have left the 'meeting of contract' as long as the offeror has agreed to extend the period of validity of the offer.[322]

Arabian codes, including the ICC, adopted the Islamic 'meeting of contract' concept, but neither the ECC nor ICC define this term.[323] Unlike Islamic jurisprudence, it can be seen that in most legal systems, the idea of 'meeting of contract' is not comprehensively regulated and as such it does not cover contracting between absentees and/or attendees. Although the Iraqi legislation has borrowed the idea of the 'meeting of contract' from Sharia law, it partly modifies it by distinguishing it in terms of three methods of linking offer with acceptance. According to

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[319] Mustafa Al-Zarqa*, Sharh al-Qanoon al-Madani al-Soori* (Institute of Arabic Research and Studies 1969) 50. For more definitions see Jamaladdin al-Utaifi, *The Egyptian Civil Codification* (1st part, Egyptian Universities Press 1949) 191.

[320] Muhammad Al-Ebraheem, *Hokom Ejra'a al-Oquud bewasa'el al-Etesalat al-Hadeetha* (Dar al-Dhiya Jordan 1986) 17.

[321] Abdul-Kareem (n 87) 290-291; Al-Ramlawi (n 39) 131.

[322] Furthermore, alternative opinion contradicts the scenario that the contract can be validly shaped without the idea of 'meeting of contract'. Therefore, the parties' arrangement to prolong the validity of an offer for a definite period denies the notion of 'meeting of contract' according to which the legitimacy of the offer is supposed to come to an end, either when the parties leave the 'meeting of contract' before acceptance or refusal of the offer comes explicitly or implicitly. However, this assessment appears to be questionable in the field of trade, thus the parties must be permitted to set a precise acceptance time with no restrictions. Traders sometimes might need more time to ponder the value of transactions. Consequently, restricting the validity of an offer for only the 'meeting of contract' may cause detriment or difficulty to them and thus, detriment or difficulty must be removed. Also, this concept is essentially created for the advantage of the parties, not to provide complexity or formalism in the Islamic system, hence the parties should have the power to extend the offer for more time if they think it is for their benefit. See Al-Ebraheem (n 321) 58-59.

[323] Rushdi (n 15) 25.

the ICC, contracts can be concluded between two persons present at the same time as per Article 82, via correspondence or other similar methods as provided for in Article 87,[324] or finally by telephone or other similar methods as provided for in Article 88.[325] In the realm of meeting of contract, Article 82 states that 'contracting parties have an option after the offer until the end of meeting; where the offeror has withdrawn his offer before the acceptance has been expressed, or where either contracting party utters a saying (statement) or makes an act (gesture) which indicates rejection, then the offer will be void, and any acceptance uttered thereafter shall be disregarded'.[326] However as previously stated, this text of the ICC mentions the term 'meeting of contract' in a vague and obscure wording in terms of there are no definitions or any other details for the term.[327] Likewise, The ICC in this Article appears to narrow the idea of 'meeting of contract' as it adopts it only for those situations wherein both the contracting parties are present to conclude the contract.[328] Other than that, Article 84 has made exceptional changes to the scope of 'meeting of contract' if there is a binding offer.[329] In such a situation, the 'meeting of contract' continues during the specified duration even though the parties are separated or the negotiation has been discontinued.[330]

[324] Which is similar to the ECC, Article 97.
[325] Which is similar to the ECC, Article 94.
[326] ICC, Article 82. This text is almost identical to ECC Article 94 and the Jordanian Civil Code (JCC) 1976, Article 96
[327] For more comments regarding these Articles, see Hasan and Rasoul (n 7)12; Aldamlouji (n 12) 48; Hasan and Abdul-Ridha (n 7) 9; Enas Mohammed Radhi, 'Legal Challenges to Resolve Electronic Contracts Through Internet and the Practice of Iraqi Law' (Working Paper, Law School, University of Babylon, Iraq 2014) 3-4. Also see for more about these two types of contracting: Abdullah (n 14) 76; Abdul-Majeed (n 19) 11.
[328] Abdullah (n 14) 22–23. Furthermore, the views of scholars have varied regarding a correct definition, some believe it is the *presence* of contractual parties in one place and remain busy in negotiating the terms. See for example Dr Barham M Atallah, *The Basis of the Obligation theory*, (University Culture Corporation Press Alexandria 1982) 64. Others however have concluded that it is a unit of *time* by saying that 'the place including contractual parties where the physical place itself is valueless, but the time through which parties still busy in contracting without any another concerns'. Alsanhori, *Masader al-Iltizam* (n 89) 214; Dr Al-Fadhel (n 203) 120.
[329] Similar to ECC, Article 93. It is necessary to note that Article 93(2) contains a provision that does not exist in the ICC; that is the deduction of the offer from the circumstances of the situation or the nature of the transaction. It could be agreed that the meanings of 'meeting of contract' in Iraqi and Egyptian laws are consistent with their significance in *Mejelle* in terms of being free to adhere to the rigid unity of place.
[330] In the face of such vagueness and obscurity, some have defined the term 'meeting of contract' as 'the meeting where contracting parties shall be in direct contact in which there is no period that separates between the issuance of the acceptance and being known by the offeror'. In their view, this will mostly be achieved if the contracting parties were meeting in one place. However, they do not stipulate that the parties be physically present in one place, and accordingly it would be sufficient if they were contracting via a telephone call or any other similar method. See Abdullah (n 14) 25. The *Mejelle* has stipulated the nature of this meeting in sale and leasing contracts, which can be generalized for similar contracts. See Articles 182 and 445. See also Dr Subhi Muhammasani, *General Theory for Obligations and Contracts*, (1st part, Dar al-Malaien Press, Beirut 1948) 296.

3.2.1. The Concept of 'Actual Meeting of contract'

An actual meeting of contract requires that the parties to the contract should be physically present at an agreed venue at the same place and time in order for them to conclude the contract without any obstacles. To prevent any confusion over the identities of the contracting parties, it is basically vital in these types of meeting that the concerned parties can 'see and hear' each other. In other words, the two criteria, seeing and hearing, remove any confusion that may arise with regards to the identity and speech of the contracting parties.[331] On this issue, judges have wide discretionary powers to decide whether or not an actual meeting of contract has been achieved.[332] This type of meeting of contract is likely to occur in the so-called contracts *inter praesentes*.

Based on the definitions that have been provided, the 'actual meeting of contract' is likely to occur in face-to-face contracts, and it begins from the moment the offer is communicated and continues as long as the contracting parties continue to meet, provided the offer is not rejected. It is important to take note that the actual meeting of contract requires that the offer is matched with an acceptance within the period the offeree knows about the offer. Since it is an *inter praesentes* contract both the contracting parties know what each other have expressed.[333] This scenario presupposes that the offeror is completely aware of the acceptance, as the ICC, Article 82, states that the issuance of the acceptance and its awareness must take place in the meeting of contract.[334] As such, any acceptance issued after the meeting is over is void.[335] However, this scenario is applicable if the acceptance is expressed in a language the offeror understands and perhaps it may be difficult to apply it in other scenarios. One example is if the acceptance is issued in a language that the offeror does not understand, even though there is a face-to-face transaction it does not qualify as a contract inter praesentes.

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[331] As stated by the *Maliki* school, and confirmed by the *Hanafi* school, 'in sales, the evidence of consent (is) required. In other words, jurists from these schools have authorised the contracts to be concluded by writing in contracts *inter praesentes* as well as contracts *inter absentes*. See Aldusouki (n 105) 4; Alsewasi (n 101) 79; Alshafi (n 28) 25.

[332] Ibid, 238–239. There are two standards by which the criteria of 'seeing' and 'hearing' are determined. First, it could be determined according to the standard of the lay man, and second, it could be determined according to custom. The standard of the layman, or the so-called objective criterion, is a standard that used to be applied in Iraqi courts to calibrate the amount of awareness of the accused person as regards contractual liability and tort responsibility. See Alhakeem, *et al* (n 15) 64

[333] Dr Mohammed Salih, *Origins of Pledges* (4th edn, Alittimad Press 1933) 217.

[334] The ICC, Article 82 states that 'contracting parties have an option after the offer until the end of meeting; where the offeror has withdrawn his offer before the acceptance has been expressed, or where either contracting party utters a saying (statement) or makes an act (gesture) which indicates rejection, then the offer will be void, and any acceptance uttered thereafter shall be disregarded'.

[335] In addition, some Arabic Civil codes have cited the same sentence, including the Egyptian, Jordanian, Syrian and Kuwaiti civil codes in Articles 94, 96, 95 and 109 respectively.

In the previously-mentioned scenario, the offeror has not set a specific duration for his offer; as such the offer will continue to be valid until an acceptance is issued. However, if the contracting parties are in an actual meeting of contract and the offeror has committed to a binding period that extends beyond the parties' separation after the meeting of contract, then the question that may arise is whether or not this period is taken as a part of the meeting of contract. Therefore, is the meeting hypothetically extended or it is considered to have been terminated and the contract cannot be concluded?[336] With regards to the first scenario, *Hanafi, Shafi'i* and *Hanbali* jurists believe that the offer is void and the offeror is not bound by it during the extended period after which the parties have separated.[337] Since the offeror has provided the extended period voluntarily, he need not abide by it. To assert otherwise would mean that the offeror would be restricted to some extent from taking legal actions regarding his property.[338] However, this will constrain the owner from exercising his ownership rights. This is dissimilar to the situation whereby the offeror constrains himself with a period that expires before the meeting ends, and in such a situation when the offer period expires the offer is void. With regards to the second scenario, the *Maliki* jurists believe that if the offeror voluntarily restricts themselves with a period of time, they must abide by it. This is confirmed by custom and it is as if the offeror says, 'I am bound by this offer for a period of ten days'. In the aforesaid example, it should be treated as a mandatory commitment by the offeror and the offeree can express his acceptance within the stated duration so long as there is no abandonment. It is contended that this view is more suitable for commercial transactions.[339]

To summarise, the *Maliki* jurists suggest that the offer continues to be valid until the specified period expires. The researcher agrees with this view because the commitment is the free will of the offeror and it is a general principle that has been expressed by Prophet Mohammed (PBUH), for he said that 'Muslims will be held to their conditions, except the condition that makes the lawful unlawful or the unlawful lawful'.[340] Therefore, the offer shall continue irrespective of whether the period expires before or after the end of the meeting. Moreover, the

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[336] Undoubtedly, if the prescribed period ends before the period identified by the offeror, this will mean that the offer will expire, and eventually, the meeting of contract will be ended. This principle seems settled in both Sharia or Civil law. However, the debate is about whether the duration of the offer extends beyond the separation of the parties or not, as there are several views on this issue.

[337] See among *Hanafi* jurists: AlKasani (n 195) 138; *Shafi'i* jurists- Ibrahim Albajouri*, Hashiat Albajouri, (*Part I*,* Dar Ihia'a Alturath Alarabi Press, no year*)* 339; *Hanbali* jurists: Shamsaddin A Almaqdisi, *Alsharh Alkabeer* (Dar Alkitab Alarabi Press 1972) 4.

[338] Ali Alkhafif, *Ahkam Almoamalat Alamaliyah* (3rd edn, Dar Alfikr Alarabi Press 2008) 175.

[339] Alhattab (n 310) 241. Alkhafif (n 339) 175–176.

[340] Mohammed I Altirmithi, verified by Ahmed M Shakir and others (no year). Sunan Altirmithi, in the section of what was stated about the Prophet Mohammed (PBUH) in reconciliation among people, hadith no. 1352 (Dar Ihia'a Alturath Alarabi Press) 634.

lapse of the binding offer after the separation of the parties will make the meeting of contract look like only an element of place when it is not truly so, for it must also be viewed as an element of time.[341] In addition to that, the decision of the Conference of Islamic Jurisprudence with regards to e-contracts clearly states that 'if the offeror has issued an offer that will be valid for a specific period of time, then he shall honour that commitment during that period …'.[342] In practice, this is the preferred view because it facilitates transactions, particularly when the offeror has voluntarily committed themselves to it.[343]

It is noted that the idea of the hypothetical extension of the meeting of contract is nothing new, nor is it inconsistent with the views of Sharia or civil jurisprudence. For instance, in spite of the fact that some problems may arise and hinder the issuance of the acceptance during the period of the meeting of contract, the offer continues to be valid and can still be accepted. If a party has made an offer and left the place because an act of God, such as an earthquake, has occurred before the offeree has issued his acceptance, then if they have met again after the earthquake and the offeree has accepted the offer, the contract is then concluded. This is because throughout the whole period the meeting is sustained and remains connected. Similarly, a contract is also concluded in the event a third party's accident arises, such as when one or both parties leave the meeting place to save a drowning person and subsequently meet again and the offeree accepts the offer.[344]

However, questions about validity may arise when the parties' 'meeting of contract' continues to shift or change, for example if the parties are negotiating a contract while they are walking or travelling in a car or aeroplane. In this situation, current Islamic law has two contrasting points of view. The *Hanafi* School of thought suggests that a contract can only be concluded at the exact place where the offer is first issued.[345] Therefore, no valid contract is formed when the parties, either together or separately, are participating in an activity that they can stop, such as riding a horse or travelling in a car.[346] The justification for this approach is that since the 'meeting of contract' keeps moving, there is no unified place. The offer is made at one place and the acceptance is made in another and this is in direct conflict with the rule of a solitary or single 'meeting of contract'. Consequently, there is no valid communication of the offer and acceptance to form a legal contract because the communication is carried out outside the

[341] Abdullah (n 14) 60.
[342] Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).
[343] Dr Mohammed Y Moses, *The Islamic Jurisprudence* (3rd edn, Dar Ilkitab Alarabi 1958) 327.
[344] Alshafi (n 28) 371.
[345] Al-Kasani (n 195) 539.
[346] Alsanhori, *Masader al-Iltizam* (n 89) 9

'meeting of contract'.[347] In such cases, the contract will be valid if both parties stop walking or travelling when the offeror issues the offer and the offeree issues an acceptance. If it is not possible for them to stop travelling, for example they are travelling in an aeroplane or ship, they should make provisions for the contract to be legally concluded irrespective of whether they are moving or standing still.[348] A modern school of thought believes that the 'meeting of contract' concept does not refer to a specific place or spot where the contracting parties conclude their contract but refers to the place in its wide meaning (country).[349] Consequently, according to this school of thought, a contract can be legally concluded irrespective of whether or not the contracting parties are together at one actual location, travelling or walking.[350] Prophet Mohammad's actions support the latter approach and at the same time are not consistent with the former as it has been said that the Prophet himself concluded a contract while he continued to walk or ride on an animal without stopping.[351] Moreover, other complications may arise if the parties have to stop moving in order to conclude a contract in one 'meeting of contract' as it is inconsistent with a core Sharia principle of removing hardship from Muslims.

As previously mentioned, in order for the contract to be valid, the offer and acceptance must be communicated by the offeror and offeree during their 'meeting of contract'.[352] However, there are divergent views surrounding the meaning of such communication of the offer and acceptance. According to the *Shafi'i* School of thought, the acceptance must be made as soon as the offer is made.[353] As such, any delay in accepting the offer will be deemed to be a rejection, even when the parties are still together in their 'meeting of contract'.[354] As such, an offer becomes non-existent as soon as it is made. However, the acceptance can only be made after an offer is issued and the communication of the offer and acceptance cannot be undertaken contemporaneously and as such no valid contracts can be concluded.[355] As a result, due to the

[347] Al-Joroshy (n 94) 33-34.
[348] See al-Shafiy (n 28) 86-127.
[349] Alattar (n 313) 61. Also see Alzarka (n 313) 348.
[350] It is important to note that in Islamic theory, the meeting of the parties to negotiate is not, in any case, applicable to unilateral contracts such as gifts, agency contracts, bequests, partnerships that can be revoked by either parties at any time or contracts to pledge and deposit that becomes binding after the object is delivered and which can also be cancelled by the owner of the object at any time. See Rayner (n 29) 307
[351] Narrated by Al-Bokhari, Sales Chapter, Prophet Saying no. 2115, 239.
[352] Abdul-Kareem (n 87) 290.
[353] Alkhateeb (n 107) 6; Shamsaddin M Alramli, *Nihayat Almuhtaj Ila Sharh Alminhaj* (Part 3, 3rd edn, Dar Ihia'a Alturath Alarabi Press Beirut 1992) 381; Al)) 160
[354] Al-Nawawy, *al-Majmu'* (n 109)160. However, a sect of this school has asserted the need for a period of thinking for the contracting parties to accept or reject, but the period measured in terms of the nature and extent of custom as considered in the termination of the meeting. See Alkhateeb (n 107) 6.
[355] Ibid.

necessity of enabling the valid communication of offer and acceptance, the offer legally exists and the acceptance must be made instantaneously after the offer is issued.[356] However, it is noted that this view does not have many supporters. Many jurists are of the opinion that acceptance need not be issued immediately after the offer. Instead, for it to be legally valid, it can be issued at any time as long as the 'meeting of contract' continues.[357] Merchants will usually need some time to consider the value worth of contracts before decisions are made. As such, having to immediately issue an acceptance will be difficult for the offeree and it will also represent a contravention of a basic Islamic principle of providing ease and removing hardship. As a result, the offeree should have the chance to appraise the offer at some point in the 'meeting of contract' period.[358] Delays in the issuance of acceptance are only allowed so long as they are within the 'meeting of contract' period. Such periods are normally quite brief and will not inconvenience the offeror.

3.2.2. The Concept of 'Presumed Meeting of contract'

Sharia scholars have allowed the formation of contracts when one of the parties is absent, as saying otherwise would cause considerable difficulties to Muslims involved in commercial activities.[359] However, when contracting *inter absentes* there is a need for an intermediary to convey the consent to enter into a legally enforceable contract between the contracting parties. Traditionally, either a messenger or a written letter would have been used, but these days it is quite likely that an electronic device will be used to send an email via the Internet.[360] In the case of presumed meeting of contract, the parties to a contractual relationship are not physically present at one common venue during the conclusion of the contract. Instead, the offer is expressed by means of a letter, an agency or other similar forms.[361] Difficulties may arise if the 'meeting of contract' concept is applied in the formation of a contract when the contracting parties are at separate locations. The difficulties arise because of the time delay between the sending and receipt of the communications by the contracting parties. Obviously, such delays

[356] However, it is allowed to delay the acceptance for a short period of time as long as the parties do not speak of any alien word with no relation to the transaction. Abdul-Kareem (n 87) 290-291; Hamid (n 200).
[357] AlKasani (n 195) 134; Alsewasi (n 101) 78; Alhattab (n 310) 240; Almaqdisi (n 338) 5.
[358] Al-Dobaiyyan (n 281) 182; Pak (n 86) 655; Alsanhori, *Masader al-Iltizam* (n 89) 3; Dr Abdul-hameed Al-Ba'ali, *Dhawabed al-Uquud* (1st edn, East Foundation 1985) 74; Dr Mohammed W Sewar, *al-Ta'beer An al-Iradah Fi al-Fiqh al-Islami* (Dar al-Thaqafa, Jordan 1998) 166; Alzuhaili, (n 23) 2947
[359] Al-Joroshy (n 94) 64.
[360] See Jerome Aumente, *New Electronic Pathway*s (Sage Publications 1987) 10; Al-Shafiy (n 28) 252.
[361] See other definitions for presumed meeting of contracts: Dr Saladin Zaki, *Takawon Alrawabit Alaqdiya Bain Algha'bain* (1st edn, Dar al-Nahda Alarabia Press 1963) 138. See for details Alhattab (n 310) 240; Alnawawi, *al-Majmu* (n 109) 160; AlKasani (n 195) 137; Albahouti (n 109) 147.

do not happen in face-to-face transactions because the offer and acceptance are heard the instance the contracting parties utter them.

In the presumed meeting of contract, the contracting parties are not personally facing each other and neither their representatives and the party issues their offer or acceptance through an email, agent, message or other similar means. In this instance, the offeror is deemed to be presumably present at the meeting and to have communicated his offer to the offeree.[362] A modern jurist has described it as a meeting whereby the offer is conveyed to the offeree in writing or through an agent.[363] Consequently, the presumed meeting is deemed to have started after the communication between the contracting parties began.[364] In response to the difficulty, Islamic law has created a constructive 'meeting of contract'. The notion of a constructive 'meeting of contract' indicates the location where the offer was made known to the offeree.[365] What this means is that the constructive 'meeting of contract' is considered to be effective in contracts *inter absentes* when the offeree becomes aware of the offer, and the offer remains viable as long as the offeree stays in the place where the offer was first communicated to them. The most dominant view for the *inter absentes* contract to be legally concluded in Sharia, the offeree must issue their acceptance at the same exact place where the message is communicated, or where the letter is read to them.[366]

Sharia scholars are divided on whether an offer in a letter or conveyed by a messenger remains valid and the offeree can still accept it if the letter is re-read or the message is re-delivered. Such a suggestion was supported by some references which state that 'the design of writing is to write a message to a man...and when it is reached, read, understood and accepted by the addressee, then this is a genuine sale...while an oral message is when the offeror teaches an agent to convey wording to another person and once done ... the other has accepted.'[367] On the matter of contracting *inter absentes*, Dr. Hamid suggested that when the offeree physically moves away from the 'meeting of contract' where the offer was first communicated to them, without issuing an acceptance of the offer, the offer is deemed to have been rejected.

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[362] AlKasani (n 195) 138.

[363] It was also defined as the exchange of various types of letters, whether written, oral, or visual, by the agent, mediator or any other means of communication. See Zaki (n 362) 138.

[364] Qasim S Ala'ni, 'The Impact of Correspondence on the Legality and Annulment of Contracts' (PhD thesis, College of Islamic Sciences, Baghdad University, 1999) 11.

[365] Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 1093; Al-Ba'ali (n 359) 150; Ala'ni, (n 365) 11.

[366] The offeree does not need to accept the offer immediately for he still has time to consider the offer, but he needs to issue his acceptance before he physically leaves the place where the offer was first brought to his attention; Musa (n 238) 236-237; Al- Joroshy (n 94) 34; Al-Ba'ali (n 359) 149. Alkhafif (n 339) 177; Alzuhaili (n 23) 2950.

[367] See Shiekh Nidhamaddin al-Binhabouri and Indian Jurists, *The Body of Indian Fatwas* (Part 3, Dar Ihiaa Alturath Alarabi Press Beirut 1980) 9.

Consequently, the 'meeting of contract' cannot be reconstructed by repeating the oral message or re-reading the letter of offer.[368] Some differentiate between sale contracts and marriage contracts. As for the first type, the acceptance shall be issued in the meeting of the arrival of the agent, or the meeting of delivering the message. The offer will be deemed lapsed if the acceptance has not been issued at that meeting. Therefore, it would be unacceptable to repeat the letter or redirect the offer by the agent in another meeting. On the contrary, in marriage contracts, due to the privacy of such contracts, it would be imaginable to repeat the letter or re-direct the offer by the agent in another meeting.[369] Despite this view, this opinion is not extensively accepted in Sharia and most scholars contend that when contracting *inter absentes,* the offer can be re-read or re-delivered, provided that the letter or messenger is available, at which point the contract can be legally concluded if an acceptance is made.[370]

However, these scholars have differentiated between marriage, sale and commercial contracts and some between only sale contracts and marriage contracts.[371] As for the first type, the acceptance shall be issued once the agent arrives, or the message is delivered, otherwise, the offer will be deemed to have lapsed. As such, it would be unacceptable to repeat the letter or redirect the offer by the agent in another meeting. On the contrary, in marriage contracts, due to the privacy of such contracts, it would be imaginable to repeat the letter or re-direct the offer by the agent in another meeting.[372] Others believe that the provision applied to marriage contracts can also be applied to sale transactions. However, this view differentiates between the situation where the parties are contracting 'by a letter' or 'by an agent'. In the case of agents, the contract cannot be concluded if the addressee rejects the offer in the meeting where the message or letter is delivered. Even if the later accepts it in another meeting, it should not be considered valid, because the speech, which was the medium used to communicate between that agent and the addressee, expires at the second meeting. In contrast, offering by a letter remains valid as long as the letter exists, because once the letter is read by the offeree and then rejected in the meeting, the same letter may be repeated again in another meeting. Hence, a new meeting of contract begins. If the offeree accepts in this meeting, then the contract is concluded, and the offer remains as long as the letter exists, whether in a sales contract or in a marriage contract, as long as the offer is not revoked by the offeror.[373]

[368] Hamid (n 200) 51. Ibn-Najeem (n 101) 287–288.
[369] Ibn-Najeem (n 101) 287–288.
[370] Al-Shafiy (n 28) 257.
[371] Ibn-Najeem (n 101) 287–288; Moses (n 344) 370.
[372] Ibn-Najeem (n 101) 287–288.
[373] Ibn-Abdeen (n 101) 512; Zaki (n 362) 23–24.

Some contemporary jurists consider that offering by a letter or agent stands as long as the letter exists, or if the agent remains responsible for the offer. In other words, unlike the second view, this group of scholars does not differentiate between the letter and the agent. Additionally, they apply this rule in both commercial transactions and marriage contracts.[374] Once the letter is read or the agent communicates the offer, even if it is rejected by the offeree in the meeting, it would be permissible to repeat it again in another meeting. Hence, a new meeting of contract begins. If the offeree accepts in this meeting, the contract is concluded.[375]

After highlighting these doctrinal views, although tending to agree with the latter view, it is however important to point out that it has one shortcoming; it does not determine the period of time for which the letter can be repeated, or if the offer was transmitted by agents, whether it can be redirected in the second meeting. Furthermore, saying that the offer by letter or agent remains as long as the letter exists, or the agent is still committed to deliver the offer, might lead to some practical problems about the validity of the expressed offer. For example, an offer is issued between two distant people by postal mail, and when it is delivered to the offeree and the meeting has started, the latter rejects it. Meanwhile, the offeror may not know about the rejection of the offer due to the distance between him and the other party and after a month, for instance, when the interest of the offeror has passed, the agent repeats the same offer to the same offeree. In this case, will this be considered as an offer issued in a new hypothetical meeting of contract? Would this offer be considered as having been issued in a real meeting of contract rather than a hypothetical one?

Clearly, to avoid doubt, it is important to identify the period of time during which the offer can be repeated. Determining this period should be based on the circumstances surrounding the contractual process. To do so, custom should be considered due to its importance in formulating contracts. The offeror's intention is also important for such a purpose. This can be deduced from his instructions to the agent and/or various physical aspects throughout this process. Furthermore, the researcher agrees with the latter view that there is no difference between making an offer by mail or using an agent to do so, in the keeping open or the withdrawing of the offer after it being refused, because both are identical tools to illustrate the offeror's willingness to the offeree.[376] Likewise, the differentiation between commercial contracts and marriage contracts seems to be unreasonable because sales and other financial contracts have

[374] Alkhafif (n 339) 178–179;
[375] See Alsanhori, *Masader al-Iltizam* (n 89) 29; Al-Ba'ali (n 359) 85.
[376] See Alkhafif (n 339) 178–179.

a priority over marriage contracts, as sales are likely to be somehow different than marriage contracts.[377] Therefore, it is allowed to accept an offer by a letter or agent in the second meeting after reading it if rejected in the first and then the contract is deemed concluded according to the second meeting as long as the offeror is uninformed about the avoidance in the first meeting'.[378] As such, because it is difficult to determine the idea of 'meeting of contract' in contracts *inter absentes*, doubts arise with regards to the practical application of the rule of 'meeting of contract'. As an alternative, it is logical to extend the validity period of the offer for a reasonable period of time when contracting *inter absentes*. The courts, when adjudicating the dispute, will take into account the nature of the contract as well as the surrounding conditions and trading customs.[379] If after a reasonable period of time no acceptance is made, the offer will become invalid. Any subsequent acceptance will be deemed to be a new offer and it is immaterial whether the offeree remains at or departs from the location where he was first informed about the offer. It is worth noting that in order to remove any uncertainties with regards to the availability of the offer, the offeror should specify the validity period for that offer. This will ensure that any acceptance of the offer made after the validity period is invalid and considered as a new offer.

3.2.3. The Concept of 'Hybrid Meeting of contract'

First and foremost, there is a need to distinguish two entangled notions, 'contract *inter absentes*' and 'presumed meeting of contract'. The former refers to the contract concluded between two distant parties and the latter refers to the period of time at which the offer was made to that distant party, a period that is prior to the conclusion of a contract.[380] For instance, an offer may be sent to the offeree using an email and subsequently the offeree attends physically in a face-to-face meeting with the offeror, accepting the offer. In this scenario, although it looks like the initial meeting was a presumed meeting of contract, subsequently the contract was actually concluded between two attendees physically present. For example, a

[377] Alsanhori, *Masader al-Iltizam* (n 89) 29;
[378] The same could be said when an offer has been issued by email, and once it is delivered to the offeree and the meeting has started, the latter rejects it. Meanwhile, the offeror may not know about the rejection of the offer due to the distance between them. See Al-Ba'ali (n 359) 85.
[379] As indicated in contract *inter absentes*, the offer remains valid until an acceptance is given, so long as it is considered to be proper based on the circumstances of the case. The said period is established by taking into account the time taken for the communication to reach the offeree, for him adequately consider the worth of the offer and for his decision to reach the offeror. If the acceptance is not issued within a reasonable time, the offer will be deemed to have lapsed. See Kuwaiti Civil Code (KCC) (1980), Article 48(1) and (2)
[380] Dr Jamel Alsharqawi, *The Public Theory of Obligation: The Resources of Obligation* (Dar Alnahda Alarabia 1974) 280. See also Dr Sameer A Tanago, *The Theory of Contract and the Provisions of Obligation* (Almaarif Foundation 2005) 42.

binding face-to-face offer may be made by the offeror to the offeree and the offeree has one week to consider it and meanwhile the offeree travels overseas and before the one-week period was over he conveyed his acceptance to the offeror by sending him an email or a telegram. In this example, the offer was issued during a real meeting of contract, but the contract was concluded between absentees. This in turn gives rise to another type of meeting, a third type, known as the 'hybrid meeting of contract'.[381] Additionally, it may occur to some people that the meeting of contract is a concept that is only applicable to contracts *inter praesentes* and was not envisaged for contracts *inter absentes*.[382] However, if the 'meeting of contract' is only applicable to contracts *inter praesentes* it appears to be inaccurate, as the ICC has borrowed this term from the Sharia law via the *Mejelle*.[383] In practice, the contracting process is not confined to when the contracting parties are together in the same place and time or in other words, it is not confined in face-to-face transactions.[384] This concept should therefore be fully adopted as per the Sharia law which says that there are actual and presumed meetings.[385]
Furthermore, there is no intention for that 'meeting of contract' should mean that the acceptance must be given straight away after the offer has been issued.[386] When contracting is carried through correspondence, it has to comply with the idea of 'meeting of contract' and this idea is consistent with the nature of these contracts, as correspondence can include e-communications.[387] It is generally agreed that the idea of 'meeting of contract' can be adopted by both types of contracts, i.e. *inter praesentes* and *inter absentes* contracts. However, it should

[381] This is surely what has been indicated by some jurists by stating that the codes in many countries, Arabian or foreign, have been limited when regulating contracting by correspondence, to address the issue of time and place of conclusion of the contract, which is an issue of high importance and value. However, it is not the only one, another issue is no less important, which is determining to what extent that the offeror can keep his offer, or the period in which the offer is still valid to link to an acceptance, in other words, the period of meeting of contract. See Dr Abdulmun'm F Alsadda, *Lectures in the Civil Code: The Consent* (Dar al-Nahda al-Arabia 1958) 109; Dr Ramadan Abussoud, *Principles of Obligation* (Aldar Aljami'ia Press 1984) 99. Also, it was stated that 'the meaning of contracting by correspondence in law is to use a means or a mediator to convey the will of the offeree to the offeror, whether this mediator is a physical means represented by writing a letter or telegram, or a person represented by an agent'. See al-Oboodi (n 19) 52.
[382] It was said by some commentators that the contracting process may be classified into two types, the first type is convened between attendees and is called the meeting of contract, as this view envisages the meeting of contract as a synonym for the contract *inter praesentes*. While the second type, on the other hand, is the contract *inter absentes*. See Dr. Tewfik H Faraj and Mohammed Y Matar, *General Origins of Law* (Aldar Aljami'ia 1989) 406–408.
[383] Article 87 of ICC states that '1- contract *inter absentes* is deemed concluded in the place where, and at the time when the offeror becomes aware of the acceptance unless an explicit or implicit agreement or legal provision text otherwise 2- It is imposed that the offeror becomes aware of the acceptance in the place and at the time once received thereto.' See also Articles 97 and 101 of the Egyptian and Jordanian Civil Codes respectively.
[384] See Dr Ahmed H Abu Stiet, *Sources of Obligation* (Dar Alfiqr Alarabi Press 1963) 89 and Dr George Sayoufi, *Public Theory of Obligations and Contracts* (al-Halabi Publications 1994) 73.
[385] See Dr Mohammed S Almahaseni, *Summary of Civil Code* (Babel Press 1937) 84; Zaki (n 362) 21-22.
[386] Dr Mohsen Nagi, *The Explanation of Personal Affairs Act* (al-Ribat Press 1962) 143.
[387] It was stated that 'the concept of the meeting of contract can accommodate the contract between far-distanced persons, one in the east and the other in the west', Rushdi (n 15) 29.

be emphasised that there is a need to take into account the specific circumstances of the latter type of contracts.[388]

3.3. The application of the 'meeting of contract' to electronic contracts

In Internet transactions, it is uncertain whether the rules of the 'meeting of contract' are applicable to electronic contracts (e-contracts). It is undecided whether transactions concluded using electronic means are similar or equivalent to face-to-face transactions and thus should be conducted under the rule of 'actual meeting of contract', or whether they should be deemed to be contracting *inter absentes* and therefore require a 'presumed meeting of contract' that has different legal considerations. As such, this concept must be able to accommodate the introduction of new communication tools, such as email, Skype as well as other types of communication in order to have the ability to include all the different types of contracts concluded by the various contracting parties. In fact, the operational characteristics of these new methods are not too far removed from the older methods. A letter sent by post is quite similar to an email communication and a human agent is quite similar to an electronic agent.[389] Also, the increase in the number of transactions as well as their complexity have made it such that the conclusion of contracts is restricted only to specific methods. As such, the concept should not only be flexible, it should also be broad, so that it can accommodate any new methods of concluding contracts. Consequently, the concept of the 'meeting of contract' should not be perceived as a private link between the parties. Instead, it should be treated as an objective link between the offer and acceptance depending on the communication means used, as follows.

3.3.1. Contracts concluded by new phone generations

The communications-related functions of modern telephones are not confined to voice calls, but now include communications using text messaging and video conferencing. The type of contracting being entered into does not depend on the programme that is used to send an

[388] Faced with the acceleration in the recent evolution of e-commerce, especially in the second half of the last century, it has become necessary to regulate such issues in accordance with the purpose of their provisions. Thus, contracting by correspondence is based on the unity of the meeting of contract presumably as opposed in reality. Dr Abbas Alsarraf, *The Explanation of the Sale Contract* (Dar Albuhouth Alilmiyah 1975) 117; Dr Mohammed A Alkasim, 'Provisions of Information Technology', (Working Paper, Communications Workshop Saudi Computer Society 2002) 168-169.

[389] William Murray Gloag, *The Law of Contract* (W Green, Edinburgh 1929) 8; William W McBryde, The Law *of Contract in Scotland* (Green, Edinburgh 1987)1-10; David M Walker, *The Law of Contracts and Related Obligations in Scotland* (T and T Clark Edinburgh 1995) 3.2.

acceptance, but it does depend on the manner it is used.[390] There are questions about the applicability of the 'meeting of contract' rule when telephone-based or Internet-phone communications are used. As expected, some jurists say it is similar to contracting *inter praesentes* while others say it is like contracting *inter absentes*.

One of the legal views states that if an Internet-phone is used to conclude a commercial contract, one of the parties to the contract is deemed to be absent, in other words there is a 'presumed meeting of contract'.[391] For that reason, Internet-phone communication is regarded as similar to the use of correspondence in the traditional form of communication between contracting parties.[392] The messenger is a tool (in this case a human tool) that is utilised to convey the intention of one of the contracting parties in order to conclude a deal with the other contracting party. Similarly, the Internet-phone is also a tool (in this case a non-human tool) that is used to convey the intention of the parties with the aim of entering into a binding contract.[393] Consequently, the concept of 'meeting of contract' in contracts using these types of communication should be deliberated upon based on the formation of contract *inter absentes*.[394] The rationale for this is that the 'meeting of contract' in a face-to-face deal is based on the situation where both contracting parties are physically present together in the same place. However, the conclusion of the contract via Internet-phone communication should be considered as contracting *inter absentes* since the contracting parties are not present in one 'meeting of contract', and thereby should be regulated accordingly.

It is worth noting that the idea that both contracting parties must be physically present in the same location is not a well-defined requirement in the application of the 'meeting of contract' in face-to-face transactions. As previously discussed, the contracting parties can legally form a contract even as they are walking or travelling, despite there being no specific 'place' because the place of transaction keeps changing.[395] As such, the requirement that the contracting parties must be physically present together in one location to fulfil the rules of 'meeting of contract' in face-to-face transactions seems to be irrelevant. Moreover, it should be noted that Internet-

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[390] Al-Oboodi (n 19) 222.

[391] Al-Shafiy (n 28) 286; Ewadhain Muhammad Najeeb, 'Hal Yajoz al-Ta'aqod be al-Wasa'el al-Mostahdathah (2001) 422 al-Wa'e al- Eslamy Journal 35.

[392] See John Anecki, 'Comment, Selling in Cyberspace: Electronic Commerce and the Uniform Commercial Code', (1998) 33 Gonzaga Law Review 39.

[393] Additionally, the process may be partially automated, when a person places a telephone order into a computer by using the phone's number pad. Al-Ramlawi (n 39) 146-147.

[394] Al-Shafiy (n 28) 286.

[395] See generally Donnie L Kidd Jr., 'Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in Telco Communications v. An Apple A Day', (1998) 32(2) University of Richmond Law Review 505. See *Grand Entertainment Grp., Ltd. v. Star Media Sales, Inc.,* 988 F.2d 476, 481-84 (3d Cir. 1993)

phone based communication differs from using messengers in several ways. An important point to note is that when contracting parties use Internet-phone communication is that they are immediately linked to each other without having to go through an intermediary and they are also able to hear each other speaking instantaneously. Under the circumstances, they can negotiate the contract and mutually agree to amend the terms immediately, whereas the messenger is restricted to conveying the message according to the instructions he was given.[396] There is always a likelihood of the Internet-phone being abruptly disconnected due to unforeseen technical faults. Similarly, sudden interruptions of 'meeting of contract' in conventional face-to-face transactions can also occur if a flood or earthquake hits the place, or the contracting parties are attacked by dangerous animals and as a result the contracting parties will be unintentionally and physically separated from the 'meeting of contract'. Under these circumstances, both contracting parties can recommence their 'meeting of contract' applying the option of 'meeting of contract' as long as they do not engage in matters that are not related to the contract.[397]The same procedure should be followed when Internet-phone communication between the contracting parties is interrupted by a technical fault. In the case of the constructive 'meeting of contract', it should not be affected because the parties can restart their communication and reconvene their 'meeting of contract'.

On one view, with respect to time and place when contracting by telephone, in the former case, this is deemed to be contracting *inter praesentes,* and in the latter, contracting *inter absentes*. The essence of this view is that when contracting is conducted over the phone, it occurs in a hybrid meeting; i.e. it is between an actual and a presumed meeting of contract. In the context of time, the meeting is treated as an actual meeting of contract, whereas in the context of place, it is treated as a presumed meeting of contract.[398] The ICC has taken this view and this can be seen in Article 88 which states that 'contracting by telephone or by any other similar way will be deemed as having taken place between two persons who are present insofar as it relates to time and between two absent persons inasmuch as it relates to place'.[399]

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[396] For example, e-mail and real-time chat pose no significant problem for mutual assent. Following explication of the terms, the parties exchange promises in a manner no different than if they were sending letters or talking on the telephone. Although not face-to-face, the involved parties communicate between themselves to reach assent through the exchange of email or chat. Disregarding other issues, the language and conduct of the parties in each case manifests an intent to enter into a sales transaction. See e.g., UCC 2-204(l); UCITA 202(a) (1999) (Formation in General) ("A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.").

[397] Al-Ramlawi (n 39) 146-147.

[398] Alsanhori, *Masader al-Iltizam* (n 89) 238-239; Report of the Commission of the Conference of Electronic Banking Business between the Sharia and Law', (2003) 5 Vol (5) Dubai University Publications, 2127.

[399] See, Salman Bayat, (n 24) 86.

According to a second view, the type of contract varies, as it depends on the manner in which the Internet-phone is used as a means of communication. To conclude a contract *inter praesentes*, three characteristic features require to be achieved. Firstly, the issue and receipt of the acceptance need to be concurrent and simultaneous. Secondly, there needs to be unity of place and thirdly, there needs to be the engagement of contractors in the contracting. Therefore, if the contracting process does not have these concurrent and simultaneous features, then the parties are said to have contracted *inter absentes*.[400] It can be seen that if the telephone is used as the means for communication during the contracting process, the concurrent and simultaneous factor is present if the telephone is used for voice or video call. But if the telephone is used to send a text message the concurrent factor is no longer there. However, whichever feature of the telephone is used, the unity of place factor cannot be achieved. Therefore in the context of place and time, it is not possible to always say that an actual meeting of contract has occurred. In addition to that, contracting by telephone is different from contracting in a presumed meeting of contract as it is impossible to attain concurrence and simultaneity between the contracting parties of the meeting. Therefore, from the perspective of time and place, it should not be regarded as contracting in a presumed meeting of contract.[401]
However, the third legal approach considers contracts formed using Internet-phone communication as analogous to contracts *inter praesentes* or face-to-face transactions because there is instantaneous communication between the parties to the contract.[402] This is because of its similarity with face-to-face transactions, whereby the offer and acceptance are received by the other party as soon as there is verbal communication using the phone.[403] In the case of a live video communication, not only can the parties speak with each other, they can at the same time also see each other. Consequently, transactions conducted by video link should be treated as analogous to face-to-face transactions.[404]

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[400] In this regard, what Rushdi had said should be pointed out 'the meeting of contract will be established between attendees if they were together in one place, thus becoming on direct communication so that each can hear the speech of the other directly when they are engaged in contracting without being distracted with any other issue. It starts by providing an offer and ends either by responding to the offer by accepting or rejecting it, or adjournment without any response; whether this adjournment is by physical separation or if one or both of the parties had engaged in another issue'. See Rushdi (n 15) 28.
[401] Abdullah (n 14) 155.
[402] Section 2 of Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23). Al-Ebraheem (n 321) 105; al-Oboodi (n 19) 146. Furthermore, most of the Arabic countries civil codes adopted the same view, see articles 95, 50, 102 and 94 of the Syrian, Kuwaiti, Jordan, and Egyptian Civil Codes respectively.
[403] Madkoor Muhammad Salam, *al-Wajeez lel-Madkhal fi al-Figh al-Eslamy* (Dar al-Etihad al-Araby 2000) 264; See also Article 102 of the Jordan Civil Code (JCC); Al-Khafif (n 339) 177; Isma'eel Mohyyi Addin, *Nadhariyyat al-Aqd* (Dar al- Nahdah al-Arabiya Egypt 1990) 165.
[404] Aldewachi A, 'The Technology of Communications and Information are the Sources of International Structure' (2000) 1(4) Journal of Computer Researches Bahrain 48.

A prerequisite for this approach is that the meeting when contracting using the Internet-phone is an actual meeting and is not presumed, because it is the same as when contracting *inter praesentes*. Other than that, the cause is the same in both situations, as the telephone permits the receipt of verbal communication, whether an offer or acceptance, by the addressee directly and immediately, just as if both parties were present together in one meeting.[405] As such, it can be seen that this view does not consider physical separation to be important. What it considers as important is that both the contracting parties are able to hear clearly the words that are spoken and that there is no time lapse between the moment the acceptance is issued, and the other party becomes aware of it.[406] It is through this that the offer and acceptance are established, and the meeting of contract is the time of communication. Some jurists incline to reduce the importance of the place of the meeting of contract. They consider the unity of this meeting may be hypothetically achieved, i.e. in phone calls, there is a hypothetical connection as long as neither party did not leave the place that articulated the offer and/or acceptance'.[407]

It is important to highlight the fact that the Islamic Fiqh Assembly had, in paragraph 2 of Resolution No. 54 (3/6) of 1990, adopted the following view in relation to the conclusion of contracts using modern communication instruments:

> if contracting was concluded between two parties at the same time and they were physically separated from each other by a great distance, and if their means of communication was through a telephone or wireless, then they will be considered to be contracting between attendees and the original provisions adopted by jurists will be applied ….[408]

It should also be pointed out that the ECC adopts this view, as Article 94 states that '(1) if the offer was issued in the meeting of contract without determining the date of the acceptance, the offeror can abdicate himself from his offer if the acceptance was not instantaneous. The same issue applies if the offer was issued from another person by the phone or any similar means. (2) Yet, the contract is concluded even...'. It can be observed from this text that the Egyptian legislator did not consider the circumstances of the contractors being at distance (when contracting by telephone) important in characterising the nature of the contract. It seems that the view of the Egyptian legislator is consistent, since it does not distinguish between the place of the contract independently from its time. According to ECC, the contract cannot be concluded except by the knowledge of the offeror of the acceptance, whether contracting was

[405] Al-Oboodi (n 19) 148.
[406] To support this view, it is provided that 'it takes the provision of contracting between attendees in the meeting of contract, contracting by telephone or..., since the contractors are in direct communication that makes one of them hear immediately the speech of the other when it is provided'. Ibid.
[407] Aldewachi (n 405) 55.
[408] See Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

between attendees or absentees.[409] Despite this, in the context of applying the meeting of contract' for contracts concluded using the Internet-phone, it is important to realise that when the 'meeting of contract' rule is actually applied to face-to-face transactions, it appears to be not practical. Therefore, an additional similar 'meeting of contract' is used as a substitute. As a result, the 'meeting of contract' is considered to have started when the offer was communicated through the telephone and it carries on for as long as the parties continue to talk on the telephone.[410] As such, the offer can be withdrawn before an acceptance is issued, but a withdrawal of the offer must be communicated to the offeree.[411] Likewise, when the telephone connection is terminated before issuing an acceptance or there is a rejection of the offer explicitly or implicitly issued then this offer is deemed to have been revoked. For instance, when the parties open a new discussion about issues that are unrelated to the offer for unreasonable long time, that would to a high extent denote rejection.[412] In such a situation, if the offer is not extended for a specific period by the parties, the only point to legally conclude the contract the acceptance must be expressed at any moment before the Internet-phone or live video communication is disconnected.

3.3.2. Website contracts

As for other means of communication, although physically the contracting parties are in different geographical locations, transactions conducted over the World Wide Web (WWW) are considered to be comparable to the actual meeting of contract or face-to-face transactions.[413] Just like other types of communication, such as the telephone, the WWW can also deliver instantaneous communication between the contracting parties. Since the offer and acceptance are immediately made known to the intended recipient, they should be considered to be analogous to an actual meeting of contract in a face-to-face transaction. In this regard, since there is instantaneous communication between the contracting parties, the telephone and

[409] See, Article 91 and 97 of the ECC. It is worth noting that the Lebanese and German legislators also adopted this view. In Article 158 of the Lebanese Obligations and Contracts Code, it is provided that 'the contract that is established by a telephone conversation is considered as contract that is established between attendees, and at that time the place of its creation is identified, either by the desire of the contractors or by the judge, according to the situation of the case'. Article 174 of the German Civil Code also provides 'the offer directed to a present person cannot be accepted except immediately, the situation is similar in accordance to the offer direct from one person to the other by telephone'.

[410] Abdulrazzaq Al-Heeti, *Hokom al-Ta'aqod abr Ajhezat al-Ettesal al-Hadeetha* (Dar al- Bayareq, Jordan 2000) 22-23.

[411] Also see *Henthorn v Fraser* [1892] 2 Ch 27, CA; *Household Fire and Carriage Accident Insurance Co v Grant* (1879) 4 Ex D 216.

[412] Ala Addin Al-Janko, *al-Tegabodh fi al-Figh al-Eslamy* (Dar al-nafa'es, Jordan 2004) 321.

[413] Al-Fadhel (n 203) 136-137.

the website software appear to be the same, except that the software is programmed for the website trader to enable it to deal with online-customers immediately.[414]

However, comparing the transactions conducted over the telephone with those conducted done over the WWW does give rise to some problems. In a telephone transaction, both contracting parties negotiate as if they are in an actual face-to-face meeting, albeit it is conducted using a telephone and without any intermediary. The communication happens in real-time and allows the parties to immediately negotiate the deal, amend the terms and, if they are satisfied, reach an agreement.[415] In comparison, the website software is incapable of negotiating the terms of the contract with customers, amend terms and conditions or anything else, being limited to doing only what its programmer has programmed it to do.[416] Therefore, although there is instantaneous connection using the Internet, websites are normally pre-programmed to transact with customers without any direct human intervention. As a result, it can be said that, in comparison with face-to-face transactions, there is no direct communication between the contracting parties in web transactions. Therefore, there are uncertainties over the applicability of the 'meeting of contract' concept in web transactions.[417]

3.3.3. Contracts concluded by email, telex and chat rooms

Email, a relatively new tool, can also be used to exchange correspondence through the Internet.[418] It has, to some extent, replaced the conventional way of sending letters using postal services.[419] Furthermore, an offeror can send his\her offer in writing to the offeree using an email from his registered email address.[420] As such, the sending of an offer in an email is the

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[414] GH (German Federal Supreme Court) WM 1989,652; BAG ZIP 1982, 1467. David M Walker (ed) *J Stair, The Institutions of the Law of Scotland 1693* (Edinburgh University Press 1981) 1 X, 1, 13; Gloag (n 390) 16.

[415] Rudolf B Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems Vol. I principle of freedom of contract* (Oceana Publications 1968) 692 and 104.

[416] Smith (n 40) 456

[417] It is important to say that this view is in conformity with the Ruling of Islamic Jurisprudence Assembly, which stated that if there is a contract concluded between two distant parties, not being in one place when one cannot see nor can hear the other party directly, and the means of such a communication between the parties is either messenger, writing a letter, or the like such as telex, telegraph, fax, or computer screens, in all cases, the contract is considered to be as contracting *inter absentes*. Section (1) of Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

[418] Kamil Yahia, 'Arabic Banks' (1997) 193 Journal of Arabic Banks Union 82.

[419] Almost every user has their own email address to send and receive letters via the Internet, and it is only available to subscribers to access their private e-mails according to their usernames and passwords set manually. Ahmed al-Sarraf 'An Internet Web, connects' (1995) 171 Journal of Arabic Banks Union 61. Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2123. Osama A Mujahid, 'The Privacy of Contracting Via Internet' (Conference Paper, Conference of Law, Computer and Internet, Dubai, January 2000) 8.

[420] It is also permissible to forward the same letter to an indefinite number of subscribers at the same time by a mailing list service. See Dr Tony M Jesus, *Legal Organization for the Internet: A comparative study in the light of national laws and international treaties* (1st edn, Sadir Publications 2001) 56.

same as sending an offer in a letter through the postal services, provided the offeror has sent their offer to the email address of the offeree. The offeree will become aware of the offer when they open their email inbox and it is from that point in time that the offer is 'activated' or becomes applicable. Put another way, the receiver of the email is free to decide whether his\her accepts or rejects the offer and then can convey this decision to the offeror by replying to the offeror's email.[421] When email is used to convey the offer and acceptance between contracting parties, it may be subject to an inherent delay. As such, the contracting parties may not be aware of the offer and acceptance as soon as they are sent.[422] Email messages can quite often be delayed for hours before being received in the inbox of the intended recipient's email address. Therefore, if this method of communication is used in the formation of e-contracts, it should be classified as a contract *inter absentes*. This is because there is a time delay between the time the offer and acceptance are sent and receipt by the intended recipient.[423] Actually the email is similar to the traditional method of sending letters when contracting *inter absentes*.[424] Therefore, when contracting *inter absentes* using email, it seems that the application of the 'meeting of contract' concept is open to doubt because it is not practical to ascertain the rule of the 'meeting of contract'.

However, in the event there is an instant written communication between the contracting parties, such as when using telex or Internet chat rooms, it is arguable whether these types of communication are deemed to be actual or presumed meetings of contract. Incidentally, it is believed that these forms of electronic communication should be regarded as legally similar to when the contracting parties are communicating in face-to-face transactions because of the instantaneous connection between the contracting parties although not physically present together in a 'meeting of contract'.[425] The reason for this legal distinction is because, as mentioned above, the fundamental difference between face-to-face transactions and contracting *inter absentes* is the delay in communicating the offer and acceptance as well as its

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[421] Currently, computer programs provide the facility to make choices and respond to messages without human involvement, the viability of this humanistic principle could be threatened. See Raymond T Nimmer, 'Electronic Contracts: Part I, Computers and Law' (1996) 14(2) Journal of Computer and Information Law 36 37.

[422] This direction is also can be applied on telegram and fax communications; see Al-Adawi (n 213) 18.

[423] Delays in emails can be expected even when the two parties are simultaneously using their computers due to the nature of email communication. Also, some transactions machines reacting automatically to the customer's conduct, but delays can sometimes be expected, such as the insertion of a card into the autoteller, or the positioning of a car at the entrance of a car park. *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.

[424] The Ninth Circuit has held that loading software from a disk into the computer's random-access memory constitutes fixation in a tangible medium for cases involving copyright infringement. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511,518-19 (9th Cir. 1993).

[425] Al-Ebraheem (n 321) 104. See also the judgment of Denning LJ in *Entores Ltd v Miles Far East Corporation* (1955) 2 All ER 493.

receipt by the intended recipient. It is noted that when using the telex or Internet chat room the written offer and acceptance are instantaneously brought to the parties' knowledge.[426] Generally, it is not sufficient for the offeror to know simply that the offer has been sent. The offeror must also know that the offeree knows about the offer and it is at that point in time that the meeting of contract has been achieved.[427] That is to say, the meeting of contract begins when the offeree knows about the offer.[428] When contracting is carried out using email, the place where the email is dispatched or written is not the meeting of contract, instead the meeting is in the place where the letter or email is delivered to or where the addressee reads the letter or email.[429] Therefore, if a written offer is sent to an absentee, an immediate acceptance is not required when the offer is delivered.[430] It will be considered as if the offeror has personally sent the offer to the addressee. In this instant, the meeting of contract is the place and time the email or letter was received.[431]

As such, based on the latter legal method, the 'meeting of contract' in contracts that are concluded using these types of written communications are deemed to have commenced when the offer reached the offerees,[432] and the offer shall remain valid for as long as the contracting parties continue to be engaged with the transaction using the said instant communication provided there is no explicit or implicit rejection or withdrawal of the offer by either party.

However, treating such written forms as instantaneous communication ought to be reviewed.[433] Another approach contends that such contemporary written forms of communication ought to

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[426] Al-Ebraheem (n 321) 112.

[427] Under the UK Sale of Goods Act 1979, s18(1) in certain circumstances ownership passes when the contract is made. In general, however, both, German and Scots law clearly distinguish between contract formation and conveyance. See Kenneth G C Reid, *The Law of Property in Scotland* (Butterworths Edinburgh 1996) 606,610.

[428] It is necessary to distinguish between the commencement of the meeting of contract and the commencement of the contract itself. A contract is normally concluded when and where acceptance has been communicated. The time and place of contract formation can be essential in questions of whether an agreement is binding, and in order to decide the moment of the transfer of ownership and of risk, and for conflict of law issues. See Anton, *Private International Law* (W Green Edinburgh 1990) 270.

[429] Alkhafif (n 339) 177; Alzuhaili (n 23) 2950.

[430] Facsimiles are also included - see Jane Kaufman Winn and Michael Rhoades Pullen 'Despatches from the front: recent skirmishes along the frontiers of electronic contracting law' (1999) 55 Business Lawyer 455 at 492.

[431] It was also stated by Mohammed K Basha, *Murshid alhairan*, article (346): 'as acceptable for the sale by offer and acceptance to be concluded verbally, it is valid to be concluded by writing as well…and acceptance must be released at the meeting of arrival of letter but after being read and understood…'. For more details see Abu Alhasan A Almargenani, *Alhidaya, Sharh Bidayat Almubtadi'* (Administration of Quran and Islamic Sciences 1996) 21; Ibn-Najeem (n 101) 287–288; Shiekh Nidham and Indian Jurists (n 368) 7.

[432] See similarly, Article 2 (1.3) of the UNIDROIT (United Nations International Institute for the Unification of Private Law) Principles on International Commercial Contract (2004).

[433] Clive Davies 'Electronic commerce - practical implications of Internet legislation' (1998) 3(3) Journal of Communications Law 82; John Perry Barlow 'Selling wine without bottles. The economy of mind on the global net' in Beret Hugenholtz (ed) *The future of copyright in a digital environment* (1995) at 169.

be considered as analogous to contracting *inter absentes*.[434] As such, the contemporary writing tools appear to be similar to the formation of contracts using the traditional written letters which early Sharia scholars deemed as contracting *inter absentes*.[435] Both cases involve writing and that has essentially remained the same, but the form and the original source of the written material has changed from that of a book or pen and paper to that of a technological form.[436] Furthermore, instantaneous communication is reliant upon whether the sender will know immediately whether the message they sent has come to the knowledge of the purported receiver and that the message that was received is complete and accurate.[437] For example, the sender of a telex or other similar form of written communication will not know whether any failure has occurred during the sending of the message or whether the message that was delivered to the addressee was complete or not. It is acceptable that in contracts *inter praesentes*, the contracting parties instantaneously know about the offer and acceptance, but in the case of contracts transacted using the telex this is not guaranteed. There is always a possibility that one of the parties is not at the telex machine to read the message the moment it was relayed. Similarly, it is quite common for Internet connections to suffer from delays or even massive failure, thereby causing users of such related facilities to experience delays or a total loss of communication.

Conveying the offer and acceptance by means of telex may fall within the categories of expression by writing, considering that it is in a modern form with special specifications.[438] However, the telegraph is simply a reproduced copy of the offeror's writing that shows their expression. Although it cannot be considered to be the actual writing of the offeror, it is an exact image of what was written and signed by them.[439] As such, before the offer using the telegraph is conveyed, the offeror is required to write whatever they wish in the telegraph and it is only after this procedure is complied with that the post office will send the telegraph to the addressee.[440]

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[434] George F Chandler 'Maritime electronic commerce for the twenty-first century' (1997) 32(6) European Transport Law 674.
[435] Al-Zuhaili (n 23) 2951.
[436] *Adams v Lindsell* (1818) 1B &AId 681; *Dunlop v Higgins* (1848) 6 BeUl'sApp 195; *Thomson v James* (1855) 18D 1; Al-Shafiy (n 28) 293- 294.
[437] Beale, *Chitty on Contracts* (*General Principles*) *Volume 1* (n 215) 2-045; Megan Knight 'Anarchy on the Internet' (1998) May Intelligence 34-37; Lester Thurow 'Needed: a new system of intellectual property rights' 1997(5) Harvard Business Review 95-103; Michael R Overly, 'Laws for the cyber frontier' 1997(4) Management Review 33-35.
[438] Ala'ni (n 364) 105.
[439] Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 460. See Ian Walden 'Regulating Electronic Commerce: Europe in the global E-conomy' (2001) 26 European Law Review 529 at 537.
[440] Ayad A Albatayna, 'The Legal System of Contracts of Computer Programmes' (PhD thesis, Baghdad University, 2002) 145; Glatt (n 30) 57.

Therefore in view of these factors, the delivery of the message when using the telex and similar types of written communication should not be considered to be instantaneous.[441] As such, it is not likely that the rules of the 'meeting of contract' will be applicable when contracting *inter absentes*.[442] As a matter of fact, it is difficult to ascertain whether the contracting parties are still engaged in the transaction or they are doing something else which is completely unrelated to the transaction without shutting down the telex machine or continuing to be logged on to an internet chat room.[443] As such, in contracts that are concluded using the telex or Internet chat rooms, the exchange of offer and acceptance should be treated the same as those using letters sent through the traditional postal service. Therefore, the 'meeting of contract' should be verified by using the rules that are provided for contracting *inter absentes*.[444] In these types of contract, the offer becomes effective when it is conveyed to the offeree and it remains so for a period of time that is deemed to be reasonable, or the time specified in the offer. Unless it has been agreed earlier, the reasonable period of time can be established by taking into account the amount of time it takes the offer to reach the offeree, the amount of time that is required for the offeree to assess the offer and, if they accept the offer, the amount of time it takes for the acceptance to reach the offeror. Deeming telex and other similar forms of communication as analogous to contracting *inter absentes* is in harmony with the ruling made by the Islamic Fiqh Assembly of 1990, whereby it indicated that contracts that are concluded using telex and fax are deemed to be contracts *inter absentes*.[445] However, it might be possible to argue whether the option of the 'meeting of contract' can be applied to a contract that is concluded using the telex or an Internet chat room. This is discussed in the next section.

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[441] *Entores v Miles Far East Corporation* [195512 QB 327; *Brinkibon Ltd v Stahag Stahwarenhandelsgeslschaf mbH* [1983 2 AC 34. ' *Brinkibon Ltd v StahagSahharenhanddsgeselschaftmbH* [1983] 2 AC 34 (43). See e.g. *Department of Transport v Norris* 474 S.E.2d 216, 218 (Ga. Ct. App. 1996), rev'd on other grounds, 486 S.E.2d 826 (Ga. 1997) holding that a facsimile transmission was not a 'writing' that satisfied the Statute of Frauds. The Georgia Court of Appeals noted that 'beeps and chirps along the telephone line is not writing, as that term is customarily used. Indeed, the facsimile transmission may be created, transmitted, received, stored and read without writing, in the conventional sense, or a hard copy in the technical vernacular.

[442] See Peter Schlechtriem, Hans Stoll and Geoffrey Thomas, *Commentary on the UN Convention on the International Sale of Goods (CIGS)* (Clarendon Press, Oxford 1998)163-165 where he distinguishes between a telex receiver being as similar to other devices that record oral declarations as opposed to the telephone, which is regarded as an instrument whereby an oral declaration is communicated.

[443] From a commercial point of view, it is ridiculous to demand or specify that either party to the contract can cancel the contract as long as the telex machine is not shut down or if they do not log out of the chat room as it is quite easy not to shut down the telex machine or log out of the chat room for hours and even days.

[444]Wright (n 169) 240.

[445] See part (1) of Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

3.4. The application of the option of meeting of contract 'khayar al-majlis' to e-contracts

In Sharia, the option of 'meeting of contract' is considered to be one of the recognised rights to withdraw from a contract when the offer and acceptance is communicated as long as they remain together at the 'meeting of contract'.[446] The extent to which the option of the meeting is contentious because the *Hanbali* school has restricted it to sales and lease contracts.[447] However, the *Shafi'i* school[448] is of the opinion that it is only applicable to sales contracts.[449] The authority for this option is based on a tradition attributed to the Prophet who said "When two persons enter into a transaction, each of them has the right to annul it so long as they are not separated and are together (at the place of transaction); or if one gives the other the right to annul the transaction. But if one gives the other the option, the transaction is made on this condition (i.e. one has the right to annul the transaction), it becomes binding. And if they are separated after they have made the bargain and none of them annulled it, the transaction is binding."[450] Jurists have argued about the terms and applicability of the option present in the 'meeting of contract' when contracting *inter absentes*. It is because the rules are not so well-defined for situations where the contracting parties are not present together in one location which in turn makes the 'meeting of contract' concept clearly difficult to determine. The parties' right to annul a contract that is made *inter absentes* and under the option of the 'meeting of contract' continues to be a subject of discussion in Sharia law. *Shafi'i*[451] and *Hanbali*[452] jurists have demonstrated that the '*Khayar al-Majlis'* or the option of 'meeting of contract' is indisputable for the parties after the contract is concluded.[453] It is also provided that, unlike

[446] Some Muslim jurists do not recognise the validity of this option. See Abdullah Al-Tayyar, *Khiyara al-Majles wa al-Aeeb fi al-Figh al-Eslami* (Dar al-Maseer 1997) 66-67; Abu Raghda (n 312) 119; Albahouti (n 109) 200; Alnawawi, *al-Majmu* (n 109) 165-169; Alkhateeb (n 107) 44; Al-Ba'ali (n 359) p80.
[447] Albahouti (n 109) 199.
[448] Alramli (n 354) 381 and after. It is believed that the option of meeting is available for multiple people. For example, in sale, sellers and buyers may be more than two people and the option of meeting will be provided for all parties.
[448] Mohammed I Alshafi', *Al-Umm, Part III* (*Dar Ihia' Alturath Alarabi* 2001) 245; Alshirazi (n 305) 264.
[449] Alramli (n 354) 385.
[450] Sahih Muslim, the tradition no. 3658, translated into English by Siddiqi Abdul Hamid, (Kitab Bhavan, India 2000) 971. For more comments see: Dr Omar Abdulaziz, 'The option of meeting in sale' (1972) 1 Journal of the Imam Aadham College 259.
[451] Alshirazi (n 305) 264; Alshafi' (n 449) 245; Alkhateeb (n 107) 43.
[452] Ibn Qudama (n 311) 6.
[453] They have quoted Abdullah ibn Umar's narrative of the hadith whereby Prophet Mohammed (PBUH) said: 'both parties (in the sales) have options, unless they are physically separated, except in a conditional sale'. Sunan Abu Dawood, verified by Mohammed M Abdulhameed, (3rd Part, Dar Alfikr 1995) in the section of the option of the parties, hadith no. (3454) 272-273.

cases where there are face-to-face transactions, the option of 'meeting of contract' is not applicable if the parties are contracting *inter absentes*.[454]

The idea behind the tradition of the option of 'meeting of contract' derived its authority from a presupposition that the parties were contracting in each other's presence in a 'meeting of contract'. As such, it would be unrealistic to apply this when contracting *inter absentes* because the contracting parties are in different locations. According to one school of thought, if there is a communication of offer and acceptance between the contracting parties, the contract is considered to have been irrevocably formed and the parties do not have the option to withdraw from it. It is immaterial whether the parties were still in their 'meeting of contract'.[455] The *Qur'an* supports this legal thought by enjoining Muslims to comply with contracts.[456] A contract is legally concluded if the parties have communicated their consent (offer and acceptance) and this is in accord with the above *Qur'anic* verse which clearly instructs all Muslims to fulfil their contracts. Therefore, the application of the option of 'meeting of contract' is inconsistent with the said instruction to fulfil contracts because the parties, if the option of 'meeting of contract' is still granted to them, can cancel their contract although it has already been concluded. Incidentally, the above saying of the Prophet is interpreted based on the view that the two parties are still negotiating the contract and the contract is not formed yet, because the exchange of unequivocal offer and acceptance has not been carried out. As such, it is contended that 'separation' mentioned in the saying refers to the separation by word and not physical separation, which can happen when the acceptance of the offer has been unequivocally communicated.[457]

Both the *Hanafi*[458] and *Maliki*[459] schools reject the option of the meeting and consider that the contract is legally enforceable once an offer is matched with an acceptance and all the conditions have been fulfilled.[460] They interpret the word 'separation' in the above-mentioned hadith to mean separation by words and not physical separation. Therefore, once the contract is concluded the option no longer exist unless the parties have previously agreed it.[461] One modern view has interpreted that the purpose of the aforementioned hadith was not to support

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[454] Al-Shafiy (n 28) 544.
[455] Al-Kasani (n 195) 238-239; Ibn Rushd M Alqurtubi, *Bidayat Almujtahid wa Nihayat Almuktasid* (Part 2, vol 2, 10th edn, Dar Alkutob Alilmiya Press 1988) 170-171.
[456] Chapter 5, verse no. 1.
[457] Wahbah Al-Zuhayli, *al-Mu'amalat al-Maliya fi al-Fiqh al-Islami* (Vol 1, Dar al-Fikr, Damascus 2003) 10.
[458] AlKasani (n 195) 134; Alsewasi (n 101) 78.
[459] Alqurtubi (n 456)170.
[460] Some jurists have sustained the *Hanafi* and *Maliki* tends to ignore the option of meeting of contract such as Moses (n 344) 66-67; Alsanhori, *Masader al-Iltizam* (n 89) 37.
[461] Abdulaziz (n 451) 262.

the option of the meeting, but instead is about the period whereby the respective parties are entitled to withdraw or accept the offer before the end of the meeting.[462] Additionally, it is noted that the Islamic Fiqh Assembly did not refer to the option of the meeting of contract, but has only selected the moment the offer is matched by an acceptance. That is to say, it did not adopt the idea of the option of the meeting of contract in the actual and presumed meeting of contract.[463] However, a divergent view contends that based on the parties' 'meeting of contract', both contracting parties have the option to withdraw from the contract after it is formed until their 'meeting of contract' has ended.[464] Arguably, this saying of the Prophet clearly recognises the validity of the option of the 'meeting of contract'. Here the word 'separation' is taken to mean that either one or both contracting parties physically leave the 'meeting of contract'. Such an interpretation makes the presence of the word 'separation' in the Prophet's saying meaningful, since there is no doubt that a legally enforceable contract between the two parties cannot exist prior to the exchange of offer and acceptance.[465]

Therefore, when a contract becomes legally enforceable after the exchange of offer and acceptance, both contracting parties, based on the option of the 'meeting of contract', can lawfully cancel the contract as long as they are still together at their 'meeting of contract'.[466]

Regarding the application of this option to e-commerce, it has been argued that, in practice, the option of the 'meeting of contract' is not limited to just face-to-face transactions.[467] In fact, it has been suggested that the moment an acceptance is issued in a contract *inter absentes* the offeree has the right to cancel the contract at any time before actually leaving the location where the offer is received. Similarly, the offeror can also cancel the contract so long as the offeree is still at the same place where he received the offer.[468] Very often, it is the nature of human beings that makes a person rush to conclude a deal without appropriate and sufficient

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[462] Alzarka (n 313) 447.

[463] Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

[464] Ibn Qudama (n 311) 7.

[465] Similarly, some modern researchers believe that that the *Hanafi* and *Maliki*, in their denial of the option of meeting, make the meeting of contract end when acceptance is issued. See Alsanhori, *Masader al-Iltizam* (n 89) 17-18; Albaka'a (n 315) 90.

[466] Similarly, the notion of the option of meeting of contract is supported by the *Qur'anic* verse that says 'O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent of you'. According to this verse, the mutual consent is the basis for the option of the meeting of contract. The Holy *Qur'an*, Chapter 3 (*Surat Al-Nisa*), verse 29.

[467] Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 1093.

[468] Generally, it was demonstrated that the ECC adopts the option of meeting of contract in the attendees' contracts since the contract is concluded and becomes binding in this meeting since acceptance is issued. After that, the contract may not be terminated but by a mutual consent or for any purpose approved by law. This opinion is grounded on the assertion of the ECC's explanatory memorandum, that 'pacta sunt servanda and is a deal that binds the parties to apply it from the time when it is legally formed. Principally, one party cannot terminate or amend the contract individually but by the mutual consent of both parties or for any motive set forth by the law…'. See the ECC Explanatory Note, Preparation Series (2nd part 1948) 279-280.

consideration and this option allows the parties to re-evaluate the worth of the contract and permits them to cancel it if they so wish, without having to face legal liabilities.[469] The option of the 'meeting of contract' only persists for a limited period of time, for it ends when the parties physically move away from the 'meeting of contract' and they are free to leave the place once the contract is concluded.[470] Islamic jurists usually refer to current trade practices as well as local customs to help them to determine what constitutes physical separation. As such, whenever the contracting parties are considered to have gone their separate ways from the 'meeting of contract', provided no one has cancelled the contract, it is from this point in time that the contract is said to be legally binding.[471] In addition, since the 'meeting of contract' was conducted for the contracting parties' benefit, they should, if they wish, be allowed to exclude the application of the option of the 'meeting of contract' by incorporating the exclusion of the said option in the terms and conditions of the contract.

However in practice, when the latter legal approach is used to apply the option of the 'meeting of contract', the options are difficult to establish when the parties are contracting *inter absentes*. It is not clear how the option of the 'meeting of contract' can conceivably be established if the parties are absent. Therefore, if the option of the 'meeting of contract' is applied, it may lead to uncertainty and dispute in the contract that was formed *inter absentes* because it is not possible to ascertain when the offeree physically left the place where the offer was first communicated to him.[472] Furthermore, the necessity of the 'meeting of contract' highlights the reason why there is a need to reconsider the value of the deal in face-to-face transactions whereby the contracting parties may be enticed to rush into a contract. In contracting *inter absentes,* which is formed with an absent party, it appears that the need to have the option of the 'meeting of contract' becomes insignificant because it is normally formed after the parties have thoroughly considered it.[473] Yet, if the acceptance is conveyed to the offeror over the telephone, it is uncertain whether both the contracting parties possess the right to withdraw from the contract by exercising the option of the 'meeting of contract'. This is because under

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[469] *Tenax Steamship Co Ltd v The Brimnes* [1975] 1 QB 929 (945f); *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* (1995) Commercial Law Cases 1011.

[470] Accordingly, one of the Prophet's Companions called Abdullah ibn Omar used to walk away few steps from the 'meeting of contract' when forming a contract for the sake of making the contract irrevocable. This situation is narrated by al-Bokhari, *al-Saheeh al-Jame'a*, Prophet Saying no. 2107 238.

[471] Several examples of when parties' leave, or separation takes place were posed. Amongst others, parting is established in a large market by walking away until one cannot hear the other's normal voice; or by going to different levels, if they were in a ship and in a house, parting may be established when one leaving the house or going to a different room or up on the roof. See Al-Joroshy (n 94) 161-162; Ibn Qudama (n 311) 7-8. For the same meaning see Raghda (n 312) 152.

[472] Rayner (n 29) 112. See Dubai Contract Code 1971, Article 7 (2); Zysow (n 9) 69

[473] Al-Shafiy (n 28) 545.

the Sharia concept of the 'meeting of contract' there is a presumption that both the parties are together and physically present in the 'meeting of contract' when the contract was concluded.[474] Also, the 'meeting of contract' is considered to be over in a traditional face-to-face transaction the moment one or both parties physically leave the 'meeting of contract'. As previously discussed, this is difficult to apply if the contracting parties used the telephone for the formation of a contract. In addition to that, there is always a possibility that the Internet-phone connection may be accidentally disconnected. Hence, it is questionable if the option of the 'meeting of contract' applied in Internet-phone communication is considered to be similar to the 'meeting of contract' in a conventional face-to-face transaction.[475]

However, as long as the Internet-phone and live video communication are considered to be the equivalent of a physical face-to-face transaction,[476] then the parties' right to cancel the contract after its conclusion should be applicable. However, because it is difficult to ascertain the contracting parties' physical departure from the 'meeting of contract' when Internet-phone communication is used, it is suggested that a constructive termination can be used. As such, the option of the 'meeting of contract' when contracting using Internet-phone communication should be ended the moment the telephone connection between the contracting parties is disconnected.[477] As regards live video communication where the parties can clearly recognise each other, the option of the 'meeting of contract' should, by analogy with a face-to-face transaction, come to an end if one of the parties can see the other party leaving the venue, even though the communication line has not been terminated. If during a live video communication, a contracting party leaves the room to take an item that is related to the formation of the contract, the availability of the option of the "meeting of contract" should not be deemed to have been interrupted.[478] Incidentally, the justification for the option of the 'meeting of contract' should be taken into account. In fact, the option gives both parties more time to reconsider and re-assess the value and advantage of the transaction. The legal prerequisite of physical departure from the 'meeting of contract' is merely a method that was introduced into

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[474] In which it was indicated, according the Prophet Saying, that when two persons enter into a transaction, each of them has the right to annul it so long as they are not separated and are together (at the place of transaction).

[475] M Ewadhain and H Yajoz, 'al-Ta'aqod be al-Wasa'el al-Mostahdathah*?'* (2001) 422 al-Wa'e al-Eslamy Journal 35-36.

[476] Restatement (Second) of Contracts (1981).

[477] Al-Tayyar (n 447) 66

[478] Ali Al-Qarehdagy 'Hokom Ejra'a al-Aqood be Alat al-Ettessal al-Hadeetha' (2000) 6(2) *Journal of Mojamma'e al-Figh al-Islami* 941. For example, *Linn v Employers Reinsurance Corp.,* 139 A. 2d 638, 640 (Pa. 1598); holding that even if a telephone communication is instantaneous and two-way, acceptance is still effective when sent over the phone wires; cited in Valerie Watnick, 'Electronic formation of contracts and The Common law "Mailbox Rule",' (2004) 56 Baylor Law Review fn190.

Islamic law for the determination of the point where the validity of the option ends. Therefore, contracting parties should always have the option of the 'meeting of contract' for as long as its period of validity and time when likely to end can be determined. As a result, the option of the 'meeting of contract' in Internet-phone contracting should be considered to be analogous to the contracting parties physically leaving the 'meeting of contract'. Therefore, the option should be ended as soon as the telephone communication is disconnected.

As far as the ICC is concerned, it does not mention about the option of the meeting of contract, as it is not included in the text of Articles 82 and 87.[479] Article 82 provides options for the parties to withdraw from the deal before the acceptance is issued by the offeree. In other words, it clearly designates when the offer can be withdrawn by stating that '… where the offeror has withdrawn his offer before the acceptance has been expressed …'.[480] As such, if the ICC had adopted the option of the meeting of contract, then the said article would have granted the option available to the parties not before acceptance, but after the conclusion of the contract. By the same token, Article 87 stipulates that a 'contract *inter absentes* is considered concluded at the time and in the place…'. The way the article is drafted, it clearly states that the contract is treated as if it is concluded the moment the offeror is informed of the acceptance. It does not explicitly or implicitly indicate that the ICC takes into consideration the option of the meeting of contract.[481] Evidently, the ICC has adopted the view cited by the *Shafi'i* and *Hanbali* schools, as they did not espouse the aim or purpose of the option of the meeting of contract, and this is impliedly or indirectly understood after the above-mentioned articles were reviewed. It appears that the reason behind it all was because the ICC was influenced by the text of the Ottoman *Mejelle,* for it does not make provision about the option of the meeting of contract.

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[479] ICC, Article 82 states, 'contracting parties have an option after the offer until the end of meeting; where the offeror has withdrawn his offer before the acceptance has been expressed, or where either contracting party utters a saying (statement) or makes an act (gesture) which indicates rejection, then the offer will be void, and any acceptance uttered thereafter shall be disregarded'. ICC Article 87 states '1- contract inter absentees is considered concluded in the place and at the time when the offeror becomes aware of acceptance unless an explicit or implicit agreement or legal text enjoins the opposite. 2- It is imposed that the offeror becomes aware of acceptance in the place and at the time when he receives it'.

[480] Article 82 of the ICC.

[481] In the main, the ECC is consistent with the Iraqi position in terms of not providing a text regarding the option of meeting. However, its position is more pronounced in this matter, which can be deduced by looking at articles 89, 91 and 97 thereof. ECC Article 89 states that 'the contract is considered concluded when the parties exchange matched expressions (offer and acceptance), taking into consideration when the law designates other specific situations to conclude the contract'.

Also, Article 91 states that 'the contractual expression produces its impact at the time when communicated to the awareness of addressee, and the arrival of that expression is deemed as a presumption of awareness, unless the otherwise is proven'. Article 97 states '1. The contract inter absentees is considered concluded in the place and at the time when the offeror becomes aware of acceptance unless an agreement or legal text enjoins the opposite. 2- It is assumed that the offeror becomes aware of acceptance in the place and at the time when he receives that acceptance'.

3.5. Conclusion

The analysis in this chapter focuses on the term 'meeting of contract', an Islamic term, and its application to e-contracts. The 'meeting of contract' stands for the time and place of the meeting, and thus it differs than the meeting of minds that stands for the parties' identical intentions. In Sharia, the contracting parties, after concluding the contract and before leaving, have the right to withdraw from it. This is referred to as the option of the 'meeting of contract'. On top of that, common trading customs also play an important role in deciding the parties' physical separation from the 'meeting of contract'. It is not clear whether the rules of the 'meeting of contract' are applicable in e-commerce. In particular, the application of such rules in web transactions seems to be questionable. Although there may be instantaneous communication between the parties in web transactions, it should not be treated as comparable to face-to-face and telephone transactions. In email transactions, delays may occur between the communication of the offer and acceptance as well as in receipt of the offer by the intended recipients. Therefore, the difficulties in determining the 'meeting of contract' in contracts *inter absentes*, make the rules of the 'meeting of contract' are not applicable in email transactions. On the contrary, in contracts concluded using the telephone, the offer and acceptance are instantaneously known by the intended recipients the moment they are expressed, and this makes it analogous to a face-to-face transaction. Accordingly, it may be practical to apply the rules of the 'meeting of contract' in these types of contracts. As such, the parties' right to withdraw from the contract after its conclusion is deemed to have ended after the termination of the telephone connection. Unlike the use of the telephone, offer and acceptance when Internet chat rooms and telex facilities are used are known by the intended recipients as soon as they are communicated. Even then, contracts negotiated by these means should not be deemed to be analogous to face-to-face transactions. It may be impossible to ascertain whether the parties read the correspondence immediately or they were engaged in activities unrelated to the contract. It may be inappropriate therefore, in these cases, to apply the rules of the 'meeting of contract'. Finally, since the concept of 'meeting of contract' is not applicable to most types of new means of communication, the sole element required to start contract negotiations is that the offer must be conclusive, determined and decisive. Besides, the IESTA must show more support to technology-neutrality for new means of means of communication. The offer and acceptance are the fundamental elements of contract. This gives rise to difficulties especially on the validity of the issuance of offer and acceptance through electronic means. This legal issue will be the focus of study in the following chapter.

Chapter Four

Legal Issues Regarding Offer and Acceptance in E-Sales in Iraqi and Sharia Laws

4.1. Introduction

Traditionally, there are internal elements that are required by all contracts, namely the parties' mutual consent to enter a binding contract.[482] The parties' consent is a compulsory requirement for a transaction to be legally binding in Sharia. If there is no mutual consent between the two contracting parties, the contract will not be legally enforceable.[483] Therefore, it can be seen that the parties' consent when expressing their offer and acceptance is a legal requirement for the conclusion of an enforceable contract. In the realm of e-contracts, the main question that arises from applying the above rule is whether the offer and acceptance can be performed using new methods of communication.[484] Given the breadth of sophisticated electronic software that conclude contracts on behalf of sellers, another question that arises is whether this software is deemed as an agent or merely a tool.[485] The issue of distinguishing offers from invitations to treat is also a matter of significance, especially on websites. The question of what silence means in concluding an electronic transaction also arises, as well as the position of subject matter in cases where it is not in existence at the moment of concluding an e-contract.

As such, this chapter will focus on three main issues regarding the completion of offer and acceptance to conclude a legal e-contract. Firstly, it will examine the position of electronic agents. Secondly, it will examine the distinction between offer and invitation to treat, Finally it will undertake a discussion of the position of subject matter. This chapter will also examine other secondary issues regarding silence and differentiating between the apparent intention and actual intention regardless of what communications means was used in that contracting process.[486]

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[482] Al-Sarkhasi (n 216) 46; Ahmed Al-Ajlooni, *al-Ta'aqod a'an Tareeq al-Internet* (al-Dar al-A'lmeyyah al-Dowalayyah and Dar al-Thaqafah, Jordan 2002) 46.

[483] Jacob Zeigel, *The Vienna Convention on International Sale of Goods: New Dimension in International Trade Law* (Butterworths London 1982) 38; Zysow (n 9) 69-77.

[484] Judy Gardner, 'Trashing with Trollope: A Deconstruction of the Postal Rule in Contract (1992) Oxford Journal of Legal Studies 170

[485] Sharon Christensen, 'Formation of Contracts by Email – Is it Just the Same as the Post?' (2001)1 Queensland University Technology Law and Justice Journal 22; also see in Sharia, Muhammad A'rafa Al-Dosoqi, *Hashiyat al-Dosooqi ala al-Sharh al-Kabeer,* (Volume 3, Dar Ehya'a al- Kotob al-Arabiyya 'E'assa al-Babi al-Halabi wa Shoraka'ah 1983)3,

[486] Under the ICC, Article 79, the parties' consent during the formation of a contract can be expressed in various ways, i.e. verbally, using signs or gesticulations or through their conduct such as give and take contracts. Gesticulation as a tool for expressing consent or rejection of the party is defined as the moving of a part of the

4.2. Offer and Acceptance: Definitions and General Principles

As outlined in the preceding chapter, an offer alone is not enough to conclude a legal contract for there must be an expressed acceptance of the offer to conclude a binding contract.[487] The acceptance must also be decisive, and the offeree must have the intention of being legally bound by the contract.[488] So if offer and acceptance are necessary prerequisites to contract, the exact meaning of these concepts must be established. An offer is an expression of a willingness to enter into a contract with the intention that it shall legally bind the person making it (the offeror) when the offer is accepted by the offeree.[489] Sharia jurists have debated over the definition of offer and two main trends have been identified. Firstly, according to the *Hanafi* school, an offer has been described as the first expression made by one of the contracting parties and the party can be the one that will be transmitting the ownership or receiving it.[490] In this approach, the proposal is the first move made by either the seller or buyer and it is the demonstration of their interest in entering into a business relationship. As such, an acceptance in this scenario is an expression of the offeree's eagerness to accept the proposal.

The *Shafi'I, Maliki* and *Hanbali* schools however, define an offer as the utterance made by the party who will receive the ownership, regardless of whether the utterance is made first or

body in such a way that it indicates the party's consent or refusal to conclude a contract, such as moving the head up and down to indicate consent, moving the head from side to side to indicate rejection or other types of movements used in certain trades and practices in society. It is important to remember that one gesture may have more than one meaning in a particular society and it may have a totally different meaning or does not make any sense in other societies. However, an overwhelming majority of scholars do not agree that this tool should be allowed to be used to conclude contracts by people who can hear and talk. See Al-Qarehdagy, *Hokom Ejra al-A'qood be A'alat al-Ettesal al-Hadeetha*, (n 479) 956-963. Clive Schmittoff, 'Unification of the Law of International Trade' (1968) Journal of Business Law 116; Al-Dobaiyyan (n 281) 83-95. The give-and-take deal means that the buyer pays the seller and take possession of the purchased item without saying anything. An example of such a contract is goods displayed together with the selling price in retail shops where the customer selects the item he wants to buy and then pay for it without saying anything. It would be sufficient to mention here that the preponderance of Islamic legal scholars endorses this kind of transaction because it is an accurate approach and is also compatible with the daily commercial activities. For further details see Mahmassani, 'Transactions in the Sharia Law in the Middle East' in Masjid Khadduri and Herbert J Liebesny (eds) *Origin and Development of Islamic Law*, (Middle East Institute Washington DC United States 1955)192.

[487] John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer International 1999) 15. Al-Oboodi (n 19) 122.

[488] George W Paton, *A Text–Book of Jurisprudence*, (3rd edn, Oxford Clarendon Press 1968) 389. Anson (n 95) 37. Furthermore, it was debated regarding the verb tenses in contractual writing. See for details among the Shafi'i jurists: Alnawawi, *Mughni Almuhtaj* (n 251) 4. See among the *Maliki* jurists; Alqurtubi, (n 456) 168. Aldusouki (n 105) 3. See among the *Hanbali* jurists: Albahouti (n 109) 136.

[489] Beale, *Chitty on Contract General Principles* ((n 215) 2-002

[490] This definition is made by the majority of *Hanafi* jurists. See Alsewasi (n 101) 74; Dr Abdulrahman Al-Gaziry, *Al-Fiqh'a la al mazahib al-arb'a* (Dar ihya'at turath al-arabi Beirut 1983) T. II, 156. The *Mejelle,* which is mainly based on the *Hanafi Sect,* provides similar definitions, see arts. 101 and 102; Al-Ebraheem (n 321) 34.

second.[491] Then again, only the buyer can make an acceptance and it is immaterial that the buyer was the one that initiated the transaction after the proposal was made.[492] Nevertheless, these differences of opinion about the definition of offer and acceptance is no more than basic differences in terminology and have no major impact on the validity of the contract. This is because in the second approach, an acceptance can be made before the offer. As such, if an acceptance is issued before the offer, it does not result in the nullification of the contract. Fundamentally, the Islamic doctrine gives consideration to mutual consent which occurs in both approaches.[493] Therefore, when an e-contract is formed through a verbal exchange of offer and acceptance between two contracting parties, a legally binding contract is formed, for it is analogous to the verbal expression of the contracting parties in face-to-face contracts. It is immaterial whether the parties are contracting together in one place or not at the time the contract is concluded.[494] This is because mutual consent is the crucial requirement for the conclusion of a legal contract. Sharia's spirits and principles require the taking into account of public interests to provide ease to the people.[495] Consequently, Sharia does not put a definite framework around how mutual consent should be given, it is suggested that commercial practice can offer significant guidance. Therefore, any method of writing will be able to fulfil this requirement as long as the parties' consent is communicated in a format that both contracting parties can comprehend.[496] It has been asserted that a valid contract can be formed verbally, in writing or by action, and as such it should be left to the people to determine according to the current trade practices which may vary from one society to another as well as from time to time.[497] This is a demonstration of the Sharia law's flexibility for it is able to

[491] See among *Shafi'I* jurists: Alramli (n 354) 37; Albajouri (n 338) 341. Among *Maliki* jurists see Alkhurashi (n 105) 6. Among *Hanbali* jurists see Ibn Qudama (n 311) 3.
[492] The majority of Sharia jurists accept this approach, except the *Hanafi* school. See also, Al-Dobaiyyan (n 281) 13-15, 223- 226.
[493] Al-Ebraheem (n 321)37.
[494] David Marshal Evans, 'The Anglo-American Mailing Rule: Some problems of offers and acceptance in contracts by correspondence' (1996) 15 International and Comparative Law Quarterly 553; Treitel (n 3) 24.
[495] In the *Qur'an*, Allah Says; "Allah intends for you ease and does not intend for you hardship", chapter 2, verse no. 185, and also it was reported that the Prophet's wife, A'ishaa Bint Abu Bakr, said that 'whenever the Prophet was about to choose between two things, he was definitely choosing the easy one unless it is a sin then he abandons it and chooses the other one instead.' Narrated by al-Bohkari, al-Hudood Section, the Implementation of al-Hudood, Hadeeth no. 6786.
[496] In this regard, the UNCITRAL Model Law on Electronic Commerce Article 11(1) provides that: 'In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose'. In a similar provision, article 13 of the Jordanian E-Transactions Act no. (85) of 2001 states that 'data message is considered as one of the valid means to express the consent of the parties in the form of offer and acceptance to initiate a binding deal'.
[497] Ali Al- Qarehdagy, *Hokom Ejra al-A'qood be A'alat al-Ettesal al-Hadeetha*, (n 479) 956-963; Al-Dobaiyyan (n 281) 83-95.

accommodate new and developing methods of communication.

As for the ICC, it is consistent with the *Hanafi* school for it defines offer and acceptance as expressions that are customarily used to form a contract, i.e. whichever is said first is an offer and the latter is an acceptance.[498] However, the position of the Iraqi law on this matter can be criticised because Article 77(1) defines 'offer' as mainly within the competence of jurisprudence and not the legislature. In addition, Iraqi law also describes 'offer and acceptance' as any expression and it is contended that this is contradictory to practice and Article 79. That is to say, offer and acceptance can be issued in the form of writing, signals or any other forms that express the will of the party and the Iraqi legislature has stated this in Article 79. This Article states that 'as offer and acceptance may be made orally, or by correspondence or by a sign which is in common usage even when it is not from a dumb person as well as by actual exchange denoting mutual assent and any other method, the circumstances of which leave no doubt as to indicate mutual assent'.[499]

As for the ECC, it did not provide any definition of the term 'offer'; however, it can be deduced from its relevant legal provisions that offer is what is issued first. This code states that 'if an appointment for acceptance has been identified, the offeror is obliged by his offer…',[500] and 'if the offer released within the meeting of contract without identifying an appointment for acceptance…'.[501] It also states that 'if the acceptance associated to offer with extra points or….',[502] or 'if the nature of transaction or the commercial custom or other circumstances have indicated that the offeror was not waiting for a declaration of acceptance, the contract then…'[503] and finally states that 'acceptance in contracts of adhesion is limited to the mere acceptance of pre-conditions stipulated by the offeror…'.[504] In support of this explanation, is the illustration offered by the Egyptian judiciary that offer is what is 'issued from a person expressing, in a determinative way, his/her will to conclude a specific contract to the extent that if this offer has been met by an acceptance, the contract is concluded'.[505]

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[498] - See ICC Article 77(1), which is almost identical to JCC Article 91(1)
[499] The ICC, Article 79.
[500] The ECC, Article 93(1)
[501] The ECC, Article 94(1)
[502] The ECC, Article 96
[503] The ECC, Article 98
[504] The ECC, Article 100
[505] The decision of Egyptian Cassation Court, 20, [19th June 1996], 1017. Also see Appeal no. 3197, 58K in 8th June 1990, Civil Dept Egyptian Cassation Court Decisions [1990]. Also, the CISG has mentioned in Article 14(1) that the offer must be verified by clarifying the quantity of goods and the price explicitly or implicitly or if specified through the data included in offer.

From the above, it can be seen that these definitions clearly refer to the classical concept of 'offer' and the ICC[506] does not make any reference to the latest form of offer, namely electronic offer. As such, it might be beneficial to examine some of the laws outwith the region that relate to the modern form of offer. For example, EU Directive 1997/7 has defined an e-offer as any distant communication that includes the obligatory elements to encourage the offeree to directly accept the offer in the absence of advertisements.[507] It is evident that this definition depicts an offer as 'electronic' due to its usage of e-means. This has virtually no effect, because a traditional offer, similarly to an e-offer, must be determined, specified and finalised, or else it is nothing more than an invitation to treat. Similarly, an e-offer comes to an end if the offeree refuses to accept the offer or it is a conditional offer and its terms for performance have been met with failure. Such refusals can be seen when the offeree navigates to another website, shuts down the computer or sends an e-mail to turn down the offer.[508]

At this juncture, it is asserted that an offer is the first statement made by a party expressing his intention to create a contract,[509] for with such a stand it is easier to ascertain the offeror than the offeree.[510] The offer must be conclusive and fully clarified in such a way that it includes the important elements of the potential contract.[511] For example, if the offer is for the sale of an article, then the selling price and method of payment must be included and unambiguously ascertained, otherwise the offer is merely an invitation to treat. Lastly, an e-offer barely affects the means used in contracting and the essence of the offer remains the same. A notable comparison can be carried out between the modern electronic exchange of offer and acceptance with that of the conventional practice whereby the two contracting parties conduct their business with a wall in-between them. In the latter practice, the contracting parties, being far apart from each other, would communicate their offer and acceptance by shouting to each other or if they are on different sides of a wall they would not be able to see each other in spite of their being around the same location. Such kind of practices have been ruled to be legally valid.[512] This implies that a contract concluded between two parties separated within shouting

[506] Nor does the ECC.
[507] Directive no. 1997/7 EC, issued in 20/5/1997. Furthermore, this directive neither specifies nor defines the means of distance communication and that may keep the above definition pointless, and this may support the reason of why this directive has been repealed.
[508] Usama A Badr, *The Multimedia Between Reality and Law* (Dar al-Nahda al-Arabia Press 2010) 178, 194; Ahmed K. al-Ajaloni, *Contracting by Internet: A comparative study* (Dar al-Thaqafa Press Jordan 2002) 73.
[509] Alzarka (n 313) page?
[510] Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2128.
[511] Al-Adawi (n 213) 18.
[512] Al-Nawawi *al-Majmu* (n 109) 171.

distance is valid and as such it can be used as an example to support the validity of contracts concluded by the exchange of verbal agreement via the Internet and other modern methods.

4.3. Expressing offer and acceptance by silence or inaction

Silence is defined as the total silence surrounding the presumptions that are related to a party's consent to conclude a contract.[513] This definition emphasises certain essential elements that must be present for silence to be legally effective as a valid consent to conclude a contract. Silence in this context means not talking. Absolute silence means that the silence is not accompanied by acts such as gesticulations or conduct. Not all silence can validly express consent when contracting. To be more precise, the only silence that is acceptable in this context is when silence is accompanied by additional assumptions that indicate an implicit tendency to conclude a contract.[514]

However, a distinction must be drawn between silence due to disability and silence from sound people.[515] As for speech-impaired people, it was suggested that they can make acceptance by signs.[516] Accordingly, Muslim scholars have different opinions about the acceptance of signs made by these persons as an expression of them making an offer. The *Hanafi, Shafi'i* and *Hanbali* schools do not deem signs to be an expression of their intention even though they may be understood, and it is immaterial whether the person can write or not. Their justification for taking such a position is that the acceptance of signs should be out of necessity and there is no such need if a person can write or speak and write.[517] The *Maliki* scholars appear to have a dissimilar view on the same matter and they contend that an offer can be made explicitly or by implication, i.e. the intention of the offeror can be expressed using a sign even though he can talk.[518] On the other hand, the *Maliki* school has legitimated such an intention because the expression of offer can be explicit or implicit and, therefore it is immaterial whether he can speak and/or write.[519]

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[513] Sylvia Mercad Kierkegaard, 'E - Contract Formation: US and EU Perspective' (2007) 3 Shidler Journal of Law, Commerce and Technology 12; Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 965.
[514] Ibid. Alhakeem, *et al* (n 15) 133.
[515] It has essential priority over gaining profits not to harm or cheat people in trade. See, Abdulrahman Ahmed al-Jar`î, *General Principles of Sharia and their Practical Application for Islamic Work*, online article available at < http://www.islamtoday.net/english/printmenice.cfm?cat_id=36&sub_cat_id=683> accessed 18 March 2018.
[516] See Alnawawi, *al-Majmu,* (n 109) 162, 167.
[517] See among *Shafi'* jurists: Alramli (n 354) 385; Among *Hanafi* jurists see AlKasani (n 195) 135–136. Among *Hanbali* jurists see Ibn Qudama (n 311) 4th part, 9.
[518] See among *Shafi*' jurists Alramli (n 354) 385. Among *Hanafi* jurists see AlKasani (n 195) 5th part, 135–136. Among Hanbali jurists, Ibn Qudama (n 311) 9.
[519] Alkhurashi, (n 105) 5th part, 5.

If an offer is made by a person who cannot talk, the predominant view among jurists is that the use of signs is an acceptable form of expressing his will as it would not be fair to prevent him from doing so. Consequently, in the case of a person who cannot talk, the use of signs will be an acceptable way for him to express his will.[520] The ICC allows commonly used signs as feasible way of expressing a person's will even if the person can talk. On this matter, it appears that Iraqi law is at odds with the *Hanafi* and *Shafi'i* and even the *Hanbali* doctrines. This is in spite of the fact that most of the provisions of the Iraqi law are derived from the *Mejelle*, which is a codified version of the *Hanbali* doctrine. However, as far as this matter is concerned, the Iraqi legislature shares a similar view with the *Maliki* doctrine.[521] As for silence from sound people, an offer expressed as silence is incapable of expressing the offeror's intention.[522] This is because an offer is normally made by one party and directed to another and, as such the offeror will need to initiate a form of positive action to convey the message.[523] Otherwise, how can silence, for example, be used to express acceptance in e-contracts? Let us say an offer is made using email, the email is sent to a person with the intention of making a transaction, but there is no reply,[524] In this situation, can the contract be legally concluded based on the offeree's silence? If it can result in the conclusion of a contract, silence in this case would amount to a silent or implied consent.

To answer the above question, it is pertinent to refer to the ICC and Sharia to determine the issue of silence in contracts. ICC Article 81 stipulates that 'no statement shall be attributed to a silent person, but if and when expression is needed, silence will be deemed to be an acceptance'. According to Article 81, silence does not equate to a statement and as such does not amount to an expression of acceptance.[525] Consequently, mere silence does not have any legal effect in contract. There is no contract without consent and what is in a person's mind cannot be known by others unless it is expressed and silence in itself does not indicate what is

[520] Article 70 of *Mejelle* provides that signs that are usually used by dumb persons are words by tongue. It states that 'the signal of a speech-impaired person is valid in everything'.
[521] See also Articles 90 and 93 of the Egyptian and Jordanian Civil Codes respectively.
[522] John Dickie, 'When and Where are Electronic Contracts Concluded?' (1998) 49(3) Northern Ireland Legal Quarterly 332; Al-Bahooti (n 109) 148.
[523] Silence differs from a tacit expression because the latter presumes that the party has exhibited conduct which inevitably denotes his will. See Salah al-Dain Al-Nahi, *Masader al-Hoqooq al-Shakhseyya* (Dar al-Thaqaffah Jordan 1984) 77.
[524] Fasciano (n 4) 1542. Monther al-Fadhl and Shaykho Sa'eed, 'al-Ta'aqod a'an Tareeq al-Computer' (1994) 3 Jordan Law Journal 57.
[525] This is what literally been articulated in the *Mejelle*, in principle silence is not considered acceptance, because silence in itself, without any accompanying circumstances, is not valid as an expression of the will, as the latter is a positive action and silence is negative and not even an implied will, as 'the will' can be deduced from positive circumstances that denote to it.

concealed in the heart. Sharia jurists refer to a famous religious principle that is similar to Article 81 and it says, 'it does not attribute to a silent person any saying'.[526] However, in certain cases, silence can be a valid method to express consent in contracts where it is usually practised in the market to indicate acceptance. The use of silence as a valid method to indicate consent under the Islamic doctrine is based on the later part of the aforesaid religious rule which states 'but silence in circumstances that urgently require a statement indicates consent'.[527] The ICC, Article 81 states that 'silence is deemed in particular an acceptance where there are previous deals between the contracting parties and the offer was related to said dealing; or where the offer proved to be to the benefit of the persons to whom it was addressed; similarly, the silence of a purchaser after having received (taken delivery of) the goods purchased will be an acceptance of the conditions set down in the list of prices'. [528] According to this text, three exceptional situations are found in the traditional legal rules: (i) the contractors have dealt with each other before and the present offer is connected to the previous deal; (ii) if the offer is for the benefit of the offeree; and (iii) the purchaser's silence after he has received the purchased goods is deemed to be an acceptance set out in the price list. More importantly, the aforementioned situations must be handled carefully when dealing with electronic offers.[529] In these exceptional cases, silence can be a valid means of acceptance and as such, silence should be handled with caution in Internet trading. Presently, there is no legislation that can be used to determine when silence can be deemed to be a valid expression of acceptance and therefore online traders should conduct their business cautiously.[530]

In the case where there have been previous dealings, it is important to note that with the advent of Internet-based commercial practices, offers can be sent using email. Emails can be sent to large numbers of potential customers with just one click of the mouse. As a result, if silence is a valid method to show acceptance, then in this case it will result in the imposition of contracts on the consumers who have previous dealings with the seller without their agreement. As a result, those who have had previous dealings with the seller may be legally bound by these

[526] As a matter of fact, silence cannot be a tool to establish an offer in the formation of transactions. It is worth mentioning to say that silence while forming the contract is merely limited to accepting the offer, Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 966.

[527] Ibid; see also Alsanhori, *Masader al-Haq, Volume 2* (n 300) 16. This approach has been followed by certain Arabic legal systems, see for example Articles 81, 98, 99, 95 and 135 of the Iraqi, Egyptian, Syrian, Jordanian and Emirate Civil Codes respectively.

[528] The ICC, Paragraph (2) of Article 81.

[529] It is worth noting that the Egyptian legislator was more accurate than the Iraqi legislator by inserting paragraph 2 (b) into Article 98 of the ECC. It reads 'silence is considered acceptance, specifically, if...(i) the nature of the transaction or commercial custom and other circumstances denoting that the offeror was not awaiting an expression of the acceptance, the contract shall be considered concluded, if he did not reject the offer in due time'.

[530] For more details, see Mujahid (n 150) 83-84; Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 965-974.

offers because they maintained their silence. Take for example a trader who sends an email to a current customer and offers him new products as mentioned in the email. The customer has not responded, but this was treated as a silent acceptance. There is a possibility that the customer may be totally oblivious of the offer because he may not have access to the emails. Therefore, a valid contract cannot be concluded based on the customer's silence for there is no mutual consent.

In order to arrive at an acceptable resolution, it will be not judicious to consider silence as acceptance just because there have been previous dealings between the seller and buyer through the Internet. Instead, the acceptance, if any, should be shown by an additional action such as making a payment for the items purchased. Therefore, silence should not be considered as an acceptance in Internet or any other electronic transactions. With regards to the second situation, that is the offer is beneficial to the person it was directed to, this assumption is not only unusual, it also does not exist in the real world. It can be seen that most of the contracts done through the Internet are commercial contracts and done with the objective of making profits in the shortest time and expending the least expenses. Moreover, this situation is considered to be a donation and the offer does not place any obligation on the addressee and similarly, the purchaser's silence after receiving the articles purchase in the third situation. The Third situation rarely happens when contracting is done through the internet because generally silence does not mean consent. If a person receives an electronic offer via email and one of terms in the offer states that if the offeree does not give a reply to the emailed list within a specified period, he would be deemed to have accepted the offer.[531] Such a term has no legal effect on the recipient and if the offeree does not give a reply to the email no valid contract is concluded by the silence.[532] As mentioned previously, the ECC, Article 98 provides for the situation whereby the conditions and nature of the deal were such that they indicate that the offeror was not waiting for the issuance of acceptance. It reads 'silence is considered acceptance, specifically, if...(i) the nature of the transaction or commercial custom and other circumstances denoting that the offeror was not awaiting an expression of the acceptance, the contract shall be considered concluded, if he did not reject the offer in due time'.[533] The contract is deemed to have been concluded if the offeree did not reject it in due time. The ICC does not

[531] Mujahid (n 420) 83. See in general regarding the issue of silence in contracting: Owsia P, 'Silence: Efficacy in Contract Formation: A comparative Review of French and English Law' (1991) 40 *International and Competition Law Quarterly* 784

[532] Nuri Hamed Khater, *Information Contracts: A Study in the Public Principles in Civil Law, A Comparative Study* (1st edn, Amman, Adar- Al-Ilmia Adawlia, Dar Al-Thaqafa for Publication and Distribution, 2001) 15-16.

[533] The ECC, Article 98.

have such provisions. It can be declared that there must be expressed acceptance in e-contracts and that in principle, silence cannot be a valid expression of acceptance. It seems that the exceptions cited in Article 81 of the ICC cannot be applied to electronic contracts. Where there was previous contracting between the two parties, there is a possibility that the customer, for whatever reasons might not have accessed his email for quite some time. As such, he would be oblivious of these offers that were emailed to him. In such a scenario, it is not possible to assert that his silence is an expression of acceptance.[534] In the second situation, the offer is believed to be beneficial to the addressee. Such an assumption is not realistic and is not used in e-contracts, for it implies that the offeror, by making an offer, is making some form of donation to the offeree and the latter does not owe the offeror any obligations.[535] The ECC's situation in Article 98 is with regards to 'the nature of the transaction and commercial customs …'[536] appears to be a more realistic illustration of the nature of contracts concluded through websites. It is also consistent with the objectives of the internet, i.e. to facilitate transactions and save time, effort and money.

4.4. Using electronic agents to express offer and acceptance

In most commercial Internet websites, computers use programs that send, commence action and respond to messages. As such, the implications of these programmed actions has to be studied.[537] In e-transactions, an email may be sent or answered by computers that have been pre-programmed to do so. Also, there are interactive websites, where their servers have been programmed to conclude transactions with potential purchasers by responding automatically to orders without any human intervention.[538] Firstly, and most importantly, the use of electronic

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[534] It is also easy for the client to send his acceptance from any place and at any time, because of the simplicity of using electronic techniques and the availability of computer devices without depending on the previous transaction. It would be better if this silence is conjugated with other circumstances that assert the acceptance of the offeror in the electronic contract, Khalid Mamdouh Ibrahim, *Security of Electronic Documents* (1st edn, Al-Dar Al-Jamiya Alexandria 2008) 68.

[535] The ICC considers in these situations the differentiation between the internal intent and the external action, that the principle is the internal will as stipulated in Article 155 of the Civil Code that 'in contracts, consideration should be for purposes and meaning not the words and structure'. The apparent will is provided as an exception in Article 80(2) which states that 'the advertisement of goods with their prices is considered offer'. Thus, if, in application of the general rules, 'internal will' is taken into consideration in electronic contracts, the contract is not concluded because of the lack of satisfaction and the compatibility of the wills of the two contracting parties. On the other hand, if the theory of apparent/explicit will is to be taken into consideration, contracting then will be conducted, however, the contractor that was injured will provided the right to recourse on the person who was caused this injury, See Alsanhori, *Al-Waseet Fi Sharh Alqanon Almadani* (n 89) 218.

[536] The first paragraph of this Article.

[537] See, Stuart R Cross, 'Agency Contract and Intelligent Software Agents' (2003) 17(2) International Review of Law, Computers and Technology 175-189; Steffen Wettig and Eberhard Zehender, 'A legal analysis of human and electronic agents', (2004) 12 Artificial Intelligence and Law 111-135;

[538] Glatt (n 30) 45; Emily Weitzenboeck, 'Good faith and fair dealing in contracts formed and performed by electronic agents', (2004) 12 Artificial Intelligence and Law 83-110. For further discussion to the issue of

agents as part of the contracting process may be questionable within contract law. The common law principles in contract law do not have any clear answers as to whether or not e-contracts are enforceable.[539] This gives rise to the question of whether an unwilling party (person) in an e-contract can be bound by the terms of the contract. The legislature together with the judiciary are required to resolve the issue.[540] Instinct suggests that such transactions should be binding, as indicated by academic writings that suggest the extension of the doctrine to accommodate the new development. Whether this instinct is correct or not is dependent on the factors that give rise to contractual obligations. Academics have proposed various theories of contractual obligations and the two leading theories are will theory and reliance theory. The enforcement of the terms of e-contracts seems to be consistent with certain theories but it is also inconsistent with others.

4.4.1. Electronic agents: agents or mere tools

It is very difficult to give a clear definition of an electronic agent, never mind an intelligent agent. Although the term 'agent' is commonly used by a lot of people who are working in closely related areas, it is challenging to attempt to find a solitary and universally accepted definition.[541] Other than this, there are also several synonyms for electronic agents.[542] We are aware of: 'robots' (used in factories to perform repetitive tasks); 'softbots' (software robots); 'knowbots' (knowledge-based robots); 'taskbots' (task-based robots); 'personal agents'; 'autonomous agents' and 'personal assistants'. As such, there is no simple definition for 'electronic agent'.[543] The term has been commonly described as 'a software thing that knows how to do things that you could probably do yourself if you had the time'. A more precise description that gets around the needless attributions of human intelligence is that the electronic

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conferring legal personality onto electronic agents, see Andrade, Novais, Machado and Neves, (n 220) 361-367 and Zainaddin bin Ali Ameli, *(Dhahid Sani), Sharhe-el Loma, Volume 3* (Najaf Publishing Iraq 1997) 229.

[539] Some have contended that the objective of contract would make users of electronic agents responsible for transactions arranged thereby. See Ian R Kerr, 'Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce' (1999) 22 Dalhousie Law Journal 190, 214; Lerouge (n 225) 417.

[540] Joseph Sommer (n 226) 1185 who has contended that a majority of legal issues caused by software technologies are not new, envisaged that the mature law of machine discretion will look very different from his tentative exploration of the issues.

[541] Wooldridge and Jennings, (n 32) 115

[542] Interestingly, the definition of 'electronic agent' under the US Electronic Signatures in Global and National Commerce Act 2000 (ESGNCA) used the same wording found in the definition of the same term in the UETA but it concludes with "… at the time of the action or response" which is used in the Canadian Uniform Electronic Commerce Act. Section 106(3) of the ESGNCA of 2000 stipulates that the term electronic agent stands for a computer programme or an electronic or other automated means that is used independently to start an action or act in response to electronic records or executions wholly or partially without being reviewed or acted upon by any person when the action or response took place. It seems that the North American legislatures' trend now is to use common wordings.

[543] Stuart J Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* (Pearson 1995) 31

agent is software that is programmed to carry out sophisticated instructions of a human user. Writers routinely and unnecessarily attribute a form of human intelligence to agent technology. For instance, 'an electronic agent is one component of software and/or hardware that has the ability to perform exactly so as to achieve tasks on behalf of its user'.[544] Consequently, the term 'electronic agent' is deceptive because it may imply the legal effect of the term 'agent'. Nevertheless to avoid confusion, the researcher will keep figuratively using the term 'e-agent' in this section.

4.4.1.1. Do electronic agents have legal personality?

An agency does not regulate the relationship between a principal and an ordinary mechanical instrument,[545] but regulates the relationship between a principal and a person, and the principal trusts the person's discretion and understanding. Consequently, a question arises as to whether e-agents have cognitive abilities, intentions or autonomy to contract on a user's behalf as a person?[546] Gray has described the legal and technical meaning of 'person' as 'a subject of legal rights and duties'.[547] In addition, 'persons'[548] include both natural and artificial persons.[549] Natural persons created e-agents to meet the needs of society and government and as such, should e-agents be recognized as artificial persons?[550] If e-agents are to be considered

[544] Hyacinth S Nwana, 'Software Agents: An Overview' (1996) 11(3) Knowledge Engineering Review 1-40; Bjorn Hermans, 'Intelligent Software Agents on the Internet: An Inventory of Currently Offered Functionality in the Information Society and a Prediction of (Near-)Future Developments' (PhD Thesis University of Tilburg 1996).

[545] 'No 'agent' in a 'principal-agent' relationship could be in the mechanized relationship that one who causes a computer to run ... is with that computer's activities.". Margaret Jane Radin, 'Humans, Computers, and Binding Commitment' (2000) 75 Indiana Law Journal 1125, 1130. Some computers have the ability to compete. On 11 May 1997, Deep Blue--an IBM supercomputer--beat World Chess Champion Garry Kasparov in a chess finale match that lasted barely more than an hour. This was the first time a current world champion had lost a match to a computer opponent under tournament conditions. For more about this match, see < http://www.research.ibm.com/deepblue/home/may11/story1.html > accessed 11 April 2018). Consider deletion

[546] See Allen and Widdison (n 31) 25; *e.g.,* Lawrence B Solum, (1992) 70 (4) 'Legal Personhood for Artificial Intelligences' North Carolina Law Review 1262-74; Leon E Wein, 'The Responsibility of Intelligent Artefacts: Toward an Automation Jurisprudence (1992) 6 Harvard Journal of Law and Technology 105-40.

[547] See also *Byrn v New York City Health & Hospitals Corporation* 31N.Y.2d 194, 201(1972).

[548] 'What is a legal person for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person.' John Chipman Gray, *The Nature and Sources of The Law* (Columbia University Press 1997) 19.

[549] Natural persons are defined as being created by God whereas artificial persons are created and devised by human laws to serve societal and government purposes. Solum (n 547) 75

[550] Artificial persons include corporations, government entities, and select inanimate objects (ships, for example). To consider something that is not a human being a 'person' does not mean that that person has all the legal rights and responsibilities of a natural person. Instead it is a legal expedient to allow that something to share some specific rights or duties with natural persons. A corporation is similar to a natural person in that it can own properties and conclude contracts. However, it cannot vote or hold office. Similarly, a ship is like a natural person in terms of being bound to comply with laws and regulations. Ibid.

'persons', there is a need to determine the rights and duties they share with natural persons as well as the purposes for which they would serve society or the government.

If the programmed computer is a legal entity, it would be conferred with rights and responsibilities based on the general principle that the person on whose behalf a computer was programmed will ultimately be responsible for all the messages issued by the machine.[551] As such, the programmed computer would be legally responsible for their actions and able to sue for any negligent acts. This may not be viable. In other words, it is not possible to confer a legal personality on any person unless he can bear financial responsibility. Consequently, since programmed computers cannot bear financial responsibility they cannot be conferred with legal personality. Some contend that one of the rights that has been created for personified software is the right to enter into contracts as a principal or agent.[552] Arguing that reasons of social capacity and legal expediency might justify conferring the right to contract on electronic agents. The resultant duty as a principal would seemingly be to fulfil the obligations and if it is an agent, then it has to account to the principal should any malfunctions arise. [553] It has been argued that the purpose of this fiction is to protect those who would reasonably depend on the activities performed by the software. However, the fiction does not fulfil its intended purpose. Lerouge queried the point of declaring a computer liable when it does not have any personal assets.[554] A corporation is capable of having contractual rights and duties because it also possesses the right to hold assets in order to comply with a judgment. However, software is different from a corporation as the latter, being an association of persons, is capable of holding assets. In the case of a personified ship, a party can directly take actions against the ship as the ship itself is an asset and is capable of satisfying a judgment. What then is the point of taking action against a software agent *in rem*?[555]

'Personality' is to some degree a distracting metaphor that is used to describe the legal relations of human associations and property since the essential point of the law is to service persons, i.e. human or natural persons.[556] To contend that an e-agent should be considered to be a

[551] Al-Oboodi (n 19) 84
[552] Allen and Widdison (n 31) 36-43
[553] Patti Maes, Robert Guttman and Alexandros Moukas, 'Agents that Buy and Sell: Transforming Commerce as we Know It' (1999) 42(3) Communications of the ACM 81-91
[554] Lerouge (n 225) 410-11.
[555] *See* Solum (n 547) 1245 arguing that 'artificial intelligence' could be insured against the risk of legal liability; Wein (n 547) 141 explaining that the law could require that machines be insured for the purpose of satisfying legal judgments.
[556] John Finnis, 'The Priority of Persons', in Jeremy Horder (ed) *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press 2000) 9

'person' would be to miss the fact that the e-agent is just another method that natural persons use to conduct their businesses.[557] Some academics have proposed that if the principles of agency are applied to the use of e-agents in e-contracts, it will answer the above questions.[558] Some have argued that if a user has consented to the use of e-agents to form contracts, the e-agents will have the real authority to conclude contracts on his behalf.[559]Another argument says that if the user makes it such that it appears that he is using an e-agent to act on his behalf to conclude contracts, then the e-agent has apparent authority to conclude contract on the user's behalf.[560] Legally, there are a few problems when principles of actual or apparent authority are used to contend that arrangements conducted by e-agents are enforceable. From the perspective of the definition of agency there are apparent problems, because an agency is a contract where a person (the principal) agrees to appoint another person (the agent) to carry out specific legal tasks on his behalf.[561] In line with this, the ICC, Article 927 states that 'an agency is a contract whereby a person consents to appoint another that the other will carry out a definite legal disposition on behalf of the principal',[562] and the agent must be prudent when carrying out the authorised actions.[563] However, an e-agent does not have fiduciary duties and does not have any individual or autonomous interests.[564] A computer is merely a programmed machine that can only act (depending on the installed software) within a range ofcertain pre-set limits. It does not have the capacity to give consent and it is not a legal person. A computer therefore

[557] Charles Fried's promise theory builds contractual obligation in individual autonomy and freedom. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 1981); Wesley N Hohfeld, 'Nature of Stockholders' Individual Liability for Corporation Debts' (1909) 9 Columbia Law Review 285, 288 wherein he states '[T]ransacting business under the forms, methods, and procedure pertaining to so-called corporations is simply another mode by which individuals or natural persons can enjoy their property and engage in business'.

[558] See Kerr (n 540) 239-47; Fischer, (n 224) 546. An agent has actual authority to contract on behalf of a principal when the principal has manifested consent to the agent that the agent does so. See Restatement (Third) of Agency, para 7 – 'Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him'.

[559] See Kerr (n 540) 243; Fischer (n 224) 560-61. An agent has apparent authority to contract on behalf of a principal when the principal has manifested to a third person that the agent has authority to do so. See Restatement (Third) of Agency (n 559) para 8 'Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons'.

[560] Kerr (n 540) 243. For more information about these agreements see Ian Rambarran and Robert Hunt, 'Are Browse-Wrap Agreements All They Are Wrapped Up to Be?' (2007) Tulane Journal of Technology and Intellectual Property 173-203; Samir Chopra and Laurence White, 'Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis' (2009) University of Illinois Journal of Law Technology and Policy 363,393; Weitzenboeck (n 539) 204; Wein (n 547) 103.

[561] ICC Article 927.

[562] ICC, Article 930(1).

[563] Article 930 (2) states 'the agent must be of sound mind and prudent (having the power to exercise discretion); it is not a condition the he must be of major age; a prudent minor may be commissioned as agent even when he has not been authorised'.

[564] Sommer (n 226) 1178.

cannot be an agent. The concept of software agent is not meant to be used in a legal sense, but to a certain extent it implies by analogy the general idea that the software undertakes actions in accordance with what it has been instructed to do.[565]

Therefore, for the agent to be armed with actual authority, there must be consent between him and the principal. As such, a question arises as to how software can provide consent to act as the agent of the user. If the principles of agency are to be applied to e-agents, then the law must do away with the agent's consent.[566] Article 930 of the ICC states that 'in order for the agency to be valid, the principal must personally have the capacity to dispose of the thing which he delegates to another person (agent) to perform; it is not valid at all to commission an insane person or an imprudent minor not having the power of discretion nor will it be valid to commission a prudent minor to carry out a disposition which is purely harmful even though it has been allowed by the guardian; it will however be valid to commission him without obtaining the permission of his guardian to carry out disposals which are beneficial to him and if he is permitted to carry on trading activities deposals which interdicted person will be concluded subject to the permission of his guardian'.[567] For this reason, the term 'automated messaging system' is more accurate than 'electronic agent' to describe e-agents. It is said to have rectified the definitional problem because the word 'agent' seems to suggest or imply that it is a legal agent.[568] This is in line with the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (CUECIC), as Article 4G defines the concept Automated Message System (AMS) as follows 'A computer programme or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated, or a response is generated by the system'.[569] Using the term 'Automated Transaction' in the title of UETA, Section 14 indicates that the final goal in defining 'electronic agent' when

[565] Lerouge (n 225) 474; Middlebrook and Muller (n 31) 342; Fischer (n 224) 557.
[566] If software is ever to be said to have 'consented' to a contract, electronic contracting issues, as argued by one commentator 'will be the least of the concerns of the law'. See Fischer (n 224) 569.
[567] ICC, Article 930(1).
[568] A review of the definition of 'electronic agent' in statutes such as the Uniform Electronic Transactions Act (UETA)-approved By National Conference of Commissioners on Uniform State Laws (NCCUSL) on July 23, 1999 < www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm > accessed 22 February 2018. This defines the latter notion in Article 2(6) as follows; 'Electronic agent' means a computer programme or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
[569] This convention adopted by the General Assembly on 23 November 2005, available on: https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

using such means in automatically created contracts is not like sending a slave in place of the merchant to do commerce in a foreign land.[570]

In addition to that, a computer programmed to issue a party's consent and conclude a transaction without direct human intervention should be treated as just a communication tool, similarly to a telephone or a facsimile machine.[571] However, a programmed computer apparently has its own independent character, in the sense that it has the capacity to carry out certain actions without any direct human intervention. The fact remains however that no matter how advanced and sophisticated a computer is, it is incapable of making autonomous decisions. Its operation is dependent upon the relevant installed program(s) and therefore a computer should be treated as a tool that can be used to issue human consent. Other than programmed computers, there are also many other machines that can perform tasks without direct human involvement. For example, vending machines can sell and deliver products, and collect money and issue change, if any, without human control. In actual fact, a vending machine is concluding contracts without human involvement.[572] The outcome of this is that the person controlling or programming the computer to work for his benefit should therefore be liable for the actions performed by the computer.[573] This is because he uses the computer with the intention of creating binding transactions on his behalf.[574]

As a result, consent is the only justification for the existence of legal obligations between the parties in an agency relationship. A person must consent to become an agent because he does not only obtain legal rights, he also has to undertake legal duties. In particular, agents have to take on fiduciary duties as regards the principals. An agent has to be loyal to the principal and

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[570] Smith, Sarah E. "The United Nations Convention on the Use of Electronic Communication in International Contracts (CUECIC): Why It Should Be Adopted and How It Will Affect International E-Contracting." *SMU Sci. & Tech. L. Rev.* 11 (2007): 133. Furthermore, Dubai E-Transaction Law defines the concept of automated electronic agent in Article 2 as 'an electronic program, or system to a computer capable of acting or responding to an act, independently, wholly or partly, without any supervision by any natural person at the time when the act or the response has taken place'.

[571] Andrade *et al* (n 220) 360; Allen and Widdison (n 31) 46. Jawahitha Sarabdeen and Chikhaoui Emna, 'The Adequacy of Malaysian Law on E- Contracting' (2007) 13(4) Computer and Telecommunications Law Review 121,124. Nonetheless, such a matter could be of less concern when dealings are conducted electronically by means of definite instantaneous techniques of communication where the contractual parties are facing each other via live webcam mechanisms, such as a webcam connection between users in msn.com

[572] Glatt (n 30) 45.

[573] Weitzenboeck (n 539) 204. M Erdle and Deeth Williams Wall, 'On- line Contracts: Electronic Creation of Effective Contracts' (DWW.com 1997) < http://www.dww.com/articles/online.htm> accessed 22 February 2018.

[574] In this regard, UNCITRAL Model Law on Electronic Commerce, Article 13 (2) attributes the operation of electronic devices to the person who originates the data message; 'if it was sent by an authorised agent of the party, or by an information system programmed by, or on behalf of, that party to operate automatically'. See also Articles 12 and 15 (2-B) of the Saudi and Dubai E- Transactions Laws respectively.

in matters related to the agency, the agent's duty is to act only for the benefit of the principal.[575] Agents also owe their principals a duty of obedience, i.e. they have to obey the instructions issued by their principals.[576] Although e-agents can be programmed to obey and be loyal, they cannot assume any legal duty to do so. E-agents must pay out compensation if the programme malfunctions.[577] The e-agent will just do what it has been programmed to do and it does not consider whether what it is doing can or cannot give rise to fiduciary duties. It may be foolish to think that e-agents are capable of carrying out a duty of care and skill,[578] evading improper conduct,[579] providing information, maintaining and rendering accounts,[580] and so forth. It may be possible to programme e-agents to do all these things but should there be a malfunction there will not be any breach of a legal duty.[581] However, the principal may be legally responsible for the actions performed by the e-agent, including those that happen as a result of the malfunction of the program.[582] If the e-agents are deemed to be agents possessing real authority, and if the principal is responsible for all the acts of an e-agent, what is the point of saying that the e-agent is an agent that has real authority? Will it not be better to say that the person who uses the e-agent is bound by all the actions carried out by the e-agent? Having an additional tier of 'agent with actual authority' would appear to be unnecessary.

Will apparent authority be more suitable to be applied to the use of e-agents since it is less concerned with the principal-agent relationship than the principal's relationship with third parties? Apparent authority comes into existence when the principal reveals to a third party that the principal has an agent. The law usualy protects the third party, proceed upon the authority's appearance established by the alleged principal.[583] If a person is held out to third persons, or the public at large, by the principal, as having a general authority to act for and to bind him.., it would be the height of injustice.., to allow him to set up his own secret and private

[575]Kerr (n 540) 242 '[C]onsent is the paradigmatic mechanism by which authority is conferred'; Fischer (n 224) 569.
[576] See Restatement (Third) of Agency (n 559) para 387.
[577] Beale, *Chitty on Contracts, Vol. II--Specific Contracts* (n 224) 31-001.
[578] *Sommer* (n 226) 1177-78
[579] See Restatement (Third) of Agency (n 559) para 379(2). See also in this regard, Mills (n 193) 8.
[580] Restatement (Third) of Agency (n 559) para 382.
[581] *See* Lerouge (n 225) 408-09 stating 'Since vending machines are not deemed under the law as capable, they may not be counted responsible for their acts'.
[582] Of course, it can be argued that in some cases the user's mistake will render contracts made by bots voidable. However, in order to make the defence of mistake feasible, the opposite party must have a reason to be aware of the mistake or in some way be otherwise at fault. Surely, cases will arise wherein the principal will be liable for the activities of the bot, regardless of the defence of mistake*:* Restatement (Second) of Contracts (559) para153.
[583] Floyd R Mechani, *A Treatise on The Law of Agency* (2nd edn Callaghan Chicago 1982) 57.

instructions to the agent).[584] The question then arises that, if an e-agent is used to transact a person's business, does that e-agent possess apparent authority to oblige the user based on the user's mere usage of that e-agent? If apparent authority is based on the objective theory of contract, it is contended that it is not apparent to the third party that an e-agent was used until after an enforceable legal obligation has arisen, if such an obligation arises at all.[585] Furthermore, for an apparent authority to exist, the 'message' to be conveyed to the third party is not simply 'this is my e-agent', but should be 'this is my agent'.[586] Apparent authority therefore takes it for granted that there exists capacity for actual authority. Maybe the law has to recognize that software is capable of exercising actual authority.[587] For apparent authority to be granted to e-agents, there must be a legal framework operating under the principles of contract law, as contracts are usually concluded between natural or juristic persons.[588] Therefore, to overcome this legal conundrum and provide certainty in the matter, there is a need to create a new law that allows a programmed computer to conclude valid contracts, with the parties to such contracts being be bound by it. This would mean that a party to such a contract would not be able to deny liability by pleading that there was no direct human review of the computer's action.

The question then is whether the e-agents should be given a new type of agent's authority, maybe one that makes principals liable to third parties for the actions of the agents, but which does not make agents liable to the principals for failure to perform their duties correctly.[589] If an e-agent does not obey instructions, go beyond its incidental actual authority or delegates functions to another e-agent when it does not have the authority to do so, so be it. The person that used the e-agent or third party have to bear the risk for something that is considered to be an impermissible use of authority if the e-agent was a human agent. This may be in every respect an acceptable solution to the conundrum, but it will be a contradiction in to justify that it is a solution. The external as well as internal elements of an agency cannot be severed for the

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[584] Joseph Story, *Commentaries on The Law of Agency* (4th edn Gale 1851) 153.
[585] Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17.
[586] Momsen, Leonardos and Cia, 'Commentary on Brazil', in Steven Kinsella and Andrew Simpson (eds) *Online Contract Formation* (1st edn, Oceana Publications New York 2004). Mills (n 193) 2; Conor Quigley, *European Community Contract Law* (Volume 1, Kluwer Publishing 1997) pages?
[587] A representation to my neighbor that 'my dog is my agent' should not suffice to bind the dog owner to transactions arranged by the dog and the neighbor.
[588] See *Saunders v Anglia Building Society* [1971] 1 App Cas 1004; *Foster v MacKinnon* [1869] 4 LR 704; Allen and Widdison (n 31) 50.
[589]Kerr (n 540) 242 – '[T]he only aspects of agency law relevant to electronic commerce are those that pertain to the relationship between the person who initiates an electronic device and third parties who transact with that person through the device.').

mere presence of the elements is enough to create an agency.[590] The moral and economic rationales for agency law presume the presence of both elements.[591]

Some may justify the agency rules, not because mutual trustworthiness is worth protecting by itself, but on the ground that it is efficient to do so.[592] As utility maximisers, the agents may have been incentivized to pursue their own interest instead of their principals' interests.[593] An agent may neglect his duties, for instance, by not exerting enough effort or misappropriating benefits. To keep an eye on the agent directly may be exceedingly expensive for the principal.[594] Generally, rules of fiduciary liability, if created properly, create incentives for agents to carry out their duties in the best interests of the principals.[595] An e-agent is certainly not a utility maximiser and cannot be made to bear a fiduciary duty. However, an e-agent may act to the detriment of the user's best interests regardless of how well the operating programme was conceived. It is unclear whether the application of only the external aspects of agency to make the user liable for the transgressions of the e-agent will lead to efficient outcomes.[596] If selective agency principles are used to make arrangements undertaken by electronic agents enforceable, there is a need to provide some justifications. The typical justifications given to support the principal-agent relationship, such as the promotion of mutual trustworthiness and efficiency, cannot be presumed to be able to be extended to the principal-machine

[590] The 'external' elements of agency (those governing the relationship between principal and third party) and the 'internal' elements of agency (those governing the relationship between principal and agent). *Ibid.*

[591] The first sentence of Teller's agency treatise says that the idea of agency is one of delegation that gives rise to a relationship of trust and confidence concluded for a more convenient and successful management of human affairs and where its rules and principles have become more important with ever expanding commercial activities'. Ludwig Teller, *Agency 1* (National Law Review Series1948 14.

[592] Deeming bots as agents helps to reinforce the relationships of trust and confidence between individuals, i.e. the trust and confidence a person has relied upon in another person's judgment and understanding. If the agent breaks that trust, the principal can take remedial action against the agent. However, the principal cannot take action against the software. The same is also true under the apparent authority principles because the apparent authority binds a person not because he states that he will be bound by a contract another person has made, but it is due to the person stating that another person is his agent. It is this statement and thus the agent is liable for the breach of confidence or misuse of authority which reasonably induces a person to believe that the action would be inside the apparent scope of authority. Much literature has been written about the economics of the principal-agent relationship. Robert Cooter and Bradley J Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 New York University Law Review 1045; Kenneth J Arrow, 'The Economics of Agency' in John W Pratt and Richard J Zeckhauser (eds) *Principals and Agents: The Structure of Business* (Harvard Business School Press 1991) 37

[593] Steven Shavell, 'Risk Sharing and Incentives and the Principal and Agent Relationship' (1979) 10 Bell Journal of Economics 55; Joseph E Stiglitz, 'Principal and Agent', in John Eatwell, Murray Milgate and Peter Newman (eds), *Allocation, Information, and Markets* (Springer, 1989) 241; Stephen A Ross, 'The Economic Theory of Agency: The Principal's Problem' (1973) 63 The American Economic Review 134

[594]Owsia (n 46) 225; Cooter and Freedman (n 593) 1049 who state '[D]irect surveillance of the agent by the principal may be prohibitively costly or require expert knowledge'.

[595] Ibid, 1074.

[596] Kerr (n 540) 242.

relationship.[597] In fact, if the *sine qua non* is that the principal is plainly liable for the deeds of the agent (e-agents), treating the e-agents as agents seems to add nothing more than a label. Why then should the users be liable for the actions of the e-agents?[598]

To sum up, although a programmed computer has the ability to act autonomously, it cannot make a conscious and moral decision without human involvement.[599] Also, since programmed computers are in actual fact a combination of hardware and software, then conferring legal personality on e-agents gives rise to the question as to whether it is the software or hardware that is said to be the e-agent. Especially when the hardware as well as the software are spread over several locations and their maintenance carried out by different people.[600] Under the principle of agency, there must be mutual agreement between the agent and principal in order to create a legal principal-agent relationship.[601] In this case, it would be ridiculous to say that a computer can give valid consent. Such a stand is also contrary to the ICC, which stipulates that an agency is a contract under which a person (the principal) gives authority to another person to carry out certain valid and definite actions.[602] However, the question arises as to whether contracts conducted by e-agents are enforceable.

4.4.1.2. Are contracts conducted by electronic agents enforceable?

It is surely reasonable to ask whether the enforcement of arrangements made by e-agents is consistent with the various theories of contract. Atiyah lamented that 'pragmatism is the venerated approach to policy making and principle has nothing to do with it. Every problem considered on its own merits, every case is allowed to have its own separate solution and unavoidably, in the process, the long-run considerations will likely be forgotten'.[603] Some theories appear to answer this question. Under promise theory, a person can create a contractual

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[597] Allen and Widdison (n 31) 34-35; Kerr, 'Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act' (Conference Paper, Uniform Law Conference of Canada 1999)

[598] It has been proposed to deem that the bot is a legal entity and then develop a theory of liability based on that presumption. However, such a solution may be inappropriate because a computer does not have self-consciousness and thus it is not proper to treat it as a legal entity. Allen and Widdison (n 31) 35.

[599] Kerr (n 540) 263. As a result of future developments in artificial intelligence, it may become possible for Automated Message Systems to learn, change instructions in their own programs, and even advise new instructions. Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264, reproduced in *UNCITRAL Yearbook, vol. XVI – 1985*, (United Nations New York 2007) para 3.

[600] Fischer (n 224) 557; Wrinn and Wright (n 221) 5-24.

[601] Lerouge (n 255) 473-474. For more information see Juanda Lowder Daniel, 'Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope' (2008) 43 Gonzaga Law Review 239.

[602] See Article 927 and thereafter.

[603] Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 613; Jay M Feinman, The Significance of Contract Theory, (1990) 58 University of Cinncinati Law Review 1283, 1285; Steven D Smith, 'The Pursuit of Pragmatism' (1990) 100 Yale Law Journal 409, 430-33

obligation by conveying a promise, thereby invoking an agreement creating binding commitments.[604] If the issue is that a person can create a legal obligation by willingly conveying a promise, the usage of e-agents of itself might perhaps be insufficient to create a contractual obligation. In order to have a binding commitment, the law requires either a preceding promise to comply with the commitment that will be organized by the e-agent, or a subsequent promise to comply with the commitment made by the e-agent. It might be asked why the law cannot simply declare prospectively that the people who use the e-agents are bound by the exchanges they make, thereby creating a convention that the usage of an e-agent represents a promise. Since promise theory considers that communicating an important element of a convention can be used to form an enforceable promissory obligation, invoking such a convention would not give rise to a promissory obligation any greater than that of invoking the 'convention' that destroying another's property would generally give rise to an obligation to pay for it. Liability will be present, but it will not be promissory.[605]

Under consent theory, a person will create a contractual obligation if he makes known an intention to be legally bound to transfer the right to a property at the time the contract is formed.[606] If the issue is the manifestation of consent when the legal obligation arises, the law ought to require the same manifestations that would affect the promise theory, i.e. a preceding consent to transfer rights that has been specified by the interaction with the e-agent. Consent theory has its own wider purpose that enables individuals to pursue their objectives through cooperative activities. An external manifestation of consent, although another party might not be aware of it when the obligation arises, may fulfil the purpose as well as the manifestation of consent that the other party knows about when the contract is formed so long as each party voluntarily decides to take part in the particular form of cooperative activity. In this way, the wider purpose of consent theory seeks to protect the boundaries of individual activity as well as enable cooperative arrangements. This appears to justify enforcement.

As for the other theories of obligation, on the one hand, the tort theory of reliance does not recognize any legal obligations until the promisee adversely relies on the service of an agent.[607]

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[604] Randy Barnett's consent theory (grounding contractual obligation in the need to facilitate transfers of property rights). See Randy E Barnett, 'A Consent Theory of Contract' (1986) 86 Columbia Law Review 269

[605] See Radin (n 546) 1127 (discussing computers and binding commitment in the context of the property-rule versus liability-rule dichotomy developed in Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

[606] Barnett (n 605) 7.

[607] Which grounds contractual obligation in the need to protect promisees from actual harm. See Grant Gilmore, *The Death of Contract* (Ohio State University Press, 1995) 95-112. Under the category 'reliance' theories, I

If actual reliance is the concern here, the party that uses an agent ought not to be held to any legal obligations until the other party experiences an actual injury. On the matter of enforcing the exchanges carried out by way of the interaction with electronic agents, tort theory allows for compensation for the harm suffered only when it has been justifiable for the person to rely on the use of an e-agents. Is it justifiable for the party using an e-agent to carry out an exchange to rely on the fact that other parties are also using e-agents with an eye on the same exchange? If the answer is yes, then the reliance of the other party using the e-agent is justifiable. Just because there is reliance, it does not mean that liability is also present. Consequently, the question that remains is why can a person be permitted to rely on other parties using e-agents? On this issue, the tort theory of reliance does not have any clear answers. On the other hand, in the confidence theory of reliance, a party is bound to a promise that is made in furtherance of a commercial activity so as to promote confidence in the economic institutions.[608] Add to that, as Barnett observed, [e]ffectiveness concepts only ... cannot entirely elucidate why definite obligations should be compulsory unless it is more exposed that economic effectiveness is the restricted objective of the legal order'.[609] If the theory's underlying economic justification when applied to promises between individuals is correct, there are doubts as to whether it is applicable when the intermediaries are e-agents. For example, the theory postulates that the enforcement of promises creates incentives for the promisors to disclose their uncertainties about performance. The e-agent users here do not have the means to divulge their uncertainties about performance, for at the moment of the contract is formed, they do not know who the e-agent has made an exchange with or the nature of the specific terms. Therefore, to enforce agreements made by e-agents will not create a default rule that provides incentives for the disclosure of information, instead it will create an unchangeable or inflexible rule that requires some independent justification. The predictable enforcement of exchanges carried out by e-agents may, in some respects, maximize utility. But if the concern here is the maximization of

include the general conception of contract as akin to tort, see Atiyah (n 604) 613, and in promoting market confidence see Daniel A Farber and John H Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"' (1982) 52 University of Chicago Law Review 903, 927

[608] This theory will not only protect actual reliance on promises, but also the parties' ability to rely them. It also grounds a contractual obligation as there is a need to promote confidence in economic institutions. See Farber and Matheson (n 608) 927-29. There is large body of literature on issues of contract law from the viewpoint of welfare economics, i.e. the purpose of contract law is to help support the economic welfare of the contracting parties. See Louis Kaplow and Steven Shavell, 'Fairness v. Welfare' (2001) 114 Harvard Law Review 961, 1102. See generally Barnett (n 605) 279-80; Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising (1989) 88 Michigan Law Review 489, 490-91.

[609] Barnett, (n 605) at 283. Kaplow and Shavell (n 609) 967.

utility, more work appears to be necessary to establish the party that ought to bear the risks of loss incurred when businesses are transacted using e-agents.

Lastly, under the trust theory of contract, persons are bound to promises so as to protect the ability of the persons to follow their reasonable objectives by using reliable arrangements.[610] It is not just the intentional act itself that has the protection of the law, it is also the ability of the persons to maintain control over their relationships in their community. Finnis explains that promissory obligations can only come into being if there are some voluntary and intentional acts which manifest an act of will by the promisor and the happening of such an act is one of the several facts that is pertinent for the emergence of the necessity called obligation and other than that it has no special role to explain the obligation of the promised performance.[611] Generally, individuals are obliged to fulfil the obligations which they have voluntarily undertaken. Therefore if a person, who does not want to make a promise, knowingly, carelessly or negligently behaves in such a manner that it appears that he is making a promise, he ought to compensate those who naively relied on that supposed promise. This compensation is a commitment under the ICC, which reads "any act that causes detriment to others…. entails payment of compensation".[612] Accordingly, if a party does not indicate assent to another party's indication this will not be fatal to the presence of a legal obligation. Consequently, the enforcement of transactions executed by e-agents seem to be compatible with the trust theory of contract. Since this theory has received less academic attention than others, it is worthwhile to draw attention to its unifying elements. It recognizes that an act of will is a necessity, but it is an insufficient condition for the presence of an obligation of the promised performance. The rationale as to why a voluntary act is essential is because the purpose of a promissory obligation is to empower an individual to exert control over their personal relationships in a community.[613] It also acknowledges the importance of protecting reliance, not just actual reliance, but also the individuals' ability to rely on acts that are purportedly voluntary undertakings of obligations as well as the obligations that were assumed. To maintain this ability, the law can hold individuals who did not make promises accountable for creating the impression that they did. A person using an e-agent to arrange transactions with another person who perceives them as obligatory

[610] Joseph Raz, 'Promises in Morality and Law' (1982) 95 Harvard Law Review 916, reviewing PS Atiyah, *Promises, Morals, and Law* (Oxford University Press 1981); see also Joseph Raz, *The Morality of Freedom* (Clarendon Publishing 1986) 173-176.
[611] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 307-323.
[612] Article 204 of the ICC. Also see page 21 of this thesis.
[613] Finnis (n 612) 308.

should in general be held liable.[614] Finally, it is commendable for the ICC and/or IESTA to insert text providing the meaning of considering electronic agents as mere tools regardless of their features and capabilities.

4.5. Invitations to treat: Definitions

In general, an invitation to treat may contain proposals aiming to invite the other party to negotiate regarding an agreement.[615] Although an invitation to treat has a crucial role in the contract-making process, other than a general meaning in ICC Article 80, this code and Sharia do not offer any further legal guidance on the invitation to treat stage.[616] It must be clarified here that an invitation to treat is not necessary or required in all instances. This is because an offer can be issued directly and as a result there is no need to negotiate on the sale to obtain legitimacy.[617] For example, if A wants to sell something to B and he says, 'I want to sell you this article for one thousand dinars' and B immediately accepts this. In this case the sale is valid, for the words used are explicit and it does not depend on presumptions or pre-conditions.[618]

In Sharia, the term for invitation to treat is '*al-musawama*' and it means the period of bargaining.[619] Sharia also deals with 'offer', but does not provide any legal effects on the invitation to treat stage that precedes the offer.[620] Sharia jurists are of the view that the issuance of a definite offer is right in between the invitation to treat stage and the meeting of contract stage, as both precede a contract's conclusion and the outcome of the invitation to treat is considered to be an offer.[621] It has been stated that, 'in a sale, if a party makes an offer, the other party is free to accept or refuse it in that meeting'.[622] Also, it is reported by another jurist that 'If a party says; if you wish I sell this for ten dinars, the other does not reply until the meeting is finished, in this case there is no contract'.[623] That is why Sharia considers that the

[614] lain Ramsey, 'The Politics of Commercial Law' (2001) Wisconsin Law Review 565, 566.
[615] Dizai' (n 15) 14. For a similar meaning, see Sewar (n 359) 141.
[616] Also the ECC. See Articles 82, 94 and 96 of the ICC, ECC and JCC respectively. Exceptionally, the Italian, Greek and Lebanese civil codes have regulated this contractual stage while the Swiss and Polish codes have indicated that the contract is deemed concluded once the parties have agreed about the essential elements of that contract as long as they have agreed to leave the subsidiary ones to be agreed about in the future. Dr Mustafa al-Jammal, *Pursuit for Contracting in Comparative Law* (al-Halabi Publications 2001) 16.
[617] Alshafi' (n 28) 25; Dr Abdul Wahid K Ali, 'The Contract inter absentes in Arabic Legislations' (2001) 2(41) Journal of Public Administration, Kingdom of Saudi Arabia 352; Al-Hakeem, (n 20) 104.
[618] Alnawawi, *Almajmo'* (n 109) 162; See for details Abdullah Al-Nasser, 'al-Oqood al-Electroniyya Derasah Feqhiyya Moqaranah' (2007) 73 Journal of al-Bohooth al-Feqhiyya al-Moa'asera 281.
[619] Alkasani (n 195) 134; Alhattab (n 310) 230.
[620] Suleiman B Aljumaili, 'Contractual invitation to treat' (MSc thesis, Al-Nahrain University, Iraq 1998) 17.
[621] AlKasani (n 195) 134.
[622] Al-Binhabouri (n 368) 7.
[623] See Alhattab (n 310) 230.

consequences of the meeting of contract only occur after the offer has been issued. The negotiator at the invitation to treat stage is, in most of the cases, free and has no obligation to stick to the commitments that can restrict the party if an offer is made. However, jurists have said that the issuance of an offer is in between the invitation to treat stage and the offer stage and that the invitation to treat has no impact on the offer. Since the ICC is derived from Sharia, it has called the 'invitation to treat' as 'negotiations', which means there is no notion named 'negotiations' after an offer being issued but before that. In other words, calling the exchange of offer and acceptance as negotiations in the ICC is a misnomer. But, as mentioned above, the invitation to treat has its advantage for it can be used as material facts for the interpretation of some ambiguous situations that are related to the formula of the offer.[624]

4.5.1. Offers and invitations to treat in electronic contracts

In the search for agreement the law distinguishes an offer from an invitation to treat.[625] The former when it is accepted will result in the formation of a contract, whereas the latter is just a part of the negotiation process and it also invites others to make an offer. The purpose of the distinction is so that the intention of the parties can be objectively assessed. The court will take into consideration the words and conduct of a party to determine his willingness to be bound by the resulting agreement should the opposite party clearly accept the terms of the offer. The willingness is the differentiating factor between an offer and an invitation to treat. A body of case law has separated many frequently occurring transactions into different categories. For instance, advertisements, trade circulars, window displays and auctions are generally considered to be invitations to treat, i.e. they invite offers from the public.[626] The common argument for such an approach is that it reflects commercial reality in so far as it relates the parties' intention. 'The trade circular states that the broadcast of such a price list does not make it an offer to supply an unlimited quantity of the particular wine at the stated price, so that the moment an order is received a binding contract to supply that quantity comes into being. If it is the case, the merchant may end up with numerous contractual obligations to supply a particular wine which he may not be able to fulfil because his stock of the said wine will be limited'.[627] To deem that such circulars and advertisements are offers will not give the seller

[624] See also Sewar (n 359) 141. Alsewasi (n 101) 190.
[625] Noeding (n 236) 85.
[626] See *Pharmaceutical Society Great Britain v Boots Cash Chemists* [1953] 1 QB 401 and *Payne v Cave* (1789) 3 Term Rep 148, respectively; *Partridge v Crittenden* [1968] 2 All ER 421,
[627] Lord Herschell illustrated this point when he was referring to a trade circular in *Grainger and Son v Gough* [1856] AC 325.

any flexibility if, for instance, he runs out of stock or receives a response from a client which he does not wish to supply the product.[628] However, such an analysis becomes less convincing if the available alternatives are considered.[629] Nonetheless, the general classifications of advertisements, circulars and shop window displays are quite well established.

The essential point to remember here that the words and conduct of the parties in the case must be objectively assessed. Henceforth, auctions listed as 'without reserve' and some advertisements have been held to be offers.[630] In the case of unilateral contracts, *Carlill v. Carbolic Smoke Ball Co*,[631] a classic case, is a good example to illustrate the point. The words used in the advertisement together with the advertiser's action in depositing £1000 in their bank showed their 'sincerity in the matter' and influenced the court to rule that their advertisement was an offer.[632] In *Bowerman v Association of British Travel Agents Ltd*, *Hobhouse LJ* repeated a point he made when he analysed an ABTA notice. He said that the document was meant to be read, and it would be reasonable for a member of the public to construe that it contains an offer of a promise which he is entitled to accept as it fulfils the criteria for a unilateral contract and it also contains promises that are clear enough to be legally enforceable. Hobhouse LJ also said that the principles established in Carbolic Smoke Ball shall apply. Furthermore, counter offer is indirectly mentioned in the ICC in Article 82.

4.5.1.1. Email and text messaging (SMS)[633]

As with all methods of communication, the courts will infer from the language that was used, together with the relevant conduct,[634] whether a party had the required intention to be bound when determining whether an offer was made. An interesting aspect of these methods of electronic communication is the huge quantity of 'spam' or unsolicited commercial communications sent to email addresses and mobile phones. In general, these communications are unsolicited advertisements for a totally unneeded product or service.[635] Subscribers of the

[628] Because of some regulatory requirement for example. The 'offer' must be based on a condition on when the stock is being available etc. Yet, this is not the view upheld by the courts. See Diane Rowland and Elizabeth MacDonald, *Information Technology Law* (Cavendish 2000) 297; Glatt (n 30) 13.
[629] *Walow v Harrison* (1859) 1 E&E 309. *Barry v Davies* [2000]1 WLR 1962.
[630] In particular the 'reward' or `unilateral contract' cases. See the discussion of *Carlill v Garbolic Smoke Ball Co* [1893] 1 QB 256.
[631] [1996] CLC 456.
[632] In *Bowerman v Association of British Travel Agents Ltd* 1996 CLC 451 at 463.
[633] Short Message Service (SMS) allows customers to send and receive text messages of not more than 160 characters through GSM (Global System for Mobile Telecommunications) and almost all modern mobile phones are compatible with this service.
[634] Such as the depositing of £1000 in the bank account so as to settle claims in the *Carlill* case.
[635] Abdullah (n 14) 29; Al-Oboodi (n 19) 97-98.

latest generation of mobile phone systems will be bombarded with messages related to product promotions in the geographical location they are in or visiting from automated systems. Although they may be mass promotional communications, the messages will be analysed based on their content to determine the existence of an intention to be contractually bound. If they are unambiguously phrased such as a promise in return for carrying out certain acts, for example, 'the first fifty customers to register on anondvds.com website will receive the new 'Harry Potter' movie absolutely free', the court may construe it as an offer that is binding on the seller as long as the customer registers himself on the website and he is one of the first fifty customers to do so. The person who sent the message may claim that the email is just promotional material or mere puff. Nevertheless, if the words that were used show an intention to be bound, then it would be taken as a unilateral offer to the whole world. Anyone that fulfils the conditions stipulated in the email can bind the sender (if the message was sent using the email there can be a lot of potential customers).[636]

4.5.1.2. Websites

Although this issue is not specifically addressed by the IESTA 2012, the CUECIC has a direct provision on this issue. It reads as follows: 'A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information system, including proposals that make use of interactive application for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance'.[637]

The conventional rules that govern the invitation to treat and offer and acceptance in conventional contracts distinguish between a contract for a sale by auction and that of goods displayed in a shop.[638] To be more specific, online sale contracts[639] undertaken over the internet are mostly concluded using two types of websites, those operated by traders, retailers and

[636] Glatt, (n 30) 34.
[637] Article 11 of the CUECIC.
[638] Peel (n 33) 12, 13.
[639] In this thesis, the meaning of online contracts means B2B, B2C, C2B, and C2C contracts.

manufacturers, and those that operate as virtual marketplaces, i.e. the so-called internet[640] or electronic marketplaces.[641]

4.5.1.2.1. Passive websites

Websites may be used simply for marketing purposes, i.e. displaying catalogues, illustrations with a price list or descriptions of products or services.[642] If the website does not do anything else and the words used on the website do not suggest it is making a unilateral offer, the chances are such displays will be considered to be an invitation to treat, since there is no intention to be bound and the aim is to publicise its services or products.[643] The courts' inquiry into this kind of website would probably be similar to the approach used by Herschell LJ in the UK case of *Grainer and Son v. Gough*.[644] The court recognised that there is a need to allow sellers to freely publicise information about their products or services without running the risk of having to supply their products or services to everyone who sees their promotional material. The seller does not show any intention to be bound by his mere act of advertising his products or services, his intention is to invite the public to make an offer. However, it should be remembered that, where appropriate, the court may rule that the promotional materials are indeed offers and as such can be accepted, thus resulting in binding agreements. A website that promises something in return if the customer acts according to instructions will likely be construed as an offer,[645] for instance, websites that offer free downloads or services if the customer carries out the instructions given on the websites. One of the popular trends in electronic advertising is the so-called 'click here for free trial' on websites promoting their services or products. The words used in the advertisement look as if they represent a clear offer, a free trial in return for clicking on the icon. It can be argued that with the free offers the buyer does not provide any consideration. However, the data provided such as email address and personal profile has considerable commercial value which can easily satisfy the requirements of consideration.

[640] Troy J Strader and Michael J Shaw, 'Electronic Markets: Impact and Implications' in Troy J Strader, Michael J Shaw, Robert W Blanning and Troy Whinston (eds), *Handbook on Electronic Commerce* (Springer 2000) 10.
[641] Electronic marketplaces are systematic virtual places where businesses advertise and offer their products and buyers have a wide variety of products to choose from. The entire contracting process from offer and acceptance to payment and sometimes shipping is all undertaken online with a high level of ease and efficiency. See Martin Grieger, 'Electronic Marketplaces: A Literature Review and a Call for Supply Chain Management Research' (2003) 144 European Journal of Operational Research 280.
[642] Troy J and Michael J, (n 641) 11.
[643] The contents of the site may perhaps be important in relations to the representations made there and they may be relevant to the terms of the contract or any later claims for misrepresentation.
[644] [1856] AC 325.
[645] See *Carlill v Garbolic Smoke Ball Co* [1893]1 QB 256.

Other than the click, the site will usually request for credit card details on top of personal information and email addresses.[646]

4.5.1.2.2. Interactive websites

Another type of online contract where it is difficult to distinguish between an offer and an invitation to treat are those carried out on the electronic marketplace and websites belonging to retailers and manufacturers. Some academics have contended that the matter should be given more attention because identifying where the online contract is formed should be based on the proper study of this issue.[647] The question here is whether their products displayed with their selling price by sellers on websites constitute actual offers to sell or merely invitations to treat. The common law and civil law systems have tackled the matter differently. The common law deems such displays as invitations to treat, not offers.[648] It becomes an offer when the customer picks up the displayed item and approaches the seller to pay for the item, and at this point the seller has the option to accept the offer or reject it.[649]

However, under the ICC, this kind of display is considered to be an offer, not an invitation to treat.[650] Therefore, there is a need to consider whether the degree to which these traditional rules are applied to websites is consistent.[651] There are academics who argue that the displays of products on websites are similar to traditional shop window displays and as such the same rules should be applied, i.e. they are invitations to treat, not offers.[652] However, others have argued that such displays of goods on websites are not merely invitations to treat for they are valid offers.[653] Meanwhile others, when suggesting a middle-ground approach, have come out with an interesting test, which asks if the websites are interactive or non-interactive.[654] Using

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[646] Troy J and Michael J, (n 641) 11.
[647] See Diane Rowland, Uta Kohl and Andrew Charlesworth, Information Technology Law (4th edn, Routledge 2012) Anne-Marie Mooney Cotter and Colin Babe (eds), Information Technology Law (Cavendish 2004) 237. Also, Rowland, Kohl and Charlesworth, Information Technology Law (5th edn 2017) 233.
[648] Robert Duxbury, *Contract Law* (2nd edn, Sweet and Maxwell 2011) 16, 101; Peel (n 33) 13. This rule is also applied in the German Civil Code, see Rowland, Kohl and Charlesworth (n 648) 238.
[649] Catherine Elliott and Frances Quinn, *Contract Law* (9th edn, Pearson 2013) 15; *Fisher v Bell* [1961] 1 QB 394;
[650] For example, ICC Article 80 provides that ['1. The display of goods with its prices shall be regarded an offer, 2. The advertisement of goods with the possible range of prices for the public shall not, under the normal circumstance, be considered an offer but only an invitation to treat'.
[651] David Naylor and Antonis Patrikios, 'Mass Market Online and Technology Contracting' in Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (6th edn, Oxford University Press 2007) 106; Hill (n 232) 24; Daniel Bates, 'Mistakes in Online Transactions-The Lessons to be Learned from Kodak' (Internet Newsletter for Lawyers, April 2002) <http://www.venables.co.uk/n0203mistakes.htm> accessed 9 March 2018.
[652] Murray (n 153) 17; Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 27.
[653] Al-Oboodi (n 19) 55.
[654]Christensen (n 486) 22; Rowland, Kohl and Charlesworth (n 648) 238.

this approach, if the websites display goods and services accompanied by information such as quality, specifications and prices, but does not allow the website visitor to complete the transaction and make payment, then it will be viewed as an invitation to treat, similarly to advertisements in newspapers and television. If, other than displaying the goods together with the relevant information, the website allows the website visitor to make a purchase by accepting payments and requesting the address for delivery of the purchased item, such actions are viewed as more than an invitation to treat and are potentially a valid offer.[655]

Many websites go far beyond the rudimentary promotion of products and services by providing customers with a 'virtual shopping experience', replicating some of the common elements of self-service stores.[656] After examining the items on offer, the customer can select the items he wants and symbolically put them in a virtual shopping basket. When he is finished with his selection, he has to click on an icon that then takes him to the 'checkout'. In this instance, similarities can be made with the website's real-world counterparts. As mentioned earlier, shop displays are usually deemed to be invitations to treat and the customer makes an offer to buy a displayed item when he hands over the said item to the cashier. Somervell LJ elucidated this analysis in *Pharmaceutical Society of Great Britain v Boots Cash Chemists* when he said:

> I can see no reason for implying from this self-service arrangement any implication other than that, [...] it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have and then to go up to the cashier and offer to buy what they have so far chosen[657]

The clicking on either the checkout or purchase icon is the same as taking the selected items to the cashier and offering to purchase them. It is at this point that the customer makes the offer and the website owner has the prerogative to either accept or reject the offer.[658] However, it is possible to have a different analysis of the website's situation. In the interactive shopping website, pre-programmed software controls the website's actions. The software is programmed to emulate human decision-making. The contract's conclusion and sometimes the despatch of goods or provision of services is done with the intervention or direct knowledge of the seller. The action performed by the website is similar to the ticket issuing machine in *Thornton v Shoe*

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[655] Ibid.
[656] In the USA, this has been a normal approach for some time. It is from this approach that the 'virtual mall' was developed and it brought websites from various well-known suppliers together and created an environment that shoppers are familiar and confident with. See `ShopSmart' at http://www.codehot.co.uk/shopping.htm or online virtual shopping mall at http://www.barclaysquare.UK.co.uk
[657] [1953] 1 QB 401 at p 405.
[658] Duxbury (n 649) 16 101.

Lane Parking.[659] The customer can look through the website, select the items he wants, pick the delivery date and have the items gift-wrapped with personal messages, but cannot negotiate with the software. Such a scenario can be construed as the website making a unilateral offer to sell goods to the customer. If the customer complies with all the requests of the website owner, i.e. select the goods, input the delivery details, make payments and click on the 'confirm' icon, this is all he needs to do and the automated system will do the rest. This situation does not differ very much with Mr Thornton's when he decided to park his car at the Shoe Lane car park. Such a conclusion would not be welcomed by website owners because they would be responsible for mistakes made by the software or on their website. Bearing this situation in mind, many website owners stipulate on their websites that a contract is not formed unless the software confirms that the requested goods have been despatched.[660] In this way, they are specifically saying that they do not have any intention to be bound until a specific point in time, thereby preventing the activities performed on the website from being construed as offers. In two recent incidents of incorrect pricing, i.e. when Amazon quoted the wrong selling price of the iPaq Pocket PC and Kodak's digital camera, the legal advice given was to look into the nature of the parties' communications with each other. A condition for the use of Amazon.com's website clearly declares that there will be no contract between the buyer and Amazon.co.uk for the purchase of any goods unless and until Amazon.co.uk confirms the acceptance of the order by email that the product has been dispatched. No dispute of this nature has been adjudicated by the courts, but it is important to note that the effectiveness of this provision depends on how clearly it was brought to the user's attention.[661]

In *Thornton*, Lord Denning stressed the fact that Mr Thornton found himself irrevocably bound the moment he slotted in his coin, thus affording him no chance to object or retrieve his money, holding that, 'he was committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time.[662]This factor undoubtedly had a great influence on the decision of the House of Lords. Most websites offer consumers several opportunities to withdraw from transactions. This should be one of the factors to be taken into consideration when analysing any electronic contractual process.[663] For

[659] Ibid.
[660] Reported at http://news.zdnet.co.uk/ 31/01/2002 and 19/03/2003 respectively.
[661] See Amazon's terms and conditions of use at the website, http://www.amazon.co.uk
[662] Sir Gordon Willmer referred to Mr Thornton's absence of opportunity to change his mind or withdraw when a ticket was offered by an automatic machine which in fact was an irrevocable process, and as such there can be no *locus poenitentiae*. *Thornton v Shoe Lane Parking Co* [1971] 2 QB 163, at 169-174.
[663] To an extent the EU Electronic Commerce and Distance Selling Directives (and implementing regulations) provide opportunities for a consumer to withdraw from an electronic contract in certain circumstances.

the analysis in this part of the research to be convincing, it will be beneficial to differentiate the two types of website displays, namely electronic marketplaces and manufacturers and retailers' websites. In online marketplaces such as Amazon and eBay, different brands and types of goods and products are offered for sale with pre-fixed prices.[664] After the buyers place their orders and make payments, the electronic marketplace (not the actual seller) will send emails to the buyer to confirm the receipt of the order.[665] On the surface, such a display appears a valid offer and the buyer's order will be an acceptance of that offer. This analysis is confirmed by the characteristics of electronic marketplaces as they function as facilitators between the customers and traders and the items offered for sale do not belong to them. An important point to take note of is that one rule is not applicable to all the various types of online marketplaces as they do not have the same terms and conditions and the respective websites have different technical characteristics and design.

For example, Amazon's website offers two categories of product for sale, namely products offered by Amazon itself as well as products from third party sellers. Amazon makes it clear that their products displayed for the website do not amount to binding offers but are merely invitations to treat, as under Amazon's condition of sale, the customer's order is considered as an offer to Amazon to purchase the product(s) and its 'order confirmation email' is not an acceptance of the customer's offer. The offer is only accepted, and the contract of sale is concluded when a 'dispatch confirmation email' is sent to the customer. Each dispatch confirmation email and its corresponding dispatch concludes a separate contract of sale between Amazon and the buyer for the product(s) stated in the aforesaid email. The customer can, at any time before the sending of the product's dispatch confirmation email, annul his order for a product at no cost to him.[666] Amazon does not make it sufficiently clear whether the same rule is applicable for the third-party sellers using the website. Apparently, the same rule does not apply to third-party sellers, as their goods displayed on the website are valid offers and not invitations to treat. This can be inferred from the phrasing used in term 5.1 of Amazon's Participation Agreement and it shows that Amazon will confirm the order to the seller and buyer. Once the seller receives the order confirmation, they must dispatch the products sold within two business days. When a seller displays a product's availability for sale on the website,

[664] For instance, Amazon.com is only a platform provider and helps to facilitate transactions undertaken on its platform and is not the buyer or seller of the item listed for sale. The conditions related to sales by third parties to the buyer can be found in the 'participation agreement' on Amazon.co.uk.
[665] Nevertheless, Amazon now functions as a virtual marketplace and also sells a variety of goods online.
[666]See Term 1 of Amazon's condition of sale on www. Amazon.co.uk.terms.

he must dispatch the product sold in accordance with its availability as stated on the website when the order was made.[667] The sellers must make a full refund to buyers who have made payment if the product cannot be dispatched in accordance with clause A.5.1. The sellers must make the refund quickly via their Amazon Seller Account in compliance with clause B.6.1, i.e. not later than thirty days after the confirmation of the order or three calendar days after the latest estimated delivery date specified on the website when the order was made.[668] Furthermore, it is illogical for a seller to pay listing fees as well as commission to an electronic marketplace just to issue an invitation to treat. The same assumption can be applied to eBay's 'buy it now' sales facility, whereby a contract of sale would be concluded as soon as the buyer clicks on the 'buy it now' icon and completes the payment procedures. Undoubtedly, when the buyer adds the 'make an offer' button next to the 'buy it now' button, it is quite certain that he is making an invitation to treat.

For the products advertised by producers and manufacturers on their respective companies' websites,[669] an analysis of the issue suggests that the situation is not quite the same. The owner of the goods displayed on the website is also the owner of the website and this is very similar to the owner of a sales outlet who displays his goods on the shelves in his shop. If the analogy between the goods displayed on shelves in shop premises and an advertisement on a manufacturer's website (virtual display) is appropriate, then it can be concluded that the same traditional rules can be applied under the common law[670] and civil law.[671] For instance, when a buyer orders a product from Apple UK through its website, the company will include the following information in an email directed to the buyer: 'once we have finished processing your order and it has shipped, you will receive an email with an updated delivery estimate'.[672] Under the common law, the email ought not to be construed as an acceptance of an offer. The acceptance took place when the seller notifies the buyer that he had shipped the goods bought by the buyer to the buyer's delivery address.[673] This idea was also accepted in the case of Argos and Kodak in the UK, where the items offered for sale on a website were wrongly priced. Argos

[667] See term 5.1 of Amazon's Participation Agreement on www. Amazon.co.uk.terms
[668] See caluse A. 5.1 of Amazon's Participation Agreement on www. Amazon.co.uk.terms
[669] Such as, www.sony.com, www.samsung.com, www.apple.com
[670] *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1953] 1 QB 401, Court of Appeal.
[671] Christensen (n 486) 22; Rowland, Kohl and Charlesworth (n 648) 238.
[672] See www.apple.co.uk
[673] For instance, Apple.com sends an email to the purchaser when shipping the ordered item: 'We are happy to inform you that your requested order W455772956 has been shipped. Please see the details of the shipment below. Your Delivery Reference Number is 38664896736. We expect your order to be delivered to your shipping address on or before 22/05/2018.'

wrongly priced a colour television at £2.99 instead of £299 on its website.[674] It received hundreds of orders through its website as the buyers felt that it was a bargain.[675] Similarly, in 2002, Kodak offered on its website a digital camera at £100 instead of £329.[676] Argos and Kodak refused to honour the purchases made by the online customers and their argument was that a mistake was made on the pricing of the goods. They also argued that the advertisement was an invitation to treat and was therefore not a valid offer. However, the courts were denied the chance to examine the issue because both Argos and Kodak managed to settle the matter before it reached the courts.[677] Very recently, Screwfix wrongly priced all products offered on its website at £34.99 when the actual prices of some of them were as high as £1,599.99.[678] Thousands of online orders for a variety of products were made through the Screwfix website. Screwfix only realised its mistake after numerous products were despatched to the buyers and it then decided to cancel all orders and made refunds to buyers. No cancellation was made in relation to customers whose purchases had already been fulfilled. No customers have taken any legal action against the online retailer, but the main issue here is the difference between an invitation to treat and offer on websites.

There are questions whether the claim that the goods displayed for sale on websites are merely invitations to treat is an acceptable ground to allow sellers to escape having to honour pricing errors unilaterally. In 2003, Amazon UK and Amazon US depended on this argument to revoke a few hundred online orders of mistakenly priced Hewlett Packard pocket computers as well as 36-inch televisions.[679] Excluding Amazon's online terms and conditions, since online orders are offers to retailers, the automated confirmation emails sent to the buyers once an order is made should be treated as the seller accepting the offer if the traditional common law rules are applied.[680] It is apparent that Amazon has taken note of these types of potential costly mistakes

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[674] Guy Veysey and Michael Chissick, 'The Perils of On-Line Contracting' (2000) 6 Computer and Telecommunication Law Review 121;
[675] Stuart Barry, 'The Argos Case: Caveat Vendor' (Swan Turton Solicitors, 8 March 2018) <http://www.swanturton.com/ebulletins/archive/STBargos.aspx#.UgEGJZKTh8E> accessed 23 February 2018.
[676] Ibid.
[677] Benjamin Groebner, 'OOPS! The Legal Consequences of and Solutions to Online Pricing Errors' (2004) 1 Shidler Journal of Law, Commerce & Technology 1; Matthew Broersma, 'Amazon Won't Honor Pricing Mistake' (*CNET* News, 19 March 2003) <http://news.cnet.com/2100-1017_3-993246.html> accessed 8 March 2018.
[678] Nicole Blackmore, 'Do Retailers Have to Honour Pricing Mistakes?' (*The Telegraph*, 29 January 2014) <http://uk.finance.yahoo.com/news/retailers-honour-pricing-mistakes-112633714.html> accessed 8 March 2018
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[679] *Lim v The TV Corporation Int'l* 99 Cal App 4th 684, 121 Cal Rptr 2d 333 (2002). See also *Je Ho Lim v The TV Corporation International* (Super Ct No BC236227) Haley J Fromholz, Judge.
[680] See Amazon's terms and condition on www.amazon.co.uk.

and as such has made it very clear that an online purchase is not complete until a dispatch notification of the goods ordered is sent to the buyer.[681]

The researcher is in favour of the claim that the webpage window showing the items together with their selling prices is different from the webpage window showing 'place order' or 'buy now'. Therein, six buyers ordered more than 1600 laser printers wrongly priced at $66 instead of $3,854 on the defendant's website. The court emphasised that this type of contract cannot be considered to be valid even though the other contracting requirements have been met because the buyers were sufficiently aware of the mistake made by the seller. The appellate court said that the general rule is that a party to a contract is bound although he may have made a mistake when he entered into the contract. But, the party that knew that the other party has made a mistake cannot claim that there was *consensus ad idem*.[682] There is no doubt that if a webpage advertises a product together with the selling price, it is an invitation to treat. However, after clicking on the item's specification, the buyer will be guided to a new webpage known as the 'internet ordering' page or the 'offer' webpage.[683] This argument was confirmed by the EU's Consumer Rights Directive, Article 8 which states that the trader shall ensure that the buyer, when making a purchase, clearly acknowledges that the purchase implies an obligation to pay. If the placing of an order involves activating a button or a comparable function, the button or comparable function must be labelled in such a way that it is highly legible and uses words like 'order with obligation to pay' or some other words that are clear and unambiguous.[684] When the buyer clicks on the 'place order' or 'buy now' icon, he is indicating his acceptance. After the order and payment has been made, the online contract is considered to have been made and the seller does not have the right to revoke the contract unilaterally.[685]

The researcher is of the opinion that the website's terms and conditions should be made so that they are presented sufficiently clearly to their users, similarly to the approach of Amazon UK,

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[681] Ibid. However, this author agrees that online contracts should be void if there is an obvious mistake in the selling price in spite of the fact that the other requirements for the conclusion of the contract were fulfilled when the transaction was carried out on the website. See Smith (n 570) 796.
[682] Alasdair Taylor, 'Offer and Acceptance Online' (SeqLegal, 8 July 2011) <http://www.seqlegal.com/blog/offer-and-acceptance-online> accessed 9 March 2018. The Court of Appeal of Singapore recognized this fact in *Chwee Kin Keong v. Digilandmall.com Pte. Ltd* [2005] Civ App No 30 SGCA 2005 [30], [31].
[683] Ibid.
[684] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. This Directive is amending Directive 93/13/EEC and Directive 1999/44/EC and repealing Directive 85/577/EEC and Directive 97/7/EC of the European Parliamen. See European Parliament and Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64.
[685] Article 8 of Consumer Rights Directive 2011/83/EU.

as to whether placing an order through the website amounts to the user making an offer or is an acceptance of the seller's offer. The aforesaid statement should be clearly visible as well as clear to the buyer when he is placing his orders. The preamble to the Consumers Rights Directive clarifies that it is important in the case of distance contracts done through websites, the consumer can read and understand the major elements of the contract before he place his order.[686] To meet the aforesaid objective, there should be provisions in the Directive to require the placement of those elements close to the confirmation requested for placing the order. In such situations, it is also important to make sure that the consumer can determine the moment when he assumes the duty to pay the seller. Therefore, it must be unambiguously made known to the consumer that his placement of an order involves him assuming an obligation to pay the seller. However, if the websites operate autonomously, it may be necessary to establish whether there was a 'counter-offer' when the system reacts to the customer's order. After an order is made, the buyer will normally receive from the seller's website a message having the details of his order as well as the terms and conditions of the transaction.[687] If the response is nothing more than an anticipated clarification of the terms of the original offer, then the customer's offer will remain.[688] However, if new terms are proposed, or existing terms are modified, the customer's offer will no longer be valid and the response of the vendor (or his automated system) becomes a new offer which the customer is free to accept or reject.[689]

4.5.1.3. Online auctions

Under the common law system, goods offered for sale by auction are not considered to be an offer, but instead are regarded as an invitation to treat.[690] The bidders in the auction are the ones making the offer and when the auctioneer approves the highest bid, provided no reserve price has been set, he is in fact issuing an acceptance of the offer.[691] The same rule is also adopted by the ICC, Article 89 states 'No valid contract shall be concluded in auction sales unless the highest bid is received, and the auctioneer has approved it. A tender shall be aborted with the presence of another higher bidder even though the latter might be invalid'. However,

[686] See paragraph 39 of the Consumer Rights Directive Preamble.
[687] The most common terms used are related to delivery and product returns, but most of the time other more significant terms regarding liability, applicable laws as well as jurisdiction are also included.
[688] Being equivalent to further enquiries or simple clarification of the existing terms and conditions. *Stevenson v McLean* (1880) 5QB 346.
[689] See *Jones v Daniel* [1894] 2 Ch 332.
[690] Peel (n 33) 12.
[691] Ibid 12. This rule is also applied in US statutory provisions in the UCC, paragraph 2- which states '(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.'

the Iraqi law does not provide any further rules regarding the cases where the auction can be made with or without reserve.[692] However, if this rule is applied in online auctions it may give rise to uncertainties, especially as to whether the list of items for auction on the websites are considered to be valid offers or invitations to treat.[693]

The posting of items for sale on an online website auction has been held to be a valid offer, with the bid at the highest price becoming the acceptance.[694] An enforceable contract is concluded when the acceptance is issued, irrespective of whether the value of the final bid is lower than the actual value of the auctioned item.[695] In this case, the claimant, a consumer, won the auction of a car on an online auction website. The auction's minimum starting price was about half the actual value of the car. However, only one bid, which was at the minimum starting price, was received at the end of the auction period. The claimant paid for the car and tried to make arrangements for its delivery. The seller refused to honour the sale and claimed that no binding contract was concluded between them and that he only issued an invitation to treat and as such was not obliged to accept any offers or bids.[696] Fascinatingly, at first instance, the seller's argument prevailed and the online contract was nullified.[697] The court relied on Germany's auction law,[698] which stipulates that the placing of goods on auction platforms is not an offer, for it is an invitation to treat. The court said that it was not logical to expect the seller to agree to sell the car at 50% of its real market value.[699] It was no surprise that the District Court's ruling was reversed by the Court of Appeal.[700] Rather than relying on Germany's auction law, the appellate court based its judgment on the terms and conditions of the website which clearly states that the sellers are obligated to accept the highest bid. Furthermore, the court also concluded that when the car was listed on the online auction website, it was considered to be an offer and not an invitation to treat, and this is in keeping

[692] ICC, Article 89.
[693] Peel (n 33) 12; Rowland, Kohl and Charlesworth (n 648) 241.
[694] See Peer Zumbansen, 'Contracting in the Internet: German Contract Law and Internet Auctions' (2001) 2(7) German Law Journal 241.
[695] Hans-W Micklitz, Jules Stuyck and Evelyne Terryn (eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 200.
[696] Astonishingly, the terms and conditions on the online auction's website agreed to by both parties state that the goods offered for sale on the website should be treated as an invitation to treat and not an offer. However, at the same time it also states that the seller is required to accept the highest bid. In the writer's opinion, the said clause on the website was made so that the buyer has the chance to revoke his bid if nobody else placed any bids. See Rowland, Kohl and Charlesworth (n 648) 241; Zumbansen (n 695) 242.
[697] District Court of Landgericht Münster, Germany.
[698] Rowland, Kohl and Charlesworth (n 648) 241; Zumbansen (n 695) 242.
[699] Ibid; Rowland, Kohl and Charlesworth (n 648) 241
[700] Ibid.

with the nature and practice of internet buying and selling.[701] This judgment of the Court of Appeal was subsequently upheld by the German Federal High Court.[702] In this case, the German courts[703] were forced to decide on which of the two options to apply to the facts of the case. Namely, whether to apply traditional auction law by relying on the reasonable facts and circumstances of the case or to uphold the online auction website's terms and conditions as well as take into account Internet trading customs and practice.

Apparently, the initial trial court tried to infer the seller's true intention in order to determine his willingness to make an offer when he fixed the minimum starting bid for the car. The court also appeared to sympathise with the seller instead of relying on the facts of the case when it said that it was not logical for a seller to agree to sell his car at less than half of its real value. The court then relied on Germany's traditional auction law for its legal reasoning and completely ignored the fact that both the contracting parties have agreed to use the website's terms and conditions. The decision of the trial court was not based on the fact that the online auction website's user agreement was not reasonable and not clearly presented, and the defendant in the trial also did not argue about the weaknesses of the aforesaid user agreement. It was wrong of the court not to rule on the applicability of the online auction website's terms and conditions. Consequently, the decision of the trial court was overruled by the Court of Appeal and the decision of the latter was subsequently confirmed by the Federal High Court. Other than the interesting fact that was brought up about the computer-generated emails sent to the purchasers upon their placing their bids or orders,[704] the court's findings appear to be quite logical. When examining whether eBay listings constitute offers or invitations to treat, it is crucial to first examine the characteristics of eBay's auction process. eBay has four different ways for its sellers to list items for sale on its website:[705] (1) 'buy it now; (2) buy it now' with an option to 'make offer; (3) 'place bid; and (4) 'place bid' with an option of 'buy it now'.[706]

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[701] Zumbansen (n 695) 243.
[702] Rowland, Kohl and Charlesworth (n 648) 241.
[703] See *Exco Cars BV v X* Court of Appeal Den Bosch 14 July 2008, LJN BE0004 demonstrating that in the Netherlands, courts have reached similar conclusions. See also Huub de Jong, 'Contracting online – a review of recent Dutch cases' (*Bird & Bird*, 10 May 2010) <http://www.twobirds.com/en/news/articles/2012/contracting-online-review-recent-dutch-cases-050510> accessed 11 March 2018.
[704] See Rowland, Kohl and Charlesworth (n 648) 244, 245.
[705] Dawson J Price, 'Leaving Feedback: An Analysis of eBay, Online Auctions, and Personal Jurisdiction' (2014) University of Illinois Law Review 1.
[706] See Julia Layton, 'N-CAP Users' Guide: Everything you Need to Know about the Internet - How eBay Works'; <http://e-association.ca/cim/dbf/how_ebay_works_-_english.pdf?im_id=56&si_id=305> accessed 2 March 2018;

It is clear that the first and second methods are not auctions, they are just items for sale displayed on the website[707] and will be examined later.

From a contract law perspective, when the seller in a traditional auction sale declares an item for sale, he is considered to be issuing an invitation to treat and not an offer[708] because no valid contract is formed until the auctioneer accepts the highest bid.[709] However, the rules can be different in auctions undertaken via eBay. When a seller places an item to be auctioned on eBay using the 'place bid' method only, it is more likely that he has made an offer, because the successful bidder will be obliged to purchase the item and he will be automatically directed to PayPal to make the payment.[710] Furthermore, it is a fact that items listed on eBay are offers because it is clearly stated on eBay's terms and conditions and the buyer and seller has to agree with these when opening an eBay account. The only exception is that the highest bidder is not obligated to conclude the transaction.[711]

The same analysis is applicable when an item for sale is listed for sale for auction, but also has the 'buy it now' option at a fixed price. There is no doubt that in both cases an offer is being made, but the offer is made in two different ways.[712] It can be argued that when the seller displays the 'buy it now' price together with the auction, he is fixing a reserve price and will not accept the highest bid if it falls below the reserve price. The listing of an item for auction is an invitation to treat, but if it is listed under the 'buy it now' option then it is an offer. Superficially, this may be misleading for first-time users of eBay. In fact, it is not misleading because in eBay's auction process, the seller has to dispatch the item to the highest bidder even

[707] 'Buy it now' and 'buy it now' with the option of 'make offer'.
[708] In Australia, the Supreme Court of New South Wales reached the same conclusion in an online auction case between two eBay users, which the courts in Germany, the Netherlands, and the USA also reached. See *Peter Smythe v Vincent Thomas* [2007] NSWSC 844; Rowland, Kohl and Charlesworth (n 648) 241; Peel (n 33).
[709] Kanchana Kariyawasam and Scott Guy, 'The Contractual Legalities of Buying and Selling on eBay: Online Auction and the Protection of Consumers' (2008) 19 Journal of Law, Information and Technology 12; see also ICC Article 89 and UCC para 2-328 (3).
[710] Rowland, Kohl and Charlesworth (n 648) 240, 241.
[711] For instance, the UK's eBay user agreement stipulates under the 'Purchase Conditions' that the customer is obliged to read the full item listing as well as the instructions provided by the seller before he makes a bid or commitment to buy. Unless otherwise stated, by bidding or committing to buy a product on eBay, the buyer makes a commitment to buy the item. If the buyer commits to buy or his bid is the winning bid or is accepted, the buyer enters into a legally enforceable contract with the seller and shall purchase the item. http://pages.ebay.co.uk/help/policies/user-agreement.html accessed 6 March 2018.
[712] *Begraft v eBay Inc* (Superior Court of New Jersey 1 October 2003) (Unpublished New Jersey trial court decision), a copy of the verdict can be found at <http://eric_goldman.tripod.com/caselaw/begraftvebay.pdf > accessed 6 March 2018.

if the value of the bid is below than the 'buy it now' price set by the seller.[713] In fact, this point is ambiguous and it falls between the offer and invitation to treat, and so purchasers using eBay should take note of this.

The above-mentioned scenario might be practical if the seller were to insert an extra clause that provides for an undisclosed reserve price wherein he will not accept the offer if the highest bid is less than that reserve price. Such type of clauses is rare in online auctions, but they do sometimes happen on eBay. eBay usually does not allow users to change the selling and buying rules, but it provides sellers space to add their descriptions and specifications of items for sale as well as other additional information about the items. Some sellers may use the space reserved for the description of the items to insert such extra clauses. The first consequential problem that arises therefore is whether the aforesaid clause can be enforced against the highest bidder if the value of the bid is lower than the undisclosed reserved price. If the clause is valid, the seller's listing is considered to be an invitation to treat, the highest bid is an offer and the contract is not concluded if the seller does not accept the offer. The researcher is of the opinion that users of online auction websites or other similar online services websites cannot unilaterally revise the websites' terms and conditions.[714] Therefore, this type of clause may not be legally enforceable.

4.5.1.4. The position of Sharia and Iraqi Laws

Different legal frameworks have their own specific way to deal with this distinction. In one of the approaches, an offer directed at the general public is deemed to be an invitation to treat rather than an offer because it is not aimed at any particular person or persons.[715] As such, advertisements of items for sale to the public in shops or through the mass media are deemed to be invitations to treat. Here, the trader's intention is to advertise his products and persuade the public to buy them without any intention to make an offer. The ICC, Article 80 stipulates that 'in case of ambiguity, all publications or advertisements stating the current prices of goods and every display related to it directed at the public or individuals shall not be treated as an offer, but an invitation to treat'.[716] This approach of treating goods displayed in shops as invitations to treat is justified because it absolves the trader from having to fulfil the orders in

[713] Sellers probably prefers using this method to make sure that they secure their intended lowest price or declare the highest prince that they hope their products will attain. See Rowland, Kohl and Charlesworth (n 648) 240, 241.
[714] *AV v iParadigms* LLC 562 F 3d 630 (4th Cir 2009).
[715] Shafeeq Muhsin, *Naql Altoknologiya min Alnaheyah Alqanonyyah* (Dar al-Nahda al-Arabia, Cairo 1984) 92
[716] Paragraph 1 states that 'advertising goods along with their prices is considered offers'.

the event the goods are out of stock. The same justification can also be used for advertisements.[717] Interestingly, some have argued that consideration, as a requirement of a valid contract formation, only exists in the common law regime.[718] In *Partridge v Crittenden,* the court pointed out that 'if the advertisement was treated as an offer, this could lead to many actions for breach of contract against the advertiser, as his stock of birds was limited. He could not have intended the advertisement to be an offer'.[719] Similarly, if the content of a website is considered to be an offer, there is also a possibility that the online seller may not be able to meet the demand if it outweighs the supply. As the reach of the Internet is as good as worldwide, the probability of such an occurrence is high.

From a legal perspective, to treat shop displays as invitations to treat rather than offers can be supported for several reasons. Firstly, taken from the perspective of the concept of meeting of contract,[720] the contracting parties can terminate the contract even after the exchange of offer and acceptance has been made, provided both the contracting parties remain together at the place the transaction was carried out. In the case of goods being displayed in a shop, the seller, even if he has sufficient stock, can decline the buyer's acceptance without falling foul of the law as per the legal norm of the meeting of contract.

However, under the common law, it might be difficult sometimes to distinguish between an offer and an invitation to treat, as the sole criterion for distinguishing between them is mainly dependent upon the intention of the party.[721] Also, the seller's intention is to sell items he has in stock and, therefore the intention is no longer present once all his stocks are sold. Since an essential element in a contract is the requirement to have mutual consent for a transaction to be legally enforceable, the seller whose stock has run out cannot be legally compelled to sell an item he no longer has in stock. When orders exceed supply, the trader's obligation is to fulfil the orders on a first-come first-served basis until all his stocks run out. Once the stocks run out, the seller is no longer obliged to fulfil the orders.[722] However, if goods in shops are clearly displayed together with all the required elements of the deal, then they are deemed to be offers. In this situation, a contract is validly concluded when an acceptance is made.[723]

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[717] Peel (n 33) 72; Young (n 33) 60.
[718] See Deveci, 'Consent in Online Contracts' (n 132) 2.
[719] *Partridge v Crittenden* [1968] 1 W.L.R. 1204.
[720] This issue has been examined further in the previous chapter of this thesis.
[721] See Peel (n 33)) 11-12; Robert Upex and Geoffery Bennett, *Davies on Contract* (10th edn, Sweet and Maxwell 2008) 8. See Articles 79, 90, 93 and 1101 from the Iraqi, Egyptian, Jordanian and French Civil Codes respectively.
[722] Strader and Shaw (n 641) 11; Grieger (n 642) 280. Al-Heiti A, *Hokom al-Ta'aqod abr Ajhezat al-Ettesal al-Hadeetha* (Dar al- Bayareq Jordan 2000) 58.
[723] Abdulrahman Ahmed Shoqie, *al-Nathaeyyah al-A'ammah lel Eltezamat* (2nd edn, Dar Alkitab 1989) 38.

Sharia, the primary source of the ICC, requires that the seller must be able to deliver the subject matter in order for a valid contract to be concluded. In this case, since the advertised items have all been sold the seller will not be able to deliver the said item. Therefore, the transaction cannot be legally concluded.[724] As for the ICC, it does not provide any definitions for 'invitation to treat', 'offer' or 'acceptance', except in Article 79, which provides that an offer could be made in any form that clearly reveals the intention of the party to make a valid offer, such as writing, speaking or gesticulating. Writing is a considerable means to form contracts in several laws.[725] Yet, Article 80 stipulates, *inter alia*, that 'the display of goods together with the selling price is deemed to be an offer'.[726] Therefore, in light of these provisions, goods and services advertised together with their respective prices should be deemed to be offers.

However, if there is any ambiguity as to whether a statement is an offer or an invitation to treat, then the statement should be considered to be an invitation to treat. It is provided in ICC Article 80(2) that 'the publication, the advertisement, stating the current prices of goods and every other display relative to proposal directed to public or individual at the case of ambiguity is not treated as offer, but an invitation to treat'.[727] This special rule is to remove uncertainty and prevent potential disputes between the contracting parties. Nevertheless, if publications, advertisements and other form of displays directed at the public or individuals contain the important elements of a contract, they are not deemed to be an invitation to treat, but an offer.[728] Therefore, it is not important whether the statement is directed at an individual or the general public when construing whether the statement is an invitation to treat or an offer. In such a situation, the seller's intention is most important. Therefore, the words in the seller's statement will determine whether it is an offer or an invitation to treat.[729] Based on this reasoning, if articles for sale are accompanied by a selling price and a condition that says that it is valid until stocks run out, then they are deemed to offers and not invitation to treat.[730] Similarly, in website transactions, the website's contents should be considered as offers when the articles for sale

[724] Al-Nasser (n 619) 282.
[725] See Articles 79, 90, 93 and 1101 from the Iraqi, Egyptian, Jordanian and French Civil Codes respectively.
[726] Article 1 refers.
[727] ICC, Article 80(2).
[728] Shoqie, (n 724) 38.
[729] Al-Dobaiyyan (n 281) 27.
[730] It should be noted if there is no time limit for the sale of the advertised commodities, the advertiser or merchant will not be bound by the advertised price list if a significant amount of time has passed by between the advertisement and the receipt of the acceptance because the market value of the said items might have changed. The same approach can also be used if there is a sudden change in the price of goods. See, for more details about the theory of consideration in contract law see Stephen Waddams, 'Principle in Contract Law: The Doctrine of Consideration' in Richard Bronaugh, Stephen Pitel and Jason W Neyers (eds), *Exploring Contract Law* (Hart Publishing 2009) 51; Al-Dobaiyyan (n 281) 26-27. Ali al-Saloos *Figh al-Bae'e wa al-Estiethag wa al-Tatbeeq al- Moa'aser* (Volume I, Dar al-Thaqafah, Qatar 2001) 29-30, 36-37.

have listed prices. Sometimes the products are linked to databases that show the quantity of stock available for sale.[731]

However, the basis of distinguishing between an invitation to treat and an offer may not be adequate for resolving the problems in some of the cases. This is because it may be difficult to differentiate between an expression that amounts to an invitation to treat and another that amounts to an offer that refers to the meeting of contract stage.[732] Even though the difference between an offer and an invitation to treat is of utmost importance,[733] the judiciary and modern jurisprudence have unfortunately not been able to agree on decisive criteria for resolving the issue.[734] Nevertheless, it is quite evident that the above distinction depends on the presence of a determined intention to create legal effect and it is because the offer is based on the presence of such an intention or otherwise that it is deemed as an invitation to treat. The identification of such an intention, according to the ICC, is a matter of fact that the judge will need to identify from the conduct of the parties.[735]

Due to this insufficiency of provisions in the ICC, it is useful to examine Article 39 of the Kuwaiti Civil Code (KCC), which contains a standard that enables a distinction to be made. According to this article, a legal offer shall include two aspects: (i) the party's final determination to conclude a contract because a mere desire to do so is not enough and (ii) the final determination must at least include the nature and important conditions of the potential contract. Therefore, if an offer is in compliance with Article 39, an acceptance issued by the offeree will lead to the conclusion of a contract. Consequently, all contractual actions that precede the aforesaid two final determinations will not be considered as offers, but rather as invitations to treat. The way the offer is determined under the KCC is not mentioned in the ICC for the purpose of distinguishing between an offer and an invitation to treat. However, the ICC considers the disclosure of intention as a matter of fact and it varies according to the circumstances and discretion of the judge in each separate case. Furthermore, there is no general rule and therefore the issue is decided on a case-by-case basis wherein the judge examines whether the expression used amounts to an offer or an invitation to treat. For instance,

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[731] Quentin Archer, 'The E-Commerce Series: Electronic Contracts' (2000) 11(7) Practical Law for Companies 17.

[732] Clarence W Dunham, *Contracts Specifications and Law for Engineers* (3rd edn, B McGraw-Hill 1962) 33.

[733] Dr Abdul Fattah Abdulbaqi, *Sources of Obligation in the Kuwaiti Civil Code: The Contract* (part 1, Dar Alkitab 1983) 105.

[734] Al-Oboodi (n 19) 78.

[735] In this regard, the ICC determines the issue of supplying goods with their prizes by considering it as a legal offer in Article 80(1) which states that 'supplying goods with their prices is an offer'. See the comments regarding this issue Dr Fathi A Abdullah, *Formulating Elements for Contract as a Source of Obligation* (Dar al-Nahda al-Arabia, Egypt 1987) 88.

a telex message that includes the price of goods may be considered to be an invitation to treat under certain circumstances and it may be an offer in other circumstances. Yet, for a better approach and if there are any disagreements with the decision of the judge in the subordinate courts, the matter can be reviewed by the appellate court. Therefore, it is contended that it would be better to include a provision in the ICC, as this will provide more certainty to the contracting process. It is also suggested that with the advent of e-commerce, the invitation to treat should be made an obligatory part of the process when contracting electronically and it should not be just a stage that precedes the contract.[736] The rationale behind this is because the electronic invitation to treat has become more important and lengthy. This is especially so when big financial investments and e-contracts are involved because the agreements reached during the invitation to treat stage are as important as the final contract.

Another way is to consider that every proposal that is directed to the general public is an invitation to treat just like the offers in auctions.[737] This view was derived from the CISG, Article 14(2), which states 'A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.[738] However, such a proposal may be considered as offers in certain exceptional cases whereby the advertiser or seller has made it clear that his advertisement is an offer. In general though, the sellers' advertisements on websites are generally presumed to be invitations to treat'.[739] This presumption is appropriate when it is applied to commercial activities. However, in practice there is no absolute certainty as to whether commercial advertisements are meant to be offers or just to show the merchandise to the public in order to entice them to make a purchase. In order to remove doubts and confusion on the matter, the aforementioned article apparently treats commercial advertisements as invitations to treat unless the advertiser clarifies that they are offers.

It is important to ascertain whether the online sellers' intention in showing off their merchandise is meant to be an offer or an invitation to treat. It is also important to take note that when an advertisement fulfils the conditions of an offer by incorporating all the required elements of a contract, it is likely that the advertiser intended the advertisement to be an offer. However, it should be noted that goods or services sold on a website can be seen and accepted by anyone in the world. This may give rise to problems if the online seller does not intend to

[736] See Ibrahim (n 12) 270.
[737] See Peel (n 33) 12.
[738] CISG, Article 14(2). For comments on this convention, Siegfried Eiselen 'Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980', (1999) 6 EDI Law Review 21, 24.
[739] Al-Oboodi (n 19) 100; Muhsin (n 716) 92; Rowland, Kohl and Charlesworth (n 648) 241.

trade with everybody who visits his website. Moreover, it is not possible to confirm the identity of visitors to websites. As such it is more advantageous for a website retailer to ensure that the contents of his website will be construed as an invitation to treat and not an offer. He should ensure that the contents of his website unambiguously indicate that it is an invitation to treat. As compared to off-line transactions, it is relatively easier to avoid ambiguity in online transactions because in the latter visitors to the website have to comply with formalities such as providing identity, credit card information, etc.[740] If the website is designed in such a way that it is an invitation to treat, the buyer is required to identify himself when he makes an offer and the seller has the discretion to either accept or reject the offer. Moreover, the website seller has the right not to supply goods to certain countries, offerees below a certain age and to impose other conditions such as that payments must be made within a certain timeframe before the goods are dispatched.[741]

It seems that the national laws and courts in each Member State determine whether making goods available for sale in the online auction site constitutes an offer or just an invitation to treat. The EU Directive does not address this issue, nor does the European Parliament and the Council's Proposal for a Regulation on a Common European Sales Law (CESL).[742] Although a separate section has been allocated in the Regulation for 'Contracts Concluded by Electronic Means', the EU Commission, 'Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law' COM (2011) 635 final. Article 24(3)(a) provides that: 'The trader must provide information about the following matters before the other party makes or accepts an offer: The technical steps to be taken in order to conclude the contract'.[743] In fact, although this Article does not refer to any criterion that can be used to distinguish between the offer and the invitation to treat in online contracts in general, it provides a good standard that, if it applies, it would make the pre-contractual steps to conclude the online contracts very clear. Consequently, the question of whether it is an offer or an invitation to treat would not arise.[744]

As for online auctions in Iraq, it would seem safe to assume that the Iraqi courts will adopt the same approach as their counterparts in other countries. However, such an assumption is not

[740] Belgum K, 'Legal Issues in Contracting in the Internet' <http://library.findlaw.com/1999/Aug/1/128190.html> accessed 10 March 2018.

[741] There are only a few EU cases regarding such an issue; however, a couple of interesting cases can be found in Germany and the Netherlands. See Hill (n 232) 24; See Zumbansen (n 695) 243; Micklitz, Stuyck and Terryn (n 696) 200; Smith (n 603) 451.

[742] Ibid.

[743] Article 24(3)(a) of these regulations.

[744] See E-commerce Directive, Article 10(1)(a).

assured under the Iraqi legal system as the judges' discretionary powers are restricted by the provisions of statutory rules. This is to say that even Article 1 of this code opens doors for judges' discretion by stating '1. The legislative provisions shall apply to all matters covered by this code in its textual and substantial construction. 2. In the absence of applicable legislative provision, the judge shall pass his ruling in accordance with the custom. In the absence of the custom, the judgment shall be made in accordance with the Islamic Law principles. In case no such principles exist, the judgment shall be passed in accordance with the principle of equity'.[745] However, the next Article restricts the previous Article by stating 'No discretionary powers shall be conferred where the applicable statutory provisions exist'. [746] Add to that, the ICC considers that goods for sale in an auction represents an invitation to treat and not an offer.[747] Therefore, if the same rule is applied to the eBay auction website, it may give rise to results that are different from the decisions made by the courts in some EU member countries.[748] The researcher feels that the Iraqi courts should prioritise internet customs and practices when they are interpreting the statutory rules in new type of cases that have never previously come before the court.

From the above discussion, it is proposed that the internet customs and online practices have probably created some rules that are well understood by those who are involved in online buying and selling and they are different from those that are applied in traditional practices or legal activities. It can be assumed that those who have a general knowledge of online buying and selling are aware that if they were to place an item on an eBay auction, then they are in fact making an offer which cannot be revoked unless no bids were received. Except in certain circumstances, the right to revoke cannot be used if there is a bid for the item. However, it does not mean that the assumption is absolute and those who are not familiar with online transactions should consider the matter carefully before they make any bids on an online website auction. These bids should be taken seriously as they are legal actions that can result in binding agreements. From the examination of the relevant case law, it is noted that the uncertainties surrounding invitation to treat and offer were used as counter-arguments by sellers in online auctions to renounce their contractual obligations. However, their pleas were not accepted by the courts.

[745] ICC, Article 1(1) and (2).
[746] ICC, Article 2.
[747] Abdul-Majeed (n 19) 40, 100
[748] See the German Court Decision previously mentioned in pages 122-123 of this thesis.

4.6. Differentiating between apparent and actual intentions

Sometimes a misrepresentation occurs in an essential issue in a contract.[749] An example would be where a thumb drive with 8GB memory was mistakenly advertised for GBP2.0 instead of GBP20, which was the real price and was subsequently sold to a customer who wanted to buy a thumb drive with 8GB memory. As a rule, an expression of intention in a contract must conform to the actual intention in the contracting party's heart, and that is impossible to be ascertained by a third party. However, there is no legal difficulty with the valid conclusion of a contract when the concealed intention is manifested in the expression of consent. However, the issue becomes a big concern if there is a mistake as there will then be a claim that the contracting party's apparent expression is different from the real consent. In this case, if one contracting party was aware about the mistake then he/she would not have concluded the contract. This therefore demonstrates that the particular type of mistake is a key component for contracting. In Internet transactions, there is always a possibility that the computer can make errors during the transacting process. It is immaterial whether the error is due to a technical fault or because the effect will be that the expressed consent will be different from that of the originator's actual consent.[750] The question that arises is whether or not there is a valid contract and if the owner of the computer is legally responsible for the mistake. Since the offer has been accepted, was there, in the first place, any binding contract to be concluded given that the expression that was manifested is different from that originally intended?

There are some suggested solutions to tackle this legal question. The first suggestion is to only consider the expressed intention and ignore the actual intention, since it is impossible to know what is in a person's heart or mind.[751] Therefore, based on the above-mentioned example, the contracted selling price is GBP2.0 even though the intended selling price is GBP20. When someone wants something, he has to express the nature of what is wanted and consequently the applicable rules will be applied. If a person does not express his intention, nobody else will know about it and as such it cannot be judged. Therefore, the status of the contract will depend on the parties' expression of consent and it does not matter if it is not the same as the real intention, otherwise, the trust and confidence between the parties will be eroded and it will also

[749] See Desponia Anagnostopolu, 'E - Commerce in International and European Union Law: The Policy of the European Union on Digital Agenda and Strategy' (Jean Monnet Chair, New Dimensions on EU Legal Studies Research Essays Series, 2013) < http://afroditi.uom.gr/jmc/wp - content/uploads/2013/06/Research - Essay - No-11.pdf > accessed 12 June 2017.

[750] Gallagher (n 3) 101 ; Bates (n 652) 2.

[751] Worldly court judgments should be made based on a person's behaviour and not his intention as no one, except *Allah* (God), can know the intention of the person. Muhamad Ibn al-Qayyem, *E'alam al-Muaqe'en an Rab al-A'alameen* (Volume 3, 2nd edn, Dar al- Kutob al-Elmeyah 1993) 82-85.

negatively affect the stability of commercial practices. In a normal situation, the opposite party will respond according to the expressed intention and it is about the only thing he can do because he will not be able to know what the other party's actual intention is.[752] To answer the aforesaid question, in the latter approach, the contract was not legally concluded because the seller did not consent to sell the product at the displayed price. In this situation, the buyer has two options, accept the correct selling price of the article, thus leading to the legal conclusion of the contract, or reject the correct selling price and no contract is concluded.

However, the ICC Article 155 contradicts the above meaning as it stipulates that 'in contract, intention and meaning are given effect, not words and phrases.[753] As a result, consent has no legal standing in Sharia if it is hampered by errors, misrepresentations, frauds and coercions.[754] It has been demonstrated that a party's consent is an important condition for the conclusion of a legal contract. The expression of that consent is simply a way to make known the parties' intention and it has no legal effect if it is contrary to the real intention of the contracting parties. The parties' real intention is more important than the manifested intention and, therefore it must be determined and then used to decide whether a legal contract has been concluded.[755] As such, expression of consent to contract made by an insane person, a person who is sleeping or a person who has been coerced has no legal force because the expression of consent was not proper. The ICC stipulates two conditions about mistakes. Firstly, the mistake has to be substantial, i.e. the contracting parties would not have concluded the contract if they knew about the mistake. The subjective method is used to assess how substantial the mistake is. This is because there is a need to assess what was 'substantial' for the contracting party who relied upon the information and was unaware of the mistake, i.e. if it was an important fact that made him decide to contract or they would not have contracted if they were aware of the mistake.[756] The other condition is whether the seller is aware of the mistake. This is because although the purchaser can nullify the contract that he entered into due to a misrepresentation (immaterial whether the seller had made the same mistake, knew or could have easily found out),[757] the

[752] Ibid, 85. Also see Ahmed Shoqie (n 724) 32.

[753] Article 1, which was derived from Article 3 of the Mejelle. See for more comments, Jamal Nasir, *The Islamic Law of Personal Status*, (2nd edn, Graham and Trotman 1990) 25

[754] For further general details about the impediments to consent in English law, see Anon, 'Meeting of the Minds as Test of the Formation of Contracts' (1929) 29(4) *Columbia Law Review* 523-524, and for Arabic and Sharia law see al-Qarehdagy, *Hokom Ejra al-A'qood be A'alat al-Ettesal al-Hadeetha*, (n 479) 600-822; Rayner (n 29) 174-258; Al-Oboodi (n 19) 100; Muhsin (n 716) 95.

[755] Ibn Hajar Al-Asqalani, *Fateh al-Bari:* (Volume 1, Dar al-Kutob al-Elmiyya Beirut 1989) 179-181.

[756] ICC Article 119 states that 'A party to a contract who has committed a mistake may not invoke it except where the other party had committed the same mistake or had knowledge thereof or could have easily detected (discovered) the mistake'. See for more comments, Abdul-Majeed (n 19) 67; Alhakeem *et al* (n 15) 81.

[757] Muhsin (n 716) 92.

ICC prefers to guarantee the stability of transactions. This is why it includes this condition, and if the mistake is too remote for the other party to know about it or for whatever reason did not know about it, then the contract can be nullified.[758]

The theory that contracts are governed by intention instead of expression is impractical. The intention to contract is initiated in the human mind and there is no known method to find out what is going on in the mind unless the person uses words or signs to express it.[759] Therefore, how can a contract be governed by intention when it is impossible to find out what is going on in the human mind? Also, the implementation of this theory may produce serious instability in commercial transactions, because individuals trying to get out of contractual obligations may claim that their true intention is different from that which was expressed and as a result it may automatically lead to the annulment of contracts.

In order to arrive at a satisfactory solution to overcome the ambiguity surrounding the intention, it is suggested that an amalgamation of both theories may resolve the problem. Mutual consent is a fundamental element of contracts, for without it, no contract can be validly concluded. However, as discussed earlier, the parties' consent has no legal effect unless it is expressed. An expression conveys a party's intention which only he himself knows and others have no way of ascertaining it. Therefore, a contract shall be legally concluded as long as both parties to the contract have expressed their consent. In the situation where a party claims that the actual intention is different from the expressed intention, there must be a clear indication to support the claim for it to succeed.[760] In the example given previously, the selling price for the item was listed as GBP100 when it should be GBP1,000 is an unintentional error. If the price of similar articles in the market place is much higher than the price of the offered article, it indicates that there is a mistake in the pricing of the offered article. Therefore, the seller should not be compelled to sell the article at the wrong (or cheaper) price. If there are no clear differences between the oral statement and genuine intention, and if a party claimed otherwise but is unable to produce valid evidence to support his claim, then consideration should only be given to the expressed consent in the contract, notwithstanding that it may or may not be consistent with the actual intention.[761]

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[758] Al-Oboodi (n 19) 100.

[759] Abdul El-Hassan and Ahmed El-Wahab, 'Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law' (1985) 1(1) *Arab Law Quarterly 51, 55*.

[760] Ibn Qayyim al-Jawziyya, *E'alam al-Mowaqaeen An Rabb al-Alamin*, (Volume 3, al-Maktaba al-A'assriyya, Beirut 1987) 98-99.

[761] Al-Oboodi (n 19) 77.

In e-transactions, the party that the programmed computer is working for shall be responsible for any error cause by the computer even though it is not due to his negligence. This is because the party chose to use the particular computer to act on his behalf although he is aware that such errors can occur.[762] That is, the party that benefits from the usage of the computer shall also bear the risk and liability for using it.[763] This liability should also cover incidences whereby the computer accidentally performs transactions that are not intended by the party.[764] The liability here is the same as when cars or machines are used by their owners, they cannot deny liability by pleading that it is due to the technical fault of the car or machine.[765]

The researcher believes that in order to protect purchasers in e-contracts, the second condition in the ICC should be removed, as it will be enough to determine mistake based only on substantiality. In other words, there is no need to consider the condition or assumption of knowledge on the part of the seller. This is because it is difficult to prove the second condition for the seller might have made the same mistake but chooses to deny it in order to prevent the purchaser from nullifying the contract on the grounds of misrepresentation. It may lead to the contract being suspended, because silence by itself is deemed to be a bad intention or fraudulent under the law. Moreover, a mistake in an e-contract can result in an invalid consent. Therefore the contract should not be annulled, but should be suspended until obtaining the proof from the contracting party that his consent was defective. During a three-month period, commencing at the date the mistake was discovered, the latter party can confirm or nullify the contract.[766]

It is noted that some people consider misrepresentation to be a substantial defect, or the defect that motivated the party to conclude the contract. The party would not have concluded the contract had he known that the conditions he agreed upon amounted to a misrepresentation made by the other contracting party.[767] However, it would be judicious not to compensate the offeree if under the circumstances of the case it is strongly felt that he knew or should have known about the mistake in the offer, but he still chose to accept the offer in order to obtain some advantage from the error.[768] Regardless of its object (whether mistake happened upon;

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[762] Abdullah (n 14) 155.
[763] Bates (n 652) 5.
[764] Anon, 'Meeting of the Minds as Test of the Formation of Contracts (n 755) 523-524.
[765] Andrade *et al* (n 220) 361.
[766] ICC, Article 134(1) and 136(2).
[767] See, Mahmud Jamaluddin Zaki, *Summary in the Theory of Obligations in Civil Law* (2nd edn, Dar al-Nahda al-Arabia 1995) 122; Alsanhori, *Masader al-Iltizam* (n 89) 111.
[768] It is not sure whether this theory can be applied in certain cases when, for example, an item was offered for sale at the wrong price, but the erroneous price was not much different from the intended one. For example, the wrong price is GBP10 and the correct price is GBP20. In this case, the customer may think that the item is on sale at a special discount or there is a special promotion. It should be noted that the determination will depend on the facts of each individual case. Under the common law system, a court, when dealing with the above legal question,

(i) a substantial characteristic of the thing which is object of the contract, (ii) in the personality of the contracting party or one of its characters, if this personality or characteristic is the main reason for contracting or (iii) another crucial issue in the contract). It is worth mentioning that the ICC stipulates three situations in which mistake should be considered substantial. Article 118 states 'there is no consideration to the assumption of the apparent falsity, the contract is not enforced if; (i) there is a mistake as to the quality (the description) of the thing which in the view of the contracting parties is or must be considered essential due to the circumstances in which the contract had been concluded and to the good faith that must be expressed in dealing; (ii) there is a mistake as to the identity or any of the capacities of a party which thing was the sole or main cause for the contracting; (iii) there is a mistake in issues that, the integrity of transactions, allows the contractor which claim mistake, to consider it as necessary elements in the contracting'.[769] However, the ECC provides in Article 121, two situations of 'substantial mistake'. This Article reads 'Mistake is considered substantial specifically if: (i) it afflicted a description of the thing that is substantial for the contractors or must considered as such according to the circumstances surrounding the contract and according to the good faith that is necessary in transactions; (ii) the mistake happened as to the identity of the contractor or any capacities of the party which thing was the sole or main cause for contracting'.[770] However, despite clarifying 'substantial mistake' in such situations in the ICC and ECC, but it does not mean that they confined them to those situations only. The inclusion of these situations was as examples and illustrations of what might constitute substantial mistake. Accordingly, if the contracting party has fallen into other situation of substantial mistake in the contract, he/she can request the nullification of the contract, as long as this mistake was the motivation for contracting, to the extent that without it the contract would not have concluded or at least would not have concluded it with its conditions that he/she had agreed upon.[771]

The latter theory appears to be a perfect approach for tackling the aforementioned legal issue as well as for affording stability and justice in commercial practice. However, not every single contract can be annulled just because one of the contracting parties claims that the intention is different from the expression. There is a need to produce evidence to support the claim,

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will consider the exterior manifestation of consent, regardless of the actual consent. Consequently, the party will normally be bound by the contract even though the error occurred when he was expressing his consent. However, for a claim of mistake to succeed, the mistake must be a fundamental term of the contract and the other party to the contract must have known about the existence of the mistake when he acted upon it. See Veysey and Chissick (n 675) 121; Bates (n 652) 5; Anagnostopolu (n 750) 1; *Hartog v Colin and Shields* [1939] 3 All ER 566.

[769] The ICC, Paragraphs 1, 2 and 3 of Article 118.

[770] The ECC, Paragraphs 1 and 2 of Article 112.

[771] Zaki (n 768) 125.

otherwise it may lead to uncertainty in the legal effects of commercial transactions.[772] Furthermore, since mistakes are more likely to occur in commercial contracts, it may be judicious to give the party the option to pull out of the deal. However, to ensure that the contracts between parties are enforceable, the option to pull out of the contract should be confined to cases where the mistake can be established.[773] There is also a need to prevent some parties from using the option by purposely entering into a contract so that they can take advantage of an apparent mistake created by the other party when expressing his intention.

In view of this discussion, it seems sensible to suggest that when the computer erroneously expresses the intention of a party, although the contract can be lawfully concluded by exchanging an offer and acceptance, it can be revoked if mistake can be established. The owner of the computer should be liable to pay compensation to the other contracting party for all the losses caused by the mistake unless the latter knew of the error and still proceeded to conclude the contract.

4.7. Subject Matter in Electronic Contracts

Subject matter is one of the essential elements of a contract without which no valid contract can be formed. In a contract of sale, the item and its selling price are the subject matter and it is a reference to the objective for creating the contract.[774] According to the ICC, the subject matter covers a huge variety of things or objects. It can be a piece of valuable property in a contract for the sale of land, or it can be a debt, benefit or any other form of pecuniary right. It can also be an obligation to perform certain tasks or even an undertaking not to carry out certain work.[775] Article 126 states 'every obligation which has resulted from the contract must have an object attached to it which is susceptible of (knowledge) its legal consequence; the object may be property be it an object of material value, a debt, a benefit, or any other pecuniary right; it may also be work (to be done) or abstention from doing work'. Consequently, it seems necessary to analyse the conditions that must be present for particular subject matter to be valid

[772] Belgum (n 741) 2; Rowland, Kohl and Charlesworth (n 648) 241.
[773] Smith (n 40) 451.
[774] Musa (n 238) 281.
[775] ICC, Article 126.

as being in existence when the contract is being concluded,[776] Subject mater has to be ascertained,[777] and it has to be lawful.[778]

4.7.1. The Requirement for the Subject-Matter to be Existing

On the matter of the existence of subject matter when contracts are made, Sharia jurists are divided as to whether it is required or not. One legal opinion says that subject matter must be existent at the conclusion of the contract by referencing it to the sale of fruit that has not yet appeared on trees.[779] However, the implementation of this legal approach may have long-term negative implications on the development of e-commerce. A vast number of e-transactions are related to services that have not yet been provided and if this approach is adopted these e-transactions will face the risk of being invalidated. In fact, the aforementioned saying of the Prophet forbidding Muslims from selling things that they have not yet possessed does not refer to a requirement for the physical existence of the subject matter of the contract. Rather, the Prophet's intention for issuing the instruction was to prevent uncertainty by proscribing sellers from selling something that is impossible for them to fulfil,[780] not because that something does not exist. Conflict may arise between contracting parties if the seller cannot deliver the purchased item.

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[776] ICC, Article 127 states '1- the contract is non-existent if the subject-matter of the obligation is impossible to perform, the impossibility being absolute 2- if the obligation is impossible for (as much as concerns) the debtor where impossibility in itself is not absolute the contract is valid, and the debtor is obligated to pay damages because he has failed to perform his undertaking'.

[777] ICC, Article 128 states '1- the subject-matter of the obligation must be determined in a manner which negates excessive ignorance regardless of whether the determination was by pointing out to the subject or its specific place if it is present (available) at the time of forming the contract or by stating its distinctive features and quantity if it is quantitative or in such other way which negates excessive ignorance; mentioning the kind rather than the quantity and description will not be adequate 2- It would however be adequate if the subject is known to the contracting parties where the need does not arise for describing and identifying it in another manner 3- Where the subject has not been designated in the aforementioned manner the contract is null and void'.

[778] This condition is uncontroversial and thus needs no study in this thesis. Furthermore, Article 130 states the following '1- The subject-matter of the obligation must not be legally banned nor must it be to the prejudice of public order and morals as otherwise it would be null and void 2- The following are particularly deemed to be to the prejudice of public order: the provisions concerning personal status such as capacity and inheritance as well as the provisions concerning conveyances and the proceedings (procedure) needed for disposing of waqf (dedications), of immovable estates and of the property of interdicted persons of waqfs and of the state and the laws of mandatory pricing and the other laws which are in exceptional circumstances enacted (to satisfy) the needs of consumers'.

[779] Al-Sarkhasi (n 216) 2. In support of this argument, it is narrated that Hakeem Bin Huzam, one of the companions of the Prophet, once asked the Prophet, 'someone offered me to buy something that I do not own; may I go and buy it from the market?' The Prophet replied, 'Do not sell what you do not have'. Narrated by Abu Dawud. See Ibn Othaimeen (n 37) 128. Out of necessity and being a normal or usual practice in the trade, the ordered sale (a contract of sale for a product that is fully paid in advance and will only be delivered in the future) and manufacturing sale (a contract of sale in which the buyer placed an order with a workman or seller to make a specific product and agrees to pay a fixed wage or price for the product when the product is ready) have been accepted as exceptions to the principle of the existence of the subject matter of the contract. This approach allows for future provision and manufacturing of goods. See Rayner (n 29) 133; Musa (n 238)282.

[780] Article 197 of the *Mejelle* states that: 'the thing sold must be in existence'. Article 205 states that 'the sale of a thing not in existence is void'. Ibn Qudama (n 311) 208; Ibn al-Qayyim (n 761) 8; Al-Maqdisi (n 338) 27.

In addition, the mere fact that the subject matter exists is insufficient. For the contract to be valid, the subject matter should be available for immediate delivery.[781] For instance, one cannot sell a rabbit that has escaped or a bird that has flown away, for such type of sales would be null and void.[782] Similarly, the wool that is still on the sheep's back cannot be sold because the quantity of wool is not yet known. Furthermore, this rule, as well as being applicable to sales contracts, is also equally applicable to all juridical acts such as rentals, loans or deposits.[783] In the event of this rule being applied when there is an obligation to execute, the obligation must be capable of being executed. 'So, the engagement of a physician to cure a patient is null and void, for only God alone can ensure a patient's recovery'.[784] The requirement to deliver the subject matter immediately emphasises the influence of the rule of morality on contracts in Sharia. It is actually a matter of deciding the legality of a judicial act in a special legal system where morality levies a kind of censorship before the admission or prevention of any dealings which may have a random or aleatory character as it is done with the objective of attaining a perfect balance of benefits for the contracting parties.

ICC Article 127 confirms, on the matter of possibility, that it must be possible to fulfil the subject matter requirement, otherwise the contract is void. It reads '1- the contract is non-existent if the subject-matter of the obligation is impossible to perform, the impossibility being absolute 2- if the obligation is impossible for (as much as concerns) the debtor where impossibility in itself is not absolute the contract is valid and the debtor is obligated to pay damages because he has failed to perform his undertaking'.[785] Evidently, it distinguishes where the impossibility is absolute or is confined to the seller. The former case nullifies the contract while the latter validates the contract, but the seller will have to pay compensation in the event of non-performance. Normally, products purchased over the Internet cannot be physically observed at the formation of the contract. Therefore, there is a need to make it such that the online purchaser is able to have a good idea of the subject matter before the contract is concluded.[786]

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[781] Kasani (n 195) 147; Alhakeem *et al* (n 15) 95.
[782] Al-Sarkhasi (n 216) 194; Dr Noori al-Talabani, Kamil Abdulhussain and Hashim al-Jazaeri, *Commercial law* (Part 1, Dar al-Kutub, Mosul University Iraq 1979) 61.
[783] Ibn-Hazm al-Andalusi, *al-Muhalla* (an-Nahdat Cairo 1928) V 111, 131.
[784] Abdul-Rahman al-Gaziry (n 491) 241.
[785] ICC Article 127.
[786] At the international level, UNCITRAL Model Law on Electronic Commerce 1996, Article 16, requires the describing the subject-matter of the contract in terms of its nature, price, quantity and the related components before implementation of the contract. It states that 'Actions related to contracts of carriage of goods: without derogating from the provisions of part one of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:
a. furnishing the marks, number, quantity or weight of goods;

4.7.2. The Requirement for the Subject-Matter to be determined

Normally the products are not physically presented at the formation of the contract and the parties' mutual agreed consent may change upon the receipt of the purchased article. This idea accepts that no matter how accurate and sufficient the description of the product might be, it is not comparable to an actual physical inspection of the product at the formation of the contract. Therefore, from one point of view, the contract is invalid if its subject matter (tangible goods) is not realistically presented to the parties at the conclusion of the contract although it was sufficiently described.[787] The foundation for this rule can be found in a Sharia saying, 'do not sell what you do not have'.[788] This does not just address inexistent subject matter, but it also includes subject matter that was not presented to parties at the conclusion of the contract.[789] Furthermore, Sharia prohibits all sales that contain uncertainty and in this situation the sale of subject matter absent at the conclusion of the contract involves uncertainty.[790] However, such an approach can hamper commercial activities on the Internet, for the subject matter of e-contracts is displayed on computer screens and is not physically exhibited in front of the parties at the conclusion of the contract. The parties are normally living far apart from each other and cannot meet each other at the location the contract is formed. It is also unrealistic to oblige the seller to present the subject matter of the contract to the other party at the time the contract is concluded. On the matter of the uncertainty of the product at the time of contracting, it will be reduced significantly if a good detailed description of the product is provided.[791]

Consequently, there is no need to present the subject matter to the parties provided with a good detailed description of it at the time the contract is concluded.[792] Such an approach is convenient and practical for both parties and it is especially so if they are far away from each other for they can conclude binding contracts without the need to physically see the article(s) for sale. Furthermore, this approach will encourage and promote the development of online commercial trading. Therefore, the sales of articles displayed and defined on websites should be legalised provided the said articles are sufficiently defined. The aforementioned Prophet's saying that prohibits parties from selling something which they do not have is probably

b. stating or declaring the nature or value of goods';

[787] From the earliest examples set by Sharia scholars, the sale of future crops and fruits. See Imam Malik, *al-Muwatta Ma`a Sharh al-Zurqani* (Volume 3 Dar Alkitab 1995) 261; al-Nawawi, *Mughni Almuhtaj* (n 251) 286.

[788] The Prophet's answer to Hakeem Bin Huzam that was narrated by Abu Dawud. See Ibn Othaimeen (n 37) 128.

[789] Al-Sanhori, *Masadir al-Haqq* (n 300) 41. Al-Joroshy (n 94) 175.

[790] Al-Ramlawi (n 39) 390.

[791] Al-Joroshy (n 94)176. Also, the earlier Muslim schools of thought had mentioned that the sold thing must be precisely determined. See Al-Kasani (n 195) Volume *5* 156; Ibn Qudama (n 311) 309-310.

[792] Al-Ramlawi (n 39) 385.

referring to an article which is impossible to deliver, for example a camel that has run away. The researcher contends that is not an absolute prohibition of items that were not presented to the parties at the time the contract was made. Therefore, a contract involving an article that was not presented to the parties at the time the contract was made but is capable of being delivered should not, within the context of the Prophet's saying, be forbidden.

According to the ICC, when there is a question relating to the product, the subject matter should be established according to its type, quality and value. Article 128 states '1- the subject-matter of the obligation must be determined in a manner which negates excessive misunderstanding regardless of whether the determination was by pointing out to the subject or its specific place if it is present (available) at the time of forming the contract or by stating its distinctive features and quantity if it is quantitative or in such other way which negates excessive misunderstanding; mentioning the kind rather than the quantity and description will not be adequate'.[793] The determination of the subject-matter can be conducted by indicating what it is, where it is from, its unique features and the relevant quantity if it can be quantified, or in any other manner that can help to reduce excessive incomprehension.[794] It may also be sufficient to talk about the subject if it is known to the parties or else the contract is void.[795] However, Article 514 of the ICC stated that excessive misunderstanding should be used as a criterion for determining the subject matter, but it did not provide sufficient details as to how to differentiate it from minor misunderstanding.[796] Jurists have looked for criteria to validate juridical acts and most of them selected minor misunderstanding and excessive misunderstanding.[797] A misunderstanding is excessive when, for example, beef is sold as camel meat or sheep's wool as goat's hair.[798] On the other hand, it is minor if carrot is sold as radish because both have just one root and their quantity can be easily established. Likewise, if corn is sold, regardless of its quality, the ignorance is always minor. The two types of

[793] ICC Article 128.
[794] ICC Article 515 states that 'the sale of things that are measured by volume, weight, count, or length is valid if sold by volume, weight, number, or linear units and may also be sold in bulk (*en masse*); a sale is deemed to be in bulk even where it is incumbent to determine the quantity of the sold thing in order to fix the price'.
[795] ICC Article 128 states '2- it would however be adequate if the subject is known to the contracting parties where the need does not arise for describing and identifying it in another manner 3- where the subject has not been determined in the aforementioned manner the contract is null and void'.
[796] ICC Article 514(1) 'the subject-matter of the sale must be determined in a manner which negates excessive misunderstanding (indefiniteness)'.
[797] For the *Hanafi* Shool see Al-Kasani (n 195) 157-158; (for the Hanbalites), Alhattab (n 310) 285 et seq.
[798] Ibn-Rushd (n 456) 130 66.

misunderstanding permit the annulment of the juridical act in the first instance and validation in the second.[799]

Misunderstanding is deemed to be major or *fahish* when the type of subject matter of the contract is not revealed.[800] For example, if a trader says, 'I am selling you a dress from this bundle', the sale is vitiated or *fasid* because the trader did not indicate a specific dress, as it is very easy to differentiate one dress from another.[801] If for example, the sale involves choosing one dress out of three that are shown to the buyer, then the misunderstanding is minor. However, if the subject matter of the sale is not ascertained, it is still possible to ascertain it by letting the buyer make his choice. There is, however, an exception: an obligation to pay a certain sum of money is only executed upon receipt of the said amount by the creditor; and whether the said amount is specified or not will have no effect. Furthermore, it has been held that the obligation to transfer money is always possible, at least in principle. Moreover, Arab Civil Codes provide that 'the obligor is bound only to the extent of the actual figure of the sum of money stated in the contract, whatever may be the increase or decrease in the value of such money at the date of payment'.[802] It is a major misunderstanding if the value of the subject matter is not fixed, especially if it is in monetary value. All the different schools are agreeable on the annulment of the sale of any article if the price of the article is to be determined by a third party.[803] As to misunderstandings of type, quality or value, there is no absolute rule. However, the authors agree that misunderstanding of type or value can be minor or major depending on the circumstances.[804] To determine whether such a misunderstanding is minor or major, it becomes necessary to refer to usage and custom for each and every case.[805] On the matter of misunderstanding of quality, this is deemed to be minor and as such it does not affect the validity of the act.[806] The jurists' requirements concerning the exact identification of the object of obligation have been pushed to such an extent that it sometimes make one wonder

[799] Ibid 129-131.
[800] Al-Kasani (n 195) T V, 158
[801] See A Al-Twaijri, 'Ijtihad and Modernity in Islam' (*Islamic Educational, Scientific, and Cultural Organisation*) available at < http://www.isesco.org.ma/english/publications/Islamtoday/24/p1.php.> accessed 25 February 2018. See also case no. 1802 of the Syrian Court of Cassation, 6/12/1980 (1980) 3 Journal of al-Muhämun 348. However, as mentioned earlier, in the case of the Jordanian, United Arab Emirates, Kuwaiti and Yemeni Civil Codes, ownership is transferred upon the conclusion of the contract.
[802] See Articles 128 of the ICC, 162 of the JCC, 173 of the Kuwaiti, 134 of the Egyptian, 134 of the Libyan, 135 of the Syrian, 82 of the Sudanese, 95 of the Algerian, 30 of the Qatari and 204 of the United Arab Emirates Civil Codes respectively.
[803] Abdul-Rahman Ibn Qassem, *Ibn Taimyya's Fatawa Compilation* (al-Resala, Beirut 1997) 1326 Hegira 220
[804] Ibn-Abdeen (n 101) 259.
[805] Al-Kasani (n 195)T. V 160-161.
[806]Mohammad Yousef Musa, *At- Tashri'al-islami wa atharuhu fil-fiqh al gharbi, (*Al Maktaba al-Thakafiya, Cairo, 1960) 312.

what a minor misunderstanding might possibly be! However, whenever it is possible to determine the subject matter, there are no grounds for contest since the act is valid.[807]

However, Sharia is different from the ICC, as it protects the purchaser if the subject matter is not presented to the parties during the formation of the contract by giving them the opportunity to withdraw from the contract upon the receipt of the purchased article.[808] In this situation, the description of the purchase article will not be a concern to the purchaser as he has an option to withdraw from the contract upon sighting the purchase item without being legally bound. The question then arises of whether the purchaser has an option to withdraw from the contract if the article is found to be exactly the same as the description given at the formation of the contract. Unfortunately, the Sharia is silent on this point.

One legal opinion on this issue is that the option to withdraw should be made available to the purchaser at all times and it is immaterial whether the article fits the given description or not.[809] However, a contradictory opinion contends that the option provided under Islamic doctrine is not available to the purchaser if the article he received fits the provided description.[810] The second approach is reasonable, because if a good description of the article is provided to the prospective buyer, his knowledge about the article would be the same as when the article was physically presented to him. Therefore, just like when the article for sale is physically presented to the buyer to view at the time of the formation of the contract, the deal is legally binding and he cannot withdraw from the contract unless the seller agrees. Similarly, the contract should be binding if the article that was not presented to the buyer when it was received fits the given description.[811] However, the latter approach may give rise to problems in day-to-day transactions since getting to know about something through a description, regardless of the accuracy of the description, can never be the same as if the article is physically present in front of the buyer. It is also contended that if this legal approach is applied it may cause confusion and uncertainty that can potentially give rise to conflict in the commercial market. There is no straightforward method to measure the degree of accuracy of the description of the purchased article. If there is such a method, it can help to determine whether the contract is legally binding

[807] One might take the example of birds in a cage, for it is possible to count them and to catch hold of them. See Ibn-Abdeen (n 101)166.
[808] For further information see Al-Ramlawi (n 39) 374-407. Al-Joroshy (n 94) 171-203.
[809] Al-Kasani (n 195) 163. See more about selling future subject-matters, Zahraa, Mahdi, and Shafaai M Mahmor. 'The Validity of Contracts When the Goods Are Not Yet in Existence in the Islamic Law of Sale of Goods' (2002) 17(4) Arab Law Quarterly 379-97.
[810] Al-Bahouti (n 109)17.
[811] Al-Joroshy (n 94) 178.

or not, which in turn gives the purchaser the option to withdraw. In order to give greater certainty and constancy in commercial practice as well as to reduce potential disputes, the purchaser should, if the article was not presented to him at the formation of the contract, have a legal right to withdraw from the contract. This right should be applicable regardless of whether the description given is accurate or not.[812] Based on this premise, it is important to note that the right to withdraw should be made available to purchasers in e-transactions irrespective of whether the description of the article is in oral or written form, displayed on websites, in catalogues or any other electronic display tools.

ICC Article 517 gives the buyer the right to inspect the subject matter of the contract.[813] It also clarifies that this inspection includes getting to know the attributes of the subject matter through the sense of sight, touch, smell, sound or taste.[814] The ICC also has specific provisions for the use of this option when a sale is conducted using samples.[815] when more than one type of product is involved in one transaction,[816] when this option is used by the principal, agent and messenger,[817] and involving a blind buyer.[818] However, it may be complicated to determine the time span available to exercise this option,[819] so it is vital to examine how long this option to be available to exercise. In other words, as the buyer has the right to withdraw the contract, then it is imperative to define the exact stage at which such contract will be regarded as being legally binding.

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[812] This is according to the earlier legal thought provided in this matter.

[813] ICC Article 517(1) states that '1- He who has purchased a thing which he did not see will have discretion either to accept it or to revoke (rescind) the sale when he sees it; the vendor shall not have any discretion regarding that which he has sold without seeing it'.

[814] ICC Article 517(2)

[815] ICC Article 518 states that '1-It would be adequate to see a sample of a thing which is being sold on the strength of viewing the sample: if it is proven that the sold thing does not conform to the sample on the strength of which the purchase was made the purchaser will have an option of accepting it at the price named or rejecting it by rescinding the sale 2- Where the sample has suffered a defect, or has perished in the hand of either contracting party even without fault on his part, this contracting party –purchaser or vendor- shall have to prove that the things conform or do not conform to the sample'.

[816] ICC Article 519 states that '1- Where a number of different things have been sold in one transaction, it will be imperative for the sale to be binding that each item is viewed separately 2- Where the purchaser had seen some of the sold things he may, when he has seen the remaining items, take all the things or reject them and may not take that which he had seen and leave out (reject) the remainder thereof'.

[817] ICC Article 521: viewing of a thing by an agent assigned to purchase or to receive is like viewing them by the principal; viewing by a messenger does not extinguish the right of option of the purchaser.

[818] ICC Article 520 states that 'where a thing has been described to a blind man who became aware of the description and purchased he shall not have the right of inspection 2- In any case the right of inspection of a blind man lapses by touching the things which are identified by smelling and by tasting testable things'.

[819] ICC Article 522 states that 'a person who has viewed a thing with intent to purchase it and after a while purchased it knowing that it is the thing he had viewed will have no right of inspection except if he found out that the thing has changed from the state in which it was at the time of viewing'.

4.7.2.1. The Expiry of The Option of Inspection

Jurists disagree on the time limit to be provided to the purchaser to inspect the article. One view holds that the option to withdraw starts the moment the purchaser sees the article and it lasts as long as he remains in the same location he received the article.[820] In this approach, the option to withdraw is considered to have ended and the contract becomes irrevocable when the purchaser walks out of the place where he received the article without rejecting the article. This approach gives the purchaser the right to withdraw from the contract and limits the availability of the option. However, from a logistical standpoint it is difficult to enforce. If the contracting parties are not in the same location or same country, it is impossible to determine the place the purchaser received the article and exactly when he left the place. Therefore, the implementation of this approach is not without concerns. Another approach is that the purchaser continues to have the right to withdraw until he gives an unambiguous consent after he has seen the subject matter of the contract. For example, he may say 'I accept this item' or 'I confirm the deal', or he may use the subject matter in such a way that it signifies an implied consent.[821] Therefore, the purchased article remains in its original condition for an unspecified period of time until an acceptance is given unless the purchaser gives an explicit or implied consent to accept the article.[822]

The latter approach is in line with ICC Article 523(1) which states that the option to inspect lapses when the purchaser acknowledges that he has viewed the goods and accepts them in their current state. Other than the aforementioned situation, the same article also mentions other situations that have been dealt with by other provisions in the ICC such as the termination of legal proceedings upon the death of the buyer and other similar events.[823] However, this may cause difficulties and discomfort, as the availability of the option for an unspecified period of time may result in injustice or hardship to the opposite party who may have other obligations. If the party with the right to withdraw maintains his silence without indicating his consent after inspecting the subject matter it may give rise to confusion and uncertainty because the opposite party does not know whether the contract is going to be confirmed or revoked.

Having expressed the need to set a time limit for the availability of the right to withdraw from the contract, on second thoughts it might be better to leave the matter to the contracting parties to decide for themselves. This means that the contracting parties should specify in the contract

[820] Al-Nawawi, *Mughni Almuhtaj* (n 251) 289.
[821] Al-Joroshy (n 94)180.
[822] Al-Kasani (n 195) 295.
[823] ICC, Article 523.

the period during which the purchaser can withdraw, if he wants to, from the contract. The period should begin from the date the purchaser received the article and the right of withdrawal shall end at the end of the specified period. To determine the period, the type of contract should be taken into account. This would include giving the purchaser enough time to look at the suitability of the article and to decide one way or the other. As mentioned previously, the period to exercise this option should not be excessively long for it may distress or inconvenience the other party.[824] This suggestion is, to a certain extent, in line with ICC Article 523(2). It is because the discretion is only granted to the vendor to set a reasonable period to enable the buyer to inspect the subject matter.[825] This is only partial conformity to … it is the vendor who sets the period and the buyer must abide by it. Based on the above discussion, the researcher contends that it is better to let the contracting parties decide on the duration within which the buyer can exercise his right to withdraw based on the nature of the contract. They should take into account that the duration they agree upon must be enough for the buyer to check on the quality and suitability of the product, but it should not be longer than necessary so as to ensure that the interests of the opposite party are also very well represented. It should be remembered that the right to inspect products purchased unseen is a legal right given to the purchaser and the seller cannot deny him the right.

4.8. Conclusion

The focus in this chapter was on the offer and acceptance and the objective was to examine how they are applied to three main issues, electronic agents (bots), distinguishing offers from invitations to treat and subject matter.

The matter of whether exchanges arranged by the interaction of bots are legally enforceable was extensively discussed in this chapter. As the principles of agency are basically apt to human interactions, and applying them to the relationship between a human and machine would warrant some justification and provide uncertainty. The theories that seem to be consistent in the enforcement of such transactions are those that seek to protect individuals' ability to pursue reasonable objectives using reliable arrangements. Other theories appear to be inconsistent with enforcement, at least in some aspects of their formulation. Perhaps the said aspects need

[824] Article 6 (1) of the EC Directive 1997 in Distance Selling provides the customer with 7 working days.
[825] The vendor may set a suitable time limit for the purchaser (to exercise his right of inspection) the expiration of which extinguished the (right of) option if he does not return the thing back during the said time limit'.

rethinking or clarification.

A second click is conducted to confirm the acceptance, after which the e-contract becomes legally enforceable. Moreover, consent issued by programmed computers is taken as if it comes from the owners of the computers themselves. There was also a discussion about errors occurring when the computers issue consent and the conclusion was that if there is indisputable evidence to show that the computer was in error, the e-contract can be legally revoked, and the owner is responsible for the error or should have been aware that such errors may occur.

On the issue of whether the trading website's content is an offer or invitation to treat, it would be judicious as well as in the best interests of traders to make it clear that it is an invitation to treat. Consequently, there will be no binding deal unless an exchange of offer and acceptance was made. The general rule is that mere silence cannot amount to a valid acceptance. According to the ICC, silence can amount to a valid acceptance in contract in three situations. However, this exception is not applicable in e-transactions because it may result in the conclusion of contracts based on silence and without actual consent. On issue of subject matter, it is adequate for it to be accurately and sufficiently defined. The purchaser has the right of inspection and it is better to let the contracting parties decide and mutually agree on the procedures for the inspection based on the nature of the contract.

According to the above-mentioned issues, amendments proposed in chapter 6 shall be imposed to the ICC in order to be equivalent with the current electronic revolution. According to the ICC, an offer matched by an acceptance is insufficient because the offeror must also know about the acceptance, because the time he was aware of the acceptance is crucial for the conclusion of the contract. Therefore, the moment contracts were concluded when using the Internet will be discussed in the following chapter.

Chapter Five

The Forms of Acceptance in E-Commerce and The Time The E-Sale Is Concluded

5.1. Introduction

Generally, when an acceptance takes effect indicates that the contract has been concluded. The said 'time point' is highly significant to the contracting parties as it indicates the point in time that they are legally bound by the contract and that no new terms or conditions can be inserted into it unless by their mutual consent.[826] The ICC requires that the offeror must be informed of the acceptance or he must receive the acceptance.[827] However, in an electronic environment, it is difficult to establish when the offeror knows about or receives the acceptance. As a result, there has been substantial debate as to which rule is applicable to e-contracting and also whether the Iraqi legislature should enact a new law to clarify the position.[828] Acceptance, in the present context, is the final and indisputable agreement to all the terms of the offer.[829] An acceptance cannot introduce new terms or any variation of the terms in the offer and if it does, the law deems it to be a counter-offer and the original offer no longer exists.[830] However, if the offeree seeks to clarify or verify the details of the offer, it will not amount to a counter-offer but will be deemed to be a 'mere inquiry' and the original offer will remain unchanged.[831]At this juncture, there is a need to examine the approaches adopted by some of the interactive websites. Usually, the customer's order is deemed be an offer to contract and this is followed by a message (on the computer monitor or via e-mail) from the vendor or his electronic agent to verify that the order was received. However, other than the confirmation that an order has been received, the message from the vendor may contain terms about delivery, choice of forum and the applicable law.[832] If the aforesaid additional terms are not included in the original offer, the vendor has in effect made a counter-offer and this would require the buyer to give a new acceptance before the contract is concluded.[833]

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[826] Althannon (n 17) 55; Abdullah (n 14) 75.
[827] ICC, Article 87.
[828] See *Felthouse* v *Bindley* (1862) 11C.B. (N.S) 869, where the facts indicate that the nephew had accepted the offer. *cf The Hannah Blumenthal* [1983] AC 854.
[829] Nancy S Kim, 'The Duty to Draft Reasonably and Online Contracts' in Severine Saintier, Keith Rowley, Larry A Dimatteo and Qi Zhou (eds), Commercial Contract Law: Transnational Perspective (Cambridge University Press 2013) 181.
[830] *Jones v Daniel* [1894] 2 Ch 332 and *Hyde v Wrench* (1840) 3 Beav 334.
[831] See Lush LJ in *Stevenson v McLean* (1880)5 QBD 346.
[832] Issues regarding the applicable law are out of the scope of this thesis.
[833] See *Bowerman v Association of British Travel Agents Ltd* [1996] CLC 456; *Carlill v Carbolic Smoke Ball Co* [1893]1 QB 256.

As such, this chapter will seek to establish what constitutes an acceptance before discussing at which point that acceptance becomes effective. The researcher will, first of all, examine the issues as to what will count as an acceptance. These include signatures, acceptances made accidentally, clicks, and also the terms and conditions that have been incorporated into the contract. Secondly, the researcher will also look for a well-established rule on acceptance in order to determine the point when a contract can be said to have been concluded in an electronic environment. Finally, the researcher will analyse and assess theories on the conclusion of contracts, and this may be in a variety of forms as it depends on the nature of the medium that is used for the commercial transactions.

5.2. Communication process

Before discussing the effectiveness of acceptance conveyed using Internet-based methods, there is, first of all, a need to analyse the communication process. Such a basic approach is not just technology-neutral (on the assumption that being technology-neutral is considered necessary), but it also leads back to the traditional division of parties either contracting face-to-face or at a distance. It may, however, give rise to some analytical difficulties caused by the inherently ambiguous definition of the term 'communication'[834] which has to do with how information is imparted as well as how it is transmitted. Coote was the first to make the distinction and he emphasised that instantaneous transmission cannot by itself be decisive, because there is a necessity to ascertain that the parties are able to communicate instantaneously with each other.[835] It is only when the parties use face-to-face dealings that there is an assurance that there is instantaneous communication, i.e. information is immediately conveyed by the sender to the addressee. Such an interaction is bi-directional[836] and in real time,[837] and any failure in communication is detected and immediately corrected. As a result, the principle can be applied to interactions that bear a resemblance to face-to-face dealings and those that are dissimilar will be treated as exceptions. When exchanging opinions on the information exchange process, there is a need to ignore which communication methods or devices the party

[834] Joseph N Cappella, Interpersonal communication: Definitions and fundamental questions (*Handbook of communication science* 1987) 184-238.
[835] *Schelde Delta Shipping BV v Astarte Shipping Ltd (The 'Pamela'*) [1995) 2 Lloyd's Rep 249.
[836] Restatement (Second) of Contracts, para 64. See Rix J in *Jayaar Impex Ltd v Toakaz Group Ltd* [1996] 2 Lloyds Rep 437 at 446.
[837] See Susannah Downing and Justin Harrington, 'The Postal Rule in Electronic Commerce: A Reconsideration' (2000) 5(2) Journal of Communication Law 43; Baum and Perritt (n 155) 32; Murray (n 153) 17.

utilised.[838] This is because there are different ways to use the same device or method. Dealings done through the phone are similar to face-to-face interactions[839] as both parties are present and at the same time using similar devices. However, such a resemblance vanishes if the addressees are absent and messages are recorded by answering machines.[840] As a result, the addressee only receives the message later, i.e., when he checks the answering machine for messages.[841]

Such an argument can be used in the case of emails and instant messages (IM). From a technical point of view, email is non-instantaneous because access to email is normally delayed, and it is a unidirectional method of communication.[842] However, it is possible to have a two-way communication as all that is required is for the parties to remain with their computers as well as continually synchronise their mail-servers. To make sure that communication failures are immediately detected, an inherent characteristic of face-to-face interactions, the receiving system should be capable of automatically (i.e. without any direct intervention by the addressee) and instantaneously generating confirmations or notification failures. However, this kind of response presupposes specific technical capabilities of the addressee's mail servers, which may in fact be lacking.[843] That is to say, unlike face-to-face interactions, the detection of failed receipts may be dependent upon the addressee extending his co-operation. Therefore, it may not be possible to fully recreate proper two-way communication. In contrast, interactions using IM are synchronous and in real time. If a message is not delivered it is immediately obvious because the communication or conveyance of messages is instantaneous and bi-directional.[844] In spite of the technical differences, either method can be utilised in such a way that it resembles the other. For instance, if both parties have access to email at the same time they can exchange messages in real time. Similarly, in the case of IM, the communication can be delayed if the sent messages are stored for later delivery.

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[838] Juliet M Moringiello and William L Reynolds, 'From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting' (2013) 72 Maryland Law Review 452.
[839] *Express Airways v Port Augusta Air Services* [1980] Qd R 543; *WA Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278; *Aviet v Smith & Searie Pty Ltd* (1956) 73 WN (NSW) 274; See also *Trentham Ltd v Archital Luxfer* [1993]1 Lloyds Rep 437.
[840] *Robolphone Facilities Ltd v Blank* [1966] 1WLR 1428, 1431; see also Hans B Thomsen and Bernard S Wheble, *Trading with EDI, The Legal Issues* (IBC Financial Books, 1989) 133
[841] Nimmer, *Electronic Contracting* (n 172) 223
[842] Andrew Terret, Ian Monaghan, 'The Internet-An Introduction for Lawyers' in Lillian Edwards, Charlotte Waelde (eds), *Law & the Internet* (Oxford University Press, Oxford 2000) 25; Wright and Winn (n 221) para 2.02
[843] Charles P. Morrison, 'Instant Messaging for Business: Legal Complications in Communication' (2004) 24 Journal of Law and Commerce 141-150, 142
[844] Kevin Moore RFC 3461 'Simple Mail Transfer Protocol (SMTP) Service Extension for Delivery Status Notifications (DSNs)' (2003) < https://tools.ietf.org/html/rfc3461> accessed 13 June 2018

Such a discussion is incomplete without alluding to the trend of integrating real time communication services (for example IM, telephony and video conferencing) with non-real time messaging such as email. Such 'unified communications' are customised to the addressee's communication status,[845] i.e., whether he is online, offline or roaming, as well as his readiness to communicate (available, busy or not to be disturbed). Since Internet-based methods of communication are now also available on portable devices, businessmen are now no longer tied to their office computers and irrespective of their whereabouts, they can use Internet-based real time communications. The senders can also verify the addressee's communication status (i.e. whether he is willing to communicate in real time) with ease and select the appropriate communication method based on the known status.[846]

For instance, an email is appropriate if the addressee is not online or chooses not to be disturbed by instant messages or voice calls even though he may be online and available.[847] Difficulties may arise if the addressee, even when he is online, chooses not to communicate at a particular time and will only retrieve the stored message later. In such a situation, other than the evident difference of such a scenario to that of a face-to-face interaction, the assumption is that the addressee has to bear all the associated storage risks.[848] However, it must also be assumed that the party that elected or imposed the method of communication shall *prima facie* assume all the inherent risks.[849] As a result, the amalgamation of the two factors (i.e. the person that insisted on the method and the person that delayed the communication even though it was possible to have real time interaction) necessitates a detailed assessment on whether a specific risk originated from the sender or the addressee.[850] The evaluation must incorporate the multiple variables that are not only connected to the speed of communication or the apportionment of risk, but in this case also the features of the communication process. Simplistic generalizations are no longer possible. It must not be forgotten that instantaneous transmission is a precondition of real time communications, but it is not a conclusive feature to establish the time of formation of contract. Instantaneous transmission does not ensure that

[845] M Day and others, RFC 2778 'A Model for Presence and Instant Messaging' (2000) < https://tools.ietf.org/html/rfc2778> accessed 13 June 2018; Rogers (n 653) 28.
[846] Michael L Rustad and Diane D'Angelo, 'The Path of Internet Law: An Annotated Guide to Legal Landmarks' (2011) 12 Duke Law & Technology Review 1.
[847] Christensen (n 486) 22.
[848] Robert Lee Dickens, 'Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases' (2007) 11 Marquette Intellectual Property Law Review 379.
[849] Ibid.
[850] John W Cooley, 'New Challenges for Consumers and Businesses in the Cyber-Frontier: E-Contracts, E-Torts, and E-Dispute Resolution' (2001) 13 Loyola Consumer Law Review 102.

a particular interaction is similar to face-to-face dealings, it does not decrease communication risk or assist in the immediate detection of communication failures.

5.2.1. Signature and accidental acceptance

Although signatures are not a precondition of a valid contract, they are integrally linked to the issue of whether a suggested set of terms has been incorporated.[851] In theory, incorporation of terms is dependent on whether assent has been given. There is no need to express acceptance for it can be implied from the fact that a party was aware that the terms were present after having been informed of their existence. Alternatively, the terms are deemed to have been accepted if the contractual document, containing or referring to the terms, has been signed. As mentioned earlier, intention can be established in any manner. Consequently, intention can be indicated with a click of a mouse, which, to be precise, is one way of requesting HTML files and evoking or inducing responses from client-cum-server-side applications.[852] Although it cannot be disputed that clicks can demonstrate acceptance, there is no general agreement as to whether or not they are equal to signatures. One approach repudiates such a possibility,[853] while another, focusing on the function of a signature instead of its form, accepts it.[854] It must be highlighted that the legal effect of a signature does not depend on its form, but it is dependent upon the intention when it was made.[855] The intention can be derived from the context[856] or the type of document that was signed.[857] Therefore, the matter of whether a click can be equated with a signature appears to be of limited importance, since the analytical procedures required to prove that a click was carried out with the intention of giving assent are identical to those of proving that a click amounted to a signature. In both situations, the focus of the analysis is on the context in which the click or signature occurred. The legal effect stays the same. That is, the parties agreed to contract based on the terms that were provided. Meanwhile, it seems that when acceptance is given using a signature, then in theory, no notice is required. This is because once the document is signed the terms are automatically incorporated. However, incorporation

[851] Kidd and Daughtery (n 135) 215.
[852] Chissick and Kelmann (n 268) 97
[853] R Fielding and others, RFC 2616 'Hypertext Transfer Protocol - HTTP/1.1' (1999) < R Fielding and others, RFC 2616 'Hypertext Transfer Protocol - HTTP/1.1' (1999)> accessed 13 June 2018
[854] UK Law Commission, *Electronic Commere: Formal Requirements in Commercial Transactions,* (TSO, December 2001) 3.36-3.40
[855] Jane K Winn, 'Open Systems, Free Markets, and Regulation of Internet Commerce' (1998) 72 Tulane Law Review 1177- 1195, 1181; Holly K Towle, 'E-Signatures - Basics of the US Structure' (2001) 38 Houston Law Review 921-990, 923;
[856] *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661, 666-667
[857] *Joseph Grogan v Robin Meredith Plant Hire and Triact Civil Engineering Ltd* (1996) 15 Tr LR 317

by signature is premised on the point that the document bearing the signature has a contractual effect. This gives rise to the issue of whether a website can be a document and/or also how can a website become 'contractual'. At the end of the day, discussions concerning the legal effect of a click or the presence of a signature inevitably lead back to an analysis of the actual background context in which they were made. How clicks can become the equivalent of signatures is, however, of unquestionable value in cases where a formal requirement must be met.

Notwithstanding this, the conventional handwritten signatures are undoubtedly better than clicks, for they are also generally perceived as indicating acceptance. A signature binds the person who knowingly signs it.[858] In actual practice, the parties work in an environment whereby they have tacitly assumed the commercial implications.[859] However, clicks are not connected to such conduct and are bereft of any inherent meaning. When compared to signing, one is more likely to click instinctively and without second thoughts, since clicks are mainly a means of navigating hypertext environments rather than establishing contracts. As mentioned earlier, the legal effect, if any, can only come from the context in which signatures were made. Bearing this in mind, one must note that not all websites are of a commercial nature and not everybody who navigates the Internet make purchases from websites.[860] As it is easy to move from one website to another, the transition a commercial to a non-commercial website or vice versa may not be obvious.[861] In the physical world, it is as good as impossible to be 'teleported' from a library to a bookshop. In the virtual environment, a user looking for recipes on the Internet can effortlessly 'step into' an online bookshop, as the latter is only a click away. However, the problem is not just one of ease of movement from a non-commercial website to that of a commercial one,[862] but is that mere usage of the website, i.e. continued browsing, may result in the browser becoming subject to terms. Previously, Internet users could obtain information from the Internet gratuitously and without restrictions. As a result, most users are unaware that they are being subjected to terms just for browsing websites or that the act of browsing itself may lead to or require the conclusion of a contract. This gives rise to one more

[858] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Roe v Naylor (Nol)* [1917] 1 KB 712, 716
[859] Michael J Madison, 'Rights of Access and the Shape of the Internet' (2003) 44 Boston College Law Review 433-507,457
[860] Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (15th edn Oxford University Press, Oxford 2007) 133
[861] Fasciano (n 4) ; Watnick (n 479) 175.
[862] See Andy Harris, 'Dealing with Online Contracts and Electronic Signature' (MBM Commercial) http://mbmcommercial.co.uk/news/article/dealing-with-online-contracts-and-electronic-signatures.html accessed 8 April 2018.

complication, that owners of websites can take advantage of impatient click-happy web surfers by constructing websites that minimise the likelihood of their terms being reviewed.[863] Users continue to browse these websites without knowing that their conduct is deemed to be an agreement to, for example, allow the collection of their personal data or the installation of spyware.[864] In such a scenario, is there a contract?

On the one hand, the objective test cannot be applied in favour of a person who is aware of the truth.[865] It is possible to assert that the website operator, not the user, is the one who created the appearance of intention. On the other hand, although the idea of 'unintended' or 'accidental' acceptance gives the impression it is self-contradictory, it must be admitted that objectively, notice was given, and the terms were accessible. It may perhaps have been the user who was overenthusiastic and continued to browse the website with giving any attention to the communications on the website. In any case, if a person voluntarily carries out an act that shows an intention to form a contract, the act, when compared to the intention, is more important.[866] Furthermore, non-payment (the fact that no payment card details were provided) does not always indicate that no contract was formed. The consideration from the user can be his permission to allow the website operator to study his browsing habits.[867] Although the website operator conceived the transacting interface as well as most likely manipulated the user, this can nevertheless be taken as meaning the user undertook the risks that are inherent in the new medium.[868] In the absence of coercion and misrepresentation on the effect or intent if a click, the user ought to be bound. It is one thing to use trickery to make a user enter into a transaction, it is another to exploit his lack of attention.[869] This situation gives rise to the opportunity to reconsider the question of exactly what intention should relate to: is it the carrying out of an act (clicking) or the assumption of a contractual obligation?

However in practice, the question is not whether the user assented, but whether or not he intended to contract.[870] Transactions are often carried out without the parties knowing about

[863] Maxeiner (n 270) 119;
[864] Peter A Alces, 'Guerilla Terms' (2007) 56 Emory Law Journal 1511-1562, 1554; Hillman and Rachlinski, (n 41) 480;
[865] *Scriven v Hindley* [1913] 3 KB 564
[866] Barnett (n 605) 299
[867] Jane K Winn, 'Contracting Spyware by Contract' (2005) 20 Berkeley Technology Law Journal 1345-1362, 1349, 1354. *Petelin v Cullen* (1975) 132 CLR 355
[868] Martin Samson, 'Groff v America Online, Inc' (Internet Library of Law and Court Decisions, 2014) <www.internetlibrary.com/cases/lib_case20.cfm > accessed 2 June 2017.
[869] Michael Geist, 'The Shift Toward 'Targeting' for Internet Jurisdiction' in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) 91.
[870] Hill (n 232) 25, 26; Murray (n 153).

the contractual situation or specific legal consequences as a result of their acts. Presumably, intention is related to getting into a transaction in general and it is not necessarily related to the conclusion of a contract or an agreement to certain terms.[871] The same assumption should be adopted in web-based transactions. It is also tempting to correlate the problems of 'accidental' clicks (an expression of acceptance) with *non est factum*. Being unfamiliar with the meaning of a click can be compared with being unaware of the legal consequences of a signature. In *non est factum* cases, the signatory knows that he signed the document, but he lacks knowledge of the nature or effect of the document he signed.[872] In general, the lack of knowledge is related to the legal effect or meaning of the click.[873] However, if the person in a *non est factum* case seeks to disown the signed document he must provide evidence to show that he signed the document without negligence.[874] Similarly, the same argument can be used by a person to withdraw from a transaction to support his contention that he had no intention to express acceptance by one of his clicks. The absence of carelessness can be derived from the fact that the user did not have any reason to suspect that he was going to enter into a contract. Incidentally, this approach falls back on the objective assessment of the content of the relevant website, i.e. the context wherein the click was made.

5.2.2. Enhancing the click

The lack of clarity surrounding clicks and the perceived risk of them being accidentally accepted as acceptances have given rise to hypotheses that they require an extra act of acceptance or the enhancement of the act itself.[875] Merely remaining on the site or downloading software cannot be deemed to be acceptance. Since such acts are ambiguous. There is a need to have a button with the words 'I agree' or other similar words denoting the same. Acceptance must be in the form of an explicit act which is dissimilar from expressing a desire to obtain a benefit. This is derived from a series of cases in the United States of America that differentiate between the so-called 'click-wrap' and 'browse-wrap' agreements.[876] This terminology, as well as its perceived legal implications, has gradually found its way into wider international

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[871] See Marc J Goldstein, 'E Mail Contracting and the 'Agreement in Writing' Requirement on the New York Convention' (Marc J Goldstein, February 2012) <http://arbblog.lexmarc.us/2012/02/e-mail-contracting-and-the-agreement-in-writing-requirement-of-the-new-york-convention/> accessed 25 March 2018.
[872] *Muskham Finance Ltd v Howard* [1963] I QB 904; *Saunders v Anglia Building Society* [1971] AC 1004; 5
[873] Tim Andrews, 'Be Careful What You're Signing' (2007) 190 Property Law Journal 16; Rogers (n 653) 36.
[874] Michael Furmston, *The Law of Contract* (4th edn Lexis Nexis Butterworths, London 2010) 1022-1023
[875] Anthony M Balloon, 'From Wax Seals to Hypertext Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions' (2001) 50 Emory Law Journal 905-950, 933.
[876] Ian C Ballon, *E-Commerce and Internet Law: A Legal Treatise with Forms* (2nd edn, Westlaw 2010) 627; *Specht v Netscape Communications* 306 F 3d 17 (2nd Cir 2002)

literature and has become a permanent feature of the legal landscape in e-commerce.[877] In a click-wrap agreement, the user must activate the 'I agree' button before the order can proceed to the next stage. In addition to that, a technically predetermined contracting sequence must be adopted. The sequence is such that if the terms are not displayed, the button cannot be activated or the service cannot be used. Generally, when the button is clicked, it signifies acceptance, but in a browse-wrap agreement there is no separate button and the terms can usually be accessed through a hyperlink. It is generally known that browse-wrap agreements do not give rise to unambiguous expressions of acceptance because the terms are avoidable, and it does not require a distinct act of acceptance. Consequently, browse-wrap agreements are considered to be unenforceable.[878]

Examination of click-wrap and browse-wrap agreements does not concentrate on the incorporation of terms, but on their legal validity. The difference between them is substantial. Based on logic, only the terms that have been incorporated will be enforceable. It has been stated that if there is no express acceptance the terms become unenforceable and there is no contract.[879] However, another approach overtly distinguishes the formation of a contract from the incorporation of terms.[880] In the event the incorporation is not successful, there may be a contract as all the gaps may be filled by implication.[881] Furthermore, if the proposed terms were brought to the other party's attention, or the parties signed the contractual document, the formation and incorporation occurred in a single act. Although the general intention to be bound is discernible from the acceptance of specific terms,[882] there is no need for a separate act of assent or expression of acceptance. However, the success of an incorporation procedure may have a direct effect on the formation of the contract. This will be the case if the proposed terms stipulate the manner of acceptance.[883] If such terms are not communicated, the opposite party will not be able to assent to them, so a question arises as to which act is deemed to constitute acceptance. If this statement is transposed onto the offer and acceptance model, the

[877] See e.g. Melissa Robertson, 'Is Assent Still a Prerequisite for Contract Formation in Today's E-Economy? (2003) Washington Law Review 286-297; Lorna E Gillies, *Electronic Commerce and International Private Law* (Ashgate 2008) 16
[878] Davidson (n 137) 66; Smith (n 570) para 10-100. Roger C Bern, '"Terms Later" Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding' (2004) 12 Journal of Law and Policy 641-687;
[879] Jean Braucher, 'Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice' (2002) 46 Wayne Law Review 1805-1853; *Specht v Netscape Communications* 306 F 3d 17 (2nd Cir 2002).
[880] Discussed in the next section.
[881] Smith (n 40) para 10-100.
[882] Joshua Fairfield, 'The Cost of Consent Optimal Standardization in the Law of Contract' (2009) 58 Emory Law Journal 1401-1458,1424.
[883] Smith (n 40) para l0-006

offeror prescribes the manner of acceptance, including the required clicks. Acceptance can only occur if the offeree has knowledge of the offer and it is especially so if the offeror is the one that prescribes the method of acceptance.[884]

Other than suggesting that a distinct or express act of acceptance is required, click-wrap supporters appear to discard all other methods of making the terms available that require minimal user activity.[885] It is undeniable that terms that require self-display will attract more attention than those that have to be retrieved via a hyperlink. The moment that users know that the terms exist, they are likely to make efforts to look for them, for example by activating a hyperlink.[886] The chronological or spatial separation of notice, preventing its availability, or placing the terms behind multiple hyperlinks are practical reasons to make such terms less understandable. Particularly, even conventional incorporation procedures implicitly allow some manipulations, in that terms may be shown in small black print on brown paper[887] or cross-referenced between several documents and places.[888] The incorporating party can lessen the chances of review of their terms by offering minimal yet sufficient notice, or by making it burdensome to obtain them.[889] The general prejudice against browse-wrap agreements is mainly because of the links to their terms are not easily viewed and their existence is also not obvious.[890] Consequently, due to insufficient notice as well as the lack of a clear transactional context, users are not aware that they are entering into a contract and that their transactions are governed by certain terms. The proponents of click-wrap agreements may have to remember that a click on the 'I agree' button does not, of itself, give rise to any awareness of the contractual situation or show acceptance.[891] If, prior to the user making a click, the legal effect of that click is not conveyed to him, it can be interpreted as the click being made without the requisite contractual intention. Therefore, the issue is not about the enhancement or duplication

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[884] Jacques Delisle and Elizabeth Trujillo, 'Consumer Protection in Transnational Contexts' (2010) 58 American Journal of Comparative Law 135.
[885] Thomas Schultz, 'Carving up the Internet: jurisdiction, legal orders, and the private/public international law interface' (2008) 16 European Journal of International Law 30.
[886] Raymond SR Ku and Jacqueline Lipton, *Cyberspace Law: Cases and Materials* (3rd edn, Aspen 2010) 39.
[887] *L'Estrange v. F Graucob Ltd* [1934] 2 KB 394; See also the series of electronic contracting case law surveys in the US over the period 2001-2011, written by Juliet M Moringiello and William L Reynolds <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 10 April 2018.
[888] *Hollingworth v Southern Ferries Ltd ('The Eagle')* [1977] 2 Lloyd's Rep 70; *Petroleum AB v Vitol Energy SA* [1995] 2 Lloyd's Rep 160; *McCutcheon v David MacBrayne, Ltd* (1964) WL 19517 (HL);
[889] Steven A Smith, *Atiyah's Introduction to the Law of Contract* (6th edn Clarendon Press, Oxford 2005) 188, who emphasized that notice, which is a sufficient instrument in law, may be fictitious.
[890] *Ticketmaster Corp v Tickets.com Inc 2000* L 525390 (CD Cal 2000); *Pollstar v Gigmania Ltd* 170 F Supp 2d *974* (ED Cal 2000).
[891] Emily Wilson, 'Douglas v. Talk America: Making the Case for Proper Notice' (2009) 45 Idaho L Review 479-508, 483; *Hubbert v Dell Corp,* 835 NE2d 113 (III 2005); Naylor and Patrikios (n 652) 133.

of the act of acceptance, but it is about giving the user notification about the presence of terms.[892] Of greater importance is that the user must be aware that he is entering into a contract. It is not possible to use the principles of contract law to justify the use of 'additional' or 'enhanced' acts of assent. This is because the making of a contract and/or incorporation of terms in Internet transactions are not dependent upon the presence of an 'I agree' button. The downloading of the product is an execution of the order as well as a legal expression of acceptance. In both the aforesaid instances, the click amounts to an acceptance and its meaning is derived from the context or from the terms. The click must be carried out with the knowledge that it will be objectively interpreted to constitute an agreement. The user's awareness of the terms and their decision to proceed further with the transaction shows their acceptance.[893] An evolving online trend involves the provision of a 'legal link' at the end of the page and has become a permanent menu option. This is despite Specht specifically stating that having a scrollbar on the webpage does not create any obligation to scroll down.[894] It is becoming more difficult to claim ignorance about these types of links given their virtually ubiquitous presence at the bottom of virtually all e-commerce websites.[895]

If there is adequate notice, then consent can be inferred.[896] As such, there is no need to enhance the assent, but enhancement is required as regards the notice on the existence of terms and formation of a contract. The said notice not only conveys the existence of terms but also creates the contractual context. This does not require a new principle of contract law. Instead, there is a need to adapt the 'reasonableness' of the notice to the peculiarities of transactions done on the web. When assessing 'reasonableness', there is a need to make provisions for information overload,[897] the perceptive limitations of the web-interface,[898] as well as the fact that e-commerce business models are frequently built on the basis of the number of times the site is visited, and that as a result, there is a continuous competition to attract and retain attention.[899]

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[892] *Cairo, Inc v Crossmedia Services, Inc.,*2005 WL 756610 (NDCA 2005); *Ticketmaster Corp, v Tickets.com, Inc* WL 21406289, 2003 US Dist Lexis 6483 (2003); *Register.com Inc v Verio Inc 356* F 3d 393 (2nd Cir 2004).
[893] Margaret J Radin, 'Online Standardization and the Integration of Text and Machine' (2002) 70 Fordham Law Review 1125, 1126; Kayleen Manwaring, 'Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK' (2011) 5 Studies in Ethics, Law and Technology 1 <www.bepress.com/selt/vol5/iss1/art4> accessed 22 July 2017.
[894] *Specht v Netscape Communications* 306 F 3d 17, 32
[895] Burke T Ward and Janice C Sipior, 'Where in the World Is Internet Jurisdiction: A US Perspective' (2010) 4 International Journal of Value Chain Management 5.
[896] J Palfrey, U Gasser, *Born Digital, Understanding the First Generation of Digital Natives* (Basic Books, New York 2008) 10.
[898] Jean Braucher, 'Rent-Seeking in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online' (2001) Wisconsin Law Review 527- 531, 539
[899] See Simon Jones, 'Forming Electronic Contract in the United Kingdom' (2000) 11 International Company and Commercial Law Review 301.

The latter shortcoming can easily be overlooked.[900] If, contextually, the information provided is not objectively transactional, users will not anticipate the presence of the terms. As such, a click will not mean acceptance and/or possess an incorporating effect because no contractual intention can be implied.[901] Even though the full legal consequences of an act need not be grasped, the user ought to know at least that he is forming a contract. Once a user realises he is entering into a contract, the general expectation is that he knows that the transaction will likely be governed by terms. As such, knowledge of the terms is of greater importance than the form of the acceptance.[902] However, improving upon the simple act of clicking may be necessary, if the click's purpose is to duplicate that of a signature in order to comply with formal requirements. Laws that set up formalities seek to forewarn signatories to the potential effects of their acts. For that reason, the ceremonial or defensive functions of signatures may necessitate that acceptance should include a more complex action than a simple click.[903]

However, if formal requirements are not needed, then there is no need for enhancements or duplications. These unwanted outcomes may be more prominent in web-based transactions. However, the problems of being oblivious to existing terms or not reading them in sufficient depth are nothing new.[904] The numerous arguments that question the legality of browse-wrap or click-wrap agreements can be used against any contract wherein the standard terms are not immediately available or obvious. Furthermore, although these terms may be available, they may have been incorporated in such a manner that the user is effectively prevented from being able to recognise them. As such, there is a need to examine them thoroughly in the next section.

5.3. The incorporation of terms to determine the moment the contract was concluded - An analytical study

There is no doubt that terms and conditions for use of a particular website are deemed to be its most important constituent part and this is because of the significant legal implications that may arise from such use.[905] Regrettably, most people using websites to purchase goods or

[900] See James Martin, 'Personal Jurisdiction and Choice of Law' (1980) 78 Michigan Law Review 872.
[901] Kierkegaard (n 514) 12.
[902] Scott Glickson, 'Point, Click and Buy: Contracting for Online Products and Services' (1997) 13 Computer Law and Security Report 436.
[903] Henry H Perritt Jr, *Digital Communications Law* (Aspen 2010) para 9-36, 9.06 [A]
[904] Shirley A Wiegand, 'Fifty Conflict of Laws 'Restatements': Merging Judicial Discretion and Legislative Endorsement' (2004) 65 Louisiana Law Review 1; Willis L M Reese, 'Conflict of Laws and the Restatement Second' (1963) 28 Law and Contemporary Problems 679.
[905] These terms are also referred to as 'User Agreement'. Jonathan D Frieden, 'Website Terms of Use: Common Issues Facing E-Commerce Businesses' (The National Law Review, 24 July 2014)

services, regardless of whether or not they are professionals[906] do not usually read this important information.[907] Additionally, they are not aware of the important legal implications that may arise from such use.[908] The reasons for this are varied, but there is no doubt that people are of the opinion that such terms and conditions are non-enforceable or non-negotiable.[909] In *Pollstar v Gigmania Ltd*, the court accepted this fact, and stated that its agreement with the defendants that a majority of website visitors may not know of the license agreement.[910] The way acceptance is expressed, as well the way in which contract terms are incorporated in web-based transactions, demonstrates how the analytical hurdles created by the innovative communication technologies are circumvented by going back to technology-based solutions, new terminology and the alteration of contractual principles. It is undoubtedly difficult not to be overwhelmed by the unique nature of the online contracting environment, wherein the complete shopping experience is squeezed and restricted to the users' computer monitor and traditional method such as physically going to a shop and choosing goods from the shelves is replaced with clicks. The simplicity of these clicks, other than camouflaging the very fact of contracting, also accelerates the contracting process. From the outset, there is a requirement to make some broad observations. Firstly, almost all web-based transactions are reliant upon standardised terms and traditionally they are discussed with regard to which particular conditions are unjust, as well as which requirements must be fulfilled before such terms can be incorporated. Since the issues about substantial fairness are not confined to the Internet, the focus of this evaluation continues to be on the process of incorporation. Since the capability to negotiate is not a precondition for agreement, there is a need to acknowledge that the problems

<www.natlawreview.com/article/website-terms-use-common-issues-facing-e-commerce-businesses-3rd-series> accessed 10 October 2017. Rowland, Kohl and Charlesworth (n 648) 236

[906] In this concern, Riefa portrays eBay's terms and conditions by stating that: 'A notable example is that of the online auction on eBay website. These terms are so accurate, that many well-trained solicitors feel stunned by the job of revising the terms and conditions and their related forms. Actually, on eBay, consumers have access to much information to be fully comprehended must tick a link to the clarity of precise terms or to policy documentation. The design of the site and the manner in which links are structured obstruct a direct return to the original page of terms and conditions, which means that even the most competent attorneys end up plainly lost. *Feldman v Google,* Inc Civil Action No. 06-2540 (2007) US Dist.

[907] In the same manner, some interestingly portrayed the website terms and conditions as follows: '[W]ith some Internet companies' terms and conditions being longer than Shakespeare's Hamlet, could it be that "unfair clauses" in agreements are not even worth the paper they are printed on it?'; Alex Hudson, 'Is Small Print in Online Contracts Enforceable?' (BBC News Technology, 2 February 2017) <www.bbc.co.uk/news/technology-22772321> accessed 27 June 2017. See also Christine Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14 Lex Electronica 1.

[908] Oliver Bray, 'The App Factor: How Apps Are Changing the Legal Landscape' (2013) 24 Entertainment Law Review 1; See also UK Office of Fair Trading, 'Empirical Study on Consumer Contracts' (February 2011) <www.oft.govuk/shared_oft/market-studies/consumercontracts/oft1312.pdf> accessed 13 September 2017; Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 324.

[909] Manwaring (n 894) 1.

[910] *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (2000; Kim (n 830) 181.

of standardisation, as well as informed consent, are not the creation of modern communication technologies. Under the common law, standard contracts are binding even though they have not been read, assent has not been expressly given or parties are even aware of assent.[911]

However, it is acknowledged that web-based transactions aggravate certain analytical problems that are related to the expression of acceptance as well as the incorporation of terms. Secondly, the terms themselves, and hence how they are incorporated gain certain importance in web-based transactions. Generally, there are two types of terms, with the first type regulating the use of the particular website[912] and the second relating to the commercial transaction itself. The former explains the website owner's rights and sets out the communicative signs and instructions that govern the behaviour on the site following arrival on it. It must be noted that most websites sell tangible goods. The site by itself may represent the object of the transaction (i.e. the content or services it provides). Thirdly, the web apparently provides a perfect information environment that enables the actual conveyance of terms as well as the resulting informed consent. Users are free to compare the products of rival vendors and have the chance to read the terms in the comfort of their houses.[913] However, such an ideal scenario must be treated with caution. The mere fact that the terms are obtainable does not indicate that they will be read. Of greater importance is that the information density of the web should be assessed against the inadequate information processing capability of an average user.[914] Having more information does not mean that the quality of acceptance is enhanced. It may just give rise to information overload and decrease the likelihood of users reviewing or even taking notice of the terms. Consequently, web-based transactions are affected by countless disputes about whether the terms have been correctly incorporated (having been assented to) or whether a contract was legally concluded.

The sequence of this analysis is obtained from the rather complicated relationship between acceptance,[915] formation and incorporation. However, the principle that intention can be

[911] Mark A Lemley, 'Terms of Use' (2006) 91 Minnesota Law Review 459, 460;
[912]Robertson (n 878) 197; Lawrence Lessig, 'The Law of the Horse: What Cyber Law Might Teach Us' (1999) 113 Harvard Law Review 501, 519; Chris Reed, 'Electronic Commerce' in Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information, Information Technology* (6th edn, Oxford University Press 2007) 199.
[913] Eisenberg (n 267) 211-259. *eBay v Bidder's Edge* (N.D. Cal. 2000) 100 F. Supp.2d 1058
[914] Robert A Hillman and Ibrahim Barakat, 'Warranties and Disclaimers in the Electronic Age' (2009) 11Yale Journal of Law and Technology 2-29; Bert-Jaaps Koop, 'Law, Technology and Shifting Power Relations' (2010) 25 Berkeley Technology Law Journal 973-1035, 1012.
[915] Given the difficulty of labelling individual acts as offers or acceptances, 'assent' is a neutral term describing contractual intention *in general.*

articulated in any manner is incongruous. As such, the moment the contract is concluded can be inferred from conduct. It must be remembered that generally, the formation of a contract does not require any formalities. Consequently, signatures are not a precondition of enforceability. In spite of this assertion, the presence of a signature will set off a specific line of analysis. This is the case with incorporation procedures, i.e. the steps that are required for the terms to become a part of a contract and they can be generally divided into those that have and those that do not have a signature. If a document bears a signature, the person who signed the document is bound, irrespective of whether he has read or understood the terms in the document.[916] The other requirement of incorporation is notice.[917] 'Notice' is found in all contracting methods but does not include incorporation by signature.[918] The notice must be realistic and it is needed in cases where the contract provisions are particularly onerous.[919] In web-based transactions, the notice and signature together with the implicit prerequisite that the terms are available are all required to counter technology-specific challenges.

5.3.1. Incorporated terms and conditions of internet websites

It is important to note that an indispensable condition for the lawful formation of a contract is that the acceptance must conform in every aspect with the offer and include the incorporation of the terms and conditions.[920] As such, if the offeree (vendor) amends or modify to the terms and conditions of the sale his 'acceptance' is, in actual fact, a new offer.[921] Therefore where an offer is sent using email, replete with all the pertinent terms and conditions, and is accepted by the offeree without any amendments to the terms and conditions, the validity of the contract is indisputable. From a legal point of view, it is immaterial whether or not the parties, in fact, read the contract terms and conditions. However legally, the other party must agree with the terms and conditions in order to prevent him from subsequently claiming that they are ambiguous or misleading.[922] A few methods can be used to inform users of the terms and

[916] *Parker v South Eastern Railway Co* (1877) 2 CPD 416; *McCutcheon v MacBrayne* [1964] 1 WLR 125, 134; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.
[917] Clarke (n 264) 72; Mohammed Hussain Mansour, *The Electronic Liability* (Al-Maa'rif Institution- Alexandria 2006) 17.
[918] Peden and Carter (n 265) 15; Woodrow Hartzog, 'Website Design As Contract' (2011) 60 American University Law Review 1635.
[919] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; *Balmain New Ferry* Co *Ltd v Robertson* (1906) 4 CLR 379; *Flood v Anchor Line* [1918] AC 837, 844; *Chapelton v Barry Urban District Council* [1940] 1 KB 532;
[920] Albahouti (n 109) 1377, Al-Kasani (n 195) volume 6, 537, and Jordan Civil Code (JCC), Article 99(1)
[921] JCC, Article 99(2)
[922] Glatt, (n 30) 34: Matus, W. (2001) 'Forming Binding Agreements on the Internet' http://www.tilj.com/content/ecomarticle09040101.htm > accessed 24 March 2018.

conditions of transactions carried out on websites. One is to hypertext a link to the terms and conditions in order to make them directly accessible from the website. An easier choice is to make it possible to gain access to the terms and conditions even in an offline environment. Another way is to display the terms and conditions on the web page and make sure that the customer scrolls through them and gives his acknowledgement of doing so by clicking a hypertext link to show his consent, prior to his moving forth to conclude the contract.[923] From the Iraqi legal perspective, the propriety, efficacy and adequacy of these methods remains insufficiently clear, as neither the ICC or the IESTA 2012 have examined this specific issue. To date, Islamic jurisprudence also does not have a direct ruling on the matter.

It is however beneficial to refer to the ruling made in the US case of *Ticketmaster Corp v Tickets.com*.[924] In the facts of this case, the plaintiff had listed the terms and conditions, via a hyperlink, using small print at the foot of its website. The court noted that users were not required to click on the button stating 'I agree' on it on the relevant website. Also, as the terms and conditions were arranged in such a manner that users had to scroll down the home page to search for, find and read them, it is likely that they would not read the small print. As such, simply putting the terms and conditions in this manner did not mean that a valid contract was created with anyone who used the website.[925] This means that if a website is not well designed, the customer will not be aware of the terms and conditions and as such he should not obligated by the terms and conditions. The US court decision is congruent with the basic rule on mutual consent that is needed for forming a valid contract under the principles of Islamic contract law. It is noted that in *Ticketmaster,* users were not required to express their consent, such as clicking on the 'I agree' button, and as such, under the terms and conditions of the website, users did not provide their consent. However, it is contended that the user, by continuing to place their order for goods or services, has impliedly given his consent to the website's terms and conditions. In spite of the fact that the contracting parties can validly give their consent by explicit or implied means, implied consent was not applicable in the above case because the terms and conditions may not have been accessible to the user or the user may not be aware of their existence.

In the conventional method of contracting using paper, the terms and conditions of the contract are normally printed on the flip side of the written contract or appended to the contract on a

[923] Smith (n 603) 456.
[924] *Ticketmaster Corp. v. Tickets.com*, *Inc.* 2000 L 525390 (CD Cal 2000)
[925] Ibid; Deveci, 'Consent in Online Contracts: Old Wines in New Bottles' (n 132) .

separate sheet of paper. But, in Internet transactions[926] concerns about the enforceability of standard terms integrated into transactions concluded on websites may arise in three different types of agreements,[927] namely shrink-wrap,[928] click-wrap,[929] and browse-wrap agreements.[930] Under the general rule of mutual consent, in order for the terms and conditions of the contract to be legally enforceable, they must be made known to the other party who then has to give his consent before the contract is concluded. That is to say, if the terms and conditions of the offer are not properly conveyed to the other party during the formation of the contract, then he may not be legally obliged to comply with them. Irrespective of the methods employed by the vendor on his website, the main questions about online contractual terms and conditions will likely be whether the clauses are legally formulated and are binding and enforceable.[931] It has been decided that the general terms and conditions of the contract must not only be available, the intended recipient must also be able to retrieve them.[932] Theoretically, the criterion on the enforceability of online terms and conditions has been presumed to be obvious. This is supported by Article 10 of the E-commerce Directive stating: 'Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.'[933] However, to what extent has this criterion been satisfied in browse-wrap or click-wrap websites?

It should be clarified that the terms and conditions of websites should be made easily accessible and visible on the website so as to enable the user to view them before he places his order.[934] It was stressed that mere reference to the general terms and conditions of the contract in a written agreement to a website hyperlink is not sufficient for enforcing them against the other

[926] Smith (n 603) 456.
[927] Mann and Siebeneuche (n 265) 984; Cordon(n 132) 435.
[928] Shrink-wrap agreements are particular to computer games and software developed and designed by software commercial entities where such license agreement terms are integrated with the package and are legally enforceable against the user once opening the software's packaging of the shrink-wrap agreement. See David L Hayes, 'The Enforceability of Shrink- wrap License Agreements On-Line and Off-Line' (Fenwick & West LLP, 1 March 1997) <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf> accessed 15 July 2017.
[929] For a definition of click-wrap agreements see Chapter 2 of this thesis.
[930] For a definition of browse-wrap agreements see Chapter 2 of this thesis
[931] The uncertainty of the enforceability of online terms and conditions is not a novel issue, see Samer Qudah, 'Website Terms and Conditions and UAE Law' (2003) 18 Arab Law Quarterly 209. However, it could be debated that the uncertainty of this issue is still controversial; Cordon (n 132) 435.
[932] See also Zia Akhtar, 'Distant Selling, E-Commerce and Company Liability' (2012) 33 European Competition Law Review 497
[933] E-commerce Directive, Article 10(3).
[934] *First Data v Attingo* (LJNBO7108, Rvdw 2011, 252).

party accepting the offer.[935] Simply positioning the terms and conditions well is not sufficient, because they should also be convenient to retrieve and download by the user before they place their order.[936] In theory, the terms and conditions found in click-wrap and browse-wrap agreements are binding, but it is difficult to predict the extent of their enforceability.[937] The criterion that the terms and conditions must be retrievable before an online purchase is made may differ from one website to another. Ultimately, the main objective of the courts will surely be to examine the degree to which the vendor has sought to notify the buyer and also whether he has done enough to get the buyer to take note of the website's terms and conditions, i.e. the user agreement.

Regarding B2C contracts, the enforceability of the website's terms and conditions should not take precedence over the fundamental consumer-friendly rules established by some international regulations.[938] In *Content Service Ltd v Bundesarbeitskammer*,[939] the Austrian court decided that the clause presented on the website through a hyperlink (browse-wrap agreement) that took away the consumer's right to withdraw from the contract was not enforceable even though the consumer had consented to the website's terms and conditions.[940] Content Service Ltd, an English online service company, offered its services to German consumers through its website. After placing an order, the consumer had to tick a small box to indicate that they accepted the online terms and conditions featured on the website, the user agreement, which were accessible through an attached hyperlink. After the contract was concluded, the user would be notified by the service provider that, in accordance with website's user agreement, to which he had given his consent, he had waived his right to withdraw from the contract. *Bundesarbeitskammer*, a German organization, brought a class action (on behalf of a group of consumers) against Content Service Ltd contending that the English company

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[935] Reinout Rinzema, 'The Netherlands: Dutch Supreme Court Rules on Referring to General Conditions Available on a Website' (2011) 27 Computer Law and Security Review 316.
[936] Akhtar (n 933) 497.
[937] Michael Swinson and Carolyn Wong, 'Online Contracting: "Wrapping" Up Terms of Use' (King & Wood, November 2011) <www.mallesons.com/publicationlerts/2011/Information-Technology-Update-November-2011/Pages/Online-contracting-wrapping-up-your-terms-of-use.aspx> accessed 12 July 2017.
[938] Chris Connolly, 'Hot Topics 70: Legal Issues in Plain Language - Cyber Law' (Sydney, NSW Legal Information Access Centre, 2009) 14 <www.legalanswers.sl.nsw.govau/hot_topics/pdf/cyberlaw_70.pdf> accessed 8 May 2014; Kariyawasam Gu (n 710) 42; Christine Riefa, 'To Be or Not to Be an Auctioneer?' Some Thoughts on the Legal Nature of Online 'eBay' Auctions and the Protection of Consumers' (2008) 31 Journal of Consumer Policy 167.
[939] Case C-49/11 *Content Service Ltd v Bundesarbeitskammer* [2012] CMLR 34;
[940] Belli Van Beal 'ECJ Rules that Information Provided via Website or Hyperlink Does Not Meet Requirements of Consumer Distance Contracts' (Mondaq, 6 August 2012) <www.mondaq.com/x/190226/Consumer+Law/Van+Bael+Bellis> accessed 12 July 2017; Cătălina Goaţa, 'Information Duties in the Internet Era: Case Note on Content Service Ltd v Bundesarbeitskammer' (2013) 21 European Review of Private Law 643;

had contravened the EU's rules on consumers' distance contracts. The said EU rules require the English company to bring the clause to the attention of their consumers by using a 'durable medium' before the conclusion of the contract.[941] After examining the case, the Austrian court said that it had not been able to fully ascertain whether the term 'durable medium' could be applied to the website's hyperlink. Interestingly, the inference from this ruling is that the online terms and conditions of the website are enforceable against the consumer as long as the method used to display the terms and conditions on the website fulfils the requirement of being a 'durable medium'.[942] The court opined that the use of a hyperlink 'browse-wrap' does not qualify as a durable medium and was therefore insufficient to notify the buyer to make him sufficiently aware of some of the important clauses inside the website's user agreement.

The researcher is of the view that the court's conclusion in *Content Service Ltd* may give the impression that there is a tendency to distinguish between browse-wrap and click-wrap agreements in the same manner as some of the US courts. Thus, courts might find that the online terms and conditions may be enforceable against the consumer if the vendor designs his website in such a way that the terms and conditions are sufficiently conveyed to the consumer. It is more likely that the 'durable medium' will satisfy the requirements of consumer protection laws if the website adopts the click-wrap agreement method. As a result, the terms and conditions can be viewed on computer screens and can be emailed to the buyer upon request. Alternatively, the consumer can print a hard copy by clicking on the 'print the terms and conditions' option provided by the vendor.

Pursuant to the Unfair Terms in Consumer Contracts Directive (Unfair Terms Directive),[943] it

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[941] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, Article 5(1), provides that: 'The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4(1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him'.

[942] The Consumer Rights Directive defines 'durable medium' as 'any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of information and which allows the unchanged reproduction of the information stored.'

[943] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29 (Unfair Terms Directive) Article 3 provides that: '1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer; 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre- formulated standard contract.' In favour of this argument see Hill (n 232) 201-205; see also Robert L Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts' (2006) 42 Houston Law Review 1041.

is contended that the enforceability of many conditions in online B2C contracts may be significantly narrower than in online B2B contracts. In *Spreadex Ltd v Cochrane*,[944] the English High Court declined to issue a summary judgment in favour of the plaintiff's claim against the consumer on the ground that the terms and conditions were not 'individually negotiated' and were thus not in accordance with the Unfair Terms in Consumer Contracts Regulations 1999. Justice David Donaldson highlighted in his judgment that it would not be possible for the consumer to have read and understood the whole 'Customer Agreement', when he signed up for a betting account on the website. The agreement ran to 49 pages. As explained earlier, the potential buyer was informed that four documents, including the Customer Agreement, could be viewed online by clicking on the 'view' button.[945] However, it is reckoned that most people would ignore this invitation and simply click on the 'Agree' button, despite the fact that there was a suggestion that they should read and understand the documents before agreeing to make the purchase. Even if the rare and exceptional buyer decided to read the documents, he would have to read the 49-page long Customer Agreement containing numerous closely printed and complex paragraphs. It would be close to miraculous if he read as far as Clause 10(3), let alone understood the purport or implication of its second sentence, and it would be rather illogical for the claimant to suppose that he had. It was a completely inadequate way to try to make the buyer liable for any prospective trades that had not been authorised by him and there was another factor that made the second sentence of Clause 10(3) into an unfair term.[946]

A leading case on the issue of enforceability of terms and conditions on websites is *ProCD Inc v Zeidenberg*[947] of 1996, where the court ruled that the terms and conditions in a software licence agreement that was divided between shrink-wrap and click-wrap agreements was enforceable against an individual buyer.[948] In actual fact, this case had nothing to do with click-wrap or browse-wrap terms and conditions of particular websites, but it has often been cited by scholars as the foremost case on the question of the enforceability of shrink-wrap and click-

[944] *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm).
[945] Frieden (n 906) .
[946] Bray (n 909) 1; See also the UK Office of Fair Trading, 'Empirical Study on Consumer Contracts' (n 909) .
[947] Jennett M Hill, 'The State of Copyright Protection for Electronic Database Beyond ProCD v Zeidenberg: Are Shrinkwrap Licenses a Viable Alternative for Database Protection?' (1998) 31 Indiana Law Review 143; Also see *ProCD Inc v Zeidenberg* 86 F3rd 1447 (7th Cir 1996); Cordon (n 132).
[948] Oakley (n 944) 1041; Svantesson (n 192) 324.

wrap agreements.[949] In 2001, *Specht v Netscape Communications Corporations*[950] was the first to consider the issue of enforceability of a website's terms and conditions. The court did not enforce the supposed click-wrap agreement against several consumers, instead it stressed that no click-wrap agreement was presented and actually only an ordinary browse-wrap agreement was made.[951] However, the approach to enforceability of the website's terms and conditions[952] indicates that when other courts examine the enforceability of the terms and conditions their focus was not predominantly based on the difference between the consumer and business.[953] When compared, the latter court ruling favoured the application of a more objective criterion when handling this kind of issue.[954] That is to say, the court will consider whether the presentation of the terms and conditions on the website is conspicuous enough or not, as well as how it catches the attention of the visitor to the website before he uses it or carries out a transaction.[955] It would seem that the chances of the courts enforcing online terms and conditions are greater in click-wrap agreements than browse-wrap agreements.[956] For example, in *Scherillo v Dun and Bradstreet*,[957] the court ruled that the website's click-wrap agreement was enforceable against the buyer, as his clicking on the 'I agree' icon was sufficient to show his consent to the terms and conditions of the agreement irrespective of whether or not he read

[949] Amelia Boss H, 'Electronic Contracting: Legal Problem or Legal Solution?' in *Harmonized Development of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs in Trade and Investment* (United Nations - Economic and Social Commission for Asia and the Pacific 2004).

[950] Ruth Orpwood, 'Electronic Contracts: Where We've Come From, Where We Are, and Where We Should Be Going' (2008) 1 International In-house Counsel Journal 455; Mann and Siebeneuche (n 265) 984; *Specht v Netscape Communications Corporation* 22 Ill306 F3d 17

[951] Manwaring (n 894) 1.

[952] See generally Juliet M Moringiello and William L Reynolds, 'Survey of the Law of Cyberspace: Electronic Contracting Cases (2004-2010)' <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 21 June 2017.

[953] However, some states, such as California, have been keener to maintain higher consumer protection policies, especially when dealing with the enforceability of choice of court, arbitration, or law clauses in online consumer contracts. Moringiello and Reynolds, 'From Lord Coke to Internet Privacy…' (n 839) 452.

[954] See Paul J Morrow, 'Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Click-Wrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight' (2011) 11 Pittsburg Journal of Technology Law and Policy 1.

[955] See Nishanth V Chari, 'Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study' (2010) 85 New York University Law Review 101. However, courts in some states are keener to consider the protection of consumers against enforceability of the non-negotiable terms and conditions, especially in browse-wrap agreements.

[956] For example, in *Defontes v Dell Computers Corporation* No Civ A PC 03-2636, 2004 WL 253560 (RI 6 Jan 2004), the Rhode Island Supreme Court did not impose a browse-wrap agreement on consumers where such terms and conditions were presented through a hyperlink, emphasising that the user agreement could not compel the computers buyers over Dell's website due to the fact that such a hyperlink was 'unnoticeably situated at the underneath of the website'. See also Moringiello and Reynolds, 'Survey of the Law of Cyberspace: Internet Contracting Cases 2004 – 2005' (n 953).

[957] *Scherillo v Dun & Bradstreet* 684 F Supp 2d 313 (EDNY 2010); also see Jeffrey M Jensen, 'Personal Jurisdiction in Federal Courts over International E-Commerce Cases' (2007) 40 Loyola of Los Angeles Law Review 1507.

them all.[958] However, in *Hines v Overstock.com Inc*[959] the same court had a different opinion of the enforceability of an arbitration clause against a buyer in a website's browse-wrap agreement. The court drew attention to the website operator's failure to sufficiently draw the customer's attention to the terms and conditions on the website prior to her placing an order. It is therefore not surprising to see that other courts have all but applied the same test in disputes between businesses in online B2B contracts.[960]

It may be difficult, under the Iraqi laws, to declare whether a website's terms and conditions are enforceable, because the IESTA 2012 merely ascertains the legal validity of electronic documents and contracts. There are no provisions for the enforceability of the contracting terms and conditions on the websites.[961] There are also no provisions in Iraqi law that prohibit such enforcement. The researcher is of the opinion that the enforceability of terms and conditions found on websites under Iraqi law will be primarily based on procedural rather than substantive law. However, the Iraqi civil law system does not provide Iraqi judges with the discretion to interpret the law in the same way as their UK counterparts in cases that involve similar issues. For that reason, the researcher contends that the IESTA 2012 should have dealt with this issue by including relevant criteria for the courts to apply and interpret accordingly. It might be possible for the Iraqi legislature to insert a similar provision in the IESTA 2012 to that can be found in the European E-commerce Directive as regards enforceability of terms and conditions.

Other than the issue of the enforceability of websites' click-wrap and browse-wrap agreements when analysing website user agreements, another point of interest relates to which terms and conditions should people agree with when they use different websites to sell or buy goods, or become involved in activities organised by the websites. Should they agree with the terms and conditions for using or accessing the website (i.e. the user agreement)? Alternatively, should

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[958] A fascinating analogy created by The New York City District Court between a click-wrap agreement on a website and an old-fashioned paper contract by asserting that: '[A] party who checks the package assenting to the purchase terms and conditions on a website without scrolling down to read all of the terms is in a similar point as that who goes to the final page of a contract and agrees and signs it without reading the conditions namely ... the clause is still effective'; Moringiello and Reynolds 'Survey of the Law of Cyberspace (n 953).

[959] District Court of New York City in *Hines v Overstock.com Inc* 668 F Supp 2d 362 (EDNY 2009).

[960] For example, see *PDC Laboratories, Inc v Hach Co* No 09-1110, 2009 US Dist LEXIS 75378 (CD III Aug 25, 2009); *Appliance Zone, LLC v NextTag, Inc* Case 4:09-cv-00089-SEB-WGH, 2009 US Dist LEXIS 120049 (SD Ind, 22 Dec 2009).

[961] IESTA 2012, Article 13(1) states 'Any agreement by electronic communication or by exchange of electronic documents, shall be equivalent to the paper contract if the following requirements have been met: (a) the message of information should be storable on the information system and can be retrieved at any time. (b) The message of information should be possible to be stored exactly in the same form on the date of forming, sending, and receipting it. (c) The message of information should include a definite indication of the parties who sent and received it and the date and time of dispatch and receipt'.

they agree with the online contract's terms and conditions for the transactions they sought to conduct on such websites?

In *Ryanair Ltd v Billigfluege.de Gmbh*,[962] the plaintiff sued the German website operator for the breach of the plaintiff's website terms and conditions by displaying the said information on its website. The defendant contended that there was no binding agreement between them and it did not breach any contract, because the said information was freely available to all the website's users.[963] The court ruled that the terms and conditions of the website were available and could be accessed through a hyperlink found on the website and as such, the defendant should have read them prior to using the website. Consequently, the defendant's contention that there was no contract between them was not accepted by the court.[964] Similarly, in the English case of *Midasplayer.com v Watkins*,[965] the High Court confirmed that the user of a website should be obligated by its terms and conditions of use even though the user is not a registered member of the website.[966] The court granted a summary judgment in favour of the claimant for the defendant's breach of contract. The claimant, who runs an online skill game, sought a summary judgment against the defendant, a designer of cheat software that interacts like a human player and helps the software user to win and solve puzzles quicker than a human brain when competing with other users of the claimant's online game.[967] The claimant contended that the designing and selling of the cheat software violated Clause 9 of its website user agreement. This prohibits the use or deployment of any technique other than human skills in the games or competitions organised by the website. During the examination of the facts submitted by the claimant to the court, the court could not find any evidence that the defendant

[962] *Ryanair Ltd v Billigfluege.de Gmbh* [2010] IEHC 47.
[963] Ibid.
[964] Orpwood (n 951) citing Mills (n 193) 5; Anie Matthews, 'Terms and Conditions May Protect Websites from Infringing Screen Scapers' (LK Shields, March 2010) <www.lkshields.ie/publications/terms-and-conditions-may-protect-websites-from- infringing-screen-scrapers> accessed 14 August 2017. See also the summary report of the European e-Business Legal Conference, 'E-Business without Frontiers: The Legal Challenges Ahead (Dublin, 27-28 April 2004) <http://ec.europa.eu/enterprise/sectors/ict/files/legal_barriers_conf_sum_rep.pdf> accessed 13 August 2017.
[965] *Midasplayer.com Limited v John Watkins* [2006] EWHC 1551 (Ch). Judge Norris QC pointed out in para 22 that: 'Any individual pursuing to access to the King.com website is only allowed to access to the footnote that they detect the terms and conditions despite of being not registered participants yet'. This verdict was plainly indicated also in the website's user agreement, which stated that: 'By registering for the King.com Service, you approve and agree to the terms and conditions, and you re-affirm that agreement each time you visit it. Those customers who did not register to be a Member ... equally confirm that they are abide by this Agreement every time they enter to the King.com Service.'
[966] *Ibid*.
[967] Berin Michael Szoka and Adam Thierer, 'COPPA 2.0: The New Battle Over Privacy, Age Verification, Online Safety & Free Speech' (Progress & Freedom Foundation Progress on Point Paper No 16.11, 21 May 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408204> accessed 12 March 2018.

could use to challenge the claimant's pleas, because such a claim has been well-established in law and there was no point in continuing with the proceedings.[968]

From the aforementioned discussion we can reach a simple conclusion. That is, a website user will be bound basically by its reasonable terms and conditions and it is assumed that a contract is concluded between the website owner and the user the moment the latter visits the website and derives benefits from the information that is provided.[969] Ordinary individual consumers should take note of this point, think twice, and carefully read through the website's terms and conditions, before copying any data, photographic material or other exclusive information from them. A majority of such terms and conditions were drafted by lawyers.[970] As such, they might be deemed to be legally binding agreements although no transaction with value was concluded on the website. Consequently, to rule out all the uncertainties surrounding whether or not the user is aware of the website's terms and conditions and whether he agrees with them, the owner of the website should provide a means for the user to express his consent such as clicking on the 'I agree' button before he can proceed further. As such, a website's design should be such that the terms and conditions are sufficiently brought to the attention of users. Furthermore, the terms and conditions should be expressly accepted by the user before the formation of the contract, as this will avoid situations whereby the terms and conditions are not valid based on the fact that the website user did not give his consent.[971]

5.4. The time of concluding electronic contracts: An analysis

For the purposes of example, consider the circumstances wherein a resident in Baghdad (Iraq) sends his offer via email to an offeree residing in Basra (Iraq) and the offeree conveys his acceptance of the offer back to the offeror using email. In this case, it is hard to establish the precise point where the contract is said to have been formed. Is it when the offeree decides to accept the offer or is it when the acceptance was conveyed to the offeror? Alternatively, is it when the acceptance reaches the offeror's email inbox, irrespective of whether he is aware of

[968] In paragraph 20, the Court stressed that 'such three claims are well established in law and are supported by evidence that Mr Watkins has not debated. I do not count any reasonable prospect in a case afforded the chance of a trial for Mr Watkins to challenge such conclusions'.
[969] See Nicole Perlroth, 'Verifying Ages Online is a Daunting Task, Even for Experts' (*New York Times*, 17 June 2012) <www.nytimes.com/2012/06/18/technology/verifying-ages-online-is-a-daunting-task-even-for-experts.html?pagewanted=all&_r=0> accessed 12 March 2018.
[970] Undoubtedly, the conclusion of this electronic contract must depend on the website's substantive and procedural clarity and visibility of the terms and condition whether the browse-wrap or click-wrap means was used by the website's owner to notifying the user before commencing to use that website. See Chris Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010) 73 The Modern Law Review 903.
[971] For further information about the issue of click-wrap agreements, see Rambarran and Hunt (n 561) 173-203.

it or not? Could it be at the point when the offeror knows about the acceptance?

Ascertaining the time at which a contract is taken to have been concluded is essential for determining whether or not the contracting parties can retract their communication prior to the contract becoming legally enforceable. This is to say that if a contract is taken to have been concluded as soon as the acceptance is expressed, the offer cannot be withdrawn once the offer has been accepted. However, if the contract is only deemed to have been concluded when the offeror is informed of the acceptance, it is legally possible to withdraw the offer as long as the offeror has not received the acceptance. Similarly, the offeree can withdraw his acceptance if the offeror has not been informed of the acceptance.[972] It is important to state here that in the previously mentioned scenario, it is more probable that the notice of any withdrawal of an offer or its acceptance will come to the attention of the recipient before the offer or acceptance itself in spite of the fact they were sent and received earlier. To illustrate this point, take the example of an Iraqi resident sending his offer by email to a Scottish resident and it was received at 10:00 a.m. A few hours later, the Iraqi offeror changes his mind and sends a second email to the latter to withdraw his offer and it arrives at the latter's inbox at 1:00 p.m. If the Scottish resident checks his inbox once a day at 4:00 p.m., he will see the withdrawal of offer before the offer in spite of the fact that the offer was sent and received earlier. The same is also likely to happen when a revocation of acceptance is sent by email, i.e., the revocation of acceptance although it was emailed after the acceptance may come to the knowledge of the offeror before the acceptance.[973]

Consequently, it is important to establish the time a contract becomes legally enforceable so as to avoid potential disputes. In face-to-face transactions, this is not a problem. A contract is concluded when the acceptance is known by the offeror and this normally occurs the moment the acceptance is expressed.[974] Such a legal approach is normally applied in contracts that are formed using direct methods of communication, such as the telephone, where there is no time

[972] More legal consequences rising from designating the time of a contract conclusion, e.g. setting the time to transfer the purchased item's ownership to the new owner 'the buyer' and accordingly in the event the goods rapidly lose their value, determining who shall be legitimately liable for such loss, either the purchaser or the vendor. For additional details see Al-Dobaiyyan (n 281) 106-107. Al-Oboodi (n 19) 173-176.

[973] In this regard, United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, Article 22 states that an acceptance may be withdrawn if the withdrawal reaches the offeror before, or at the same time as, the acceptance would have become effective. Furthermore, since the whole issue here is regarding the existence of proof or evidence, and since email seems to be similar to telex and telegraph in terms of applying the postal rule, it is then logical that the mechanism of revoking offer or acceptance is also the same. See for a leading case of *Weld & Co. v Victory Mfg* that proves such a revocation in the time of concluding telegraph and telex transactions in page 209-210.

[974] Shalabi (n 282) 421.

delay in when the contracting parties convey their offer and acceptance to each other. If the parties use a telephone or other similar device having direct methods of communication to conclude a contract, the contract is taken as comparable to a face-to-face contract. It is therefore legally binding the moment the offeror is fully aware of the acceptance.[975] However, it is very difficult to determine when a contract is said to be concluded if the contract is conducted *inter absentes*. In such contracts there is a time delay between the sending of the offer and its receipt as well as the sending of the acceptance and its receipt between the contracting parties. Therefore, the precise moment the contract is deemed to be binding is disputable. There are four main legal theories jurists use to determine when a contract is concluded between absent parties, namely the declaration, mailbox, reception and information.[976]

5.4.1. The inclination of electronic acceptances to be non-instantaneous

Even if one is receptive to the premise that 'substantially instantaneous' and 'two-way communications' can only become effective once received, electronic acceptance will still be governed by the mailbox rule,[977] this is because electronic communication is not in actual fact an instantaneous communication means.[978] To be more precise, when a message is sent using the Internet, the message is split into smaller 'packets' of information.[979] The packets are then sent through different routes before arriving at the final destination.[980] This process is different from that involved in a telephone call, where the voice travels instantaneously on a single strand

[975] With regard to that, it is worth mentioning the judgement in the case of *Entores Ltd v Miles Far East Corporation*, wherein Denning LJ stated that 'in case where two people conclude a transaction by telephone; Supposing, for example, that I am offering to somebody by telephone and, while he is replying, the telephone's line goes dead and thus I hear nothing regarding to acceptance. No contract concluded at that moment ... If he still wishes to contract; hence, he must again get through to make sure that I hear the wording of acceptance. Assume following that the line still working, but yet it is so unclear that I cannot catch his words, and therefore I ask him to reiterate it. He nonetheless repeats it and I hear his words of acceptance. Here, the contact is concluded, not at the first try when I did not hear, but only the second attempt when I did hear'.

[976] It is worth noting that there are other legal theories; such as the theory of formulation which deems a contract is to be legally effective when the offeree starts to formulate its communication for acceptance. Thus, it is usually used in correlation with the postal rule theory to stop the offeror from withdrawing the offer once the offeree is starting to respond to that communication. See Eiselen (n 283) 24, al-Oboodi (n 19)164-166.

[977] Nimmer, 'Electronic Contracts' (n 422) 37.

[978] *Linn v Employers Reinsurance Corp.,* 139 A.2d 638, 640 (Pa. 1958) (holding that even if a telephone communication is instantaneous and two-way, acceptance is still effective when *sent* over the phone wires).

[979] Andy Harris, 'Dealing with Online Contracts and Electronic Signatures' (MBM Commercial, April 2012) http://mbmcommercial.co.uk/news/article/dealing-with-online-contracts-and-electronic-signatures.html accessed 9 July 2017; David D Tyler, 'Personal Jurisdiction Via E-Mail: Has Personal Jurisdiction Changed in the Wake of CompuServe, Inc. v. Patterson' (1998) 51 Arkansas Law Review 429, 450 noting that 'unlike the telephone, e-mail is not instantaneous').

[980] David Hricik, 'Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-Mail' (1998) 11 Georgia Journal of Legal Ethics 459, 476.

of wire.[981] On the Internet, each packet of information is just one part of the message that contains sending and receiving destinations as well as the information needed to reconstruct it when it arrives at the intended destination.[982] The different packets of information making up one message may use different routes before reaching the final destination.[983] For instance, one packet of information may travel through a wire and pass through different continents and then further countless miles via a telephone line, whilst another packet may travel through a wire and then via satellite. Ultimately, both packets will find their way to their final destination in New York.[984] These electronic packets are not conveyed instantaneously and they may be stored intermittently at different router stations along the way.[985] Sometimes an electronic message may be delayed and only arrive at its destination several hours later.[986] Consequently, acceptances sent electronically are similar to acceptances sent by regular mail and are dissimilar to other types of communication like the telephone where communication is 'substantially instantaneous' and 'two-way'.[987] Since electronic communication is in effect fast mail but not instantaneous mail, the mailbox rule should apply.[988]

When the offer and acceptance are sent using regular mail, the date the contract is concluded is either the date the acceptance is posted or received. If the offeror is bound when the acceptance is posted, he may shift his position without knowing about the acceptance, even though he has waited for a reasonable period of time before acting, and he may continue to be ignorant to the fact that he is bound by a contract due to a delay in the delivery of the letter of acceptance or the letter may be lost or have been destroyed in transit. Therefore in some cases, this rule may cause the offeror inconvenience and to suffer a loss. However, if the rule that the acceptance letter is not operative until it has been received is adopted, then it is the offeree who is exposed to risk of experiencing inconvenience or loss. One of the contracting parties has to bear such a risk. There is a need to adopt a definitive and uniform rule to overcome this conundrum. Either rule can be selected, but one must be selected. Even though the result is that

[981] *Ibid;* OA Orifowomo and JO Agbana, 'Manual Signature and Electronic Signature: Significance of Forging a Functional Equivalence in Electronic Transactions' (2013) 24 International Company and Commercial Law Review 357.
[982] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163.
[983] E S Perdue, 'Creating Contracts Online' in TJ Smedinghoff (ed), *Online Law, the SPA's Legal Guide to doing business on the Internet* (Addison-Wesley 1996) 80.
[984] Ibid.
[985] Gloag (n 390) 8.
[986] Smith (n 40) 828; Hricik (n 981) 476.
[987] McBryde (n 390) no 1-10.
[988] It was believed quite clearly as regards the application of the postal rule to the regular post mail that 'the more optimal explanation of the current rule seems to be that, in such cases, mailing the letter has been long an expected and customary way to accepting the offer....'.

one of the parties will be put at risk, the matter must not be left in doubt.[989] However, some websites operate passively and the function of these websites is that they replicate a shop window in a traditional business. Such websites usually display the company name and provide information about its products and services as well as how to contact the company for further details using non-Internet methods.[990] These websites do not permit the formation of online contracts. Consequently, the establishment of when a contract is actually formed will be based on the method of communication used. If, after accessing the website, the client contacts the company on the telephone and offers to buy some of the company's products, and the company accepts his offer, the contract will be deemed to have been concluded when the client hears the acceptance.[991] On the other hand, there are websites that have even greater interactivity, including the choice of completing transactions entirely online.[992] If, in this example, the display of the product information is taken to be an offer and the offer is accepted by a website visitor and he conveys his acceptance online using the same website, in this case the communication between the buyer and website owner will most probably be instantaneous, similarly to using a telephone.[993] The only difference will be that the contracting parties using website transactions are not connected to each other, but the 'conversation' is actually a simultaneous connection between two computers.[994] This is an important distinction; orders placed using websites may be dealt with by programmed software free from human participation. In this example, the receipt-with-knowledge theory that needs the offeror to know about the acceptance appears impractical for application under these circumstances.[995]

In view of these varied communication methods, society is at a crossroads as to what legal rule should be used for the acceptance of contracts that are undertaken electronically. Electronic messages are rapidly becoming the normal and predictable method of accepting many kinds of offers to contract.[996] As a result, there is a need, for the theoretical and practical reasons just deliberated, to evaluate the rules now, in order to select the most compatible rule. However, whether the mailbox or receipt rule is implemented is actually immaterial. Of much greater

[989] UCITA 1999 Article 203(4) (2001).
[990] John Rothchild 'Protecting the Digital Consumer: Limits of Cyberspace Utopianism' (1999) 74 Indiana Law Journal 839, 900.
[991] Dickens (n 849) 379.
[992] Richard Jones and Dalal Tahri, 'Online Selling and Contracting: An Overview of EU Rules' (2011) 27 Computer Law & Security Review 402 <http://dx.doi.org/10.1016/j.clsr.2011.05.001> accessed 15 March 2018.
[993] Ulrich Kamecke and Körber Törsten, 'Technological Neutrality in the EC Regulatory for Electronic Commerce Communications: A Good Principle Widely Misunderstood' [2008] European Competition Law Review 330.
[994] Gringras (n 58) 2.
[995] Eiselen (n 283) 24.
[996] Arthur L Corbin, *Contracts* (Volume 1, 1st edn, Lexis Nexis1993) para 78.

importance is the new game that society has created, namely 'contracting in cyberspace' and this will be examined in the next section.

5.4.2. The legal theories addressing when a contract inter absentees is formed

Under the declaration theory, a contract between two absent parties is concluded at the moment the expression of acceptance of the offer is made and it is irrespective of whether the acceptance is made known to the offeror or not.[997] This theory is built on the perception that a contract is the exchange of consent between the parties so as to enter into a binding deal. Therefore, when the offeree expresses his acceptance of the offer he received, the exchange of consent between the parties is deemed to have been reached and the contract becomes legally enforceable. It is asserted that the declaration theory is appropriate for commercial activities since these activities need prompt completion of transactions.[998] Consequently, the offeree can make sure that the contract is legally concluded and can use the purchased item as soon as the acceptance is issued and without any unreasonable delay.[999] However, declaration theory has been denounced for putting the offeree in a more advantageous position, because the contract is deemed to have been concluded without the offeror's knowledge. In actual fact, only the offeree can determine that the acceptance has been made, yet the contract is legally binding and moreover he can repudiate the declaration of acceptance if he elects to do so.[1000] This can give rise to uncertainty and confusion for the offeror because only the offeree has the power to ratify his acceptance or deny it if he wishes to change his mind. The declaration rule was probably suitable and relevant a long time ago, as it hastens the formation of contracts, however its continuing relevance today is doubtful. Formerly, communications between contracting parties would have taken a long time, but presently modern communication methods enable communication between distant contracting parties to be considerably shorter.[1001]

Unlike the declaration rule, the receipt rule declares that a contract is not concluded until the offeror actually receives the acceptance or it is made available to him, and it does not matter

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[997] Alsanhori, *Masadir al-Haqq Fi Alfiqh Alislami* (n 300) 56.
[998] This is the principle followed by Islamic law in determining the time of contract formation inter *absentes.* See Abdulrahman Alzaagy, 'The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective' (2012) 6(2) Cyber Orient 3; Chile too is moving towards this mechanism.
[999] Al-Oboodi (n 19) 157.
[1000] Sulaiman Marqass *Nathariyyat al-Aqd* (Dar al-Nashr lel-Jame'at al-Masriyyah 1956) 133.
[1001] This effect is mitigated by the rules on revocability of the offer and bona fide in pre-contractual negotiation, see Franco Ferrari 'A Comparative Overview of Offer and Acceptance Inter Absentes' (1992) 10 Boston University International Law Journal 80.

whether he reads the content of the acceptance or not.[1002] When the offeror is in receipt of the acceptance, it can be inferred that he has knowledge of its content.[1003] The receipt theory is apparently fair to both parties. Any delays, for a reasonable period of time, result in a binding conclusion of the contract from the time the acceptance is received, irrespective of whether or not the offeror is aware of it, because eventually, he is responsible for the timely management of letters received in his mailbox.[1004] Meanwhile, the theory provides that the contract cannot be lawfully concluded if the acceptance becomes lost, because the offeror does not have any control over the acceptance.[1005] Receipt theory works on the basis of dividing the risk of conveying the acceptance equally between the contracting parties so that the transmission of acceptance only becomes effective when the acceptance reaches his mailbox, unlike the postal rule, where the offeror assumes the risk regarding the transmission of acceptance. [1006]

In the receipt-with-knowledge rule, the acceptance becomes effective the moment it is noticed by the offeror and it is at this moment that a contract is formed. Analogously to face-to-face transactions, this theory views acceptance as an articulation of the offeree's consent, with no legal effect until the offeror is made aware of it. It is from this point onwards that there is a communication of the parties' consent and the contract is said to have been lawfully formed.[1007] Consequently, the offeror, under the receipt-with-knowledge theory, can withdraw the offer as long as he is not aware that the other party has accepted his offer.[1008] An important point to take note of here is that, unlike the declaration theory, under the receipt-with-knowledge theory the offeree will have difficulty determining when the offeror has become aware of the acceptance.[1009] The implementation of this theory may also result in excessive delays in the conclusion of transactions.[1010]

[1002] From some European scholars' perspectives, such as Italian, Spanish, Belgian etc., four theories have been perceived. See Perales Viscasillas, 'Contract Conclusion Under CISG' (1997) 16 Journal of Law and Commerce 319-21. In addition, there are two concepts of receipt theory: one is only to reach the addressee's hand or mailbox, the other is that the addressee must have taken cognizant notice of acceptance as well. See Henk Snijders, 'The moment of effectiveness of e-mail notices', in Henk Snijders and Stephen Weatherill (eds) *E-commerce Law: National and Transnational Topics and Perspectives* (Kluwer 2003) at 79-80.
[1003] Abdulrazzaq Al-Sanhori, *Masader al-Iltizam* (n 89) 242.
[1004] See Perales (n 1003) 321. See also Konrad Zweigert, and Hein Kötz and Tony Weir (translator), *An Introduction to Comparative Law* (3rd edn Oxford University Press 1998) 316.
[1005] Al-Oboodi (n 19) 160.
[1006] Ibid.
[1007] Alsanhori, *Al-Waseet Fi Sharh Alqanon Almadani* (n 89) 242.
[1008] It was written: 'We cannot accept that a person can become intentionally contractually bound without being aware of the existence of the contract'. This principle applies in Italy, Spain and Holland. See Ferrari (n 1002) 80.
[1009] Marqass (n 1001) 133.
[1010] Ferrari (n 1002) 89.

The ICC has adopted the receipt-with-knowledge theory in Article 87, which states that:

(1) unless there is an explicit or implicit agreement or legal text providing otherwise, contract inter absentees is concluded in the place and at the time the offeror becomes aware of the acceptance; (2) it is imposed that the offeror becomes aware of the acceptance where and when he receives it.[1011]

From this text, it becomes clear that the ICC considers the place of the conclusion of the contract to be determined by the time of its conclusion. It can also be observed that it adopts the 'receipt-with-knowledge of the acceptance' theory as a basic rule and meanwhile it adopts the receipt rule as an exception.[1012] Therefore according to the basic rule, contracting by correspondence should be considered to have been completed at the time that the offeror becomes aware of the acceptance.[1013] Additionally, the ICC considers the arrival of the acceptance to the offeror as creating a presumption of his knowledge of its content, even if he truly does not. However, what can be observed from Paragraph 2 of this Article is that it has used the word *'mafrodan'* or 'مفروضا' instead of '*muftaradan'* or 'مفترضا' whereby the former means 'imposed' while the latter means 'assumed'. It is obvious that these two words are almost pronounced the same in Arabic, but their meaning is very different. In other words, the first word means imposed or mandatory, which makes it inaccurate and contradictory as regards the rebuttable presumption mentioned in the second paragraph that can be proven otherwise, however, the second word 'assumed' indicates the meaning that the presumption is rebuttable.[1014] It should be noted that the ECC Article 97 has avoided the ICC deficiency.[1015] Additionally, the ECC has, unlike the ICC, established a rule clarifying when the impacts of the contractual expressions 'offer and acceptance' occur, by stating that the expression of the will does not produce its effect except when it meets the knowledge of whom it was addressed

[1011] Article 87 of the ICC.
[1012] The JCC Article 101 states that 'if the parties, at the time of contracting, were not in one meeting, the contracting is concluded in the place and at the time the acceptance has been issued, unless an agreement or legal text states otherwise'. Some of the jurists view that the JCC adopts the theory of declaration. Therefore, the Jordanian legislator adopts the declaration theory whether the acceptance was oral or articulation. It also adopts the theory of issuance if the acceptance was in writing because in the two situations the issuance of the acceptance occurs and the contract is concluded. See Al-Far (n 17) 48.
[1013] This was the view of the Iraqi Cassation Court in its Decision issued in 21/9/1957, (1958) 1/2 Judiciary Journal (Iraq)101.
[1014] Alhakeem, *et al* (n 15) 93.
[1015] This Article states that '(1) unless there is an explicit or implicit agreement or legal texts providing otherwise, contract *inter absentes* is concluded in the place and at the time the offeror becomes aware of the acceptance; (2) it is assumed that the offeror becomes aware of the acceptance where and when he receives it'. However, it is important to illustrate that these texts are interpretive and that this issue is not a matter of public order, this means that the contractors are free to agree to the contrary; e.g. they can agree that the contract is concluded by sending the letter or at the time of receiving it. However, this view does not solve the problem, because it is important to identify the moment that the acceptance conjugates with the offer. Thus, one of the above mentioned theories has to be given preference.

to.[1016] However, both laws have adhered to the receipt-with-knowledge theory and thus it is necessary to answer the following two questions: Is the offeror's knowledge of the acceptance one of the components for satisfaction of the contract? Is such knowledge a necessary issue for the enforcement of the contract?

The researcher believes that although the offeror's awareness of acceptance has benefits it is not one of the components of the contract.[1017] This may be illustrated in the meaning of 'contract', as it basically means matching the offer with acceptance, and the offeror's awareness of that acceptance is an element external to the meaning of agreement.[1018] It can also be deduced that knowledge is not an element constituting agreement since these laws gave the contractors the freedom to agree on determining the time and place of the conclusion of the contract. If such knowledge were to be an element of the contract, it would have not been possible to surpass this element.[1019]

Under Sharia, the matter of when a contract is deemed to be lawfully formed when contracting *inter-absentes* is a subject of discussion. One of the legal opinions is that a contract is formed when the offeree states his acceptance.[1020] Several legal texts support this approach by implying that Islamic law abides by the declaration theory in the determination of the moment a contract *inter-absentes* is formed.[1021] One of the legal texts states that if a seller sends an offer to sell an article through a messenger to a prospective purchaser who is not at the 'meeting place', and when the offer is received by the purchaser and he unequivocally accepts the offer, it is at that point in time the contract is deemed to have been lawfully formed.[1022] This shows that the contract is considered to have been concluded the moment the offeree states that he accepts the

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[1016] By virtue of ECC, Article 91 which states that 'the contractual expression produces its effect at the time it touches the knowledge of whom it is sent to, and the arrival of an expression is considered as presumption of that knowledge unless evidence show the opposite'.

[1017] It is can be said that there is no doubt that the awareness of the offeror about the acceptance has considerable importance for the following reasons. First, it would be illogical that the offeror abides by the contract without his knowledge of the acceptance. Second, it is important for the determination of the moment that the acceptor cannot retrieve from the contract. Third, knowledge of the acceptance has the benefit of avoiding the offeror from bearing the risks of the letter of agreement, in case it was delayed or lost, which, as has been seen above, one of the flaws of the theory of forwarding the acceptance Pak (n 86) 69-71.

[1018] Sewar (n 359) 123; Alhakeem *et al* (n 15) 52. Abdul-Azeez Al-Suhail, *Provisions of Iraqi Judiciary* (Part 1, Officiate Publishers-Dar Al-Tadamun for Publishing and Commerce Baghdad 1962) 100.

[1019] See the second paragraphs of both Articles 87 and 97 of the ICC and ECC respectively.

[1020] Al-Qarehdagy, *Mabda' al-Ridha fi al-Uquud* (n 202) 1101. It is worth mentioning the Ruling of Islamic Fiqh Assembly 1990 in which it is provided that when a contract is formed between absentee parties who are not together in one 'meeting place' and they cannot see nor hear each other and their means of communication is a letter or messenger, and this is compatible with telex, telegraph, fax, and computer screen, in this case the contract is considered to become validly effective at the time the offeree declares his acceptance. See Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

[1021] See Ibn-Abdeen (n 101) 26; al-Kasani (n 195) 138, and Al-Nawawi, *al-Majmu* (n 109) 197.

[1022] Al-Bahouti (n 109) 148.

offer. It has been held that the purpose of the legal texts provided by the early Islamic scholars was not for the determination of when exactly a contract was concluded, instead such texts were meant to clarify the lawful formation of a contract between parties who are not present together at the same 'meeting place'.[1023] Consequently, the general rule should be applied, which according to Islamic law means that a contract between face-to-face parties is formed as soon as the offeror is aware of the acceptance. Similarly, a contract should be lawfully formed the moment the acceptance is brought to the notice of the offeror when contracting *inter-absentes*.[1024] On the other hand, according to the mailbox theory or postal rule, it is insufficient for the contract to be formed by a mere declaration of the acceptance of an offer. In fact, the acceptance is only legally effective and can form a lawfully binding contract when the acceptance is posted to the offeror.[1025] The postal rule originated from the common law jurisdiction and is normally used in delayed forms of communication, such as the postal service.[1026] In order to provide a better understanding of the postal rule, it will be examined in a different section.

5.4.3. The time of concluding the contract via e-mail communication

It is worth discussing which of the aforementioned theories will provide a suitable approach to determine when a contract is lawfully formed in cases where the parties use a non-instantaneous method of communication such as email.[1027] As previously pointed out, all the theories have their own advantages and disadvantages when applied in *inter-absentes* contracts.[1028] The receipt-with-knowledge and declaration theories do not seem to offer an appropriate framework for contracting using email because the former theory makes it hard to establish when a message is made known to the offeror and the latter theory presents uncertainties in the determination of when an acceptance is declared.[1029] Similarly, if the postal rule is applied in email communication it will also give rise to problems. Although email, like the conventional postal service, is considered to be non-instantaneous, it has a number of key

[1023] Al-Sanhoori, *Masader al-Haq fi al-Figh al-Eslamy* (n 300)) 54-56.
[1024] The Arabic legal system follows different theories in addressing the issue of when a contract *inter absentes* is formed; Iraq, Kuwait and Egypt have chosen to follow the receipt-with-knowledge theory to apply on contracts, whereas, other countries such Syria, Jordan and Tunisia have adopted the declaration theory to set the time at which a contract is concluded. Al-Dobaiyyan (n 281) 108; Al-Ebraheem (n 321) 89.
[1025] Jones (n 900) 303.
[1026] Eiselen (n 283) 24; Larry Cunningham, 'A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law' (2006) 10 Journal of Juvenile Law and Policy 275.
[1027] Imtinan Ahmad, Hong Sik Kim, Laurance Leff and Daniel Greenwood, 'XML for Click-through Contracts' (2009) 17 International Journal of Law and Information Technology 206.
[1028] See also al-Oboodi (n 19) 166.
[1029] For further details see, Donmez (n 284) cited after Al-Dobaiyyan (n 281) 109-124.

differences. When an email is sent, before it arrives from the sender[1030] to the intended recipient's email's inbox,[1031] it is converted into digital format and divided into many separate packets. Unlike the post office representative, email users may not know that the service providers participate in the delivery of their messages. Moreover, in email communication it is possible to set up an instantaneous confirmation of receipt. The ability to instantaneously confirm the receipt of an offer and acceptance robs the postal rule of a lot of its utility.[1032] Furthermore, as with the declaration rule, it appears that only the expediency of the offeree is prioritised under the mailbox rule. Under the mailbox rule, a contract is formed when the letter of acceptance is passed to the representative of a post office or put into a post box and it is immaterial that the letter is delayed, destroyed or lost and did not reach the offeror.[1033] Therefore, if the postal rule is used in email transactions it will give rise to doubts,[1034] and this matter will be discussed thoroughly in the next section.

5.4.3.1. The postal rule: definitions

The postal rule (also referred to as the mailbox rule) is widely used in common law countries. Under this rule, a contract is formed at the time the offeree sends his expression of acceptance to the offeror or, to quote a leading Scottish case, 'a contract is accepted by the posting of a letter declaring its acceptance; the acceptor has done all that is necessary for him to do, and is not answerable for casualties occurring at the post office'.[1035] Recently, the English courts have affirmed the lawfulness (effectiveness) of a notice sent using email in a case that was sent for arbitration, even though the facts of the case showed that the recipient's staff thought that the email was spam and ignored it.[1036] With the intention of evaluating the worth of any suggestion that the postal rule should be applied to any method of electronic communication, there is a need to, first of all, consider the postal rule's origin and purpose. The case that is normally

[1030] The BusinessDictionary.Com http://www.businessdictionary.com/definition/signature.html accessed 13 August 2017; Carolina M Laborde, *Electronic Signature in International Contracts* (Peter Lang 2008) 22
[1031] Jones (n 900) 302.
[1032] Cheryl B Preston and Brandon T Crowther, 'Infancy Doctrine Inquiries' (2012) 52 Santa Clara Law Review 47; Bernachi Reachard 'Selected Issues in Electronic Contracting', available on: <www.cla.org/Publications/MemberArticles/Selectiss.html> accessed 25 March 2018.
[1033] Belgum (n 741) 4
[1034] It is important to mention here that there is a call in the Scottish law to abolish applying the mailbox rule in modern communication means. See Scottish Law Commission, 'Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods' (Scottish Law Commission 144 1993)
[1035] *Dunlop v Higgins* 1 HL Cas. 381, 1848.
[1036] *Bernuth Lines Ltd v High Seas Shipping Ltd* ('The Eastern Navigator') [2005] EWHC 3020.

attributed with the creation of the postal rule is *Adams v Lindsell*.[1037] In this case, the court had to decide which party should assume the risk of a lost or late communication of acceptance. It appears that the court put the risk with the errant party (in this instance the offeror), however this was not the reason mentioned in the case. Lord Ellenborough CJ was of the opinion that the rule was needed because without it, it would not be possible to conclude any contract that is entered into at a distance.[1038] However, Professor Treitel elucidates that the potential for unlimited communications can be avoided with any rule and it is immaterial whether the rule provides that the letter is effective on posting or delivery; the presence of a rule is sufficient.[1039] Gardner insinuates that the reasoning in *Adams v Lindsell* was centred on a more archaic and subjective notion of contract than practicality.[1040] It must be stressed that for whatever reason, the court in *Adams v Linsell* ruled that a letter of acceptance becomes effective the moment it is posted. In subsequent cases, more justifications for the postal rule were added.

In Household Fire and Carriage Accident Insurance Co v Grant,[1041] Thesiger LJ proposed agency as a basis for the rule. It was an attempt to reconcile the requirement for communication acceptance by the offeror with the postal rule, as well as the principle of *consensus ad idem*.[1042] Confronted with such diametrically opposed principles, the concept of agency was an expedient distraction, but at that time it had already been stated many times that the notion that the post office is acting as an agent for parties using this kind of communication is merely a fiction.[1043] It must be stated here that a reliable and sustainable justification for the postal rule is hard to establish. The court rulings that have set up these rules have given various justifications for them, but for quite some time it has been agreed that these justifications are not totally successful. However, it has been proven that it is now harder to find satisfactory alternative explanations.[1044] Faced with the duty of allocating a loss caused by a failure to communicate

[1037] (1818) 1B& AId 681. However, this case was upheld in fact before any general rule that acceptance must be communicated existed. See Alfred W B Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 Law Quarterly Review 247.
[1038] '…no contract ever can be performed by the post. For if the defendants were not restricted by their offer once accepted by the plaintiffs till the response was received, then the plaintiffs will not to be abide till after the receipt of the notification that the defendants reviewed their response and assented to it. As such, it might go on *ad infinitum'*. *Ibid*.
[1039] See also Gardner (n 485) 170. Treitel (n 3)) 24.
[1040] Gardner (n 485) 171 states 'The optimal explanation for the choice of the court for posting is that according to the case's facts, this view has included the lesser departure from the consensus model. At posting, the parties simultaneously had together to contemplate contracting...; whilst by the moment of the letter's delivery the defendants intended no longer to proceed to contracting with the plaintiffs'.
[1041] (1879) 4 Ex D 216, 223-4.
[1042] *Ibid* at 221.
[1043] Gardner (n 485) 173; E Macdonald and Rowland, (n 629) 305; Smith (n 603) 71; Downing and Harrington (n 838) 33.
[1044] Gardner (n 485) (referring to the decision of the Court of Appeal in *Henthom v Fraser* [1892] 2CH 27.

acceptance by post, the court decided in favour of the offeree. Although the risk of losing the letter or delay in delivering it is neither party's fault, the fault has to be allocated to one of the parties. The seeming injustice created by such an apportionment has been mitigated by the recognition that the offeror can easily exclude the consequence of the rule.[1045] Also, the rule should not be applicable if the offeree is at fault, for example, if he failed to correctly stamp or address the communication or if the application of the rule would result in 'manifest inconvenience or absurdity'.[1046] Some have tried to justify the retention of the mailbox rule for electronic acceptances by emphasising that it will promote certainty in the business world and the courts will be able to administer it more uniformly.[1047]

In contrast, the receipt rule, exceptionally accepted by the ICC, will probably mean the courts becoming involved in factual matters.[1048] These factual issues will produce disparate results and promote uncertainty surrounding the effects of an acceptance. Furthermore, these matters will instigate the courts to inquire into the metaphysical questions surrounding when exactly an electronic acceptance was received.[1049] Consider the scenario where a buyer sends an email acceptance on Wednesday to a domain that, for technical reasons, was closed. Then, the seller got to know about the electronic acceptance when he reopens the electronic address a week later. In this scenario, if the mailbox rule is used, there is no need to inquire as to whether the domain or system was available or not. By comparison, there is case law that states that if the electronic acceptance is correctly addressed and sent to the receiver by the offeree, the electronic acceptance should be effective.[1050] In this manner, the postal rule will also put a stop to the many potential factual inquiries as to when an offeree's system was able to receive an electronic contract acceptance if the mailbox rule is adopted for electronic contract

[1045] *Holwell Securities v Hughes* [1974] 1 All ER 161.
[1046] Ibid *per* Lawton LJ, 168.
[1047] *In re Main Motor Oil, Inc*., 740 F.2d 220, 228-29 (3d Cir. 1984) 78
[1048] Ibid 228 (noting a dispatch rule will minimize the 'number and difficulty of disputes that will arise between the parties').
[1049] Likewise, in case of an acceptance sent to a vendor whose computer is still on, but who is however out of communication for a couple of weeks, here the difficulty surfaces as to when this acceptance is legally effective. Additionally, the dispatch rule makes the court's actual inquiry far simpler. Acceptance will be deemed to have happened when the acceptor sends it, irrespective of when the offeror (seller) indeed did retrieve or could have the electronic acceptance. See National Economic Development Council, EDI or DIE? *A guide to introducing EDI between companies* (National Economic Development Office 1992) 1. 6
[1050] For instance, when an e-mail accepting a contract is dispatched the customer to purchase on Saturday evening, and the seller is on holiday while his computer is shut down until he is back on the next Monday, the simplest actual determination is made by functioning a dispatch rule to say that the purchaser's assent was applicable when dispatched. Consequently, employing the dispatch rule totally avoids the actual examination regarding the issue of when that acceptance was received by the vender's system. See Tayloe v Merchs'. Fire Ins. Co. of Bait., 50 U.S. (9 How.) 390, 400-02 (1850).

acceptances. In addition to this, the mailbox rule should, on practical grounds, be applied to cases involving electronic communications in order to ensure that the date the contract was formed is definite and obvious, and the parties do not need to have further communication on the matter.[1051] On the matter of the regular mail, the mailbox rule has been validated by the fact that it gives rise to finality.[1052] Shorn of the mailbox rule, the offeree will not be able to know if a contract has been concluded until the acceptance has been received by the offeror.[1053] In actual fact, the offeree will have to wait until the offeror informs him that he has received the contract before he can act on the contract. It can result in a circle of communication without a conclusion, as the offeree may not receive the offeror's notification of receipt of acceptance. As a result, the offeree may not know of the existence of the contract until he is sued by the offeror for breach of contract.[1054]

Just as it circumvents the unending circle of communication when using the conventional postal service, the mailbox rule also has the same effect in the case of electronic acceptances.[1055] Using the mailbox rule permits the offeree to instantly act on the contract that was electronically formed in roughly the same way as a contract that was formed using the regular mail. For example, if a buyer sends an electronic offer to buy 1,000 pairs of shoes for $10,000 to the offeree (seller), the offeree can reject all earlier offers he has received for the purchase of the shoes the moment he sends his electronic acceptance to the buyer without having to consider whether the buyer in fact reads or retrieves the acceptance.[1056] The seller can then confidently proceed to fulfil the contract. Similarly, the mailbox rule also creates certainty when the acceptance is sent using regular mail and as such it will also create a measure of certainty in the electronic contracting process. Also, the offeror can shield himself from the effects of the mailbox rule in transactions that involve communications sent by email, similarly to regular mail, by demanding that acceptance must be received for it to be effective. If the offeror does not impose this explicit requirement, the mailbox rule ought to be retained for contracts formed electronically.[1057]

[1051] Zweigert, Kotz and Weir (tr) (n 1005) 381; Mills (n 193) 9.
[1052] M A Emmelhainz, *EDI: A Total Management Guide* (Van Nostrand Reinhold 1993) 76; Sizwe Snail, 'Electronic Contracts in South Africa - A Comparative Analysis' (2009) 2 Journal of Information, Law and Technology 44.
[1053] *See Adams v Lindsell* (1818) 106 ER 250, 251.
[1054] Definitely, a contract of sale over US$500 will show a Statute of Frauds issue.
[1055] See for example UCC 2003 para 2-201(1).
[1056] See for example UCITA 2001para 203 cmt. 2; UCC 2003 para 2-206(1).
[1057] Zweigert, Kotz and Weir (tr) (n 1005) 381.

In conclusion, Iraq's existing laws do not have a default rule to establish the time acceptance is sent electronically. In the context of sending an acceptance by regular mail, the existing rule retains its utility, but when it comes to electronic acceptance, the future of the rule is not so clear. Although the IESTA 2012 does not prescribe a suitable rule to establish the timing of an acceptance, the ICC specifically declares that an acceptance is effective the moment it is known or at the very least when the offeree receives it,[1058] which is a difficult proposition as with acceptances sent using the email. Anyhow, the IESTA 2012 and the ICC have left almost all substantive contract law determinations to current rules, thus implying that the receipt-with-knowledge rule remains as the default rule for commonplace contractual agreements. As a result, this leaves space for a good argument that the mailbox rule ought to be maintained for contracts that involve electronic acceptance.[1059]

5.4.3.2. The postal rule and new communication means

Some critics have proposed the application of the postal rule to email communication but not to online transactions such as those undertaken via interactive websites.[1060] Email has many features that are analogous to the postal system. Once an email message is despatched, the sender has literally no control over what can happen to it, for he has done all that he can by passing control over the message to a third party.[1061] Predictably, there will be some form of delay because very often the contracting parties are not communicating simultaneously. There are proposals to reformulate the postal rule for the twenty-first century, by concentrating on the characteristics of the communication itself. When an offeror makes an offer with the expectation of receiving the acceptance through a non-instantaneous method of communication, the acceptance should be effective from the time the acceptor sends it or when it leaves the acceptor's control.[1062] Murray however, noted that such a definition relies heavily on the difference between instantaneous and non-instantaneous methods of communication, a currently unpredictable and problematic distinction which may become increasingly distorted in the future.[1063] Essentially, the distinction is based on the instantaneous method of communication and as contended previously, it detracts from the essential reasoning of the

[1058] Article 87 thereof.
[1059] See for more details about the postal rule, Lerouge (n 225) 420; See generally UETA 1999; para 75, UCITA 2001, 203(4).
[1060] Sarabdeen Jawahitha and Emna Chikhaoui, 'The Adequacy of Malaysian Law on E-Contracting' (2007) 13 *Computer and Telecommunications Law Review* 121.
[1061] Murray (n 153) *26*
[1062] Ibid.
[1063] See Tom Russell, 'A Cautionary Tale for Online Operators' (2012) 23 Entertainment Law Review 219.

courts in *Entores* and *Brinkinbon*.[1064] It is difficult to justify having different ways to treat contractually significant communications based solely on the means of communication used to transmit them. This difficulty is underscored by the many attempts made to find the rationale behind the ushering in of the postal rule in order to determine whether it is appropriate to other methods of communication.[1065] New methods of electronic communication have given rise to new legal questions and it is vital that a good rationale forms the basis of their regulatory treatment by the law. Failure to utilize a sound rationale for different treatment or a consistent approach for all methods of communication will result in uncertainty in the law.[1066] In the more recent cases the courts have, when addressing the issue, placed the emphasis on the apportionment of risk, as well as considering which party is better placed to know of, and act on, a failure in communication. The courts have, using this rationale, reinforced the use of the general rule for the communication of acceptance.[1067] With the telex, delays are likely and at times unavoidable. Even though delays also occur when email and other types of electronic communications are used, the courts have not found it essential or desirable to create an exception to the general rule on acceptance based on commercial or judicial convenience. It is submitted that email and other methods of electronic communication will receive the same treatment from the court.[1068]

One of several clear points that have arisen from this analysis is that, when the offeror is in some way at fault for not receiving the acceptance or delaying its receipt, the court's ruling will be in favour of the offeree. In the electronic environment, if a party does not download or read his email or data from a particular website or fails to make sure that his interactive website is effectively handling all communications of acceptance, the court may decide that under the law he has received the communication of acceptance and is thus contractually bound. When considering whether the postal rule should be applied to emailed acceptances, the first important step to take is to determine whether the email is the same as an instantaneous or non-instantaneous form of communication. Chitty[1069] opines that the email is instantaneous,[1070] and if it is so, then the postal rule cannot be applied because in *Entores v Miles*[1071] the court said that the postal rule cannot be applied to instantaneous methods of communication. However, it

[1064] *Entores v Miles Far East Corporation* [1955]2 QB 327.
[1065] Matthews (n 965)
[1066] Taylor (n 683) .
[1067] Blackmore (n 679)
[1068] Broersma (n 678).
[1069] Beale, *Chitty on Contracts* (n 215) 75.
[1070] Ibid, Volume 1, para.2-046
[1071] [1955] 2 All ER. 493.

can be argued that email is not an instantaneous mode of communication. While emails are generally exceptionally fast, once in a while they may take hours or even days to arrive at the intended recipient's inbox. Therefore, if the speed of communication is held to be the deciding factor for the proper application of the postal rule, an emailed acceptance would surely meet the criterion and be covered by the postal rule. Another argument that supports the use of the postal rule to email communications is related to control. In the case of the conventional postal rule, once a letter is handed over to an agent of the postal service, the sender no longer has any control over it. If it is an acceptance, the offeree has done all that is reasonable to send the letter of acceptance to the offeror. In *Household Fire Insurance Co Ltd v Grant*,[1072] Thesiger LJ said that the acceptor, by posting the letter, has surrendered his control over it and his extraneous act has clenched the deal.[1073] It seems that the law favours the person that 'trusts the post'.[1074] Consequently, the same principle should be applied to email because once an email is sent, the sender has no control over his sent email and cannot ensure that it reaches the addressee.

It is clear that there are a few obvious resemblances between email and the postal service, but does this mean that the courts should extend the application of the postal rule to email? Perhaps not, and this is because of the reason behind the creation of the postal rule, which was to provide certainty in the formation of contracts at a time when it was common to experience unavoidable delays when letters were sent via the postal service. While email is not instantaneous, it is generally very fast, but on rare occasions it also experiences delays. In the early nineteenth century, the only available mode of long-distance communication was the postal service, and it would have been very hard to check on the success or otherwise of an acceptance. Meanwhile, in the present century, the offeree can easily find out whether an emailed acceptance has been received or not by using an instantaneous form of communication, for example the telephone or fax. If such methods of communication were present then, it is doubtful that the postal rule would have been created. If it is not possible, or maybe undesirable, to check whether an emailed acceptance has been successfully delivered by using the telephone or fax, most email software enables the sender to request for 'delivery' and 'read' receipts when an email is sent. For example, the sender will receive a delivery receipt if the email has been successfully delivered to the addressee's email account or a read receipt if the email has been read. Basically, these receipts allow the sender of an email to know that his email has been successfully sent,

[1072] (1879) LR 4 Ex. D. 216.
[1073] Ibid, at 223.
[1074] Ibid.

which is similar to the way recorded delivery packages are sent via the conventional postal service. Regrettably, although most email software permits the request for delivery and read receipts, 'firewalls'[1075] installed on many computers can block the transmission of these receipts. Although this may, to a limited extent, reduce the strength of this argument against the use of the postal rule in the email, in actual fact most modern firewalls permits the sending of email receipts. Besides delivery and read receipts, it is now normal for the sender of an email to be notified about the non-delivery of an email. This can happen if there was an error as regards the recipient's address or when the recipient's email system is malfunctioning. If there is a non-delivery message, there will not be many advocates for a rule that will allow for the creation of a contract when the offeree knows for sure that acceptance has not been communicated! As such, since it is now possible to verify the delivery status of an email, is there still a need to extend the postal rule to include the email? Another argument for the application of the postal rule to email communications is linked to the lack of control an email's sender has once it has been sent. Recent developments in email technology have now enabled senders to exercise some control over a sent email, as the sender can often recall his sent email. Although this does not have any influence on the determination of when an emailed acceptance is considered to be effective, there is no doubt that it checks the influence of the control argument when it is used to support the postal rule's application to email.

5.4.3.3. Electronic Messaging Time -An Analysis

One of the conventional problems with distance contracting has always been the determination of precisely when the addressee receives a message after it has been sent. There are also similar questions on that issue in the electronic environment: namely, when was the electronic message sent or when did it reached the addressee?; when did the electronic file reach the recipient's computer or his server?; when did the recipient check the message?; and what does it mean when the sender clicks on the 'send' button on his computer screen?[1076] Traditionally, the time a letter is posted can be easily determined, but the sender no longer has any control over the

[1075] Firewalls are computer programs that function to keep personal computers protected from any non-user or hacking activities that may happen while connected to the internet, for instance automated emails that have not actually been dispatched by the consumer. Unfortunately, firewalls have become a very important requirement in everyday life because the rising number of spyware applications, which are programs that inspect and report your PC usage to another PC. Add to that Trojans, applications designed to use the PC of another person to accomplish tasks and send the outcomes to another PC.

[1076] Wolfgang Hahnkamper, 'Acceptance of an Offer (Article 18): The CISG Communication Tool Box, 25 Years Later' (Conference Paper, 25 Years United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, March 15-16, 2005).

letter once it is dropped into a mailbox or handed to a postman. In a computer network, determining when an electronic message is sent is more complex.

5.4.3.3.1. Time of sending an electronic message

With regards to an email acceptance, whether the postal rule is applied or not, it would be difficult to determine the exact point when an email is sent and received. For many users of the Internet, it is financially not viable to maintain a dedicated '24/7' Internet connection. In spite of the increasing popularity of broadband Internet, many Internet users will still intermittently connect to the Internet using a dial-up connection. Email software allows the drafting and 'sending'[1077] of emails without the computer being connected to an Internet service provider (ISP). It can be contended that this is the initial stage of the email's journey to the addressee. The next stage occurs when the sender of the email connects to an ISP and the email starts to travel along an international network of computers and finally reaches the addressee. If the court examines the facts of the case, the court will most likely rule that the mere drafting of an email and then parking it in the 'outbox' of the email application means that the email has not been sent, because to send the email the user needs to click on the 'send' button. This scenario is analogous to when a person places a letter in a stamped and addressed envelope and then puts it by the side of the front exit ready to be taken and placed inside a post box at the end of the road. Perhaps the email can be taken to have been sent when the user connects to the Internet and the email truly leaves the outbox of the user's computer.[1078] This approach is consistent with what Thesiger LJ said in *Household Fire Insurance Co Ltd v Grant*,[1079] i.e. when the sender loses control of the communication. In actual fact, before the email leaves the 'outbox' of an email application, the user has full control of it as he is able to amend and even delete it.[1080] The user loses control of the email at the point when the email leaves the 'outbox'.[1081]

[1077] Here, the word 'sending' is used in the context of putting the email in the 'outbox' of the email application ready to be sent when the user connects to the internet service provider.

[1078] Of course, if the sender is connected to the internet at the time when they draft the email and click 'send' on the email application, the email will be sent at that time.

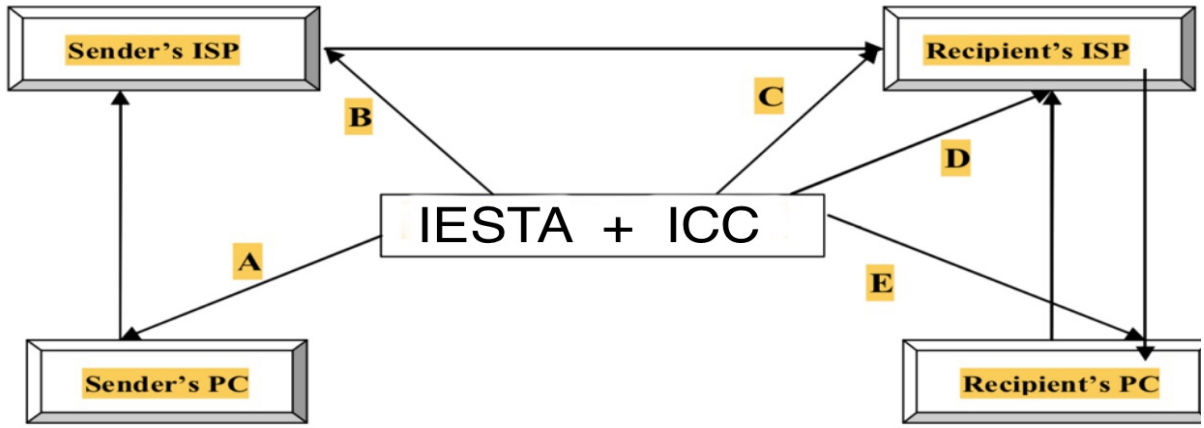
[1079] (1879) LR 4 Ex D 216 at 223.

[1080] This is the position that was adopted by the United Nations Commission on International Trade Law (UNCITRAL) when it published the Model Law on Electronic Commerce. This Model Law was created because UNCITRAL believed adopting the Model Law will assist all States significantly to enhance their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists. UNCITRAL Model Law on Electronic Commerce, General Assembly Resolution 51/162 of December 16, 1996.

[1081] The term 'data message' is defined in the UNCITRAL Model Law on Electronic Commerce (MLEC) Article 2 as 'information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy'. Article 15 deals

The IESTA 2012, Article 20(b) stipulates that where the addressee has a designated information system to receive messages, receipt is deemed to have occurred when the message is received by the designated information system, or if the message is sent to an addressee's non-designated information system, then receipt occurs when the addressee retrieves the message.[1082] It also states that an email is received at a designated email address the moment it enters a service provider's email system and will appear in the user's inbox when he opens his email account.[1083] This means that it does not matter whether the addressee has read the message or not; the fact that the email has arrived at the email address is considered to be sufficient. In practice, this is very similar to when a letter is posted, as a letter is considered to have been received when the letter is dropped into the addressee's letter box. Even when the addressee has not opened the letter, it does not prevent the contents of the letter from becoming effective.[1084]

Figure 1: the time of sending of the electronic message



From this figure, there are five points can be raised with regards to the sending of messages using present email technology, it appears to be fairly complicated. Firstly, the sender may lose

specifically with the time and place of dispatch and receipt of data messages (email), and states in para.1 that 'unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator'.

[1082] IESTA, Article 20(b).

[1083] It should be stressed here that Article 20 means that the email is available for collection. The Article does not mean that the email needs to be collected.

[1084] The Model Law fails to refer to the postal rule at any time, arguing that it has avoided the matter so as 'not to interfere with national law applicable to contract formation'. The Explanatory Notes (Note 78) justify this evasion stating that '[i]t was felt that such a provision might exceed the aim of the Model Law, which should be limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications'. Perhaps this omission suggests that UNCITRAL recognises that the postal rule has its place, and that this place does not exist within an environment of electronic communications.

control of his email the moment it leaves his information system. Secondly, the sender may lose control of his email the moment it leaves his ISP's (third party) system. Thirdly, the sender may lose control of his email the moment it enters the system of the recipient's ISP (third party). Fourthly, the sender may lose control of his email before the recipient opens it (this will be explained in greater detail shortly). Lastly, the email enters an information processing system that is used and controlled by the recipient.[1085] Consequently, it is difficult to know when an email has completely and exactly moved beyond the control of the sender. Likewise, two times of sending can be established. Firstly, most laws consider the sending time to be when the sender or his official agent loses control of the electronic record after the message has been dispatched. The other time the message is sent is when the electronic record goes into an information processing system[1086] that is controlled by the addressee or the ISP chosen or used by the addressee. As a result, there are two critical opinions on these general notions. The first view is that the time the message is sent is the moment the electronic data is dispatched by the sender, and the second view that the message is sent when the addressee gains control of the electronic data.

The IESTA 2012 provides two criteria for assessing when a message is sent, namely, when the electronic data is beyond the sender's control and when the addressees can retrieve the electronic data. Unless the sender and the addressee have otherwise agreed, the sending of a data message happens the moment it enters an information system that is beyond the originator's or his official representative's control.[1087] However, there is a suggestion that an electronic record is sent once it is addressed or properly directed to an information processing system designated or used by the recipient to receive electronic records or information.[1088] The electronic data must not only be retrievable by the recipient, it must also be retrievable in a form that the system can process. Also, an electronic record is sent the moment it enters into an information processing system that is beyond the sender's or his official representative's control, or when it enters the information processing system designated or used by the addressee.[1089] In other words, the determination of the time of sending of an email is based on

[1085] UETA 1999 15(a)(3).
[1086] According to the definition of MLEC, 'information system' means a system for generating, sending, receiving, storing or otherwise processing data message; In the UETA, 'Information processing system' means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.
[1087] UNCITRAL Model Law on Electronic Commerce (MLEC) provides the same meaning in Article 15 (1).
[1088] *Rhode Island Tool Co v United States*, 128 F. Supp. 417 (Ct. Cl. 1955), in Zweigert and Kötz (n 1005) 359.
[1089] UETA 1999 para 1 (a).

the following three additional conditions that are; 'out of the sender's control, designating a system, and capable of being retrieved and processed.[1090]

According to the IESTA 2012, other than the need to designate a system (which by itself can give rise to different situations), the recognition of what is required so that it can be retrieved and processed is quite natural. Therefore, without the aforementioned requirements, the time of sending can be a bit earlier, because the electronic record is deemed to have been sent when it enters a computer that is controlled by any person other than the originator, even though the said computer is not used or designated by the addressee.[1091] If the time of sending is to be determined in accordance with the provisions of the IESTA 2012, it appears to be fairly complicated, and as mentioned earlier in figure 1, there is five points raised with regards to the sending of messages using present email technology.[1092] Consequently, it is difficult to know when an email has completely and exactly moved beyond the control of the sender. Moreover, if both contracting parties are using the same ISP, the email may remain under the control of the sender until the recipient opens it.[1093] For example, 'Outlook' allows an email to be revoked by the sender even it is opened by the recipient,[1094] whilst 'Daum.net' allows an email to be revoked by the sender until it is opened by the recipient.[1095] This means, in the latter website, the email is not dispatched until the recipient opens it. In such a situation, it appears that the time the email was sent and received is identical. According to the UNCITRAL's Working Group dealing with electronic contracting, if the sender and recipient are using the same information system, the dispatch and receipt of the data message occurs when the data message can be retrieved and processed by the recipient.[1096]

5.4.3.3.2. The time an electronic message is received

When evaluating whether a communication has been 'received', the researcher would like to propose that the objective approach adopted by the English courts should be considered. It seems that the 'actual' communication to the offeror or his agent is not needed. Support for this

[1090] Braucher, 'Rent Seeking in the New Statutory Law of Electronic Commerce' (n 899) 530.
[1091] Gyung Young Jung, 'Korea's Electronic Transaction Law: A Comparative Study' (2000) 28 Korean Journal of International and Comparative Law 94-5.
[1092] UETA 1999 15(a)(3).
[1093] This is one of the leading Korean ISPs.
[1094] See How to Recall or replace an email message that you sent. Available on: https://support.office.com/en-ie/article/recall-or-replace-an-email-message-that-you-sent-35027f88-d655-4554-b4f8-6c0729a723a0 accessed 25 March 2018.
[1095] See https://www.daum.net accessed 25 March 2018.
[1096] UN Official Records of the General Assembly, Report of the Working Group on Electronic Commerce on the work of its forty-second session, (Vienna, 17-21 Nov. 2003), A/CN.9/546, para. 59.

proposal can be seen, albeit in the context of telex communications, in the judgments of Lord Denning in the *Entores* case and Lord Fraser in the *Brinkibon* case.[1097] Lord Fraser noted that the moment the offeror's telex machine receives the message, it would not be perverse to treat it as having been delivered to the principal offeror because he is responsible for making arrangements for the quick delivery of messages in his organisation.[1098] It must however be acknowledged that the communication may arrive at a time when it will be unreasonable to expect that the offeror has received it and in such an event the principle cannot be applied. For example, if the communication arrived outside of office hours, then it would be reasonable to say that the offeror received the message at the start of the next working day.[1099] If a business organisation uses email, website or other means of electronic communication, Lord Fraser's view of the telex can be readily applied and as such, the offeror bears the responsibility of creating an efficient system of handling communications in his organisation. On the other hand, the nature of the electronic environment produces another important question: what are the actual office hours of the online environment? Since the Internet has no geographical and temporal restraints it is imaginable or arguably usual for interactive websites to operate on a '24/7' basis. After all, this is one of the main advantages of e-commerce. In the present context, it can be argued that the office hours are operable '24/7'. This would imply that as soon as the acceptance is received by the service provider's site it becomes effective. The service provider may try to restrict the virtual office hours of his site to certain hours only where he is able to keep track of all the communications. As such, the site owner will have to clarify the time zone he is referring to if he wants to restrict his site's 'office hours'. The problem associated with this approach is that the restriction of 'office hours' may deter potential customers from different time zones, thus resulting in the loss of one of the key benefits of e-commerce.[1100]

In *Entores*, Lord Denning pointed out that if the offeror is in some way at fault, he may be estopped from repudiating receipt of the acceptance if the situation is such that it is reasonable to expect him to make sure that the message is received.[1101] Therefore, the compilation or 'prompt handing' of communications will obviously be the responsibility of the user of the technology, as will be its maintenance, and this is the same as making sure that the paper used

[1097] *Brinkibon Ltd v Stalag StahvrenhanddsgeseUschaft mbH* [1983] 2 AC 34 [43]
[1098] *Brinkibon v Stalag und Stahlwarenhandelsgesellschaft mbH*, per Lord Fraser at [43].
[1099] *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep 249; also, Gatehouse J in *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] CLC 1011. His comments were about the context of contracting by notice rather than accepting an offer, the principle however is consistent.
[1100] This may explain the many commercial websites that do not restrict their business hours and have 24hr helplines.
[1101] *Entores* per Lord Denning at p 515.

by the telex machine does not run out. Lord Wilberforce pronounced that no universal rule can deal with all cases and reference must be made to the parties' intentions, 'sound business practice'[1102] and risk allocation. Such a practical approach is especially relevant when the wide range of business practice in the electronic environment is taken into consideration. The important question for the objective of this discussion is; how can the objective view of receipt can be applied to the various forms of electronic communication?[1103] In web-based and email communications, the communication can be considered to have been received at different points, for example, when it is downloaded by the offeror's computer or it has been received by the server from which he can access the communication. By analogy, in *Brinkibon*, Lord Fraser suggested that since the offeror is responsible for the efficient and quick handling of messages, the appropriate point for the receipt of the communication is its arrival at the offeror's mailbox on the server.[1104] However, a distinction was also made between an offeror having his own server with another that utilises an ISP's server facilities.[1105] In the former case, the message is received when it reaches the server, and as for the latter, it is only taken to be 'received' the moment the offeror downloads it from the server. Anyway, if an objective approach is used, the point the communication is considered to have been received may vary depending on the actual circumstances. However, such an approach may give rise to an unfortunate amount of doubts, especially for the parties who are keen to look for business opportunities in the electronic environment. As a result, service providers have perceived the need to explain the intended legal consequences of every communication. While it presents an illusion of creating certainty, it also makes the websites more cumbersome, as they will now be filled with extensive terms and conditions that, in any event, may be futile when confronted by differing local rules and legislation in different jurisdictions.

UNCITRAL Model Law on Electronic Commerce (MLEC) has attempted to governing when an email is deemed to be received. Article 15(2) states 'Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee

[1102] Ibid 107.
[1103] For an interesting comparison with the German Civil Code regarding this point see; Jan-Malte Niemann, 'Cyber Contracts- Comparative View On The Actual Time of Formation' (2000) 5(2) Journal of Communications Law 48.
[1104] The equivalent to the advent of the telex machine. See Rowland and Macdonald (n 629) 306.
[1105] See Chissick and Kelman (n 268) para. 3.45.

that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee'.[1106] However according to the ICC, the matter is different to large extent. The moment the acceptance is brought to the knowledge of the offeror[1107] or if he has at least received it,[1108] the acceptance becomes effective. Subsequently, the critical issue is the place and time the communication was received. As discussed earlier, in the electronic environment, there are several distinguishable points along the communication network where a communication can be considered to have been 'received' by the addressee.[1109] As for the IESTA, Article 20(2) states a similar text to the MLEC text as follows:

> If the addressee has designated an information system for the purpose of receiving data messages, receipt occurs at the time when the data message enters the designated information system; or if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;[1110]

An information system can be defined as a system that can generate, send, receive, store or process messages.[1111] The data 'enters' the information messaging system the moment it is available for processing by the information system.[1112] Accordingly, the message is deemed to have been despatched when it goes into an information system that is beyond the control of the sender, and the information system may be that of an intermediary or the addressee.[1113] For instance, if an email is sent from a person's personal computer, the moment it leaves the outbox it enters the ISP's system and from there it goes to the sender's mail-host.[1114] The moment the 'send' button is clicked, the message proceeds to a system that is out of the sender's control. In the case of an interactive website, the information (data message) that is input by the customer moves into the service provider's system the moment the 'submit' button is clicked. Furthermore, a 'designated information system' is so designated with the intention of including a situation where a party specifies an address where the data message should be sent to, for

[1106] MLEC, Article 15 (2).
[1107] Article 87(1)
[1108] Article 87(2)
[1109] For example, the, point at which an e-mail arrives at his service provider's server or the point at which the e-mail is downloaded to the recipient's computer.
[1110] Paragraph A of this Article. Paragraph B states that: 'If the addressee has not designated an information system, receipt occurs when the data message enters any information system of the addressee'.
[1111] Article 2(f).
[1112] A. Brooke Overby, Will Cyberlaw Be Uniform - An Introduction to the UNCITRAL Model Law on Electronic Commerce 7 Tul. J. Int'l & Comp. L. 219 (1999) para 103.
[1113] IESTA 2012, Article 21.
[1114] In many cases these will be one and the same.

instance a communication of acceptance. But, it is not so designated for the situation where an address is routinely added on a website or other documents without specifying that it is meant to be used for such purposes.[1115]

Put another way, if the addressee specifies or designates a particular information system, the message is considered to have been received once it is available for processing by the system. For instance, the moment an email is available and can be downloaded on the website's host server it can be considered as having been received. The moment the information is sent in to a supplier's interactive website it can be processed and is thus deemed to have been received. So, if the said data message is a legal acceptance, the acceptance is effective from that point. However, if the message is not sent to the specified or designated system, it will only be considered to have been received when the message is actually retrieved by the addressee from the system. In such a situation, the email is considered to have been received when the addressee downloads the message or information to his device or remotely retrieves the information from his server. If the address does not stipulate a particular system, then the message will be considered to have been received when it is obtainable for processing on the addressee's information system. Once again, the onus is on the addressee to stipulate the address for the receipt of significant communications or to continually check all his addresses or sites. Although this approach may be apt for commercial parties and places the onus on them to handle their communications efficiently, it is without a doubt not a suitable system for individuals or consumers. When it is stated 'if it is not otherwise agreed by the parties', then the acceptance is considered to have been received and effective from that point, and before the offeror has read or was even aware of the existence of such a message. In this case the onus is placed very firmly on the party that made the offer. If the party is aware that he has made an offer to another party and has stipulated an address and mode of communication, it is reasonable to place the responsibility on him to deal with the messages efficiently.

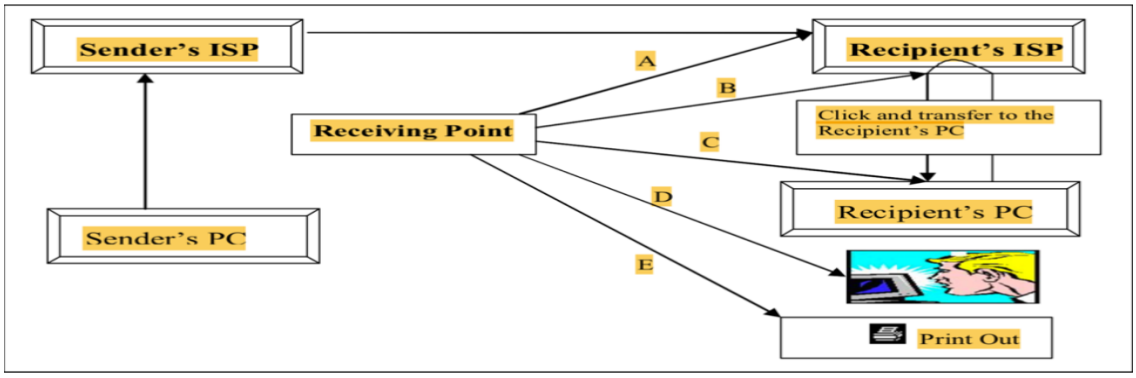
The IESTA 2012 does not unequivocally deal with the intelligibility of the message or its utility for the addressee or take into account system downtime or technical faults. This appears to be a potential flaw. On the matter of attributing data messages, the IESTA 2012 has, however, incorporated an approach that is similar to the common law's position on the 'snapping up' of incorrect offers. Article 18 purports to prevent the originator of a message from denying that the message, as received, was the exact one sent by him or his official representative. If a data

[1115] IESTA 2012 para. 102.

message containing errors is received by the addressee and he 'knew or should have known, …. that the transmission is accompanied with an error in the received data message' he cannot assume that the message is what the originator intended, or act upon that assumption.[1116] In practice, the time when an electronic message is received is also complex to determine, because there are five possible different points when it can be received in the present electronic system. The time an acceptance is received is more important than the time when it was sent, because the place where it was received can be stipulated in the contract as having jurisdiction over the contract. As for the ICC, Article 87 provides that the offeror's awareness of the acceptance concludes the contract *inter-absentes*.[1117]

To sum up, the gist of the issues regarding the time of receipt are as follows. An electronic message or record is considered to have been received in the following scenarios: (i) if an addressee uses a designated computer for the receiving of electronic messages or records, the time of receipt is when the message or record enters that computer; (ii) if the electronic message or record is sent to a computer that is not designated, the time of receipt is when the message or record is retrieved or printed by the addressee and (iii) if the addressee does not have a designated computer, the time of receipt is when the message or record enters an addressee's computer.

Figure 2: the time of receipt for email message



[1116] IESTA 2012, Article 18(4) which states that 'an electronic document is deemed not issued by the originator, if the addressee has known or should have known that this document is not issued by the originator'. Furthermore, in the preliminary materials to the proposed UNCITRAL Convention on Electronic Contracting (A/CN.9/WG.IV/WP.95 available at http://www.uncitral.org, the points of transmission errors and input mistakes are debated and, in certain situations, it is suggested that natural persons may not be bound by these errors while contracting by using such automated systems. See MLEC Article 13(5).

[1117] '(1) Unless there is an explicit or implicit agreement or legal text that establishes otherwise, contracting between absentees shall be considered concluded in the place and at the time that the offeror becomes aware of the acceptance; (2) it will be enjoined that the offeror become aware of the acceptance in the place and time of his arrival thereto'.

In the description of the time of receipt,[1118] where the addressee uses a designated information system to receive messages there are two specific issues. Firstly, unless and otherwise previously agreed between the originator and the recipient, the receipt occurs when the data message goes into the designated information system (A in Figure 2). However, if the data message is directed to the addressee's other information system instead of the designated one, the time of receipt is when the addressee retrieves the data message (D in Figure 2).[1119] In the second situation, if the addressee does not have a designated information system, the time of receipt is when the data message goes into one of the addressee's information systems. (C in Figure 2).[1120] In addition, the acknowledgement of a receipt is considered to be received when the addressees are able to gain access to them.[1121] As illustrated in Figure 2, the time of receipt is when the email enters the recipient's ISP (i.e. point B) because from this point onwards the recipient can access his information system or a third party's ISP.

Generally, people who are acquainted with email are bound to perceive that the time of receipt is when the email enters the addressee's ISP, i.e. point C or D in Figure 2, because they can see that the electronic message is truly within their control after it has been downloaded on their computer or they can see it for themselves. However others, mainly the senders of emails, may be convinced that the time of receipt is at point B in Figure 2 because they know that that is when an email arrives at an addressee's email inbox and the addressee can download and read it using the ISP's system.

Basically, when correspondences are exchanged using email, points B, C and D in Figure 2 may not have any time lag as regards determination of the precise time the contract is formed. However, if the contract is attached to an email, there may be a time lag in the formation of a contract. For instance, when the addressee opens an email with an attached file (containing the contract form), the addressee will be prompted by a message on the computer screen to open, save or cancel the file. If the file is opened directly, the document is opened on the email's inbox. However, if the file is saved in the computer's hard disk, the document cannot be read at that time. In this case, points B, C and D in Figure 2 can be chronologically separated. The receiving time is the moment the electronic record enters the recipient's designated information processing system, or one that he uses to receive electronic records or information, and from

[1118] MLEC, Article 15.
[1119] MLEC, Article 15 (2)(a)(ii).
[1120] MLEC, Article 15 (2)(b).
[1121] Chissick and Kelman (n 268) para. 3.45

which the addressee can retrieve the electronic records in a form that can be processed by the system (typically point A or C in Figure 2).[1122]

The criterion for the receiving time is made up of the three actions linked to when the electronic data comes under the recipient's control and has an additional requirement, i.e. the electronic data must be in a form that the recipient's system can process. Consequently, if the data message is not sent to the addressee's designated information system, but to the addressee's other systems, the time of receipt is when the addressee prints out the data message (E in Figure 2).[1123] From this analysis, unless it is otherwise agreed between the originator and addressee, the time the contract is formed when using the Internet gives rise to complexities and uncertainties as regards the lawful conclusion of the contract when supranational and national laws are taken into consideration. It may become an obstacle to the development of international trade using electronic forms of communication.

There are sound theoretical and practical reasons to support the application of the mailbox rule in the formation of contracts. The researcher advocates the retention of the mailbox rule for contracts. This is because electronic acceptances are two-way and not instantaneous. As such, an analogy must be made with cases involving regular mail, telegraph and telex, which are non-instantaneous forms of communication. The mailbox rule is applied to these methods of communication and it creates factual and legal certainty, thus allowing contracts to be easily formed when the contracting parties are staying far away from each other. As such, the mailbox rule should similarly be applied to electronic acceptances in order to create certainty in electronic contracting. The application of this rule will avoid factual uncertainty with regards to when an electronic acceptance is received between the contracting parties and it will also help to streamline judicial fact-finding in contractual disputes. Furthermore, the mailbox rule will also do away with the endless circle of communication involved in proving the existence of a contract. In this manner, the despatch rule in electronic contracting will permit the parties to contract freely using electronic means without having to be concerned about whether both parties will be aware of the existence of a contract when it is formed.

[1122] UETA 1999, Article 15 (b).
[1123] Jung (n 1091) 5-6.

5.4.4. The time the contracts in web transactions are concluded

As a rule, a contract is concluded when an unequivocal acceptance meets the offer to form a lawful and binding agreement.[1124] The matter of timing in web transactions is contingent on the nature of the respective websites and the procedures they adhere to in their transactions with customers. In traditional face-to-face contracting, the process is generally unambiguous. The key challenge website operators have to confront is user-dependence, i.e. they have inadequate control over how users view their websites. This conundrum precedes any evaluation as to whether the contents of the website amount to an offer or an invitation to treat. It is linked to what is actually stated on the website.[1125] The objective approach in contract law prescribes that intention ought to be evaluated from the perspective of the addressee. It presumes that a statement appears to be identical from the perspective of the originator and addressee. The contents of websites are derived from HTML files hosted by web-servers. The HTML file with website code has to be interpreted and then displayed by browser software located in the user's computer. Depending on the type and version of the browser software, the website may display the same content differently, or in certain extreme conditions may not even display certain content.[1126]

As such, the user may not get to see the statement in the form that was intended by the website operator. What will be visible to the user depends on two factors, namely the web browser he uses and the type of browser the website uses. A website developed for Internet Explorer might not show the same content when viewed using Firefox or Safari.[1127] The operators must choose whether to build their website to be in compliance with the relevant standards[1128] or to suit the browser with the largest market share. Internet Explorer has, for many years, been the most popular browser, but at the same time it is renowned for not complying with web development standards. The more IT-literate users generally tend to stay away from IE and opt for other browsers. Neither the operator who chooses to cater to the biggest audience nor the tech-savvy

[1124] Peel (n 33) 25; Jeff C Dodd and James A Hernandez, 'Contracting In Cyberspace' (1998) 201 Computer Law Review and Technology Journal 1; Bernhard Maier, 'How Has the Law Attempted to Tackle the Borderless Nature of the Internet?' (2010) 18 International Journal of Law and Information Technology 142

[1125] Bainbridge, *Introduction to Information Technology Law* (n 262) 319

[1126] Alzaagy (n 999) 3, 4.

[1127] A popular phenomenon statement is This site is best viewed with Internet Explorer'.

[1128] Standards include technical specifications that show details about different aspects of the world-wide-web, for instance, the websites' usability and accessibility. The standards of websites include recommendations by the W3C, Internet Standards and Requests for Comment published by the IETF, and Standards published by the ISO (amongst others) as well; the existing standards regulate the coding of, *inter alia*, the following languages: HTML 4.0, XML 1.0, XHTML 1.0. See: <www.webstandards.org> and <www.w3c.org> accessed 20 December 2017).

user using a less popular browser that is standard-compliant and secure are acting unreasonably. To make things more difficult, most web-pages boast multiple points of access. Users may pass over the relevant homepage and log on to the transactional part directly,[1129] thereby probably bypassing the hyperlinks to the terms or notices. This is nothing new in the real world as shops have a single-entry point and a few fixed, unavoidable elements. As a result of the integral non-linearity of websites, navigation sequences are random, thus making it difficult to ensure the timing of the notice is correct, i.e. before or during the contract formation.[1130]

User-dependence also has an effect on the deployment of technologies which appear to be custom-made for incorporation purposes. Pop-up windows, which are appropriate for the automatic display of terms or notices, are seen as intrusive and distracting. More often than not users have pop-up blockers to stop their appearance. Scripts which can create the 'red hand pointing to the word printed in red ink'[1131] and make sure that the user takes notice of the onerous terms are frequently disabled. Since pop-up windows frequently carry advertisements and scripts cause serious security concerns, users should not be accused of acting unreasonably by blocking their appearance. Therefore, other than the usual problem of not having any control over how the statements appear to the recipient, website operators run the risk of notices or terms that are strategically located to be seen during the contract formation process are not sufficiently prominently displayed or are less obvious than intended. These technical problems have resulted in a legal problem: who should bear the risk of the 'incorrect' display? Can one even refer to it as an 'incorrect' display when the originator of the statement or the addressee can be blamed for their choice of browsers or for disabling a particular technological feature?

While there are many cases and write-ups that offer practical guidelines on the placing and colour of the hyperlinks leading to the terms,[1132] the most obvious or visible hyperlink may still not be able to 'survive' the addressee's browser. A so-called reasonable 'notice' from the operator's point of view may be hardly visible to the user and the terms that were very accessible by one user may be difficult to find by another.[1133] However, as regards the actual practice of online contracting using the Internet, it is contended that it merits different analysis.

[1129] *Specht v Netscape Conmunications* 306 F 3d 17, 24
[1130] *Olley v Marlborough Court Ltd* [1949] 1 KB 532
[1131] *Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466
[1132] *Caspi v Microsoft Network LLC* 723 A 2d 528 (NJ Super CAD 1999); *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000);
[1133] Mann and Siebeneuche (n 265) 1003

Superficially, it appears that the traditional postal rule used in distance contracts should also be applied for the determination of the time a contract was formed on a website, just like the exchange of offer and acceptance using fax and email. When the traditional norms are applied to determine the time at which online contracts are formed on a website, some scholars have noted that website communications do not benefit from the norms of the postal rule when it comes to determining the exact time the contract is concluded.[1134] It would be more rational to treat website contracting as similar to that of instantaneous contracting over a telephone line.[1135]

It is argued that the comparison between contracting on a website and over a telephone line, on the assumption that the contract was formed when the online buyer clicks on the 'place order' or 'buy it now' button, might not be a true reflection of the practice of website contracting in certain cases. That is to say, the expression of acceptance over the telephone using the words 'yes' or 'sure', whereby the contracting parties can hear it, may not be directly comparable to clicking on the 'place order or 'buy it now' button on a website, where the parties are anonymous and at best, one party is a pre-programmed automated machine. This analysis encounters a problem when attempts are made to distinguish between an offer and invitation to treat on website advertisements for goods and services.[1136] It is not always correct to presume that a website's online contract is concluded when the user clicks on the 'place order' button, because the display of goods together with the price may not amount to a valid offer but could be an invitation to treat.[1137] This is particularly the case if it is considered from the traditional common law approach.[1138] Some websites, when an internet order is placed, send a notice to the buyer to inform him that his order is being processed and that the sale will be finalised the moment the shipping notice is sent to the buyer.[1139] In these types of cases, the buyer cannot assume that the online contract was concluded when he clicked on the 'place order' button. Therefore, insofar as this part of the study is concerned, the comparison between websites and

[1134] See Amelia Rawls, 'Contract Formation in an Internet Age' (2009) 10 Columbia Science and Technology Law Review 201; Murray (n 153) who argues that: 'The best way to imagine the transfer of data between the computers is to treat it as a telephone conversation between computers rather than two individuals';
[1135] The same notion is upheld by some Iraqi academics. See for example, Mohammed Jamal and Mohammed Tahir, 'Instantaneous Contracting and Its Particularity in Electronic Commerce Transactions' (2012) 12 Rafidain Journal of Law 42.
[1136] In favour of the same argument, Watnick (n 479) argues that: 'While the layman may think it patently clear that a contract has been formed when the consumer leaves the website and has committed to pay for something, other legal commentators have posited.
[1137] Peel (n 33) 25; Elliott and Quinn (n 650) 15; *Fisher v Bell* [1961] 1 QB 394.
[1138] Such as the Apple process to perform an online purchase over its online store, see http://www.apple.com/uk/
[1139] UETA 1999 para 15.

telephones may be inaccurate and other factors should be considered, for example the differences between the common law and civil law methodologies, the technical construction of the website itself, and the conventional rules of the internet and e-commerce transactions.

The IESTA 2012 has rules for the determination of the time an electronic acceptance is sent and received,[1140] however it does not have any direct rules to determine when an electronic contract is concluded. Although this Act does not have any explicit rules on when an electronic contract is formed, it is contended that the retailer or service provider should be strictly obliged to optimise their website in such a way that the time a contract is concluded should be made clear to the other party. This should be done before the order is placed. One credible and simple solution to ensure compliance with such a requirement is to incorporate clauses into the website's terms and conditions which state explicitly the moment the contract becomes binding.[1141] As far as online consumer contracts are concerned, these must include more specific rules on when exactly a contract involving distant communication is concluded, as this will ensure that consumers are informed of the exact time they enter a binding agreement.[1142] The seller should ensure that when the consumer is placing his order, he clearly acknowledges that he is obliged to pay for the goods he ordered. If the placing of an order involves triggering a button or something similar, then this should be legibly labelled to indicate that it is the final 'checking out', i.e. it is an offer to purchase by the buyer. In such a situation, when and how does the offeree express his acceptance? Under the existing common law and legislation, the answer to this question is not clear. Perhaps the seller should include the words 'order with obligations to pay' or words with similar effect to indicate that the placing of an order involves an obligation to pay by the seller. If the seller does not comply with this sub-paragraph, the buyer is not legally bound by the contract or order.

Under the ICC, the rules of receipt and receipt-with-knowledge are applicable. That is to say, merely receiving an acceptance is not sufficient to make an assumption that a contract has been concluded, because the offeror should also know of the arrival of the acceptance at his mail box or his email inbox.[1143] When the offeror is informed of the acceptance, the acceptance

[1140] The IESTA Articles 20 and 21.
[1141] Peel (n 33) 25; Dodd and Hernandez (n 1124) 12.
[1141] Reed (n 199) 203-204; Bainbridge, *Introduction to Information Technology Law* (n 262) 319.
[1142] Dodd and Hernandez (n 1124) 12.
[1143] ICC, Article (87) states that: '1. A contract between parties at distance shall be concluded at the time, and in the place where the offeror gets informed with offeree's acceptance unless stated by agreement any other provision. 2. Such a determination supposed to have been done at the time, and in the place where the acceptance has been received'; see comments about this Article Al-Hakeem, (n 20) 77.

becomes valid.[1144] The application of such a rule to a website's offer and acceptance should not create any controversies. However, the website operator might have to issue a confirmation of receipt of the acceptance for the purpose of proving the exact time the contractual obligations became due. By validating this rule, the IESTA 2012 has stipulated that an electronic document shall be deemed to have been sent the moment it enters into the receiver's data processing unit.[1145]

Based on the preceding discussion, the researcher is of the view that the following are true as regards the timing of contracts formed on websites. If there are no rules to deal with electronic transactions, the conventional postal rules may be applicable to websites that only issue invitations to treat. In such a situation, the contract is concluded when the seller sends a confirmation email to the offeror stating that he accepts the offer. If the website's display of goods is considered to be a valid offer, then the contract is considered to have been concluded when the offeree clicks on the 'buy it now' button. On the other hand, since the website has special characteristics of communication (ie.e the contractual parties do not know, hear or see each other) there is a need to make sure that the online contract is concluded the moment the internet order is placed. This can be done by using an instantaneous pop up window message or automated email which is sent the moment the website order is placed.[1146]

[1144] Jamal and Tahir (n 1135) 42.

[1145] IESTA 2012, Article 20(1). It is worthy to peruse quickly the dispatch and receipt time of automated communications promulgated by the United Nations CUECIC. This Treaty is of great importance for the countries that yet do not issue provisions to regulate electronic contracts. The function of this Convention will help to greatly develop the legal certainty of e-commerce dealings in signatory countries. See Luca G Castellani, 'The United Nations Electronic Communications Convention - Policy, Goals and Potential Benefits' (2010) 19 Korean Journal of International Trade & Business Law 1. Article 10 of the Convention states detailed rules for the time of dispatch and receipt of electronic messages by stating that: '1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator, the time when the electronic communication is received. 2. The time of receipt of an electronic communication is the time when it becomes capable of being received by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that electronic communication has been sent to that address. An electronic Communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.'

[1146] See (UK) Department for Business, Innovation & Skills, 'Draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations'. The UK Department counts the question of the time where the transactions are entitled to deliver a purchase confirmation to the consumer in case of selling downloadable instantaneous digital products as follows: 'In general, confirmations must be sent to the consumer once the contract is concluded but not after the goods' delivery or before commencing the service. In the event of digital downloads where it is often instantaneous, the trader must ensure to send the confirmation simultaneously with, or earlier than, the commencement of the download.'

5.4.5. The time the contracts in telephone transactions are concluded

Cases involving telephone acceptance often revolve around the crucial question about the location of contracting, rather than when the acceptance was made.[1147] Nevertheless, these cases are useful when considering the issue of acceptances sent electronically.[1148] In cases involving acceptances made by telephone, the courts have ruled that the contract is formed at the place the acceptance is spoken. Although these courts seldom address the issue of the time at which the contract was formed, they however imply that the formation of the contract occurs at the time the offeree utters his acceptance.[1149] However, there are two views on the issue of characterising the nature of contracting.

First view: some believe that contracting by phone is deemed to be one of the forms of contracting *inter praesentes* because it is instantaneous, as the contracting parties are directly communicating with each other and they can hear what the other party is saying at the precise moment it is spoken.[1150] They consider that the physical disengagement is unimportant. To them, what is important is that the contracting parties can hear each other speak instantaneously and when an acceptance is declared the offeror hears it immediately.[1151] Also, in both situations, the cause is the same, since the telephone permits the transmission of the expression, be it offer or acceptance, directly to the contracting parties as if they were physically together in the same place.[1152] Accordingly, the acceptance by telephone has been held to be effective[1153] and the contract to be concluded at the place the offeree uttered his acceptance.[1154] This theory is rejected because when it is compared to situations where the acceptance is made using postal mail or telegraph, the reported cases have consistently found that the offeree concluded the contract at the place where he declared his acceptance.[1155] This appears to be

[1147] See, for example *Bank of Yolo v Sperry Flour Co.,* 74 P. 855, 855 (Cal. 1903).
[1148] For example, the Supreme Court of California held that an offer made in Yolo County, California to advance a sum of money was accepted in Sacramento County, California at the time and place where the offeree expressed his assent. See *Linn v Employers Reinsurance Corporation*, 139 A.2d 638, 639-40 (Pa. 1958).
[1149] *See,* for example *Bank of Yolo,* 855; *Linn,* 139 A.2d 640.
[1150] Dr Abdukareem Zidan, *The entry for studying the Islamic Sharia* (5th edition, Dar Alkitab 1976) 292.
[1151] Al-Khafif (n 339) 177.
[1152] Zidan (n 1150) 294.
[1153] Pennsylvania's highest court, *Linn v Employers Reinsurance Corporation*; *Bank of Yolo,* 74 P 855.
[1154] In so holding, the court noted that Professor Williston and the Restatement of Contracts take a different view, theorizing that the contract is only formed if the acceptance is heard and that the place of contracting is where such acceptance is heard *Cardon v Hampton* 109 So. 176, 177 (Ala. Ct. App. 1926).
[1155] *Bank of Yolo v Sperry Flour Co.,* 74 P. 855, 855 (Cal. 1903); (citing *United States v. Bushwick Mills*, 165 F.2d 198, 202 (2d Cir. 1947); *Traders Oil Mill Co. v. Arnold Bros. Gin Co.,* 225 S.W.2d 1011, 1013 (Tex Civ App-Galveston 1949, no writ)); *Trinity Universal Ins. v Mills*, 169 SW2d 311, 314 (Ky Ct App 1943); *see, e.g., Ledbetter Erection Corp. v Workers' Comp. Appeals Bd.,* 203 Cal. Rptr. 396, 401 (Cal. Ct. App. 1984) (noting that the contract is formed when and where employment applicant uttered his acceptance).

significant, because it undermines the conclusion that acceptance must be received for it to be effective in situations where the communication is instantaneous and two-way.[1156] To be more precise, even if the communication is immediate, such as being made using a telephone, the acceptance is effective and the contract is concluded the moment the acceptance is declared. That is to say, the acceptance becomes effective the moment it is sent via the phone wires.[1157] It is important to note that the Islamic Fiqh Assembly adopted this view and it can be found in paragraph 2 of Resolution No. 54/3/6 of 1990 which states that 'when the contract is simultaneously concluded between two distant parties, -such as by telephone, -the contract is considered concluded inter-attendees, and the original provisions adopted by jurists will be applied...'.[1158] It should also be noted that the ECC adopted this view. Article 94(1) states that 'if an offer was issued without specifying the time an acceptance must be made, the offeror is free from his offer if no acceptance was immediately issued. The same is applicable if the offer is issued using the telephone or any similar means'. It can be seen from Article 94 that the ECC did not consider the fact that the contracting parties were far away from each other (when contracting using the telephone) important in indicating the nature of the contract. It appears that the ECC's view is consistent with itself because it does not differentiate the place a contract was formed independently from the time of formation. As a result, the contract cannot be formed except with the offeror's knowledge of the acceptance, whether the contracting was done *inter-praesentes* or *inter-absentes*.[1159]

The second view: Then there are those who are of the view that contracting by using the telephone is deemed to be contracting *inter praesentes* in respect of time and *inter-absentes* in respect of place.[1160] The essence of this view is that the contracting happens in a so-called hybrid meeting, i.e. between a real and presumed meeting of contract. From the perspective of time, the meeting is deemed to be an actual meeting of contract, but from the perspective of place, it is a presumed meeting of contract.[1161] Such a view was adopted by the ICC and can

[1156] *Linn v Employers Reinsurance Corporation* 139 A.2d, 640.
[1157] *Dudley A. Tyng & Co., v Converse,* 146 N.W. 629, 630-31 (Mich. 1914). See comments about this issue *Pearson v Elec. Serv. Co. of Pensacola,* 201 P.2d 643, 644 (Kan. 1949); *Ward Mfg. Co., v. Miley*, 281 P.2d 343, 348 (Cal. Dist. Ct. App. 1955).
[1158] See, Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).
[1159] See ECC, Article 91 and 97. It is worth noting that the Lebanese and German legislators also adopted this view. In the Lebanese Obligations and Contracts Law, Article 158 it is provided that 'the contract that is established by a telephone conversation is considered as contract that is established inter attendees, and at that time the place of its creation is identified, either by the desire of the contractors or by the judge, according to the situation of the case'. The German Civil Law, Article 174 also provides 'the offer directed to a present person cannot be accepted except immediately, the situation is similar in accordance to the offer direct from one person to the other by telephone'.
[1160] Al-Sanhori, *Masader al-Iltizam* (n 89) 238-239.
[1161] Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2127.

be seen in Article 88 which stipulates that if contracting is done using the phone or any other similar means, it will be considered to have occurred between two persons who are present in relations to time and between two absentees in relations to place.[1162] In the observations of the Preparatory Committee of the ICC, the following had been stated: 'as to contracting by telephone, it is clear that in relation to time, there is no period...of time that separates the offer and acceptance. Therefore, this contracting is considered as happening *inter praesentes*. However, in relation to place, the situation is different, if the seller (while in Baghdad) called by telephone the purchaser (which is in Basra)...the purchaser accepted by telephone, contracting is considered established by the reach of the acceptance to the knowledge of the offeror (he is in this scenario in Baghdad) also the place where the contract is concluded is Baghdad not Basra'.[1163] However, it is important to note that the separation of time and place in Article 88 of the ICC does not introduce a new provision than Article 87.[1164] It can be seen that this Article deems contracting using the telephone to be face-to-face contracting in relation to time, and distance contracting in relation to place. Furthermore, as mentioned earlier, under the ICC the contract is considered to be concluded at the instant the offeror is aware of the acceptance -the offeror's place. From the preceding discussion, it is clear that Article 88 provides no different provisions to Article 87. When characterising the situation of the contracting parties, the ICC takes into account the fact that they were in contact with each other over the telephone (in terms of time) and they were also far away from each other (in terms of place). Consequently, there have been calls for the removal of Article 88.[1165]

After considering the two views on contracting by telephone, the researcher thinks that the best way to address the situation is to combine them. In particular, modern telephones are not only able to make voice calls, but can also send and receive text messages and host video conferencing. The type of contracting is not just dependent upon the programme used to send

[1162] ICC, Article 88.

[1163] The Report of the Preparatory Committee of the ICC, (the Preparation Committee Archive, 1948) 8. This is also the position taken by the Jordanian legislator, since Article 102 of its civil law states' contracting by telephone or any similar means is considered, in relation to place, as if it is conducted between contractors that are not joint in one meeting, while in relation to time, it is considered as if it is conducted between attendees in the meeting'.

[1164] See Bayat (n 24) 86.

[1165] As to the position of the JCC, despite the resemblance of Article 102 (which is provided to address contracting by telephone) to the provision provided by the Iraqi legislator in Article 88, the provisions that enact this Article will lead to practical differences as well as theoretical ones. The differences are not only confined to 'characterising' the situation of the contractors, also extend to the differences in identifying the time and place of the conclusion of the contract. It had been known that the Jordanian legislature considered the contract concluded *inter praesentes* the moment the offeror becomes aware of the acceptance, and considered the contract concluded *inter absentes* once the acceptance is forwarded/issued. Thus, the contract, according to the JCC, is concluded at the time the offeror has knowledge of the acceptance, while the place of its conclusion is the place that the addressee, by the offer, issues his acceptance (the place of the accepter), this is the view adopted by the Jordanian Cassation Court. Cassation Rights, No.364/88.

the acceptance, but also on how it is used. Therefore, irrespective of the programme used, if it was a voice or video call, then the contract should be deemed to be *inter praesentes* with respect to time and *inter-absentes* with respect to place (which is the approach by the ICC). If the communication used text messaging or email, then it is similar to the normal mail, i.e. contracting *inter-absentes* from the perspective of time and place. In a voice or video call, the correspondence between the contracting parties is direct, but the fact that the two parties are in different locations cannot be ignored.[1166] Although contracting by telephone is considered to be contracting *inter praesentes* in relation to time, it cannot be presumed that the non-physical presence at the same location does not have any effect. This is because one of the legal outcomes after a contract is concluded is the determination of where the contract was concluded and that is the reason for the presumption that a contract is concluded at the place the offeree uttered his acceptance. It is attributed to the place of the offeror –according to the receipt rule.[1167] Ascertaining the place of contracting is important for the ascertaining of the formation of the contract,[1168] but it has less influence on determining the time the contract was formed. However, the seller will tend to favour his own interests by giving a positive description of his goods and may even intentionally hide the negative aspects.[1169] Furthermore, if the contracting parties are communicating with each other via video conferencing, they are said to be contracting in an actual meeting of contract in relation to time and place. This contradicts some of the rights of both parties that are given to them because the contracting took place in two different locations, for instance, the party's right to waive the sale in contracts concluded using distance communication which can be distinguished by its specific character, i.e. the place character.[1170] This right protects the purchaser who cannot physically see the object for sale, or

[1166] For example, all contracting between distance (in terms of place) contractors are called contracting at distance whether the correspondence happened through a messenger or by sending letters by mail or catalogues or leaflet or telegraph or telephone or telex or internet or any other means that the contractors are at distance to each other. See Rushdi (n 15) 59-60.

[1167] Dr S Zaki (n 362) 35.

[1168] Specifically, if contracting was between persons who are from different countries, because the place of contracting plays a significant role in determining the legal jurisdiction in cases of conflict of laws. ICC Article 25(1) stipulates 'the law of the state wherein lies the domicile of the contracting parties (if they have a common domicile) shall apply to contractual obligation. If they have different domiciles the law of the states within which the contract was concluded will be applied unless the contracting parties have agreed otherwise or where it would be revealed from the circumstances that another law was intended to be applied'. Article 26 also provides that 'the formality of contracts shall conform to the law of the state wherein they have been concluded'.

[1169] Characterising contracting by telephone as contracting *inter praesentes* in respect to time and place renders the vision condition as nonsense because vision of the object of the contract is not achieved between the contractors.

[1170] Distance communication means has been defined in French Law 86-1067 (1986) Article 2(1), on Freedom of Communication, as 'every transferral or sending or receiving of symbols or signs or writing or image or sounds or information regardless of its nature, by the medium of fiber optic or electric or wireless or any other electro-magnetic systems'. Additionally, law issued in 22 December 1972, which gives the purchaser the right to

where the electronically advertised picture was surrounded by the lights of the site to make it an attractive offer to buy. Consequently, the picture may be insufficient and the buyer's knowledge of the item for sale may not be at the level where it negates a serious lack of knowledge of the sold object.[1171]

It is now clear that if contracting is done by telephone it will be deemed as instantaneous when it is a voice or video call, but this is only in relation to ascertaining the time the contract was concluded. The prolonging of the phone call is proof that there is simultaneity and as such the offer continues to be valid for acceptance, whilst the termination of the phone link will block the conclusion of the contract.[1172]

5.4.6. The time the contracts in telegraph and telex transactions are concluded

Cases whereby the acceptance is sent via telegraph have consistently held that the acceptance is complete the moment the telegram is handed over to the telegraph company.[1173] For instance, in *Weld & Co. v Victory Mfg. Co*,[1174] the buyer offered to purchase 300 bales of cotton from

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relinquish the contract- in contracts that are concluded at distance-during a period of seven days from the date of concluding the contract; and law No (88-21) issued in 6/1/1988, which gives the purchaser the right to take back the product to the seller (either to exchange by another product or to return it and retrieving its price). In Article 1 of this law, it is provided that 'in all transactions that sale is undertaken at distance, the purchaser of the product, during full seven days counted from the date of receiving his request, the right to take it back to the seller wither to exchange it by another or to return it and retrieve its price without any sanctions from his part except returning expenses'. I was unable to locate the earlier French Law – please check your citations and add to table of legislation

[1171] Rushdi (n 15) 63.

[1172] Which asserts that contracting shall be considered real contracting, in terms of time, necessitating the knowledge of the offeror of the acceptance as being concluded 'hearing in contracting by the telephone is a condition in the offer and acceptance, therefore, the theories of declaration or forwarding are invalid to this type of contracting. Because the purpose of the conversation by telephone is to clarify and disclose what is in mind, and the way to that is through speech; and speech does not exist merely by establishing letters in an abstract way. Because letters are set up as a system to refer to what is in conscious, and the connotation of this in telephone, cannot happen except with what is heard and understood. Because moving the tongue without voice is not called speech as it is not heard nor it is indicative, and does not result in speech because speech is not achieved without the voices which are segmented in a specific way'. See Alzuhaili (n 23) 292

[1173] See for example *Farmers' Produce Co. v McAlester Storage and Commission Company* 150 P.483 at 485; *Weld and Co. v Victory Manufacturin. Co*., 205 F. 770, 775 (E.D.N.C. 1913); But see *Lucas v Western Union Telegraph Co.,* 109 NW 191, 192-93 (Iowa 1906) (holding that an acceptance by telegram is only effective upon dispatch where the offeree made the offer by telegraph). The *Lucas* court adopts the rule of agency to stress that the accepting party, where the offer is not made by telegraph, has made the telegraph company his sole agent while the company is not a common agent for both parties. Thus, acceptance is still when he delivers the acceptance to the telegraph company, in the offeree's control, and the acceptance is therefore effective only once delivered. *Lucas,* 109 N.W. at 192-93. The *Lucas* decision has been described as an aberration. *See Farmers' Produce Co., 150* P. 483 at 485; *WG Ward Lumber Co. v Amercian Lumber Manufacturing Company,* 93 A. 470, 470-71 (Pa 1915); *Western Union Telegraph Company v Fletcher* 208 SW 748, 751 (Tex. Civ. App.-Austin 1919, no writ).

[1174] The *Farmers' Produce* court also noted that in the case of an acceptance by wire, the acceptance is complete at the moment the telegram is delivered to the telegraph office. It was also held that an acceptance by mail is complete at the moment of dispatch. *Farmers' Produce Co.,* 150 P. 483 at 485.

the seller by a letter dated 7 September, 1911.[1175] At 10:15 am on 20 September 1911, the seller placed a telegram with the Western Union Telegraph Company for transmission to the offeror (buyer) which served as an acceptance of the original offer.[1176] The telegram reached the buyer at 12:35 pm the same day. Meanwhile, the buyer placed a telegram with the telegraph company at 9:55 am on 20 September 1911 with a message to revoke his offer to buy the cotton. The plaintiff or seller received the message to revoke the purchase at 10:40 am the same day. Upon the receipt of this message, the seller immediately informed the buyer by telegram that his revocation of the offer to buy was too late as he had accepted the offer earlier and had already procured the cotton.[1177] The court ruled that the seller's telegram to accept the offer to contract became effective when it was handed over to the telegraph company at 10:15 am for transmission and not at the time the offeror (buyer) received it. The attempted revocation of the offer could only be effective if the seller had received it at any time before he issued the acceptance. In this case, the acceptance was effective at 10:15 am, i.e. the time it was handed over to the telegraph company, which was before the seller received the attempted revocation at 10:40 am the same day. In this case, the acceptance prevailed, and the seller was able enforce the contract.[1178]

It seems that the telex has been given the same treatment as the telegraph and regular mail.[1179] A contract is formed when the acceptance by telex is handed over to the telegraph company.[1180] In *Re Marine Motor Oil Inc.,* a case involving telex communication, the court had an extensive discussion on why the dispatch rule was adopted as the effective time for communication under the United States Bankruptcy Code.[1181] The court held that in cases where certainty is a vital aspect of communication, as in this case, the rule that gives the most certainty would be the dispatch rule.[1182] The court pointed out that the dispatch date can be easily identified from the postmark on the envelope or electronically recorded date and time a telex is sent.[1183]The court also pointed out that the application of the receipt rule would involve the court in a harder factual inquiry. For instance, the court said that the time a telex was sent is easy to determine

[1175] Ibid.
[1176] Ibid, 775.
[1177] Ibid, 773
[1178] Ibid, 775, 776
[1179] See in general, *Norse Petroleum v LVO International, Inc.,* 389 A.2d 771 (Del. 1978); *Montello Oil Corporation v Marin Motor Oil, Inc*., 740 F.2d 220, 227-29 (3d Cir. 1984) (treating the sending of a telex, rather than its receipt, as the relevant time of a formal demand under the United States Bankruptcy Code);
[1180] *Norse Petroleum,* 389 A.2d at 773. 56
[1181] *Montello Oil Corporation v Marin Motor Oil, Inc.,* 740 F.2d at 227-29.
[1182] Ibid, 228.
[1183] Ibid.

whereas the time it was received was more difficult to ascertain. The court queried about the time a telex is received if the recipient's machine was not turned on when the telex was sent, i.e. when the telex would be supposed to have arrived.[1184] Furthermore, the court said that it would be hard to ascertain the time of receipt even if the person in charge left the telex machine on overnight and the telex arrived during the period but nobody was around to read it until the next morning. In summary, as far as communications using telex are concerned, the court held that the receipt rule would involve many types of factual disputes that are more complex than those under the mailbox rule and the court would have to delve into the hypothetical question of the exact time a telex was received.[1185]

The ICC, Article 88 provides that 'contracting by telephone or any "similar" means' is regarded as contracting *inter praesen*tes in terms of time and contracting *inter-absentes* in terms of place. It indicates an advantage for the approach of the ICC in that it provides a way to accommodate modern communication methods that can be used to conclude contracts.[1186] However, it does not provide the criterion that can be applied to identify which particular communication methods are similar to the telephone.[1187] The question that arises therefore is whether the criterion of 'similarity to telephone' provided by the above Article is 'the immediate hearing only'. If that is the case, then the devices that fit this criterion would be limited to wireless devices, mobile phones and video conferencing[1188] as these devices can transmit voices immediately. However, if the criterion is 'the immediate transmission of the offer or acceptance', then, in addition to the devices just mentioned, there are other communication methods such as telex, fax and email that are considered to be similar to the telephone, meaning that Article 88 should also be applied to them.[1189]

The researcher is of the opinion that the criterion of similarity means 'enables continuous and simultaneous contact between the parties while using the communication means and during the period of communication of offer and acceptance'. The situation is similar whether they are interacting by: (i) using their voice only through mobile phones; (ii) texting each other using

[1184] Ibid, 228-29.
[1185] Ibid. For more information see, National Economic Development Council, 'EDI or DIE' (n 1050) 1.
[1186] Also, ECC Article 94 and JCC Article 102
[1187] This also applies to the positions of the ECC and JCC.
[1188] Since the advent of programs allowing the person to having conversation with the other party by voice and picture in a direct way (whether one party or more). See, Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2123.
[1189] Adnan I Alsarhan and Nouri H Khatir, *Sharh al-Qanon al-Madani: al-Iltizamat*, (Dar Alkitab, 2000) 79.

one of the many chat programmes;[1190] or (iii) using voice and pictures by utilising a video conferencing programme.[1191] There has been some support for applying Article 88[1192] to contracting using fax. However, the researcher disagrees with this contention because the fax, although somewhat similar to the telephone in as far as the immediacy of transfer of expression is concerned, does not facilitate interaction between the contracting parties. The fax conveys the expression, but there is no instantaneous communication between the parties and once the message is conveyed, the communication between the offeror and addressee comes to a halt. Additionally, if the addressee wants to accept the offer he has to write out his acceptance and then fax it over to the offeror. Therefore, it appears that the role of the fax is the same as that of the conventional writing method.[1193] Therefore, it can be said that when determining whether the contract is *inter-praesentes* or *inter-absentes* this does not depend only on the methods of communication used. Some have provided that it should be also determined in accordance with the manner this means or that is used.[1194] For instance, if the offeror uses a third-generation mobile phone to send an offer[1195] to the addressee's email and after that switches off his phone, is it correct to deem the contracting as *inter-praesentes* in a face-to-face contract with regards to time just because the communication device is a mobile phone?

It would be wrong to portray contracts concluded via the Internet (using its various services) as face-to-face contracting in the context of time. The nature of the contracting must be decided based on the type of service that is provided through the Internet. In this regard, it is worthwhile to refer to the decision made by the Islamic Figh Assembly with regards to the computer (i.e. Internet) as the first paragraph of this decision states that:

> if the contract was concluded between two distant parties, each one cannot see or hear the other, and the communication means was correspondence or writing -this applies to telegraph, telex, fax, and computer screens-, in this situation the contract is concluded when the acceptance is communicated to the addressee.[1196]

[1190] Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2123.

[1191] Video conference means 'the way of negotiation on the contract conditions to reach the conclusion of the contract…conducted in local and international businesses. In big companies there are sometimes a video conference hall which is equipped by television screens and photo cameras, linked directly with similar halls in other companies. If two companies wanted to contract in relation to a specific bargain, a team sits in the hall which is in its company and can see, at the same time, members of the other team by photo and voice, thus the negotiation is undertaken between them directly'. See Dr Rajab K Abdullah, *Al-Tafawodh Ala al-Aqd*, Dar Alnahda Alarabia press, Cairo 2000) 47.

[1192] They refer to JCC, Article 102 which is identical to ICC Article 88.

[1193] Abdullah, (n 14) 49.

[1194] Abdullah, (n 14) 50-51.

[1195] 'third generation mobile phones provide the possibility of their owner accessing/entering the internet and view live images of whom he speaks to, or the possibility to send emails or other various services'. See Ahmed Mazin 'The Birth of Third Generation of Mobile Phones' (2001) 4 Al-Rasheed Al-Masrafi Journal 55.

[1196] See, Decision no. 54/3/6 in Jeddah, Saudi Arabia, 14-20 March 1990 (n 23).

It can be seen that this decision considered contracting between absentees and by computer using the Internet to be equal and that in both situations the contracting is carried out between absentees. It can also be seen that it did not make any distinction between the services provided by the Internet when determining the nature of the contracting. Incidentally, the researcher agrees with the solution adopted by the Islamic Figh Assembly in 1990, since contracting using the Internet during that period was very different from now because during the said period there was no audio or video facilities. During that time, the party that wished to contract sent a letter by email expressing this desire and the addressee would respond by saying he accepts or rejects the offer. There is no doubt that this process would take some time, thus making this contracting method similar to that using normal mail. It can therefore be said that it was like contracting *inter-absentes* in terms of time and place. Recently, the contracting methods using the Internet have changed as the contracting parties can now carry out direct and instantaneous two-way communication.[1197] As such, it can be said that it is not the contracting method that ascertains the nature of contracting, but the system or programmes that contracting method uses. Although ICC Article 88 can be applied to developments that have occurred or will occur in communication methods, it should more precisely describe how the 'similarity' criterion can be applied under the article for it to be compatible with such developments.

5.5. Assessment of the situation

Generally, a contract is concluded at the time and place the acceptance is made known to the offeror.[1198] However, the general rule is not applicable in cases where the communication is not instantaneous; in such a situation the contract is concluded at the time the acceptance is dispatched or the postal rule is applicable.[1199] However, the postal rule is not applicable to telex messages. Even though it is 'not in fact received instantaneously by the responsible principal', it has been held that the telex should be considered as instantaneous communication between the contracting parties, i.e. as if the contracting parties were communicating on the telephone.[1200] It seems that three main conditions have to be complied with to justify this outcome. Firstly, the dispatch and receipt of telex messages are considered to be almost simultaneous. Although the communication was not absolutely instantaneous, the contracting parties were treated as pretty much in each other's presence, just as if they were talking to each

[1197] Report of the Commission of the Conference of 'Electronic Banking Business (n 399) 2126.
[1198] ICC, Article 87. See also *Entores v Miles Far East Corporation* [1955] 2 QB 327 [332].
[1199] *Entores v Miles Far East Corporation* [1955] 2 QB 327; *Brinkibon Ltd v Stalag Stahwarenhandelsgeslschaft mbH* [1983] 2 AC 34
[1200] *Brinkibon Ltd v StalagSahharenhanddsgeselschaft mbH* [1983] 2 AC 34 [43].

other on the telephone.[1201] Secondly, the contracting parties do not have to depend on a third party. In order to send a letter or telegram, it has to be entrusted to the post office (or the telegram service provider today), whereas the telex goes directly to the addressee. The addressee is responsible for the speedy management of messages within his own organisation.[1202] Finally, the chances of a faulty transmission are more or less equal between the parties. The party that sends a telex message can usually know whether the message has or has not been received by the addressee. As such, it is expedient to make the offeree responsible for ensuring that the acceptance reached the offeror.[1203] Hence, the contract is concluded when the notice of the acceptance reaches the offeror's telex machine and the offeror is notified of its receipt.[1204] However, it has been highlighted that this reasoning may need some modifications in the light of recent technological developments and that no all-encompassing or comprehensive rule exists to cover all such cases.[1205] The general or postal rule should not be applied unthinkingly as it could give rise to 'manifest inconvenience or absurdity'.[1206] As regards the aforementioned criteria, what are the best solutions for dealing with electronic acceptances? The postal rule has been rejected by some scholars, and it has instead been suggested that electronic acceptances should be treated in the same way as telex messages.[1207] However, this approach is too simplistic, as the various electronic communication methods can differ considerably from each other. Consequently, there is a need to differentiate between the various contractual situations.

As previously indicated, in an online communication, the parties are connected by means of a direct link and communication is instantaneous. In this situation the general rule will apply, and the contract will be concluded at the time and place the offeror was informed of the acceptance.[1208] In an EDI transmission, the most widely used direct link, it will be concluded at the moment the offeror's computer receives the message. If a message is sent through a network, the contracting parties are considered to be communicating directly (if no third party

[1201] *Entores v Miles Far East Corporation* [1955] 2 QB 327 [337].
[1202] *Brinkibon Ltd v Stalag StahvrenhanddsgeseUschaft mbH* [1983] 2 AC 34 [43]
[1203] Ibid.
[1204] *Entores v Miles Far East Corporation* [1955] 2 QB 327 [335f].
[1205] *Brinkibon Ltd v StalagStahLwarenhanddsgeseUschaft mbH* [1983] 2 AC 34 (42). Moringiello and Reynolds, 'Survey of the Law of Cyberspace…' (n 953) .
[1206] *Hotwell Securities v Hughes* [1974] 1 WLR 155(161).
[1207] Joanna Angel, 'Legal risks of providing services on the Internet', (1995) 11(6) Cambridge Journal of Law and Policy 150, 152.
[1208] Noora Khadhim Al-Zamily, 'The Time of Electronic Contract's Conclusion' (2009) 2 Al-Qadysia Journal of Law and Politics 345.

is involved) and the sending and receiving of the data is almost simultaneous.[1209] Consequently, this kind of practically instantaneous communication should fall under the general rule as well.[1210] If, during the transmission of data, more than one network and service provider are involved, the situation will be different. When compared with face-to-face or telephone conversations, the exchange of information is non-instantaneous.[1211] However, if the network transmission methods are practically instantaneous, then it will have to be consigned to the same category as telex and if that is the case the general rule will apply. In line with this logic, arguments have been put forth in support of applying the general rule to email.[1212] If the test developed by the courts in the telex cases is adopted, there would have to be almost simultaneous dispatch and receipt of email.[1213] More often than not, email is delivered very quickly. However, the transmission speed is nowhere near that of the telephone or even the fax.[1214] Problems in sending can arise even without computers being hacked which can cause the Internet to crash, and a simple blockage on the information highway may lead to delays or even prevent transmission. As such it is not certain when or if an email will ever arrive.[1215] Secondly, the email message is handed over to service and network providers and their computers send and receive the data. Normally, the email is stored in the mailboxes of the service provider's computer and the addressee retrieves his email from there. This is similar to letters sent to PO boxes which the addressee has to physically pick up. There are some suggestions that acceptance using the electronic system is similar to that of acceptance by telegram.[1216] Nonetheless, the electronic system has no direct connection between the addressee and offeror that can be compared with the telephone, telex or fax. In actual fact, the parties rely on an identifiable third party.

Finally, should the sender or addressee bear the responsibility for the transmission? Certain software allows the sender to request for confirmation of delivery or even that the message was read. This confirmation is automatically sent back via an email message. However, this will

[1209] L J Davies, 'The Internet and the Elephant' (1996) 4 International Business Lawyer 151, 154.
[1210] Ghalib Ali Al-Dawoodi and Hassan Mohammed Al-Haddawi, *Private International Law: Conflict of Laws, Conflict of Jurisdiction and Enforcement of Foreign Judgments* (3rd edn, Al-Attick Publishers 2009) 150
[1211] Anton (n 429) 270.
[1212] Gringras (n 58) 17.
[1213] John N Adams, 'Software and Digital Content' (2009) 4 Journal of Business Law 396.
[1214] Bainbridge, *Introduction to Computer Law* (n 53) 216.
[1215] Smith (n 570) 99.
[1216] Reed (n 199) 305 with regard to EDI. See also Sara E Smith, 'The United Nations Convention on the Use of Electronic Communication in International Contracts (CUECIC): Why It Should Be Adopted and How It Will Affect International E-Contracting' (2008) 11 Southern Methodist University Science and Technology Law Review 133;

only work if the addressee's computer has the required software to respond to such a request.[1217] Even if such a message was issued to the sender, it merely confirms that the addressee's service provider received the message (i.e. confirmation of delivery) or that the addressee has retrieved the message (confirmation of reading).[1218] Moreover, it may take quite a while before the confirmation reaches the sender and on top of that he cannot tell whether his full acceptance message arrived or it was distorted along the way.

These deliberations evidently indicate that email communication cannot be considered as virtually instantaneous. As a result, the postal rule should normally apply and the contract is formed at the time and place the acceptance was posted (sent). However, the question that arises is; in an electronic environment what amounts to 'posting'? Is it sufficient for the sender to click on the 'enter' button on his computer screen and in that way the contract is concluded at that moment and place?[1219] Or does 'posting' mean that the service provider's server has received the email and then delivered it to the addressee? The offeree has fulfilled all his duties te moment he drops his letter of acceptance into a post box[1220] or hands it to an employee of the post office[1221] from where it is then delivered to the offeror.[1222] Likewise, the acceptance is complete the moment the acceptance message is received by the telegram service provider which then delivers the message to the offeror.[1223] The logic behind this rule is that the offeree handed his message over to the post office or telegram service provider and then reasonably relied upon them for the successful delivery of his message. When applied to network communications, it means that the data of the acceptance must be received by the node of the network and from there it is forwarded to the offeror.[1224] For example, if the offeree sends his message from the computer in his house, the time of acceptance is when the service provider's computer receives the message. Therefore, the place of acceptance is where the service provider's computer is located.

The researcher proposes that the postal rule will also be applicable to EDI communications that are carried through one or more service providers. The situation here is not significantly different from using email as outlined above. There is no direct link between the parties and

[1217] See Smith (n 570) 99.
[1218] Gringras (n 58) 18. 4
[1219] Ibid 42.
[1220] *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 [332].
[1221] *Thomson v James* (1855) 18 D 1(11).
[1222] *Dunlop v Higgins (1848)* 6 Bell's App 195.
[1223] *Cowan v O'Connor* [1888] 20 QBD 640(642); *Re London and Northern Bank* [1900] 1 Ch 200.
[1224] Olivier Hance, *Business and Law on the Internet* (McGraw Hill 1996) 155; Reed (n 199) 505;

their communication is also not instantaneous.[1225] Sooner or later there becomes a need to examine acceptances issued via interactive websites. Distinguishable from email, the parties here are communicating with each other online. Subject to the manner and time that the messages are transmitted, there is a likelihood of a time lapse between the dispatch and receipt of messages. However, the built-in programme on the website can recognise when no data, or incoherent data is received, and it will automatically respond with an appropriate message.[1226] The user who is waiting for a confirmation or some response to his message will also be able to recognise a failed connection. This type of communication appears to be similar to direct EDI and it would be judicious to apply the general rule,[1227] i.e. the contract is concluded the moment the offeror is informed of the acceptance.

Two problems can be found from the above analysis, i.e. there will be a practical contradiction and a legal conflict between the domestic laws. Possible solutions to resolve the two problems are now discussed.

5.5.1. Contradiction in practice

There are two possible suggestions to resolve the problems of the different requirements with regards to when the message was sent and its receipt in advance of them arising. Firstly, there is a need to simplify the determination of the point a message is sent or received in the information processing system. As illustrated in Figure 2 above, there are several different possible points where the message is sent or received, and they can be confusing to e-commerce practitioners. Therefore, if the parties use different ISPs, the correct sending point is point C in Figure 1, because points A, B and C can be connected to each other as there is an automatic sequential processing. If the same ISP is used by the parties, the sending and receiving point is equal and as such it may be the same as the telephone, telex or fax. If the message does not reach point C because of a system error or other problems, the message may not be sent. In such a scenario, the recipient is not yet a party to the communication because at this stage the problem is between the recipient and his ISP. Therefore, it might be reasonable to treat point C as the time the message was sent. Points D or E are not appropriate from the sender's

[1225] Ian Walden, Contractual harmonisation in the European Union: a new approach towards information technology law, (1995) 11(1) Cambridge Journal of Law and Policy 2, 3; N Helberger, MBM Loos, Lucie Guibault, Chantal Mak and Lodewijk Pessers, 'Digital Content Contracts for Consumers' (2013) 36(1) Journal of Consumer Policy 37.
[1226] Gringras (n 58) 27.
[1227] *Ibid* 23-26.

perspective because he will presume that the recipient, being a businessman, will check his commercial correspondences every working day. Moreover, if the parties use different ISPs, point C is the proper receiving point, regardless of whether or not the acceptance was sent to the designated or non-designated ISP.[1228] The difference between the processing of conventional and electronic posting systems is due to the different technical roles of the post office and the ISP. In fact, the post office is seen as a common carrier while the ISP is a private one.[1229] If the receipt rule of the conventional postal system is used, point A would be correct if the ISP is the same as a post box that takes the place of the recipient. In addition, this is because the postman just places an acceptance letter into the addressee's post box without having any thought over whether the addressee will open the letter or not.[1230] However, the recipient will not be able to manage the ISP's system by himself. As such point C can be the only point of receipt to the addressee.[1231]

This assertion is supported by ICC, Article 87(b) which stipulates that a contract is concluded when the acceptance is received.[1232] Therefore, acceptance given by means of a telephone or another medium having 'substantially instantaneous two-way communication' is regulated by the principles of the receipt rule when the parties are together in the same place.[1233] A similar approach (the acceptance rule) has also been adopted by civil law countries such as the People's Republic of China.[1234] The exact point in time the email is considered to have been received by the offeror is still not entirely clear. The exact point in time can be: when the offeror reads the email; when it is reasonable to expect that the email has been brought to the attention of the offeror; or when (the more likely case) the email arrives at the server of the offeror's ISP. A somewhat similar principle on the conclusion of B2B e-contracts for the sale of goods can be found in the CISG, Article 15(1). This stipulates that the offer is effective the moment it reaches the offeree. The Advisory Council said that the time corresponds with the moment the electronic communication enters the offeree's server. In the same Convention, Article 18(2) stipulates that the acceptance of an offer becomes valid the moment there are indications to

[1228] Also see *Entores v Miles Far East Corporation Ltd [*1955] 2Q. B. 327.
[1229] Smith (n 570) 99.
[1230] Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumers in the Twenty-First Century: in Lilian Edwards and Charlotte Waelde (eds) *Law and the Internet* (Hart Publishing 2009) 89, 126.
[1231] Ibid.
[1232] ICC, Article 87 ICC.
[1233] Restatement (Second) of Contracts para 64 (1979).
[1234] Wang (n 153) 56-58.

show that the acceptance has reached the offeror.[1235] However, one of the disadvantages of depending on the reasonable amount of time the offeror ought to have known of an emailed acceptance for it to be effective is that it creates uncertainty. The offeror must receive the acceptance within the time stipulated in the offer, or in the case when no time is mentioned, then it should be within a reasonable time (almost instantaneously if an oral offer was given unless the circumstances suggest otherwise).[1236] On the interpretation of 'within a reasonable time', some academicians concur that it will be wise for the offeror to stipulate that an emailed acceptance will only be deemed to have been received if it reaches the offeror's inbox during his normal working hours.[1237] However, exactly how long that period is will depend upon whether the method of communication is fast or slow as well as what constitutes the subject matter. For example, if the offer is to buy perishable goods or commodities with daily price fluctuations, the offer will lapse quite quickly.[1238] As such, it is reasonable, in order to be effective, to stipulate 'normal working hours' for acceptances using email and perhaps the period should be shortened substantially if quicker methods of communication such as automated transactions are used.[1239] In order to minimise uncertainty in online transactions the IESTA 2012 deems that an electronic record is received the moment it enters the addressee's designated information processing system for the receipt of such messages (e.g. a home office) and that it is in a form that can be processed by that system.[1240]

Therefore the time an offer is dispatched is when it leaves the originator's information system or that of the party sending the message on the originator's behalf. The time of receipt is when the electronic communication can be retrieved by the addressee from his designated electronic address.[1241] There are some who go even further, with detailed provisions that explicitly indicate how the general rule should be applied to contracting using electronic means. It

[1235] That rule, which appears in the first part of CISG Article 16(1), is tempered by the second part of Article 16(1): 'Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance'.
[1236] Mohammad Abdul Jalil, 'Clarification of Rules of Acceptance in Making Business Contracts' (2011) 4 Journal of Politics and Law 109-122.
[1237] Neil Andrews, *Contract Law* (Cambridge University Press 2011) 46.
[1238] Also see *Schelde Delta Shipping BV v Astarte Shipping Ltd (The 'Pamela')* [1995] 2 Lloyd's Rep 249 Queens Bench: it was held an acceptance that was sent out of business hours by telex would not be effective until the opening of the office on the next business day.
[1239] According to Russian Civil Code (RCC), Article 441, the duration of a 'normally required' time is a question of fact, dependent upon the nature of the contract, commercial practice and other factors.
[1240] RCC, Article 20a thereof.
[1241] See Article 15(b) following UNICITRAL MLEC Article 15, which reaches similar conclusions with a different wording than that used in the UN Convention on the Use of Electronic Communication in International Contracts, Article 10.

asserted that an electronic message is effective at the time of its receipt and that it does not matter whether the addressee was aware of its receipt or not. Lastly, it states that if an offer using an electronic messaging system automatically generates an electronic acceptance of the offer, a contract is formed when the offeror receives the electronic acceptance.[1242] For the protection of their customers, businesses are required to acknowledge receipt of orders by electronic means and their consumers are deemed to have received the acknowledgements if and when they can gain access to them.[1243] The IESTA 2012 does not specifically establish the instant when a contract is formed. It concentrates on accessibility, but the phrase 'able to access' is ambiguous, and the rules on online acceptance are subject to the national laws of each individual country or jurisdiction. Even though it can be implied from the law that a contract cannot be concluded until the buyer can retrieve the admission of receipt of an effective transaction, it has been contended that the legal obligation for confirmation is not required, since there is no general rule to say that a contract must be confirmed, and when the contract is already imminent the confirmation does not serve any legal purpose at all.[1244] For that reason, in online transactions, when a consumer clicks on the 'submit' or 'pay' buttons, or sends an email, the contract is concluded when the acceptance is expressed.[1245]

5.5.2. Contradiction in Iraqi domestic laws

Although the receipt-with-knowledge rule is still applicable, ICC Article 87 states that if a contract is concluded using a remote business communication, the receipt-with-knowledge rule should be replaced by the receipt rule without any exception as per the CISG and Unidroit Principles of International Commercial Contracts (UPICC). This is because international laws and rules generally apply the receipt rule and, even from the perspective of electronic means, the receipt rule is more equitable than the postal rule.[1246] It can thus solve the problem. Insofar as a theoretical base is concerned, the postal rule can eliminate the uncertainty about the exact time a contract is formed because of its contemporaneous exchange of notification between the

[1242] UNCUECIC, Art. 10(1), 10(2).
[1243] EC Directive 2000/31/EC on Electronic Commerce, Article 11.
[1244] This is clearly a rejection to apply the postal Rule' to electronic messages, whereby if there is no receipt the risk would be placed on the party who sent the e-message. However, since the IESTA 2012 is only applied to computer information contracts, the postal rule may be in place for electronic contracts in Iraq, which means that the acceptance is effective when dispatched (sent).
[1245] In addition, the IESTA 2012 does not impose any legal consequences in cases of a lack of acknowledgement of receipt. So, it is commendable to question the effectiveness of this request with regard to consumer protection.
[1246] The receipt rule will be a more dominant rule than the postal rule in the international sale of goods. So far, 67 countries have ratified the CISG, including Paraguay, that entered force from 1 February 2007.

contracting parties.[1247] However, if the offeree sends his acceptance and it does not reach the offeror, it will not only be difficult to know how the offeree and offeror can manage the situation, but the main question here is who is responsible for the situation.[1248] Moreover, the view in Adam's case that the receipt rule will lead to uncertainties appears to be logical. Regardless of whether there were many counter-offers before the conclusion of the contract,[1249] the ultimate offeror and offeree must be identified.[1250] Subsequently, the time the contract was concluded will be the time when the acceptance reached the offeror. The offeror notifying the offeree that he has received the acceptance is merely a substantial task of the offeror.[1251] Insofar as modern technology is concerned, the offeror's notification of receipt of acceptance to the offeree is promptly received by the latter. Therefore, it seems that the only solution to lessen uncertainty is the receipt rule as opposed to the postal rule. Furthermore, the postal rule is still viable in many countries if the acceptance is sent by regular mail, but in the context of electronic acceptances the rule's future is not so clear. In the electronic communication era, the receipt rule is more suitable than the postal rule. Even so, the postal rule is still being used by many countries in real-time communication methods.[1252] Therefore, the companies in those countries that want to have international business transactions must agree and indicate which rule is applicable, i.e. whether the postal rule or the receipt rule will apply.

Under the said circumstances, the receipt rule provided by the CISG can offer a solution. There are two reasons for this. Firstly, in spite of several issues and suggestions to amend the its provisions, many countries, with a big share of the world's international trade have ratified the CISG. Secondly, the Convention on the Use of Electronic Communication in International

[1247] Christensen (n 486) 34; Watnick (n 479) 199.
[1248] The party who shows his/her intention to the other party will be apt, in general, to be liable for errors. In the UPICC Article 3.6 states that 'error in transmission or expression: if an error occurs in the transmission or expression of a declaration is deemed to be a mistake of the person from whom the declaration emanated'.
[1249] CISG Article 19(1): A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
[1250] In the common law, there will be no contract concluded when different forms are exchanged. They will be counted simply as counter-offers. For a contract, the form of offer and acceptance and their contents must be matching to each other; the 'mirror-image rule'. The contract shall be formed according to the last content and form sent by the acceptor. This is, in turn, called 'last shot doctrine'. Consequently, most of the contractual parties would like to use their own contract formula that they are familiar with and which may grant them an advantage for themselves.
[1251] In an international transaction however, any notification sent from a party to the other party may be an obligation that belongs to the basic notion such as good faith; See Christensen (n 486) 34.
[1252] Although the UK has not ratified the CISG, the USA has ratified it. Therefore, American companies can place the receipt rule in the case when they make an international contract. Where a company in Iraq, for example, concludes a contract with a company in England, in order to apply the receipt rule, they should agree regarding the applicable law on the contract.

Contracting (CUECIC),[1253] which is based on the MLEC and CISG, can make up for the lack of clear provisions for electronic contracts in the CISG.[1254] It appears that the Convention will have a significant impact on international sale contracts that are concluded using electronic communication methods. Since the MLEC is founded on the concept of the CISG, all domestic laws on the international sale of goods should aspire to be as compatible as possible with the CISG and the CUECIC.[1255] Domestic law's compatibility with international rules will create better legal certaintly, as well as security, for the companies that are actively involved in international trade.

5.6. Conclusion

This chapter set out to establish what constitutes an acceptance, and to search for an indisputable rule on acceptance so as to determine the moment a contract is concluded in the electronic environment. It was argued that website users may contract without knowing about the ambiguous or unclear location of the website's terms. It was concluded that, in order to remove any uncertainty, the owner of the website shall ensure that the user is provided with the means to clearly express his agreement with the terms and conditions of the website.

On the issue of when a contract is concluded, it was argued that the communication methods and the software used in them play an important part in the conclusion of the contract. That is to say, when an instantaneous method such as a telephone is used, the contract is deemed to be legally enforceable the moment the acceptance is brought to the attention of the offeror. However, if there is no simultaneous exchange of offer and acceptance, the situation is different. With regards to websites, the matter of the conclusion of a contract depends on whether the website is passive or interactive. Website agreements have been held to be valid when it has been proven that the party accepting the offer was sufficiently informed of the terms and conditions of the agreement before the conclusion of the e-contract.

In the case of communication using email, it is not clear when a contract is deemed to be formed because the communication is not instantaneous. In this regard, both the declaration and

[1253] The UNCITRAL Working Group has considered an international convention of international electronic contracting, the final draft was adopted in November 2005.
[1254] See *Ad Hoc* Export Group, 'Report on Draft UNCITRAL Convention on Electronic Contracting', 5 December 2001, Available as Document A/CN.9/WG.IV/WP.96 in the UN Official Records of the General Assembly, Fifty-Third Session, Supplement No. 17 (A/53/17), para. 209; UNCITRAL Working Group on Electronic Commerce, Thirty- eighth session, A/CN.9/WG.IV/W P.89, para. 1;
[1255] The matter of the moment of contract conclusion in the CUECIC currently has an ambiguous provision, but the CISG may cover the lackof clarity since they agree to apply the CISG as a stop-gap.

receipt-with-knowledge theories cannot be applied because both seem to be unsuitable. Likewise, the awareness of acceptance that is required under the receipt-with-knowledge rule is difficult to achieve within the realm of e-commerce. Consequently, there are sound theoretical and practical reasons to support the application of the mailbox rule to email. However, the researcher reckons that the mailbox rule should be retained for contracts because electronic acceptances are not instantaneous and two-way. As such, comparisons must be made to cases using regular mail, telegraph and telex for these methods have been acknowledged as non-instantaneous forms of communication. These cases have uniformly applied the mailbox rule and it has created factual and legal certainty, thereby allowing contracts to be easily formed when the parties are far away from each other. Due to the legal uncertainties regarding when an e-contract becomes legally enforceable, the websites owners, websites operators, or sellers should clearly address this issue in the terms and conditions of the contract so as to prevent any potential disputes. To reiterate, the automatic confirmation of receipts that have been established in electronic communication may in that regards provide some certainty. Accordingly, these issues impose amendments to the ICC and IESTA mentioned in chapter 6 in order to be equivalent to the current electronic environment.

Chapter Six

Conclusion

6.1. Introduction

It has been postulated that Iraqi traditional contract law is not currently sufficient for regulating all aspects of e-contracting. Consequently, the researcher has scrutinized and examined whether that hypothesis is true. The ICC, Article 87 states the requirement for the offeror's awareness of acceptance as a precondition for concluding distance contracts, but this condition is difficult to apply to e-contracting. This is because it would be difficult to conceive how the offeror can become aware of an acceptance when communication has been by electronic means. This thesis sought to build up a legal basis for the modern generation of e-contracts of sale concluded over the internet, as well as to diagnose some practical problems that occur during the process of forming e-contracts. Subsequently, it attempted to analyse and evaluate the status of Iraqi law in terms of contract formation provisions in order to examine its suitability to govern e-contracts. It critically analysed and assessed ICC Articles 82, 87 and 88 to see whether they are suitable to be applied on online contracts. Consequently, the main research question posed in this thesis was, 'to what extent is Iraqi traditional contract law, with respect to the aforementioned ICC, suitable for application to electronic sale contracts?

Overall, the critical analysis into the formation of an e-contract conducted in this study aspires to assist the Iraqi legislature through its conclusions, which it is hoped, through its recommendations, with reforming the relevant Iraqi legal provisions. Hence, the proposed approach in this context was for the purpose of amending or modernising Iraq's existing rules of contract law to accommodate the special characteristics of the Internet, because the internet enjoys a special nature, meaning that there has to be special legal rules to regulate its contracting framework. This research is a critical analytical study of Iraqi contract law supplemented by reference to Sharia law. It has used a legal doctrinal method and adopted black letter standard legal analysis relying on scrutinizing the primary sources of the ICC and Sharia law, court decisions (where available) and, to a very limited extent, the ECC and the law of some other jurisdictions to illustrate whether there are any gaps and/or shortcomings in current Iraqi law. It explored whether there are any additional provisions that the ICC does not currently provide and considered whether it would be necessary to suggest amendments and/or additions. As a result of this research, and this research method, this study has reached some findings, conclusions and recommendations as follows:

6.2. Research findings

The findings in this thesis are divided into two categories. The first addresses the challenging characteristics of electronic contract formation and the second makes some conclusions and recommendations regarding the core research question in terms of the timing of the electronic contract process. Both categories are by further supplementary findings that emphasize the author's conclusions on the applicability and consistency of rules and practices in the electronic environment. These conclusions have been founded on the analysis of legislation currently in force, critical assessment and analysis of the relevant literature and contract law jurisprudence.

6.2.1. General findings

6.2.1.1. The concept of electronic contract

To distinguish an e-contract from classic paper contracts, a question was established as to which part should be electronic, the offer, the acceptance or both. Accordingly, some conferred the so-called 'electronic' feature to the contract when any part of it is performed electronically under a condition that this electronic part is fundamental to convey the will of the party to the other to fulfil the contract. However, most contracts are not usually devoid of electronic elements and thus contracting by electronic means partially is not enough to brand it as an e-contract. Additionally, this view lacked for the criterion that should be used to identify the 'fundamental part or action' that should be undertaken electronically. Other provided that an e-contract may not be called as such unless all its parts are performed electronically. However, applying this view portrays most e-contracts to be non-electronic, because one or two aspects have not been performed electronically, and it may be inappropriate to deny the electronic feature in a contract that is mostly concluded by electronic means except for one or two steps concluded physically.

The researcher believes to select the act of acceptance as the determining factor. When acceptance is undertaken electronically, then the contract is an e-contract. This is because any contract cannot be concluded without an acceptance to the initial offer while the offer alone is insufficient for the conclusion of the contract. Therefore, it was deduced that acceptance is the main pillar of any contract to which an electronic feature can be attributed. Furthermore, since every online contract is an electronic contract but not every electronic contract is an online contract, and despite that electronic contract is also called many names such as; online contract, distant contract, online transaction, and automated transactions. However, each one of the these terms refers to one aspect or feature of e-contracting except the term 'electronic contract',

which encompasses all the e-contracting aspects referred to by other terms.

6.2.1.2. Expressing offer and acceptance by silence or inaction

It was shown that there must be expressed acceptance in e-contracts and that in principle, silence cannot be a valid expression of acceptance. This was due to the idea that no statement shall be attributed to a silent person, but if and when no expression is needed, silence will be deemed to be an acceptance. It is asserted that the exceptions to that rule cited in ICC Article 81 cannot be applied to electronic contracts. Firstly, in the case where there have been previous dealings, those who have had previous dealings with the seller are legally bound by the offers because they maintained their silence. However, the customer is totally oblivious to the offer in case of having access to emails. Secondly, when the offer is beneficial to the person to whom it was directed, this assumption is unusual. This situation is considered to represent a donation, whilst most contracts conducted over the Internet are commercial contracts with the objective of making profits in the shortest possible time and with the minimum possible expenditure. The third situation rarely happens when contracting is conducted over the internet because generally, silence does not mean consent. If a person receives an electronic offer via email and one of terms in that offer states that if the offeree does not provide a reply to the email address listed within a specified period, he will be deemed to have accepted the offer, such a term has no legal effect on the recipient. Consequently, if the offeree does not reply to such an email no valid contract will have been concluded by the silence.

Alternatively, it was shown that the ECC, Article 98 provides a more realistic illustration that is currently absent in the ICC for contracts concluded through websites.[1256] It provides that if the conditions and nature of the deal indicate that the offeror was not waiting for the issuance of an acceptance, the contract is deemed to have been concluded if the offeree did not reject it in due time. This is consistent with the objectives of the worldwide web, namely to facilitate transactions and save time, effort and money.

6.2.1.3. Differentiating between apparent and actual intentions

In Chapter 4, it was shown that there is always a possibility that the expressed consent will be different from that of the originator's actual consent and that the ICC stipulates two conditions about such mistakes. Firstly, the mistake has to be substantial, i.e. a mistake so serious that the contracting parties would not have concluded the contract if they knew about it. Secondly, the

[1256] See discussion about this Article of the ECC is in page 95.

seller must be aware of the mistake. It was argued that applying these two conditions here produces serious instability, because individuals may claim that their true intention is different from that which was originally expressed. The satisfactory solution as found stems from an amalgamation of both views in order to resolve the problem; if such claims occur there must be clear evidence to support the claim.

The party for whom the programmed computer is working shall be responsible for any error caused by that computer and for incidences where the computer accidentally performs transactions not intended by that party, with no pleading that it is due to a technical fault. The researcher recommends that the second condition in the ICC should be removed as it will be enough to determine mistake based only on substantiality with no need to consider the condition of knowledge of the seller. This is because it is difficult to prove this second condition. The seller also might have made the same mistake but sunsequently denies it in order to prevent the purchaser from nullifying the contract on the grounds of misrepresentation, and such denial is definitely deemed to constitute bad faith intention or fraud under the law.

6.2.2. Specific findings

6.2.2.1. The concept of meeting of contract

The concept of 'meeting of contract' is a unique Islamic idea and is relevant to the place, time and the parties' engagement in contractual negotiation. However, linking this meeting to 'place' is not applicable within e-commerce because the place of contracting is prone to change in a matter of seconds. The meeting of contract is also linked to the parties' engagement in contractual negotiations, but it is also inapplicable to e-commerce due to the difficulty in knowing whether the other party is still engaged in negotiations or not. As such, the time was found to be the most suitable criterion for the meeting of contract because it provides more certainty and accuracy for e-contractual activities. It was shown that the meeting of contract differs from the meeting of minds, as the latter relates to the parties' intentions, whereas the meeting of contract relates to the time and place of the meeting rather than the intentions underpinning it. For instance, if two parties are negotiating regarding a transaction and the offeree refuses the offer, then no meeting of minds has occurred. A meeting of contract however still exists from the point the offer is issued and directed to the offeree and is only ended by the latter's rejection of the offer.

It was then asserted that the meeting of contract is either actual, presumed or hybrid in nature. The actual meeting of contract requires that the parties should be physically present at the same

place and time and that each party can 'see and hear' the other. In e-contracting, the unity of 'place' has become outdated but the criteria (seeing and hearing) are still the same with no necessity to be in one place. This type of meeting of contract is most likely to occur in *inter praesentes* contracts. The presumed meeting of contract occurs when the contracting parties are not personally facing each other and either their representative or the party himself issues the offer or acceptance through an email, agent, message or other similar means. As for the hybrid meeting of contract, it was almost concealed in the past but e-commerce has brought it out more clearly through the new means of communication. It occurs when an offer is sent to the offeree using an email and subsequently the offeree attends physically in a face-to-face meeting with the offeror accepting the offer. Although it appears the initial meeting was a presumed meeting of contract, subsequently the contract was concluded between two attendees on an *inter praesentes* basis.

Engagement in contracting is a fundamental condition for the meeting of contract. As such, the meeting of contract is not applicable in websites and email transactions because of the difficulty in knowing whether the website operator, or the other party in email contracts, is still engaged in the transaction or not. Furthermore, many websites have pre-programmed software to perform the transaction on behalf of the vendor, thus the engagement feature becomes too abstract to be realistic. On the contrary, it may be practical to apply the rules of the 'meeting of contract' in contracts concluded using the telephone because the offer and acceptance is instantaneously known by both intended recipients respectively the moment they are expressed. This means that the engagement condition is still viable but this conclusion is confined to the case of telphone calls, whether using a telephone call or video call whilst using phone applications such as email, text messages and chat rooms, which all have different rules according to the programme used. When Internet chat rooms and telex are used, the offer and acceptance are known by the intended recipients as soon as they are communicated. However, it may be impossible to ascertain whether the parties read the correspondence immediately or whether they were engaged in activities that were not related to the contract. Even where the sent chat reads as 'seen', there is no evidence that it has really been seen by the specific person the offer or acceptance was genuinely intended for. Consequently, it may be inappropriate to apply the rules of the 'meeting of contract'.

Finally, it was concluded that the 'meeting of contract' is not applicable to most types of new means of communication, except for telephone transactions. It is believed that it is better not to apply these rules to all new means of communication including telephone transactions to

remove any variation in the applicability of the rules of meeting of contract according to the communication means used.

6.2.2.2. Using electronic agents to express offer and acceptance

It was asserted that the idea of legal personality is difficult to apply if computer hardware and relevant software are spread over several locations with their maintenance undertaken by different people. If the programmed computer was deemed a legal entity it would be conferred with rights and responsibilities based on the general principle that the person on whose behalf a computer was programmed will ultimately be responsible for all the messages issued by it. As such, they would be legally responsible for their actions and could sue for any negligent acts, a position that is not viable. It is not possible to confer a legal personality on any person unless he can bear financial responsibility. Generally, programmed computers cannot bear financial responsibility and therefore cannot be conferred with legal personality. It was also suggested that the computer be treated as an agent. However, this is similar to the argument of conferring legal personality to the computer, and the proposed solution is not valid and therefore unenforceable.

Contract principles deliver no well-defined solution to the question of whether interactions conducted by the communications of e-agents are enforceable. The theories that seem coherent with imposing such interactions are those that purport to protect persons' ability to pursue sensible goals throughout consistent measures. Other theories seem inconsistent with enforcement, at least in some features of their construction. Conceivably, those features permit reconsideration or elucidation. Hopefully, by perceiving contractual obligation theories in light of this particular problem, there will be better understanding into each theory, and thus, a justified practice is to be proven or substantiated regarding this particular problem.

The principle of agency constructs a hypothesis about human communication; to apply the principles of agency to the connection between a machine and a human would necessitate particular explanation beyond those that authorise the use of such principles in their entirety. Current Iraqi statutes, especially the IESTA 2012, addressing this matter fails to deliver well-defined solutions. There must be mutual agreement between the agent and principal in order to create a legal principal-agent relationship. As such, it would be ridiculous to say that a computer can give a valid consent. Such a stance is also contrary to the ICC, because it stipulates that an agency is a contract under which a person (the principal) gives authority to

another person to carry out certain valid and definite actions. A bot may not be sued and does not have fiduciary duties or any personal interests because, as mentioned in chapter 4, since a bot cannot give consent to be an agent then it has no legal responsibility and finally it has no legal responsibility, which means no legal claims can be arisen against bots. The computer is merely a programmed machine that can only act within some certain present limits, it does not have the capacity to give consent and is not a legal person. A computer therefore cannot be an agent.

The concept of a software agent is not meant to be used in a legal sense, but to a certain extent it implies by analogy the general idea that the software acts according to what it has been instructed to do. For this reason, it is concluded that the term 'automated messaging system' is a more suitable term for 'electronic agent', as the pre-programmed computer should be treated as just a communication tool, similar to a telephone or a facsimile machine. This is even though a programmed computer apparently has its own independent character in the sense that it has the capacity to carry out certain actions without any direct human intervention. However, the fact remains that no matter how advanced and sophisticated the computer is, it is incapable of making autonomous decisions and its operation depends upon the installed programme that should be treated as a tool for issuing human consent. The outcome of this is that the person controlling or programming the computer to work for his benefit should therefore be liable for the actions performed by the computer, because he/she uses that computer with the intention of creating binding transactions on his behalf. In principle, contract law transactions might be concluded between natural or juristic persons. However, legal difficulties are results of the situation when a programmed computer is doing the job. Therefore, to overcome this legal conundrum and provide certainty to the matter, there is a need to create a new law that allows a programmed computer to conclude valid contracts without leaving leeway for any plea that there was no direct human review of the computer's action.

6.2.2.3. Offer and invitation to treat in electronic contracts

In practice, there is no absolute certainty as to whether commercial advertisements are meant to be offers or simply invitations to entice the viewing public to make a purchase. When an advertisement fulfils the conditions of an offer by incorporating all the required elements of a contract, it is likely that the advertiser intended the advertisement to be an offer. However, the online seller does not intend to trade with everybody who visits his website. As such, the website retailer must ensure that the contents of his website unambiguously indicate that it is

only an invitation to treat. As compared to off-line transactions, it is relatively easier to avoid ambiguity in online transactions because in the latter, visitors to the website have to comply with formalities such as providing their identity, credit card information, etc. If the website is designed in such a way that it is an invitation to treat, the buyer is required to identify himself i.e. by registration when he makes an offer and the seller has the prerogative to either accept or reject that offer.

The ICC mentions no conditions relating to the specific nature of an offer to be recognised from an invitation to treat. Due to this insufficiency of provisions in the ICC, it is useful to examine Article 39 of the Kuwaiti Civil Code (KCC), which contains a standard that enables a distinction to be made.[1257] According to this article, a legal offer shall include two aspects: (i) the party's final determination to conclude a contract because a mere desire to do so is not enough and (ii) the final determination must at least include the nature and important conditions of the potential contract. Therefore, if an offer is in compliance with Article 39, an acceptance issued by the offeree will lead to the conclusion of a contract. Consequently, all contractual actions that precede the aforesaid two final determinations will not be considered as offers, but rather as invitations to treat. The way the offer is determined under the KCC is not mentioned in the ICC for the purpose of distinguishing between an offer and an invitation to treat. However, the ICC considers the disclosure of intention as a matter of fact and it varies according to the circumstances and discretion of the judge in each separate case. Furthermore, there is no general rule and therefore the issue is decided on a case-by-case basis wherein the judge examines whether the expression used amounts to an offer or an invitation to treat. For instance, a telex message that includes the price of goods may be considered to be an invitation to treat under certain circumstances and it may be an offer in other circumstances.

6.2.2.4. The requirement for the subject-matter to be determined and viewed

Sharia states 'do not sell what you do not have'. The ICC states that excessive misunderstanding should be used as a criterion when determining the nature of particular subject matter, but currently does not provide sufficient details to differentiate excessive misunderstanding from minor misunderstanding. Sharia, unlike the ICC, protects the purchaser if the subject matter is not presented during the formation of the contract by giving the opportunity to withdraw from the contract upon the receipt of the purchased article. To cover the deficiency in the ICC, the researcher suggests that the option to withdraw should be made

[1257] See discussion of Article 39 of the KCC in page 128 of this thesis.

available to the purchaser at all times whether the article fits the given description or not. Furthermore, the ICC gives the buyer the right to inspect the subject matter of the contract, however, it does not determine the time span for exercising this option. As such, it is better to let the contracting parties decide on the length of time during which the buyer may check on the quality and suitability of the product and can exercise his right to withdraw based on the nature of the contract. This should not be longer than necessary so as to ensure that the interests of the opposite party are also optimally represented.

6.2.2.5. The incorporation of terms to determine the moment the contract was concluded

The way acceptance is expressed as well as the terms that are incorporated in web-based transactions show that users with no awareness enter into contracts because these terms and conditions are not distinctive, or that because they have not read this important information and are not aware of their important legal implications. Interestingly, it was shown that the inference from some court rulings is that the online terms and conditions of the website can be enforceable against the consumer as long as the method used to display the terms and conditions on the website fulfils the requirement of being a durable medium'. It has been upheld that the use of a hyperlink 'browse-wrap' does not qualify it as a durable medium and is insufficient to notify the buyer to make him sufficiently aware of some of the important clauses inside the website's user agreement. Therefore, to rule out all the uncertainties as to whether or not the user is aware of the website's terms and conditions and if he agrees with them, the owner of the website should provide a means for the user to express his consent such as clicking on the 'I agree' button before he can proceed further. Consequently, a website's design should be such that the terms and conditions are sufficiently brought to the attention of the users. Also, the terms and conditions should require to be expressly accepted by the user before the formation of the contract, as this will avoid situations whereby the terms and conditions are held not valid based on the fact that the website user did not give his consent.

The adequacy of these methods is still not clear in the either the ICC, the IESTA 2012 or Sharia, none of which have examined or addressed this specific issue. Consequently, under Iraqi law, there are no grounds for declaring that a particular website's terms and conditions are enforceable, because the IESTA 2012 merely ascertains the legal validity of electronic documents and contracts. It contains no provisions addressing the enforceability of the contracting terms and conditions on websites. At the same time, there are no provisions in Iraqi law that prohibits such enforceabilty. The researcher is of the opinion that the enforceability of

terms and conditions found on websites would primarily be procedure-based rather than substantive law-based. However, the ICC does not provide the judges the discretion to interpret the law in a way similar to their UK counterparts. For that reason, the IESTA 2012 should address this issue by inserting criteria for the Iraqi courts to apply and interpret accordingly. The relevant provisions of the European E-commerce Directive provide a useful example.

6.2.2.6. The time of concluding the contract via e-mail communication

It was shown that it is very difficult to determine when a contract inter absentes is concluded due to the time delay between the sending of the offer or acceptance and its receipt by the other party. Most communication methods are non-instantaneous, even where they are communicating a particular expression to the other party instantaneously. This is because it can remain uncertain that the recipient is actually the other party as intended or someone else, for example a representative of the telex company. For websites, they are not instantaneous whether they are passive or interactive, because even though the latter type responds instantaneously, it is however restricted by a sale process that takes hours or even days, thus generating a time lapse between the acceptance of the offer and the conclusion of the contract. Telex, fax and email communication methods are adjusted to apply the postal rule to conclude a contract. There are sound theoretical and practical reasons to support the application of the mailbox rule in the formation of contracts. However, the researcher advocates the retention of the mailbox rule for contracts. This is because electronic acceptances are two-way and not instantaneous. As such, an analogy must be made with cases involving regular mail, telegraph and telex which are non-instantaneous forms of communication.

As regards the time a message is sent using electronic means, two distinct sending times can be established. The first is the time the message is sent, being the moment the electronic data is dispatched by the sender, and the second is when the addressee gains control of the electronic data. The criteria for the sending of an email is based on the following three conditions; out of the sender's control, designating a system, and capable of being retrieved and processed. According to the provisions of the IESTA 2012, sending of messages using present email technology will be complicated because of five points can be raised. Firstly, the sender may lose control of his email the moment it leaves his information system. Secondly, the sender may lose control of his email the moment it leaves his internet service provider's (ISP) (third party) system. Thirdly, the sender may lose control of his email the moment it enters the system of the recipient's ISP (third party). Fourthly, the sender may lose control of his email before

the recipient opens it (explained in greater detail shortly). Lastly, the email enters an information processing system that is used and controlled by the recipient. Therefore, it is difficult to know when an email has exactly moved beyond the control of the sender.

As for the time when an electronic message is received, it is also complex because there are five possible different points when it can be received under the present electronic system. The time an acceptance is received is more important than when it was sent because the place where it was received can be stipulated in the contract as having jurisdiction over the contract. As for the ICC, Article 87 provides that the offeror's awareness of the acceptance concludes the contract *inter-absentes*. This condition provides uncertainty to e-contracts and transactions. The IESTA 2012 also does not unequivocally deal with the intelligibility of the message, its permitted uses on the part of the addressee, or take into account any system downtime or faults. This appears to be a potential flaw. On the matter of attributing data messages, the IESTA 2012 has however, incorporated an approach that is similar to the common law's position regarding the 'snapping up' of incorrect offers. Article 18 is meant to prevent the originator of a message from subsequently repudiating an allegation that the message, as received, was the exact one sent by him or his official representative. If a data message containing errors is received by the addressee and he 'knew or should have known, …. that the transmission is accompanied with an error in the received data message' he cannot assume that the message represents what the originator intended or act upon that assumption. Alternatively, the gist of the issues regarding the time of receipt are as follows. An electronic message or record is considered to have been received in the following scenarios: (i) if an addressee uses a designated computer for the receiving of electronic messages or records, the time of receipt is when the message or record enters that computer; (ii) if the electronic message or record is sent to a computer that is not designated, the time of receipt is when the message or record is retrieved or printed by the addressee; and (iii) if the addressee does not have a designated computer, the time of receipt is when the message or record enters an addressee's computer.

The mailbox rule is applied to these methods of communication and its application creates factual and legal certainty, allowing contracts to be easily formed when the contracting parties are far away from each other. As such, the mailbox rule should similarly be applied to electronic acceptances in order to create certainty in electronic contracting. The application of this rule will avoid factual uncertainty between the contracting parties with regards to when an electronic acceptance is received and it will also help to streamline judicial fact-finding in

contractual disputes. Furthermore, the mailbox rule will also do away with the endless circle of communication to prove the existence of a contract. In this manner, the dispatch rule in electronic contracting will permit the parties to contract freely using electronic means without having to be concerned about whether both parties will be aware of the existence of a contract when it is formed.

6.2.2.7. The time the contracts in web transactions are concluded

The user may not always be able to see the statement in the form that was intended by the website operator regarding the conclusion of a contract. What is visible to the user depends on two factors, namely the web browser he uses and the type of browser the website uses. A website developed for Internet Explorer (IE) might not show the same content when viewed using Firefox or Safari. The operators must choose whether to build their website to be in compliance with the relevant standards or browser that has the largest market share. Furthermore, most web-pages boast multiple points of access, and users may bypass the website homepage and log on to the transactional part directly, thereby probably bypassing the hyperlinks to the terms or notices. As a result of the integral non-linearity of websites, navigation sequences are random making it difficult to make sure the timing of the notice is correct, i.e. before or during the contract formation. Superficially, it appears that the traditional postal rule used in distant contracts should also be applied for the determination of the time the contract was formed on the website, just like the exchange of offer and acceptance using fax and email.

The IESTA 2012 has rules for determining the time an electronic acceptance is sent and received, however it does not have any direct rules for determining when an electronic contract is concluded. Although this Act does not have any explicit rules on when an electronic contract is formed, it is contended that the retailer or service provider should be strictly obliged to optimize his website in such a way that the time a contract will be deemed to have been concluded should be made clear to the other party and this should occur before the order is placed. One likely and ordinary solution to ensure compliance with such a requirement is to incorporate clauses into the website's terms and conditions which state explicitly the moment the contract becomes binding. As far as online consumer contracts are concerned, they must include more specific rules on when exactly a contract involving distant communication is concluded, as this will ensure that consumers are informed of the exact time they enter into a binding agreement. Under the ICC, rules of receipt and information are applicable. That is to

say, merely receiving an acceptance is not sufficient to make an assumption that a contract has been concluded, because the offeror should also know of the arrival of the acceptance at his mail box or the inbox of his email. When the offeror is informed of the acceptance, the acceptance becomes valid. The application of such a rule to a website's offer and acceptance should not create any controversies. However, the website operator might have to issue a confirmation of receipt of the acceptance for the purpose of proving the exact time the contractual obligations became due. By validating this rule, the IESTA 2012 has stipulated that an electronic document shall be deemed to have been sent the moment it enters into the recipient's data processing unit. In light of this, there are no rules to deal with electronic transactions. The conventional postal rules may be applicable to websites that only issue invitations to treat. In such a situation, the contract is concluded when the seller sends a confirmation email to the offeror stating that he accepts the offer. If the website's display of goods is considered to be a valid offer, then the contract is considered to have been concluded when the offeree clicks on the 'buy it now' button. On the other hand, since the website has special characteristics of communication (the contractual parties do not know, hear or see each other) there is a need to make sure that the online contract is concluded the moment the internet order is placed. This can be achieved by using an instantaneous pop up window message or automated email which is sent the moment the website order is placed.

6.2.2.8. The time the contracts in telegraph and telex transactions are concluded

The seller's telegram or telex to accept the offer to contract became effective when it was handed over to the relevant telegraph or telex company. However, determining whether the contract is *inter-praesentes* or *inter-absentes* does not depend only on the methods of communication used, but should be additionally determined in accordance with the communications means used. As such, it would be wrong to portray contracts concluded via the Internet as face-to-face contracting in the context of time. The nature of the contract must be decided based on the type of service that is provided over the Internet. The decision of the Islamic Figh Council considers computer contracts using the Internet to be equal and that in all contract situations the contracting is carried out between absentees. This solution fits as regards the Internet during that period when the party that wishes to contract will sent a letter by email expressing this desire and the addressee will respond by saying he accepts or rejects the offer. Undoubtedly, this process takes some time, thus making this contracting method similar to that using normal mail and it can be said that it is like contracting *inter-absentes*. Recently, Internet contracting methods have changed and the parties can now carry out direct and instantaneous

two-way communication. As such, these contracting methods do not determine the nature of contracting, but it is the manner or programme the method uses.

The ICC, Article 88 considers that contracting by telephone or any 'similar' means is regarded as contracting *inter-praesentes* in terms of time and contracting *inter-absentes* in terms of place. The said article indicates an advantage in this ICC approach in that it provides a way to accommodate modern communication means that can be used to conclude contracts. However, it does not give the criteria that can be applied to identify which communication methods are 'similar' to the telephone so that this article can be applied. Although Article 88 can be applied to developments that have occurred or will occur in communication methods, it should describe in greater detail how the phone similarity criterion can be applied. for it to be compatible with developments in the communications methods.

6.2.2.9. The time the contract in telephone transactions are concluded

It was shown in the previous chapter that the Islamic Fiqh Assembly 1990 and the ECC declare that contracting by phone is instantaneous and is deemed to be one of the forms of contracting *inter-praesentes*. Article 94(1) of the ECC does not consider the fact that the contracting parties were far away from each other (when contracting using the telephone) important in indicating the nature of the contract. The ECC's view is therefore consistent with the the Islamic Fiqh Assembly mentioned above because it does not differentiate the place a contract was formed independently from the time of formation. As a result, the contract cannot be formed except with the offeror's knowledge of the acceptance, whether the contracting was done *inter-praesentes* or *inter-absentes*. The ICC on the other hand deems that telephone contracting is contracting *inter-praesentes* in respect of time and *inter-absentes* in respect of place. The researcher thinks that the best way to address the situation is to combine the two views. In particular, modern telephones are not only able to make voice calls, but can also send and receive text messages and can conduct video conferencing. The type of contracting is not just dependent upon the programme used to send the acceptance, but also on how it is used. Therefore, irrespective of the programme used, if it was a voice or video call, then the contract should be deemed to be *inter-praesentes* with respect to time and *inter-absentes* with respect to place (which is the approach by the ICC). If the communication was conducted using text messaging or email, then it is similar to the normal mail, i.e. contracting *inter-absentes* from the perspective of time and place. Contracting by telephone should be deemed as instantaneous when it is a voice or video call, but only in relation to ascertaining the time the contract was concluded. The prolonging of the phone call is proof that there is simultaneity and as such the

offer would continue to be valid for acceptance, whilst the termination of the phone link would block the conclusion of the contract.

6.3. CONCLUSION AND RECOMMENDATIONS

6.3.1. Conclusion

On the one hand, certain concepts and rules of Iraqi contract law have become unsuitable for application to the electronic contracting process, and for resolving debates stemming from its conclusion in the transnational perspective. This is particularly true for ICC Articles 82, 87 and 88. On the other hand, other rules may still fit to apply to electronic contracting. As such, it may be appropriate for Iraqi legislative authorities to re-evaluate some of the existing legal rules in order to take into account the special characteristics of electronic communications.

6.3.2. Recommendations

Firstly, the meaning of 'meeting of contract' should be re-conceptualized. Its meaning must amalgamate the concept of the time or place of the meeting and the parties' intentions. In other words, a connection must be drawn between the meeting of contract and the meeting of minds as known in the English legal system, thus uniting the purposes of the former and the latter. Consequently, ICC Article 82 should be deleted as it currently causes confusion by mentioning the word 'meeting' in a vague and obscure manner. However, it is necessary for the ICC and IESTA 2012 to adopt the option of the 'meeting of contract' to give the contracting parties more time to reassess the advantages of the deal and protects consumers against vendor fraud and/or errors. This act also must show more support to technology-neutrality and flexibility.

Secondly, since the agency rules preclude programmed software from being portrayed as agents, the influence of automated messaging systems or so-called electronic agents must not be exaggerated to the degree that they become considered as human agents. Whilst these programs are sophisticated and intelligent, they are ultimately no more than tools programmed to obey the vendor's orders. Consequently, the provisions in the ICC and/or IESTA should insert text providing the meaning of considering electronic agents as mere tools regardless of their features and capabilities.

Thirdly, internet customary practices and rules must be given primacy over the typical rules when portraying the process of advertising and exhibiting goods on websites and whether these constitute a valid offer or only an invitation to treat. As a result, the ICC and IESTA 2012 should be amended to include specific provisions about the legal characterization of displaying

goods and services on websites. The current provision, ICC Article 82, is very basic and fails to overcome most of the problematic aspects of electronic contracting, as has been demonstrated throughout this thesis.

Fourthly, the ICC must adopt a criterion that recognises minor misunderstanding than excessive misunderstanding to be used with regard to subject matters in e-contracting. Furthermore, the ICC must determine the time span for exercising this option in order to let the contracting parties decide on the length of time during which the buyer checks on the quality and suitability of the product and to exercise his right to withdraw based on the nature of the contract. This should not be longer than necessary so as to ensure that the interests of the opposite party are also optimally represented.

Fifthly, the operators of websites should be obliged by law to make the terms and conditions of websites well-defined, concise and prominently displayed in the most noticeable section on the website in a way to guarantee that the website visitors cannot be allowed to use the website until after clicking 'I accept' button to accept the user agreement. Again, the ICC and IESTA 2012 should be amended to include provisions about the legal characterization of the validity of website terms and conditions. The current laws, especially the IESTA 2012, are devoid of any relevant provision and do not overcome most of the problematic aspects of electronic contracting, as has been demonstrated throughout this thesis.

Sixthly, more attention should be given to the role of the postal rule as a method for identifying the precise moment of concluding electronic contracts, especially after examining the lack of existing provisions regulating contracting *inter absentes* within ICC Article 87. Such an action should be confirmed by reforming the Iraqi laws. Likewise, ICC Article 88 does not enable or provide any practical benefits from the separation of time and place. This Article deems contracting using the telephone to be face-to-face contracting as regards time and distance contracting as regards place. Under the ICC, the contract is considered to be concluded at the instant the offeror becomes aware of the acceptance; the offeror's place. It is therefore clear that Article 88 is redundant because it is partially repeating the provisions of Article 87. When characterizing the situation of the contracting parties, the ICC takes into account the fact that the relevant contracting parties were in contact with each other by telephone (in terms of time) and they were also far away from each other (in terms of place). Consequently, there have been calls for the replacement of Article 88. However, due to the special nature of contracting through new generations of telephone technology, and to clarify the 'similarity to telephone' criterion and how it can be identified, the researcher recommends replacing the current text of Article 88 as follows:

1. Contracting by telephone or any other similar means is considered as contracting *inter-praesentes* if the communication was by voice or video conference. However, if the communication was by writing, -regardless of its kind, -contracting shall be considered as being between absentees.
2. The similarity criterion is determined by what the communication means can achieve through direct and continuous contact between the contracting parties depending on the program, service or application used.
3. The judge has discretionary powers when determining the similarity in the different communication means.

Based on the findings, conclusions and recommendations that have been reached at the end of this research, the importance of this thesis is illustrated through the fact that it has found that Iraqi law is insufficient and has shortcomings in dealing with the formation of e-contracts. Another fact says that Sharia law represents a remarkable source for supporting the ICC, has enriched this code with many invaluable contracting provisions dating back for more than a thousand years. Notwithstanding this, these old texts still apply and remain in force. However, other sources such as the ECC, custom and the principles of equity, have provided the ICC with other controversial texts such as Article 87, which is the most controversial text studied in this thesis and is the provision on which the main research question and debates are based. In other words, the provision of this Article is not inherited from Sharia.

Due to the fact that the electronic revolution is an ongoing phenomenon, further studies are recommended to be conducted regarding the issues pertinent to electronic contracting. There will be other issues with electronic contracting such as the advent of new means of contracting not existing in the current time. Just as the telephone developed from being a means of merely making voice calls into being a tool with multiple uses such as sending texts and conducting video conferences, further developments in the current means of communication seem inevitable. Also due to being out of the scope of this research, it is commendable if future researches scrutinise the issue of determining the place of electronic contracting to identify the applicable law to this category of contracts in the light of Iraqi laws. For the same reason, searching the issue of implementation of electronic contracts is also recommended in future to be a complementary study alongside with the study of the applicable law. Finally, the abovementioned recommendations have been suggested for the purpose of bringing to the surface further research questions requiring research into their legal aspects, arguments and problems.

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