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The Alignment of the Saudi Legal System with the International Rules of  
Electronic Commerce

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**List of Abbreviations:**

(KSA) Kingdom of Saudi Arabia

(ATM) Automated Teller Machines

(EC) Electronic Commerce

(UNCITRAL) The United Nations Commission on International Trade Law

(2005 UN Convention) United Nations Convention on the Use of Electronic Communications in International Contracts.

(CISG) the United Nations Convention on Contract for the International Sale of Goods

(PECL) principles of European contract law

(UNIDROIT) principles of international commercial contracts

(SSL) Socket Layers and Secure

(SET) Electronic Transaction

(EDI) Electronic Data Interchange

(WTO) World Trade Organization

(OECD) Organisation for Economic Cooperation and Development

(APEC) Asia-Pacific Economic Co-operation

(UCC) Uniform Commercial Code

(EFT) Electronic Funds Transfer

(TCP) Transmission Control Protocol

(IP) Internet Protocol

(ARPANET) Advanced Research Project Agency Network

(WWW) World-Wide Web

(ISP) Internet Service Provider

(EPS) electronic payment system

(PIN) personal identification number

(PKI)The Public Key Infrastructure

(ECA) Electronic Communications Act 2000

(UETA) Uniform Electronic Transactions Act

(ECA) Electronic Communications Act

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## **Abstract**

This thesis deals with fundamental questions of compatibility and adaptation in the regulation of electronic commerce as it impacts on the norms and precepts of Islamic law. It finds that in the Kingdom of Saudi Arabia, the response of the religious and civil authorities to the realignment of its laws of contract, in order to encompass the innovations and changes implicit in the electronic environment, have been inhibited by misgivings about the nature of the electronic environment itself and by fears that some of the protective aspects of traditional contract formation will be lost.

Based upon a detailed comparison of the various stages and components of the electronic and traditional contract, the thesis finds that the principles underlying Islamic law are not violated or substantively threatened by the new forms. It is shown that laws and treaties, created at an international level of scrutiny and discussion, are now broadly in place and accepted by most of the 'developed' world, with necessary allowance being made for future innovation and change.

The Kingdom of Saudi Arabia, it is recommended, can only make progress in this field by a policy of greater engagement, both in respect of the nature of the electronic contract itself, and also with the arbiters of compromise in bodies such as the United Nations and the World Trade Organisation. It finds this



progress to be essential to the health and well-being of Saudi society as a whole, and it suggests that any misgivings currently felt by the nation's legislators are based more on misapprehension than on objective realities.

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## **Introduction**

As a social phenomenon, the spread and application of electronic communications seems extraordinarily diffuse and, to those who have not grown up with it, or whose employment does not require them to be immersed in it, remarkably esoteric. Entirely new applications, particularly in the field of mobile phone technology, bud and multiply in a matter of months, and as many have observed since the dawn of micro-processing, its limitations appear to lie only in the human imagination to think of new applications. Whether downloading or uploading, posting an advertisement or responding to one, chatting to people with whom we could not possibly otherwise be acquainted, ‘blogging’ on our most deeply-felt concerns, or even committing a record of our lives to be held in deep storage only to be re-awakened, like a princess in a fairy-tale, long after our mortal lives have passed into oblivion, this revolution in electronics is, like the invention of powered flight a hundred years earlier, surely the most important phenomenon of the first part of the century.<sup>1</sup>

Yet at the same time, however, and perhaps predictably in something so powerful and far-reaching, the technology is divisive. This divisiveness does not lie in the economics of affordability – the initial, high-cost phase of new

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<sup>1</sup> Gary Schneider, *Electronic Commerce*, Course Technology, USA, 7 edition, 2006, P43

products is quickly reduced by market forces<sup>2</sup> – but in the attitudes that it engenders. Does access to mobile phone technology or computer games increase the sum of human happiness or promote our spiritual well-being? To this question, there are several noteworthy types of response. From those growing up with these powerful tools of information, communication and entertainment, there would be astonishment that such a question can even be put. To them, electronic facilities are a matter of universal consumption and therefore of universal need and right. From those who find through their business or salaried employment that there is a functional necessity to make use of the latest instruments, the response will perhaps be that though life may have been pleasanter before, we are all more or less tied to screens in our work and have to live with the reality. Lastly, of course, there are those whose status<sup>3</sup> makes it unnecessary for them to be attached to these modern ‘life-support systems.’

Of all societies, legal and political systems in the world, the Kingdom of Saudi Arabia (KSA) is perhaps the one to which electronic applications might seem most alien. Islamic tradition is, more perhaps than any other religious

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<sup>2</sup> This distinguishes the current manufacturing revolution from those of the past. Electronic technology does not service the needs of an economic elite, as with the motor car or air transport, for the duration of a human generation or longer, before becoming widely accessible. Its generations of product are measured in months, and market forces drive prices down, generally before a high retail value can repay the cost of research and development.

<sup>3</sup> These are generally either the very poor or the very rich. It is sometimes said that the power of an individual in the world is expressed by not having to carry a mobile telephone. Of course, the very old and the very young are also largely exempt.

tradition, rooted in the word. Islamic law (*Sharia*) as founded upon the Holy Scripture (*the Qur'an*) represents the primary source of law, where the respective principles and parameters are derived from.

The KSA has an attitude of reverence for law that is different from non-Islamic societies.<sup>4</sup> *Sharia* (Islamic law) is, to its subjects, not simply a body of functional and pragmatic rules, nor is it something imposed and oppressive, in the way that, viewed historically, at least, the legal systems of most other countries appear to be. Yet *Sharia* is not immutable. Its code can be modified or supplemented in reference to new requirements and changed circumstances. Nevertheless, this is a code that has permanent and unassailable precepts and not one in which a belief in change or 'evolution' is inherent. *Sharia* functions as the guardian of spiritual and ethical values concerning, especially, social and domestic life, whose paradigms and predicaments are seen as essentially unchanging. The conduct of strangers, as for example in commerce, has also these timeless features that make proposed alterations to the laws of contract uncomfortable and challenging.

This thesis sets out to explore a number of concepts regarding the accommodation of new forms of contract within the Saudi Arabian legal systems and within the remit of Islamic law. The most fundamental of those

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<sup>4</sup> Saudi Arabia is the only Moslem country with strict observance of *Sharia*; hence, references in this thesis to Islamic law and traditional Islamic society mostly comprehend or imply practices within the KSA.

concepts is the proposition that the virtual world can substitute the real world of face-to-face contact. This implies that the Saudi society should suspend its disbelief or uncertainty at least to the extent that constructive debate, education and the ensuing maturity of domestic law making allow for an informed appreciation of the new concept of electronic commerce, its opportunities, its threats and ultimately the necessity to align a legal system which is based upon religious tradition with international norms.

The Saudi society has found that some features necessary to understand the new concept of electronic commerce – at least for its members and the generations not fully familiar with modern technology - are less irreducible than others. The physical presence, or the intuition and social faculty that help the parties to a transaction to perceive what is in the mind of another person, in the ‘sitting down together’ of a traditional council of contract (*Majlis*), is not replicated in electronic contracting as currently practised, although audio-visual methods are making inroads into this problem. As to the signature or process of verification, one may be on stronger grounds in supposing there to be no deficit. Not only does the electronic signature perform the same function as the traditional one but may, in its sophistication, be superior to it. The means of verification in a contract may, indeed, be representative of the intrinsic

flexibility to modification and invention of performance in electronic commerce.

The term electronic commerce ('e-Commerce') denotes business that is transacted by electronic means. Principally, this involves business-to-business and business-to-consumer transactions, but the concept is broad enough to encompass all agreements concluded electronically where a transfer of money is made by electronic means. It refers, therefore, to several different types of transaction, from simple cash withdrawal through the use of Automated Teller Machines (ATMs) to the submission of complex documents to government agencies in which a transfer of money is made.<sup>5</sup>

For the purposes of this doctoral research, e-Commerce refers to the use of computers and telecommunications to conduct business transactions in all the steps involved in the negotiation, confirmation and performance of a commercial exchange. They include the placing and tracking of orders, the delivery of goods or services and the exchange of funds. All these activities, based on the use of electronic communications systems (mainly the internet), have challenged national laws since they do not recognise either geographic or jurisdictional boundaries. Moreover, most states – even those, like Saudi Arabia, of quite recent creation - have deeply-embedded customs and practices regarding the lawful conduct of commerce and the formation of a binding

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<sup>5</sup> David. R, *Understanding Electronic Commerce*, Microsoft Press, U.S, 1997, p59.

contract. Adjustment to electronic commerce may, therefore, involve rather more than acceding to new, internationally-agreed modalities. With respect to Islamic society, it has to be shown that any departures from traditional forms of contract formation do not breach the principles of Islamic law.

Although, as has been maintained earlier and will be demonstrated throughout this thesis, *Sharia* law is adaptive and responds to altered conditions in society, it is not changeable in the sense that old laws and precepts are superseded. Put summarily, *Sharia* adds but does not subtract. This has fundamental implications. Firstly, the unchanging body of law is the pre-eminent source of its jurisprudence. No expansion of the law can be made without reference to it. Thus, the frequent references made to the *Qu'ran* and *Sunnah* in the course of this thesis are not gratuitous or pietistic, but essential points of the compass to any critique working from within this tradition. Religious text is, in Saudi legal terms, a primary source not a parallel commentary. It has been noted how this fundamental point has been misunderstood, as is evidenced by the attempt at a spurious distinction between Islamic and Saudi law. Secondly, the kind of replacive process familiar to the composition of law in Western society, especially those within the English tradition of Common Law, is alien to Saudi legal thinking. The Saudi system is reflexively more deferential, driven much less by the motor of precedent argued

in individual cases and in open court than by the rulings of the deliberative high councils of state. Understanding this process is fundamental to grasping the essence of how law and society is constructed in Saudi Arabia.

It would be a reasonable assumption that this aspect of radical difference is not easily grasped from outside or by a Western perspective. It is, perhaps, an axiom in any society that laws are a reflection of wider culture, and that sensitivity to its particular norms is, without a considerable effort of understanding, restricted to those born or living within it. Deference to religious teaching and religious practice is not an optional 'bolt-on' to the Islamic believer, but something automatic, almost, one might say, unconsidered, like the times of prayer or Friday attendance at the mosque. Outside closed religious communities, this could not be said of Christian societies in the West. The same sharp point of contrast can be found in the conduct of law. Whereas the reliance upon religious teaching in a Saudi legal case is to introduce into the argument truth that cannot be gainsaid, an appeal to a text from the Bible in a British court would be likely to invite derision and not respect for any wisdom that it contains.

That there is overwhelming advantage to both individuals and corporate entities in electronic commerce is scarcely open to question.<sup>6</sup> In an era of greatly-heightened interdependence and trade, an equally strong case for

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<sup>6</sup> Bidgoli.H, *Electronic Commerce: Principles and Practice*, Academic Press, USA, 2001, P81.



electronic commerce can be made with respect to international business. Its inherent advantages overwhelm any objections that can be made. Speed, efficiencies and economy are functionally convergent, as with notions or technological advancement and the application of new methods of technology to trade and commerce spheres.<sup>7</sup> The world of international business, seemingly, has made a decisive shift towards electronic commerce,

By contrast, the legal sphere - in character assiduous, conservative, particularistic and slow-moving – inevitably experiences difficulty in keeping up with the pace of change. Even if adjustments to traditional law had solely to be made at a national level, that is to say with reference only to the requirements of a particular society, they would involve difficulty in countries that, like Saudi Arabia, apply Islamic law. However, legal discussion simply at the national level is likely to be self-defeating. Unless reference is made to a much wider conversation, or conversations, the object of framing binding international regulations will not be achieved.

Despite the fact that companies have exchanged business data for many years by communication networks, the emergence of e-Commerce via the internet has changed the method and nature of the exchange. It has transformed the presentation of the offer from a few words, mostly concerning availability (as, for example, via telex), to a visual display with a potentially exhaustive

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<sup>7</sup> Ibid, p95.

literature. The offeror, depending on the size of the anticipated market, has the same incentive to develop the promotional side of his work as a company placing an advertisement through the mass media, only with much more scope for additional information, and at a fraction of the cost. The offeree has just as much to gain. He is given access to technical specification at a much more detailed level than, for example, by print advertising, and he is able to put questions or unresolved doubts directly to the offeror, at high speed, and at virtually no cost to himself.<sup>8</sup>

It can scarcely be overemphasised that neither the offeror nor the offeree is, in electronic commerce, subject to the time/cost factors which often go unaudited in the way we may casually think about costs. The offeror has a small fraction of the set-up and standing infrastructural costs that his high-street or out-of-town competitor must bear. It is not surprising, therefore, that in a very short space of time from their introduction; ‘dot.com’ enterprises were outstripping their rivals in such areas as mail-order clothing and retail bookselling. At the same time, savings to the consumer are not reflected in raw price alone. The hours, transportation costs and personal energy not consumed in visiting shops represents a substantial economy, and of an order similar, perhaps, to that made by the introduction of the supermarket. Moreover, rapid

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<sup>8</sup> Cameron Debra, *Electronic Commerce: the New Business Platform for the Internet*, Charleston, USA, Computer technology Research Corp. 2<sup>nd</sup> ed, 1999, p106.

access to high-quality, detailed and discursive presentation, as though being able to enter a shop and to view and discuss its items at length, goes far beyond the facilities provided by the standard office equipment of even a decade ago, namely the Fax machine. It is now in process of a further step-change through three-dimensional, or 'virtual reality,' technology.<sup>9</sup>

The settlement of a contract in the payment for goods or services by the acceptor is also radically improved through what is made available by electronic commerce. There are several forms of electronic payment, which are preferred or customarily appropriate to the monetary value or nature of the goods or services transacted. Their common features are that the exchange can take place in real time, it may be both verifiable and secure, and the costs of the exchange are kept to a minimum (subject, of course, to any costs of monetary conversion or import levy that may apply).<sup>10</sup>

The purpose for investigating the alignment of the Saudi legal system to international rules of electronic commerce draws its relevance on the opening of the Saudi Arabia to international law and, in particular its recent accession to the World Trade Organisation. The Saudi legal system, for the first time since the inception of the Kingdom of Saudi Arabia, has to interface with international treaties, often legally binding, and adapt its domestic regime in

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<sup>9</sup> Ibid.

<sup>10</sup> Gary Schneider, *Electronic Commerce*, Ibid, p131.

order to be compatible with international legal standards. Subject always to the arbitration of the monarch, whose rule is personal, new law in Saudi Arabia is proposed, scrutinised, modified and passed by three roughly parallel authorities. These are the great councils of state that control the kingdom.<sup>11</sup> Although there is no applied or explicit doctrine of the separation of powers, the first is, loosely-speaking, the executive authority, chaired by the king or his deputy. The second represents the legislative authority, which has the constituted power to introduce new regulations for new issues within the principles of Islamic law. The third is effectively a judiciary that has independent authority to decide issues under Islamic law. The indeterminate and shifting relations between these bodies have, in some cases, been a cause of delay and uncertainty in the legislative process. Yet the current government has shown awareness of the importance of e-Commerce and the role it plays in contributing to national economic growth.<sup>12</sup> It is the stated aspiration of the Saudi government to take full advantage of the use of information and communication technologies combined with organisational change and new skills.

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<sup>11</sup> The basic statute of government (BSG). Art 44. In: *The Directory for Lawyer*. Jeddah: Chamber of Commerce, 1992, p 16-34.

<sup>12</sup> Tawil, K. M, "The Internet in Saudi Arabia", (2001), *Telecommunications Policy*, 25 (8-9): 625-632.

Saudi Arabia's information technology sector is one of the largest and fastest growing in the Middle East.<sup>13</sup> A major investment has been made in recent years in developing a modern IT and telecommunications infrastructure capable of supporting e-Commerce and the demands of a growing information-conscious society.<sup>14</sup> Furthermore, it appears that the Saudi information technology sector has believed that e-Commerce should not be regulated,<sup>15</sup> owing to a perception that regulations would distort and restrict on-line market activities.<sup>16</sup> However, the global growth of e-Commerce and the fraud perpetrated through it have demonstrated the need to regulate this environment. Without well-established and defined regulations in place for e-Commerce, there is an obvious disincentive to do businesses on-line. Inevitably, this would in turn pose a significant threat to global economic growth. The issue has already attracted considerable attention,<sup>17</sup> and the paramount importance of

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<sup>13</sup> Al-Saggaf Y. 'The Effect of Online Community on Offline Community in Saudi Arabia' (2004), *EJISDC*, 16, 2, p1-16.

<sup>14</sup> AlSabti, K. 'The Saudi Government in the Information Society', (2000), 11. th. GCC e-Government. Forum, May 21-25, Dubai, UAE. *Arab News*, 2006

<sup>15</sup> Ministry of Communications and Information Technology in Saudi Arabia, <http://www.mcit.gov.sa/english/GovernmentProgram>, 02-04-2007.

<sup>16</sup> Tawil, K. M, "The Internet in Saudi Arabia", (2001), *Telecommunications Policy*, 25 (8-9): 625-632.

<sup>17</sup> Cf. Arno R. Lodder and Henrik W.K. Kaspersen, *eDirectives: Guide to European Union Law on E-Commerce*, the Netherlands, Kluwer Law International, 2002, P11

being able to engage valid and binding contracts on-line is widely acknowledged.<sup>18</sup>

In 2001, the Saudi government set up a standing commission to oversee proposed regulations for electronic commerce.<sup>19</sup> Its terms of reference were to address innovation in ways that do not contradict Islamic law. In 2006, a draft Saudi Electronic Transactions Bill (also referred to hereafter as the Draft Law) was duly published, and it is expected that revisions to it will be completed by the Council of Ministers in 2009/10.<sup>20</sup> The stated aim of this newly enacted legal instrument is to organise electronic transactions and provide a systematic framework for achieving the following objectives:

- to draw up rules for using technology in electronic transactions and signatures;
- to strengthen the use of electronic transactions on both local and international levels and support their use in fields such as trade, medicine, education, e-Government, e-Payment and other applications.
- to eliminate any obstacles facing electronic transactions and signatures.

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<sup>18</sup> Stephen York and Daniel Tunkel, *E-Commerce: A guide to the law of electronic business*, UK, Reed Elsevier, 2000, 2nd edition, p 74.

<sup>19</sup> *ibid*

<sup>20</sup> The Ministry of Commerce of Kingdom of Saudi Arabia, Laws & Regulations, <http://www.commerce.gov.sa/english/moci.aspx?PageObjectId=713>,

- to curtail cases of misuse and fraudulent opportunities, such as forgery in electronic transactions and signatures.<sup>21</sup>

If this is to be taken at face value, the Saudi government appears to be moving smoothly and logically towards resolving any systemic difficulties with regard to electronic commerce. Yet there are doubts and pitfalls. The structural uncertainties of government and the inordinate time-frame required by state councils both give rise to reasonable concern. More importantly, however, we see from other (international) bodies addressing the same issue that the definitional content of regulations may be crucial to their viability. The conundrum is simply put. On the one hand, legal definitions, *sui generis*, attempt to be all-seeing and comprehensive. On the other hand, in a sphere of activity that is changing rapidly and is expected to change still further, a comprehensive and durable approach is only achieved by a restriction of its definitional content. There is little evidence to suggest that these points are widely understood by Saudi legislators.

Furthermore, the decade that will have been required to bring specific legislation into existence does not merely reflect the intricacies of government and the slowness of its procedures but an anxiety and air of suspicion toward electronic commerce among the higher, and older, echelons of Saudi society. The underlying question (of which no hint is given in the statement of

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<sup>21</sup> [http://www.pki.gov.sa/system\\_en.htm](http://www.pki.gov.sa/system_en.htm)

objectives summarised above) is whether electronic commerce does mark a radical departure from the precepts of Islamic law on which the state is founded.

The fundamental aim of this thesis is to investigate whether or not there is substance to the concern that electronic commerce involves practices that cannot be reconciled with the Islamic legal policy of the Kingdom of Saudi Arabia. Therefore, the detail of electronic transactions – in a range of international multilateral treaties, protocols and emerging regulatory regimes applicable in Western economies - needs to be critically assessed and evaluated in order to discover in what ways electronic commerce and, in particular, the concept of electronic contract, diverge from the laws and modalities governing contract formation, execution and enforcement in Islamic society, and, since the matter under discussion is a manifest and functioning reality, what the implications for Saudi society may be.

It is held at the outset of the enquiry that only a rigorous exposure of detail and point-by-point examination will clarify the issue for Saudi legislators and allay fears. Nevertheless, any conclusions must emerge fairly from the research itself. No case is likely to be, or in an academic context deserves to be, persuasive if it attempts to gloss the problems of regulatory change.



The thesis will look at possible ways of adapting the current Saudi legal system to meet the demands of on-line commercial transactions. At the same time, it will examine the needs of government, business and the consumer to assess what regulatory instruments best serve their interests. Whatever the outcome of the research, it is necessary to bear in mind that the overall context, and desired benefit, is the smooth, seamless and mutually beneficial conduct of trade between parties to a transaction. Laws and regulations, whether within the Islamic context or not, should be facilitators, not restrictors, in the conduct of trade, and their ultimate goal the abolition of real or perceived barriers.

The above aim of the thesis can only be achieved by the critical, objective and systematic exposition of three conceptual pillars:

Firstly, through a critical analysis of the current legal position regulating e-Commerce (in particular, e-Contract and e-Signature) at an international level and through a comparison to the current Saudi legal framework regulating commercial transactions; secondly, through a detailed examination of how the Saudi legal requirements for the performance of writing and signing documents in the settlement of domestic or international trade transactions affect electronic transactions, and whether the new electronic signature technologies are capable of meeting the functional requirements of Saudi law for the creation of legally valid signatures; and thirdly, through an evaluation of the likely future

developments of electronic commerce and e-Contract international law. The focus here will be on recent developments in the EU and UK, on the UNCITRAL Model Law on e-Commerce and e-Signatures, its modification in the 2005 UN Convention, as well as other international instruments, namely the United Nations Convention on Contract for the International Sale of Goods (CISG); the principles of European contract law (PECL); and the UNIDROIT principles of international commercial contracts.<sup>22</sup>

This thesis, in pursuit of proving its hypothesis, touches upon several inter-linked themes. Firstly, the exponential growth in internet usage has widened to the extent that electronic transaction is now a commercial tool available to most businesses and adults in the ‘developed world’ as well as to many emerging sections of poorer societies. This in turn raises fundamental questions concerning the legality of transactions, specifically as they concern fraud or forgery. Secondly, the changes effected by the new electronics generally, and in computer technology in particular, are not trivial but substantive and demand legal consideration.

These changes have influenced areas of procedural law, with serious implications for evidence, contract and intellectual property rights. The ways in which developments in technology have made available a range of techniques,

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<sup>22</sup> Owing to its limited length, this thesis will not touch upon the legal issues (although they are important) of Intellectual Property or consumer protection, Internet governance, nor questions related to the regulation of on-line content.

such as electronic mail, have changed, and may further change, laws around the world. It can be said that the current, on-going advances in electronic technology have fundamentally outstripped the ability of legal systems to keep pace. In addition, given the fact that e-Commerce is based upon the processing and transmission of digitised data (including visual images, text and sound transmitted over the internet) it is questionable whether “off-line” regulation can ever be applied to the “on-line” world. Such applicability and legal sufficiency will be examined throughout the thesis.

Through the examination of the legal issues arising from the use of electronic methods as a way of conducting business in international legal systems and by contrasting the response of the latter with the response of Islamic law, this thesis will attempt to set the alignment parameters for the most optimal and the most effective legal and policy framework for electronic transactions in Saudi Arabia.

By analysing the most important of the legal issues that confront the application of the electronic commerce in the field of evidence in contract law, the research will demonstrate the emergence of best practice through flexibility of adaptation of international norm to individual jurisdictions. The research, in addition to analysing UK and US judicial developments on the topic of evidence in contract, it will focus on examining the thrust of existing statutes

and new regulations concerning evidence, contract and electronic payments. In the light of the UN Convention, and UN Model Law on electronic commerce (UNCITRAL) and the United Nation Convention on the use of electronic communications in international contracts 2005, the research will consider other international instruments, namely CISG, PECL and UNIDROIT. Management of scope and length, however, means that the thesis will not consider the important legal issues of intellectual property and internet governance. Some aspects of these, however, such as trademark and jurisdiction, must be touched upon since they are related to other key issues discussed in the study. Also beyond the scope of this enquiry are questions relating to the regulation of on-line content, data protection and privacy. In sum, what will be assessed are the fields of evidence and contract law. Evidence here relates to the admissibility and authentication of electronic messages, while the issue of contract law focuses on the process of contract formation and other related issues in an electronic context. Finally, owing to its limited length, this thesis will not touch upon the legal issues (although they are important) of consumer protection, intellectual property or internet governance, nor questions related to the regulation of on-line content.

The ultimate objective of this thesis is to fill a vacuum in the literature on this subject. It is hoped that a thorough analysis of the existing international

legal regulation of electronic commerce, and assessment of its suitability to the Saudi legal regime, undertaken in this thesis, might provide an important building block for future regulation of commercial transactions in Saudi Arabia. This thesis is a comparative-study evaluation. Research for the thesis depended mainly on primary sources in the form of *Sharia* law, Saudi government publications, the official gazette, as well as published state laws and international treaties. Secondary sources were books and journal articles, used as applicable. In the Saudi context, scholarly opinion, both historic and contemporary, is of great importance to legal issues. Likewise, as has been discussed, scriptural teaching both in the *Qur'an* and the *Sunnah*, or *Haddith*, is frequently cited as having a direct bearing on the matter. This is not merely for the precepts they contain on contract but in the wider reflection of attitudes to life, religious duty and ethical conduct that are of the utmost significance to the discussion in an Islamic society.

The author believes that the analysis of the research using a comparative methodology is an innovative way of treating the subject matter. To compare the common law/continental law positions with Islamic law in one jurisdiction and then proceed to examine the experiences of different Islamic jurisdictions is not one that this writer has found in Saudi or foreign literature in the context of electronic commercial law. The findings of such a comparison may, therefore,

be expected to yield a small contribution to the development of law in both Islamic and non-Islamic jurisdictions.

### **Structure of the research**

In Chapter One, (The Law and Governance in the Kingdom of Saudi Arabia), the author attempts to provide preliminary historical information and background necessary to the study. It sets out the constitutional and legal context of the KSA and examines its legislative authority by investigating the roles of the King and his senior councils. It analyses the process by which new regulations are adopted under the Saudi legal system and critically assesses the legislative mechanisms for the adoption of international e-commerce rules to the legal regime of KSA. There is criticism of the time-consuming procedures in the Saudi legislature, often arising from an overlap of authorities. This chapter demonstrates the interface between legislative and executive authorities in KSA in enacting domestic e-commerce rules regulations and proves the inherent flexibility of Saudi Law in adapting to international legal norms and obligations arising out of treaties on e-commerce and point at the conceptual limitations of Saudi legislators as one of the main obstacles to the alignment of the KSA legal regime with the international rules of e-commerce. Thus, this chapter conveys the basis of political authority within whose remit all

significant legal reform lies, and leads into an examination of the areas of Islamic law relevant to this thesis.

In Chapter 2 (Sources and Principles of Contract in Islamic Law), the author defines the Sources and Principles of contract under Islamic law. It looks at how *Sharia* can embrace the new methods of contracting by examining the essence of Islamic religious teaching. It describes the offer, consideration and acceptance, and explains the role of the council of contract (*Majlis*). This Chapter identifies the essential components of contract formation, including the nature of volition, legal capacity, forms and tokens of agreement, defects, misrepresentation and fraud, and options, culminating in the fulfilment of contract and classifications of contract. It also, evaluates the principles of contract under Islamic law and positions the KSA legal system as the regime which will receive international rules on e-commerce and in particular e-contracts and their respective features and principles. Thus, the chapter renders an account of the special conditions pertaining to contract under Islamic law in order to assess the receptiveness to legal innovation of electronic contract.

In Chapter 3 (The Advent of Electronic Commerce in International Legal systems and the Initial Responses of Islamic jurisprudence) the author examines the emergence of electronic commerce; of how and why it began. It traces the

role played by international organisations and within other jurisdictions in how they have identified and defined the rules that pertain to this environment. It investigates the various types, forms and tools of electronic commerce in their current applications. It provides for a comprehensive account of the interaction of international legal systems with the concept of e-commerce. Also, it compares the initial response of Islamic law to the advent of e-commerce and compares that response with the responses of international legal systems. This chapter provides for comprehensive analysis of Islamic jurisprudence (*Ulama* and *fiqh*) in its response to this new area of law and focuses on how KSA legal system has reacted to the international principles of e-commerce.

In Chapter 4 (The Nature of the Electronic Contract in International Legal Systems: Similarities and Differences) the author looks at the specific nature of the electronic contract, defining the threshold between offer and acceptance, examining how acceptance mirrors the offer, and noting the general environment in which the electronic transaction takes place. Despite differences, it finds a fundamental correspondence between the old and new forms. It recognises the greater opportunities for fraud and other malfeasance inherent in anonymity. It finds, however, that risk is endemic in all forms of contract, and that it is the attitude to risk that has salience. It utilizes a comparative critical analysis to draw upon the common position between



different international jurisdictions. The common position is reflected upon the UNCITRAL principles of electronic contract, and the comparative analysis demonstrates the flexibility in different jurisdictions in adopting that common position to their own legal systems. Thus, in its positive appraisal of the phenomenology of the electronic contract, this finding supplies an essential building block to the construction of the research hypothesis.

In Chapter 5 (The Completion of the Electronic Contract under International Legal Systems: Time, Place and Settlement), the author examines critical aspects of completion of electronic contract. Discussion shows that although the modalities of acceptance in the electronic transaction differ under international legal systems, once these are coherently defined, they present no insuperable legal problems. Also, it analyses the different completion requirements of e-contract accepted by international legal systems. This chapter demonstrates the inherent flexibility and discretion afforded to different legal systems to comply with the common position contained in UNCITRAL. In addition, it analyses the nature of money and the requirements of electronic payment systems, as well as the implications for government in the circulation of virtual currency. It finds that e-payment instruments pose the risk of dishonour as well as of fraud, and concludes that agreement on international protocols is indispensable. Thus, while recognising generic problems inherent to the fulfilment of the electronic

contract, the conclusion in this section supports the research hypothesis of the thesis.

In Chapter 6 (Chapter Six: Verification and Authority Electronic Signature under International Legal Systems and the Initial Responses to Islamic Jurisprudence), the author analyses questions of evidence arising from the use of the electronic signature. It examines types and applications, and their effectiveness. This chapter establishes that international legal systems, as well as Islamic law converge in relation to the verification and authority of e-signatures. This finding, although diluting the features of flexibility and discretion established in the previous chapters and in relation to the nature of e-contract and its competition modalities, nevertheless it points towards a uniform approach in both international legal systems and the legal system of KSA. It contextualises these within questions of jurisdiction and of Islamic law. It finds clear evidence of international consensus over the use of the e-Signature. In this key area of legal receptiveness the combination of technical innovation and international conventions suggests that the challenges posed by verification and authority are being effectively addressed. Nevertheless, insofar as the current response to these initiatives is seen as inadequate, the advocacy in this thesis for the adoption of a fresh approach in the KSA is justified and upheld.

In Chapter Seven (The Electronic Contract and its features viewed from Islamic Perspective), the author assesses a variety of opinions and proposals in relation to the regulation of electronic contract in Islamic jurisdiction and links that assessment to the exposition of traditional regulation of contract in Islamic law. It revisits some of the key texts and tenets of Islamic teaching, and in particular the crucial concept of *Majlis*, finding that the determination of the electronic *Majlis* produces a multitude of scenarios. Through a comparison of protocols at an international level, it arrives at some firm conclusions with regard to the absence and presence of parties in the electronic contract. It finds that legal definition of these variables produces difficulties more semantic than substantive in character. It proves that the absent and present of the parties under contract in Islamic law do not affect the validity of electronic contract. It also proves that the concept of *Majlis* is the connecting ground of the international rules of e-contract and the Saudi legal system. It also demonstrates that the application of traditional Islamic principles provide the freedom to the national legislator in KSA to adopt the international rules of electronic commerce and partially the function of electronic contract. Finally, it substantiates that the KSA has nothing to fear in relation to discretion and

individual concerns of contract law under Islamic system when adopting international rules of e-contract.

Finally in Chapter 8 (Recommendations and Conclusions), the author provides for recommendations to law and policy makers in Saudi Arabia, in the light of what has been found to be an insufficient response to change to assess the basis of unease in relation to the principle of accommodating Islamic law to the newly-established international norms of electronic contract. The general finding that such differences of approach as exist in other countries are not proscribed by the ethos and framework of Islamic law, but are in themselves relatively superficial in character, validates the hypothesis of this thesis as a research document, and makes cogent the hypothesis that an urgent case can now be put for a corresponding, enabling legislation in the KSA.

## **Chapter 1. Law and Governance in the Kingdom of Saudi Arabia**

### **1.1. Introduction**

A study of this kind, which is located in a legal setting that may be largely unfamiliar to the reader, is necessarily obliged to render an extensive account of local conditions, more especially if the research is purposive in character, having the intention of discovering what government policy response may be appropriate to the setting in question

This chapter sets out the constitutional and legal context of the Kingdom of Saudi Arabia in which the study is conducted. It examines legislative authority in Saudi Arabia by investigating the respective roles of the King, the Council of Ministers, the Consultative Council and the *Ulama* (Religious Council). Consideration is given to how new regulations can be made and adopted under the Saudi legal system. Specifically, an account is offered of regulations pertaining to information technology. Thus the chapter provides an outline of the contemporary and historical framework of the legal dispositions of the kingdom requisite to an understanding of the study. The relevance of this chapter lies in the particularity of the Saudi situation, and its pertinence in how little that appears to be understood outside the country.

## 1.2. The Legal System of the Kingdom of Saudi Arabia

It is handed down that Saudi Arabia was chosen by God (*Allah*) to be the cradle of Islam, to contain the holiest place on Earth, and to be the birthplace of the Islamic state. As a result, the history of Saudi Arabia is inextricably linked to Islam: Islam is not merely the official Saudi religion but to be a citizen of the state is to be a Moslem. Islam is central to every aspect of Saudi life, playing a significant role in Saudi society, and forming the foundation of the way the government performs. “More than any other country in the Moslem world, the Saudi Kingdom is identified with Islam. The kingdom is often seen as ‘fundamentalist,’ an equivocal term. Certainly it can be said that “the *Qur’an* is its constitution and *Sharia* its source of laws and regulations.”<sup>23</sup> Yet if ‘fundamentalist’ is intended to connote looking to, or dwelling, exclusively in the past, it presents a mistaken view.

*Sharia* (Islamic law) has been the foundation of Saudi Arabia since its inception. This term also has given rise to frequent misinterpretation. Properly understood, *Sharia* simply means the law. In Saudi Arabia, *Sharia*, the law, is one and indivisible. It is also robust (as bound to be with a rapidly growing and increasingly urban population). In other societies, including Arab and Moslem countries, where the word *Sharia* is used, *Sharia* stands for only that part of the

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<sup>23</sup> Al-Yasini, Ayman, *Religion and State in the Kingdom of Saudi Arabia*, Boulder, Colorado: Westview Press Inc., 1985, p.4

law which is related to religious doctrine. But in Saudi there is a unity of law: *Sharia* incorporates or subsumes both old and new domains of legal experience. Thus, any distinction drawn between *Sharia* and Saudi law is fundamentally mistaken.

At the rate of change currently experienced by nearly all societies, no legal system can cohere without appreciable qualities of resilience and resourcefulness. In this aspect, the situation of the KSA is no different from that of the UK. Misled, perhaps, by superficial externals of custom, such as dress and dietary restriction, Saudi Arabia is frequently caricatured as a society caught in a time-warp, its citizens the hapless victims of a regressive and unemancipated state. Such an image is at once belied by the youthful, confident and rapidly-developing condition of the kingdom.

Saudi theory of constitutional law is not suffocated, as may be supposed, by received tradition. It enshrines the accommodating religious principle that all things not expressly prohibited by scriptural text are presumed acceptable. On this sanction, the kingdom's rulers began to build their legal system in the first decades of the twentieth century. Criminal law, civil law, and judicial procedure are all drawn directly from Islamic teaching. Other laws add secular experience to religious principles. They include administrative law, statutes of labour, and commercial law. With respect to these domains, Saudi Arabia can derive and

adopt its laws from any source. The sole pre-condition concerning new laws in the kingdom is that they should not be in conflict with the basic tenets of Islam.<sup>24</sup>

*Sharia* is mediated through a number of layers of authority. Supreme within the kingdom is the position of the monarch whose venerated title is ‘Custodian of the Holy Places’. The king is both Head of State and the Prime Minister. As head of the executive,<sup>25</sup> he governs directly. The Crown Prince may deputise for the king within the Council of Ministers. There is no popular election for the King or Council, who rules as an absolute monarch, appointing its members.<sup>26</sup> The King or his deputy also heads the Consultative Council. As the name suggests, this is a deliberative body and, in certain contexts, its function appears to stand in contrast to the executive role of the Council of Ministers. However, as will be seen, the only way that the respective functions and spheres of influence of the two Councils can be elucidated is through understanding the fluid historical shifts of the last half century of Saudi history.

There is a third national Council of far-reaching importance in the kingdom which is the *Ulama*. It has responsibility for formulating regulations to deal

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<sup>24</sup> Abdrabboh, Bob, *Saudi Arabia: Forces of Modernisation*, Vermont, USA, Amana Books, 1984, p42.

<sup>25</sup> See the Basic Statute of Government (BSG). Art 44. In: *The Directory for Lawyers*, Jeddah: Chamber of Commerce, 1992, pp.16-34

<sup>26</sup> At the time of writing, at the behest of King Abdullah, radical proposals for elections affecting both the monarchy and state council were under consideration.



with new issues within the framework of Islamic law and is thus also a deliberative council. Yet by the nature of the role it must perform, the primary function of the *Ulama* is hermeneutic. Its task is to form judgements on disputes arising in relation to existing law, as well as proposed additions, in the light of the legal-religious foundation of *Sharia*. Hence it is foremost an interpretive body, composed of Islamic scholars. Since the kingdom is a religious foundation, members of the *Ulama*, the *Mufti*, have an acknowledged authority in political as well as in spiritual matters, and may also attend the other great councils of state.<sup>27</sup> Rulings of the Council of the *Ulama* in religious matters are paramount, and beyond even the power of the king to overturn. It should be emphasised, therefore, that the *Ulama* is not a peripheral or moribund adjunct to the legislature, as the lords spiritual might be regarded in the British House of Lords, but an indispensable part of law-making in the kingdom. The dynamics of the legal system and of new legislation is generated through the multiple interaction of its *Sharia*, a compound of immutable and adopted law; the constitutional executive power of the king, his councils and consultative apparatus; and the interpretative/ deliberative council of the *Ulama*. Through these diverse prisms, new conditions and challenges facing the kingdom are refracted, and the body of law expanded.

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<sup>27</sup> Al Uthaymin, Abdullah, *History of the Kingdom of Saudi Arabia*, Riyadh, Dar Al-Lewaa , 1984, p 42

The Council of Ministers or a minister of state may propose a regulation regarding any relevant issue. The role of the Consultative Council is to provide consultation on legal issues regarding existing legislation and regulations, and many of the *Ulama* also sit there.<sup>28</sup>

There is, finally, the hierarchy of the judiciary, which according to *Sharia*, enjoys freedom from external interference. This authority comprises, in order, the Minister of Justice, Supreme Council of Justice, the Appeal Courts, the High Court of Islamic law and the lower courts. The competence of the judiciary covers religious, civil and criminal issues. It is not, however, in any sense a repository of jurisprudence, and its functions are wholly administrative. There is also the Grievance Board, which hears appeals on administrative, labour and commercial matters.<sup>29</sup>

In order to distinguish between the laws made by God, the One Lawgiver, and rules made by men, the Saudi legal system calls laws elaborated on contemporary issues *Netham*, which literally means ‘system’ or ‘regulation’. Lawgiving is *Shura*; hence the word for law itself refers to rules legislated by God.

To summarise, there are four main bodies of law, in addition to Islamic law, controlling the kingdom. First are the statutes of the Basic Law of the

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<sup>28</sup> Regulation of the Consultative Council in Saudi Arabia

<sup>29</sup> See the BSG. Art 44. In: *The Directory for Lawyers*. Jeddah: Chamber of Commerce, 1992, pp. 66-87

government, containing eighty-three articles. They cover the monarchical system and general principles of state such as the rights and duties of Saudi society, the economy, the governmental authority and its acts. Second are the statutes of the Consultative Council, containing thirty articles. Thirdly, there are the judicial statutes, which include a hundred and two articles, controlling issues concerning judges and the courts. Finally, there are the provincial statutes, which include forty articles to govern the historical and ethnic regions of the country. The following discussion will deal firstly with the executive authority of the King, secondly with the constitutional institutions, and thirdly with the system of local government.

### **1.3. Authority within the state**

Ever since the birth of Saudi Arabia, the King has had absolute authority in all matters of the kingdom other than those of religious interpretation. This phenomenon has not only existed in the modern state of Saudi Arabia but in the early days of Islam. Executive authority, as well as power over legislative and judicial matters, resided in the Prophet Mohammed. After his death, his successors, the Caliphs, embodied all forms of authority. At various stages, due to the enlargement of the Islamic empire, they delegated some of their powers to carefully chosen individuals, but this was always within the boundaries fixed

by Islamic law, and at all times the ruler of the Islamic state had an absolute and final authority.

Before 1992, the King's duties and authorities were enumerated in a multiplicity of different laws and customs.<sup>30</sup> Now they are mostly contained within one document, called The Basic Law of Government (hereafter Basic Law). This law identifies the nature of the Saudi state, its goals and responsibilities, as well as the relationship between the monarch and the citizens.

### **1.3.1. Role of the King**

According to Islamic law, the Head of State has the right to legislate for the whole community, within Islamic principles, for the benefit of his subjects. This authority was all-encompassing in the time of the Prophet, when society had no need for such legal domains as company law or traffic regulations. "It is authorized by the *Sharia* to issue Regulations not only to enforce the commandments of the divine law but also to implement whatever is deemed necessary for the good and well-being of his {the King's} subjects. The term "law" is thus, reserved strictly for the *Sharia*".<sup>31</sup>

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<sup>30</sup> Anani, Ahmad, and Whittingham, Ken, "The Early of the Gulf Arabs", 1986, Review, Elton L. Daniel, *The American Historical Review*, Vol. 93, No. 4. ,1988, pp.1093-1094

<sup>31</sup> Baroody, George ,*The Practice Law in Saudi Arabia, King Faisal and Modernization of Saudi Arabia*, London: Westview Press, 1980, p.113

The King's absolute authority in legislative matters, as with his authority generally, is embodied in the fact that as king he has the right, by Royal Order, to dissolve and reorganize the Council of Ministers, or to appoint or dismiss individual members of the Council, together with the Deputy Prime Ministers.<sup>32</sup> Subject to their obedience before the King, members of the Council of Ministers are responsible for implementing the general policy of the state. The King also creates the Consultative Council; the king selects its members, and he alone has the power to dissolve the Council or reform it by issuing a Royal Order. Further, the King has the right to convene a joint meeting of the Consultative Council and the Council of Ministers, to invite whomsoever he wishes to attend that meeting, and to discuss whatever matter he deems necessary.<sup>33</sup>

In short, the King has a broad legislative authority. No law can be issued without his approval. The King has the right to propose policies, both to issue and sanction them, and to propose legislation. He can reject any proposed law by refusing to sign it (as Prime Minister) or issue a Royal Decree to sanction it (as king). International agreements and treaties, laws, and concessions cannot be promulgated except in accordance with a Royal Decree. The government

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<sup>32</sup> Al-Baz, Ahmed, *The Political and Administrative System in Saudi Arabia*, Riyadh: King Fahd Security College, 1994 (in Arabic).

<sup>33</sup> Ottoman, H, *Politics System and Constitutional Law*, Beirut: Aldar Aljama'aih for pressing and publishing, 1991, p83,(in Arabic).

cannot contract any loan except with approval of the King. The annual state budget and proposals for the five-year development plans require his approval. Notwithstanding the Consultative Council and the Council of Ministers, the most important constitutional laws are created directly by a Royal Order. The Basic Law, The Regulation of the Consultative Council, the regulation of the regions, and the regulation of the Council of Ministers are all promulgated under the powers of a Royal Order.

The monarch of Saudi Arabia is hence much more than the symbol of the Saudi Arabian state. He embodies the final authority within the state and is the state's representative abroad and in international organizations. His vast authority over all affairs of the country is clearly evidenced by the total absence of any independent political structure outside the monarchy. To Saudi Arabians, the Saudi monarch is considered their religious leader and as the guardian of Islam: "the King oversees the implementation of the Islamic *Sharia*."<sup>34</sup> He is the Head of the State and it is he who chooses the Heir Apparent or dismisses him by Royal Order.<sup>35</sup>

As Head of State, the King receives foreign Heads of State, their ambassadors and emissaries. He also appoints his representatives to their

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<sup>34</sup> Saudi Arabia, The Basic Law of Government, published in *Umm Al-Qura*, no 3397, dated 6-3-1992, Article 55. The text of the Basic Law is set out in Appendix Four.

<sup>35</sup> *ibid*, Article 5.c.

countries.<sup>36</sup> The King by Royal Decree gives his approval to international treaties, agreements, regulations, and concessions.<sup>37</sup> He is commander-in-chief of all branches of the armed forces; he appoints officers and has the power to end their tenure.<sup>38</sup>

In addition to this, the King is the focal point of all executive institutions, as well as of the Legislative and Judicial powers.<sup>39</sup> The main institutions of the Executive within the Saudi Constitution are the Royal Court and the Council of Ministers. In addition to these, there are various specialized commissions and institutions. The King exercises his authority through the Royal Court as well as through the Councils. It is also through the Royal Court that the King meets his personal advisers, as experts in their field:

“The importance of the Royal Court [Cabinet] stems not from its formal status as the King’s personal office as much as from the status of some of the King’s personal advisers who work there.”<sup>40</sup>

The King of Saudi Arabia has the final decision in all executive matters. During the unification period, the King exercised power without a formal legal

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<sup>36</sup> *ibid.*, Article 63.

<sup>37</sup> *ibid.*, Article 70.

<sup>38</sup> *ibid.*, Article 60.

<sup>39</sup> *ibid.*, Article 61.

<sup>40</sup> Al-Awaji, Ibrahim, “Bureaucracy and Society in Saudi Arabia”, Ph.D. dissertation, University of Virginia, USA, 1971, Pages 43-45.

order. With the passage of time, however, the King's authority has been codified in various laws.

Although various written and customary laws have regulated the constitutional affairs of Saudi Arabia since its establishment, it did not have a written document of basic law, i.e. a "written constitution", until 1992. There were many pronouncements and attempts to form a Basic Law, as distinct from regulations of the Council of Ministers, after the death of King Abdul-Aziz in 1953.

In the last years of King Saud's reign there were several attempts at constitutional reform. Rivalry within the royal family led Prince Talal, his brother, to announce the impending formation of a National Council to operate within a revised constitutional monarchy. News of this was made public on Saudi Radio, but two days later King Saud announced the abandonment of the proposal.<sup>41</sup>

When King Faisal, then Crown Prince, was made Prime Minister in 1962, he presented a ten-point programme that included a proposal for a written Basic Law. His points were as follows: formalising a Basic Law, establishing a local government system, establishing a Ministry of Justice, establishing a Judicial Council, strengthening the call to Islam, reforming the Committees for Public

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<sup>41</sup> Holder, David, and Johns, Richard, *The House of Saud*, New York: Holt, Rinehart and Winston, 1981, pp. 212-217



Morality, raising the nation's social level, enacting legislation for economic progress, developing the state's resources, and abolishing slavery.<sup>42</sup>

Sheikh H. Al-Mishari offered a description of the shifting circumstances surrounding the making of the Basic Law.<sup>43</sup> According to Al-Mishari, in the time of King Saud the authorities were enthusiastic about producing a written Basic Law (as provided for in the ten-point programme). Prince MUSAAD, the King's uncle and the Minister of Finance at that time, was in charge of this programme. The Second Deputy Prince FAHD (later the King) was a major supporter who frequently backed the proposal in his press statements. All the top officials of the government co-operated in writing the draft law, but despite this support the draft failed to become law. This was possibly due to the international situation at that time, and in particular the unrest in the Arabic World; it is also probable that the Saudi administration slowed down the pace following the constitutional experience of some of the other Arabic countries in the Gulf. In any event, much more time for study and consideration was needed in the drafting of such an important law as this.<sup>44</sup>

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<sup>42</sup> As'ad, Mohammed, "The Possibility of Change in Bedouin Society", Ph.D. dissertation, Claremont University, 1981, pp.101-102

<sup>43</sup> *AL-Yamamah* weekly magazine, An interview with the chairman of the council *Al-Mishari* Husain, reported in no. 1388, dated 16-01-1996.

<sup>44</sup> Rashid, Nasser, & Shaheen, Esber, *King Fahd and Saudi Arabia's Great Evolution*, Missouri: International Institute of Technology, Inc., 1987. P55

Several more calls were made for reforming the government system, following both external and internal unrest. In 1982, a committee of ten members was established under the chairmanship of Prince Naif, Minister of the Interior, in order to draft a written basic law for the government.<sup>45</sup> Eventually, ten years later, King *Fahd* issued three Regulations based on the committee papers: the Basic Law, the Regulations of Regions, and the *Shura* Council Regulations.<sup>46</sup> Together they embody in written form the present Constitution of Saudi Arabia.

According to the Basic Law, the King is the Prime Minister and Head of the Council of Ministers.<sup>47</sup> By Royal Order, he appoints and dismisses the Prime Minister's deputies and members of the Council of Ministers, who must swear allegiance to the King, who may dissolve and reconvene the Council at his own discretion.<sup>48</sup> The King also reserves the right to appoint others to the rank of

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<sup>45</sup> The ten-member included Abdulwahhab Abdulwasie, former Minister of Pilgrimage and Endowment; Ibrahim Al-Angari, Special Advisor to the King ; Abdulaziz Al-Tuagery, Vice-President of the National Guard; Abdulrahman Mansori, Deputy Minister of Ministry of Foreign Affairs; Mohammed Ibrahim Masoud, former Minister of State; Mohammed bin Jubair, former Minister of Justice and the Chairman of the Consultative Council; Rashed bin Khanin, former President of Girls Education now Advisor to the Royal Court; Abdul-Aziz Al-Salim , General Secretary of the Council of Ministers; Muttlab Al-Nafissah; Minister of State and President of Experts Division in the Council of Ministers; and Saleh Al-Husain, former Minister of State. Reported in *Asharq Al-Awsat*, saily Arab news, no. 4843, dated 2-3-1996.

<sup>46</sup> For full text of the three Regulations, see <http://www.shura.gov.sa/EnglishSite/Elaw/law1.htm> ,18-07-2007.

<sup>47</sup> The Basic Law of Government, Article 56.

<sup>48</sup> *ibid*, Article 57.

‘minister’, to appoint their deputies, and those of higher rank, and equally to dismiss them from their positions when necessary.<sup>49</sup>

As we have already seen, the King of Saudi Arabia has numerous rights and responsibilities, which together give an impression of unlimited power over the Kingdom. There are, however, restrictions. Firstly, it must never be forgotten that every single aspect of the King’s authority is affected by the rulings of Islam. In Islamic teaching, there is no limitation to the ruler’s authority as long as he does not go beyond the scriptural boundaries of the religion.<sup>50</sup> Secondly, there are many restrictions on his authority exercised by the Royal Family itself. The abdication of King Saud was brought about directly by members of the Royal Family. Thirdly, there are constraints imposed by the pronouncements of the *Ulama*, who are considered the guardians of Islam. Finally, although the King is not formally bound or legally answerable to any particular entity or authority within the kingdom, it is in the nature of the efficient practice of government that he should be attentive to the advice of senior members of his civil service, of the tribal leaders, as well as more generally to expressions of popular feeling within the kingdom.

Although the King is the ultimate power in the state, he may delegate some of his authority, mainly to the Crown Prince. There have been occasions when

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<sup>49</sup> *ibid*, article 58.

<sup>50</sup> Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, Boston, Brill Academic Publishers, 1999, pp.278 &281

this has been problematic, as in the struggle between King Saud and his Prime Minister, Faisal. Under pressure from the Royal Family, the King was obliged to issue this veiled statement: “We grant our Prime Ministers full power to lay down the state’s internal, external and financial policies and to supervise implementation of these policies...in order to strengthen the government’s machinery.”<sup>51</sup>

The conflict between Saud and his brother, Prime Minister Faisal, resulted in the King’s abdication from the throne in 1964. When, as Crown Prince, Faisal became King, he did not appoint anyone to take over the job of Prime Minister but retained the position himself, as has each of his successors.<sup>52</sup>

In 1993, King Fahd enacted a new system for the Council of Ministers,<sup>53</sup> whereby the King becomes the Prime Minister according to a written law, as had originally been laid down by the Council of 1954.<sup>54</sup> The Regulation makes clear the scope of the King’s authority, stating that no decision can be passed without the King’s signature.<sup>55</sup> The King has the right to appoint and to remove the members of the Council,<sup>56</sup> and the King is responsible for the general policy

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<sup>51</sup> *Umm Al-Qura* no. 1711, dated 28-3-1958.

<sup>52</sup> When Faisal became King in 1964, he formalized his position as Prime Minister of the Council; Articles 7 and 8 were amended and published in *Umm Al-Qura*, no. 2074 dated 20-11-1964.

<sup>53</sup> Saudi Arabia, *The Regulation of the Council of Ministers*, of 1993, published in *Umm Al-Qura* no. 3449 dated 23-8-1993.

<sup>54</sup> *ibid.*, Article 1.

<sup>55</sup> *ibid.*, Article 7.

<sup>56</sup> *ibid.*, Article 8.

of the state, and to oversee and co-ordinate the governmental departments in order to ensure the harmony, continuity, and unity of the Council. At the same time, the King is to observe and ensure the proper execution of the laws.<sup>57</sup>

### **1.3.2. King's Commands**

The King has a number of specific powers, or commands, at his disposal, which reflect his various positions. The law does not identify these commands (the Royal Order, the Royal Decree, the Royal Directive, and the High Order) but they have become established through customary practice.<sup>58</sup>

### **1.3.3. The Royal Order**

The Royal Order is a written decision in a specified form with the King's signature as the Head of State. It is issued as a personal prerogative of the King, not as a procedure arising from the constitutional institutions. It concerns, for example, the appointment of ministers, the choosing (and if necessary deposing) of the Heir Apparent, and the appointment of ambassadors.

### **1.3.4. The Royal Decree**

The Royal Decree is a written decision, again in specified form, with the King's signature as the Head of State, but which is used where the subject matter must first be proposed to and approved by the Consultative Council and

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<sup>57</sup> *ibid.*, Article 29.

<sup>58</sup> Al-Mutairy, Thamer, *Principles of Public Administration in the Kingdom of Saudi Arabia*, Riyadh, Dar Al-Lewaa, 1987, p.37

then by the Council of Ministers, e.g. the approval of laws, international agreements, and public policies. In some cases, such as the approval of the annual public budget, issues are discussed and approved only by the Council of Ministers.<sup>59</sup>

### **1.3.5. The Royal Directive**

The Royal Directive is an expression of the King's will, which is oral and has no specific form. It is for matters that concern individual citizens, and for the various governmental institutions. Such directives are issued by the Court of the Presidency of the Council of Ministers.<sup>60</sup>

### **1.3.6. The High Order**

The High Order is a written command but without any specific form. It carries the signature of the King as the President of the Council of Ministers, although the First or Second Deputies of the Council can sign it in his stead. The order communicates the decision of the Council on matters relating to the execution of Government rules. It is issued by the Court of the Presidency of the Council of Ministers, and represents the decision of its President. It is also different to a decision made by the Council of Ministers, which is issued by the

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<sup>59</sup> Saaty, Amin, *The Consultation in the Kingdom of Saudi Arabia: from King Abdul-Aziz to King Fahd bin Abdul-Aziz*, Cairo: The Saudi Centre for Strategic Studies, 1992, p 139

<sup>60</sup> *ibid*

General Secretariat of the Council and represents the decision of the Council as a whole.<sup>61</sup>

#### **1.4. The Majlis**<sup>62</sup>

In many Muslim countries, the government must be Islamic in order to be legitimate. At the same time, it does not qualify as Islamic unless it applies the principle of consultation. In Islam, there is no specific procedure for consultation, and hence the condition can be fulfilled by consultation with groups of either elected or selected people, by either small or large groups, or by any legislative assembly.<sup>63</sup>

Since its establishment, Saudi Arabia has always applied a consultative principle. The most common method of consultation used in the Saudi state is the open "*Majlis*." This is an informal event, held once a week, at any place of the king's choosing, where a citizen may approach the king. The *Majlis* system has been called in the West the "Desert Democracy."<sup>64</sup> King Fahd described the system thus: "You notice that no-one here has much room for protocol, I am

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<sup>61</sup> *ibid*

<sup>62</sup> *Majlis* is an Arabic word referring to a sitting down or council.

<sup>63</sup> Kechichian, Joseph, "Islamic Revivalism and Change in Saudi Arabia", (1990), *The Muslim World*, vol. LXXX, pp.1-16

<sup>64</sup> Graham, Douglas, *Saudi Arabia Unveiled*, Dubuque, Iowa: Kendall/Hunt, 1991, p.26

only Fahd to these men..We [Fahd and his brothers] are equal under God, and such men bow to no one".<sup>65</sup>

In general terms, a *Majlis* is a means of consultation through which the people can participate either directly in political life. It may also be a forum for consultation to take place between high officials. Any person can attend an open *Majlis* and request personal support, put forward a suggestion, or present a grievance. This kind of consultation is based on the old tribal tradition whereby the leaders of the tribe would meet to discuss the tribe's affairs with others, and it has continued to be used from the establishment of Saudi Arabia to the present.<sup>66</sup> Top government officials regularly hold a formal or official *Majlis*: the king, the Crown prince, the Governors, etc.

The importance of the *Majlis* was laid down in the Basic Law: "The King's Court and that of the Crown Prince shall be open to all citizens and to anyone who has a complaint or a plea against an injustice. Every individual shall have the right to address the public authorities in any matters affecting him."<sup>67</sup>

The *Majlis* system delivers a useful and constant feedback to the top officials and has a certain judicial aspect, but its powers are limited when it comes to the legislative process. The *Majlis* does play a part in this process,

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<sup>65</sup> Rashid, Nasser, and Shaheen, Esber, "*King Fahad and Saudi Arabia's Great Evolution*", op cit, p.74

<sup>66</sup> Al-Saud, Faisal, *Decision Making and the Role of Ash-Shura in Saudi Arabia: Majis Ash-Shura (Consultative Council): Concept, Theory and Practice*, US, Vantage Press , 2004, p106

<sup>67</sup> Basic law of Government of Saudi Arabia, Article 43



however, as when, for example, there is a suggestion or grievance affecting a large sector of the population. The problem can first be proposed and discussed in the *Majlis*.<sup>68</sup>

### **1.5. The role of the Consultative Council**

Each year, the king or his deputy delivers a speech in which he declares the government's domestic and foreign policies.<sup>69</sup> The role of the Consultative Council itself is contained in a number of different articles and is far-reaching. By virtue of Article Fifteen of the regulation, the Council has the right to express opinions on the general policy of the state, as referred to it by the Council of Ministers. In particular, in relation to the external affairs of the country, the Consultative Council has the right to study international law, charters, treaties, agreements and concessions and make appropriate suggestions for their amendment.<sup>70</sup> International treaties, agreements, orders and concessions are issued and amended by Royal Decree only after being studied by the Consultative Council.<sup>71</sup>

As a part of the legislative process the Consultative Council must be consulted prior to draft legislation being submitted to the King for royal

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<sup>68</sup> *ibid*

<sup>69</sup> The Regulation of the Consultative Council, Article 14.

<sup>70</sup> *ibid*

<sup>71</sup> *ibid*, Article 18.

sanction.<sup>72</sup> The Council has the right to initiate legislation on any subject which concerns the state. Any member of the Consultative Council has the right to propose a draft for a new law, or an amendment to a current law, and submit it to the Chairman of the Consultative Council. Additionally, a subject may be submitted to the Council from outside by the King.

When a subject is submitted to the Council by the King (through the general Secretariat of the Council of Ministers), it goes first to the relevant Council committee for study. The committee studies the draft and, if necessary, consults appropriate experts in the subject, before submitting its report to the Plenum of the Council. The Plenum then studies the report before listing it on the Council's agenda, to be certain that the subject's documents and discussion are complete. Once the whole Council has had an opportunity to study the report and the draft, the Chairman of the committee which undertook the first study passes to each member of the Council the complete file, together with the committee's opinion and gives a presentation of the subject, the committee's discussions, and their decision. The process now moves into the discussion stage. Each member of the Council has the right to express his opinion and to discuss freely. After the discussion, the Council comes to a conclusion, which may match the committee's decision, propose amendments, or come to an

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<sup>72</sup> *ibid*

entirely new decision. The decision is then passed to an Expert Department within the Council for drafting.<sup>73</sup>

In order for the draft to go through, a simple majority of the Council members (31) is required. The Chairman of the Council then submits the draft to the King for his seal.<sup>74</sup> However, before the King gives his absolute approval, the draft is passed by the Consultative Council to the Council of Ministers for their scrutiny. If the views of both Councils are concordant, the draft will be issued if it obtains the King's consent. If the views of the two Councils diverge, the king exercises a power of final decision.<sup>75</sup>

#### **1.5.1. The passage of resolutions within the Consultative Council**

A Consultative Council byelaw states that an ordinary meeting of the Council shall be held at least once every two weeks.<sup>76</sup> In fact, it now holds one or two meetings every week. A quorum of at least two-thirds of the members is required to convene a meeting; this must include the Chairman or his deputy. For a decision to be passed it must be approved by a majority of the Council members.<sup>77</sup> If a majority is not realised, the subject will be put on the agenda

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<sup>73</sup> Said Amin, *The History of the Saudi State*, Riyadh, Darat Almalik Abdulaziz, 1996, p 132.

<sup>74</sup> An interview with the chairman of the council reported in *AL-Yamamah* weekly magazine, no 1387, dated 30-12-1995.

<sup>75</sup> The Regulation of the Consultative Council, op cit, Article 17.

<sup>76</sup> Saudi Arabia, the Regulation of the Consultative Council, *The Bylaw of the consultative council*, Riyadh: The Government Security Printing Press, 1994.

<sup>77</sup> the Regulation of the Consultative Council,, Article 16

for voting in the next session. If a majority is still not achieved, the subject will be submitted to the king with reports and the results of the two votes.

### **1.5.2. Committees of the Consultative Council**

Regulations of the Consultative Council allow it to form, from amongst its members, the specialized committees necessary to exercise its jurisdiction. Special committees can discuss any question on its agenda. The committees of the Council can enlist the help of any outside person with the consent of its Chairman.<sup>78</sup> There is no limitation set on the number of the committees permitted, but each committee should not have less than five members. In its first session the Council established eight committees. These were the Committee of Islamic Affairs, the Committee of Foreign Affairs, the Committee of Economic and Financial Affairs, the Committee of Social and Health Affairs, the Committee of Regulations and Administration, the Committee of Public Utilities and Services, the Committee of Security Affairs, and the Committee of Educational, Cultural, and Information Affairs.<sup>79</sup>

Each committee studies matters referred to it by the Council or by the Chairman of the Council. To complete a study of a specific subject, a Council needs a majority of at least two-thirds of the committee. A report on the subject

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<sup>78</sup> *ibid*, Articles 19 & 20.

<sup>79</sup> Saudi Arabia, *the Consultative Council: Fact and Events*, Riyadh: the Consultative Council, 1995, p.1

will then be submitted to the Council; this report will include the basics of the subject, the committee's opinion, recommendations and the basis on which those recommendations were made, as well as any specific opinion of the minority, where appropriate. It is the chairmen of the specialized committees, the Chairman of the Council, and his Deputy who constitute the 'Plenum' of the Council. The Plenum has the responsibility of drawing up a general agenda for the Council and its committees, ruling on objections that may have been raised during Council sessions, and issuing the necessary rule to regulate the Council's affairs.<sup>80</sup>

### **1.5.3. The Presidency of the Consultative Council**

According to Article 10 of the regulations, the King appoints the Chairman of the Consultative Council, his deputy and the Secretary-General, but only partly defines their respective roles. A byelaw does, however, state that the Chairman of the Council is not its supervisor and differentiates between his duties and those of the Secretary-General. The Chairman must liaise between the Council and other government departments. He opens and closes Council sessions, chairs the discussions, grants permission to speak, and opens the voting. In addition, the Chairman can convene an emergency meeting of the Council, the Plenum, or any other committee to discuss any subject. The

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<sup>80</sup> Saudi Arabia, the Regulation of the Consultative Council, *The Bylaw of the consultative council*, op cit

function of the Secretary-General is defined as being to attend the meetings of the Plenum, to supervise the preparation of minutes, and to be responsible to the Chairman for the financial and administrative affairs of the Council.<sup>81</sup>

As the Council's decisions are not final (they need first the agreement of the Council of Ministers and then the king's approval), the Consultative Council does not publish its decisions in detail. At the beginning of the third year of its first session, the Council published a certain amount of information relating to its meetings and decisions. The Council issued sixty-eight decisions, most of which were adopted by the Council of Ministers. These decisions were in relation to a number of different matters concerning the state, and included such topics as the regulation of the state's patents in the countries of the Gulf Cooperation Council, the regulation controlling ownership in the countries of the Gulf Cooperation Council by Saudi citizens, the security treaty binding the countries of the Gulf Cooperation Council, the agreement on the third amendment of the International Monetary Fund, the Treaty of the Arabian Civil Aviation Association, and the sixth Development Plan.<sup>82</sup>

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<sup>81</sup> Al-Saud, Faisal, *Decision Making and the Role of Ash-Shura in Saudi Arabia: Majis Ash-Shura (Consultative Council): Concept, Theory and Practice*, op cit, p 117.

<sup>82</sup> *Al-Yamamah* weekly magazine, no.1390, dated 20-01-1996.

## 1.6. The role of the Ulama and the religious foundations of Saudi law

Councillors of the *Ulama* are considered the guardians of Islamic values and they play a key role in the Saudi Arabian legal system. In order to prevent any conflict with Islamic principles, the King meets with the *Ulama* once a week to ask their advice and to consult them on actions he wishes to take. The importance of this relationship is clear: “in Saudi Arabia, the *Ulama* continue to accept the legitimacy of the government because the Saudi Government rules according to the *Sharia* and consults regularly with the recognized interpreters of the *Sharia*, namely the *Ulama*.”<sup>83</sup> It may be noted here that although *Ulama* councils can be found throughout the Moslem world, only in Saudi Arabia, founded on a strict adherence to *Sharia*, is their influence felt so powerfully.

In Saudi Arabia, legal terminology is in itself a potential source of conflict. In order not to arouse the anger of the *Ulama*, the term “laws” can only be used for laws that are taken directly from Islamic sources, while other “non-laws” have to be called orders, regulations, or instructions. In addition, there are two different types of court to deal with disputes. The *Sharia* courts deal with the majority of affairs, but laws not referred to specifically in the Islamic texts must be referred to their own judicial forums. These are not called “courts”, but instead have been given other titles such as “committee”, “board”, or

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<sup>83</sup> Kechinian, Joseph. “The role of the Ulama in the Politics of an Islamic State: The Case of Saudi Arabia”, (1986), *International Journal of Middle East Studies*, 18 (1), p.53

“commission” as, for example, the Board of Grievances for hearing administrative cases involving government employees, or the Commission for the Settlement of Labour Disputes.

Legislation in the Islamic state must be within the boundaries prescribed by the *Sharia*. The teachings of God and his Prophet are to be obeyed; they are sacred and no legislative authority can alter or modify them or create any law contrary to their text and spirit. The primary sources of Islam are the *Qur'an*, the *Sunnah*, *Ijma*, and *Qiyas*. *Sunnah* is an Arabic word that means ‘the way’. It was applied by the Prophet Muhammad as a legal term to represent what he said, did and agreed to. *Ijma*<sup>84</sup> has been technically defined as the consensus of the jurists, at a certain historical period, on religious matters. More than this, *Ijma* is considered sufficient vindication of any action because the Prophet said, “the Muslim majority or main body will never agree to a wrong decision”.<sup>85</sup> The agreement of the scholars of Islam on any religious matter is a basis for law in Islam.

*Qiyas*<sup>86</sup> means analogy, which is to say similarity or equivalence. *Qiyas* is applied to problems about which there is no specific provision or precedent to

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<sup>84</sup> *Ijma* is a consensus of legal scholars representing all Muslims and one of the four sources of Sunni Muslim jurisprudence. <http://www.answers.com/topic/ijma> , 12--11-2006.

<sup>85</sup> Ibn Majah, “*Sunan Ibn Majah*”, no. 4, book *al-Fitan*, chapter *al-sawad al-Aadhm*, hadith no. 3950, p. 367

<sup>86</sup> *Qiyas* is an Arabic word, means in Islamic law, analogical reasoning as applied to the deduction of juridical principles from the *Qur'an* and the *Sunnah* (the normative practice of the community). With the *Qur'an*, the *Sunnah*, and *Ijma'* (scholarly consensus), it constitutes the



be found in the *Qur'an* or the *Sunnah* of the Prophet. On such issues, scholars have derived law through analogical deduction on the principle of *Qiyas*.<sup>87</sup> This method is clearly of relevance to determining the legal basis on which regulations can be devised to meet new challenges as, for example, in contracts involving electronic commerce.

While the *Qur'an* comes from God and the *Sunnah* comes from his Prophet, the other sources have been produced by the *Ulama*. Unlike the division between Church and State, which exists in many western nations, Islamic legal theory is founded on the assumption that there is no separation between *Sharia* and the State, and Islam has played a fundamental role in the legislative process in the Saudi Arabia.

In Saudi Arabia, there are two kinds of law. The first type is that which is derived wholly and directly from the *Sharia*; the criminal law is an example. The second is the kind of 'secular' law which in Saudi Arabia is called a "regulation". The creation of new law is an obvious necessity and, as such, permitted, provided that it does not conflict with Islamic law. New civil "regulations" fill the legal vacuum and have evolved to cover administrative and commercial affairs. Most of the ideas for new legislation passes between

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four sources of Islamic jurisprudence, <http://www.britannica.com/eb/article-9062126/qiyas> , 12-11-2006.

<sup>87</sup> M, Kamali, *Principles of Islamic Jurisprudence*, Cambridge UK, Islamic Texts Society, 3rd edition 2002, , p.103

the Consultative Council and the Council of Ministers. Nevertheless, the *Ulama* have the highly important task of scrutiny, as well as of formulating legislation derived directly from holy texts.

The *Ulama* in Saudi Arabia have played a crucial role in legislation through the Grand Mufti<sup>88</sup> (1952-1969). This involved the presidency of the Religious Research Department (regarding religious issues, or *Ifta*),<sup>89</sup> as well as later the Calls and Guidance (1971-1992), The Board of Senior *Ulama* (1971-present), as well as the Supreme Judicial Council and the Department of Scientific Research (1992-present).<sup>90</sup> Their role is exercised in three main ways: the drafting of laws; the issuing of *fatwa*; and opposition to any new law which they believe conflicts with the principles of Islamic law. Article 45 of the Basic Law emphasizes that: "The source of the deliverance of the *fatwa* in the Saudi Arabia is Allah's Book (the Holy *Qur'an*) and the *Sunnah* of his Messenger. The law will define the composition and the function of the Board of Senior *Ulama* and the Administration of Scientific Research and *Ifta*".<sup>91</sup>

The opinion of the *Ulama*, the "*Ifta*", is given where there is no direct text in the Islamic sources through which to solve the problem in question. The *Fatwa* takes two forms. It can be private or personal, as when the *Mufti* gives a

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<sup>88</sup> The Mufti are those individuals in the *Ulama* who deliver religious opinions.

<sup>89</sup> The religious opinion of the *Ulama*.

<sup>90</sup> Saudi Arabia, *The Regulation of the Board of the Senior Ulama*, Riyadh: the Government Security printing press, 1974.

<sup>91</sup> The Basic law of the Government of Saudi Arabia, Article 45

religious opinion to an individual. This method of interpreting Islam is in accordance with God's saying, "and before thee also the apostles We sent were but men, to whom We granted inspiration: if ye realize this not, ask of those who possess the Message".<sup>92</sup> On the other hand, when the issue is not a personal one and concerns most of the people, the *Fatwa* becomes public.

A *Fatwa*, whether personal or public, can be on any aspect of the *Sharia*. In both cases, two features of the *Ulama* should be understood. The first is the religious aspect, and whilst a *Fatwa* may not be binding in secular law, the ordinary people must follow it literally. The other aspect is the "formal legal" aspect: once a *Fatwa* receives the sanction of the King, whether the *Fatwa* was issued by the Senior Board of *Ulama*, or by the Grand Mufti alone, it has the force of law.

Although at first sight comparable, the role of the Mufti in the *Ifta* process is not the same as that of a judge in court. The *mufti*, in his *fatwa*, gives a "religious or legal opinion" but not a "judgment". When a *fatwa* is sought in relation to a legal dispute the Mufti will advise the parties to go to court. In court, the judge may use a *fatwa* for analogy where the case is in a new area of law, or where there are no legal texts already in existence. The judge's "*fatwa*" or "*Ijtihad*" is legally binding, due to his formal position in the court.

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<sup>92</sup> The Holy Quran, *Alnahl*, verse 43.

There are many examples where the religious institution of Ulama, the representatives of Islam in the law-making process in Saudi Arabia, has been involved in interpretation and enforcement of the *Sharia*, and hence, where necessary, in the creation of civil laws to “fill a vacuum.” This is where it has become evident that no law exists to deal with a new reality. The subsequent “law” is not the only kind of law the *Ulama* legislates, but just one example of the participation of the *Ulama* in the process of legislation.

Another prime example is the law whose purpose is “to set a death penalty on those engaged in drug smuggling.” This law was made by the *Ulama*, when Saudi Arabia was faced with the real and immediate problem of how to deal with increasing drug smuggling, as it was evident that there was no law to cover this in the Islamic texts. However, since the whole of the current criminal law in Saudi Arabia is derived directly from the Islamic text, the *Ulama* were the most competent group to formulate new law in this field. Hence the Board of Senior *Ulama* issued a decision that stated: “reflecting the concern and keenness of King Fahd (who had asked the Ulama for their opinion on the appropriate punishment for drug smuggling) to protect Saudi Muslim society against the evils and crimes perpetrated by drug criminals, the Board has investigated this subject, and considering the great destructive potential of drugs and the dangers posed to both the user and society, the Board has decided

by a consensus of its members to set a death penalty on those engaged in drug smuggling.”<sup>93</sup>

This decision was adopted by the king, who issued a Royal Order to the Ministry Justice and Ministry of Interior, to be circulated to all the courts and implemented.

### **1.7. The historical development of the Council of Ministers**

The Consultative Council was the main legislative authority in Saudi Arabia until the establishment of the Council of Ministers, which, when established in 1953, was given both legislative and executive authority. The new Council forced a decline in the authority of the Consultative Council as now the Council of Ministers, as well as the king, performed the same functions. However, the evolution of the Council’s authority has taken several twists and turns.<sup>94</sup>

The Saudi Arabian Council of Ministers has had four constitutions since its establishment in 1953. The constitution of the first Council of 1953 did not determine in much detail its role in the legislative process. It stated, in Article 1, “they [the members of the Council] may look into all the affairs of the nation,

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<sup>93</sup> *Alriyad*, daily paper news, no 6873, dated 13-3-1987.

<sup>94</sup> Al Johany Eid, *The Council of Ministers in Saudi Arabia*, Riyadh, Almajd for pressing, 1994, p 52

whether foreign or domestic; and it [the Council] shall decide what corresponds to the interests of the country in these matters in order to refer them to us”.<sup>95</sup>

The regulations of the Council did not specify which affairs it should appropriately discuss, nor did it define its relationship with the Consultative Council. However, Article 1 gave the Council a comprehensive domain - “all the affairs” - which *ipso facto* included legislation. In reality, it is difficult to judge the precise role played by the Council of 1953, as it lasted for such a short period, being replaced only a few months later by the Council of 1954.<sup>96</sup>

The founding regulation of the Council of 1954 similarly failed to specify the role of the Council in the legislative process. Instead, the regulation of the Council expressed its function as supervising state policy, both internally and externally. More specifically, it described this role approving international treaties and agreements, the annual budget, concession and monopoly contracts, or any other expenditure it deemed necessary. In addition, the regulation explained that the Council would consider the laws enacted by the Consultative Council or the departments concerned, in order to approve, amend, or reject them.<sup>97</sup> However, despite this absence of direct authority in any one article of the regulation of the Council of Ministers of 1954 in relation to the legislation process and its jurisdictions, it is evident from Article 7 that the Council

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<sup>95</sup> The Regulation of the Council of Ministers, of 1954, Article 1.

<sup>96</sup> Al Johany Eid, *The Council of Ministers in Saudi Arabia*, op.cit, p 82

<sup>97</sup> The Regulation of the Council of Ministers, of 1954, op.cit., Article 7.

performed the legislative authority for four and half years; “a careful examination shows that it (the authority of the Council of Ministers) extended over all legislative and executive matters”.<sup>98</sup>

In 1958, King Saud issued a Royal Decree to replace the old regulation of the Council of Ministers with a new one. This third model was founded in circumstances of financial, monetary, and political crisis, which compelled the king to give the (then informal) Council of Ministers full authority over the state’s affairs. The vast power of the new Council greatly accelerated the decline in the authority of the Consultative Council. The function of the Council of Ministers of 1958 is briefly stated in Article 18, explaining that the role of the Council is to direct the policies of the state, in both foreign and domestic affairs, and to have control of finance, education, defence, administration and all other public affairs. Further, Article 18 simply states that the Council of Ministers has overall authority of legislative, executive, and administrative matters (second only to the authority of the king).

The constitution of the Council of 1958 is far more specific about its legislative authority than had been its predecessor. Articles 19 to 24 clarify the law-making role of the Council. In particular, these articles state that international agreements, treaties and all laws could not be promulgated except

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<sup>98</sup> Al-Solaim, Soliman, “Constitutional and Judicial Organisation in Saudi Arabia”, PhD, Johns Hopkins University, Michigan, USA, 1980, p52.

by way of Royal Decree, after preparation and approval by the Council of Ministers.<sup>99</sup> Moreover, any amendments to laws and international agreements and treaties can only take place in like manner.<sup>100</sup>

The initiative for the proposal of draft legislation to the Council of Ministers, 1958, is only open to members of the Council.<sup>101</sup> In a radical move, Article 22 removes from the king the right to propose draft legislation, because, although the Council is under the presidency of the Crown Prince, the King himself is not a member. This situation had the potential for a serious conflict between the King and his Council of Ministers. If the king refused to sanction the draft law submitted to him, it had to be returned to the Council within 30 days, together with the King's objections, and discussed again by the Council. If the draft was not returned to the Council with the King's approval or objections within the prescribed time limit, the President of the Council had the power to take whatever action he deemed appropriate.<sup>102</sup> However, the regulations of the Council did not go so far as to specify the actions or the procedures open to the President of the Council. This situation, however, was altered again when Faisal became King in 1964. It was amended to re-instate

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<sup>99</sup> The Regulation of the Council of Ministers, of 1958, op.cit., Article 19.

<sup>100</sup> *ibid.*, Article 20

<sup>101</sup> *ibid.*, Article 22

<sup>102</sup> *ibid.*, article 23.



the King to his former: henceforth not only is he the ruling monarch, but also the President of the Council of Ministers.

The regulation of the Council of Ministers of 1958, moreover, defined certain specific legislative tasks. Article 48 set down the areas in which the Council should legislate; it had the task of drafting its own internal rules; rules for each of the ministries; regulations for the administration of the provinces; regulations for the municipalities, regulations for the briefing of ministers; and regulations for the sale and lease of state property. According to these regulations, all the laws were to come into effect by Royal Decree. The regulations also defined other areas of government where decisions of a quasi-legislative nature had force of law only if sanctioned by a Royal Decree. These areas briefly are: amendment to international agreements and treaties, and law; administration of the country,<sup>103</sup> imposition of taxes or duties,<sup>104</sup> collection of taxes or duties and the granting of exemptions from them,<sup>105</sup> disposal of state property;<sup>106</sup> the monopoly, concession, or granting of the right to exploit any of the state's resources;<sup>107</sup> increases to the budget;<sup>108</sup> and approval of the annual budget.<sup>109</sup>

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<sup>103</sup> *ibid*, article 26.

<sup>104</sup> *ibid*, Article 29.

<sup>105</sup> *ibid*, Article 30.

<sup>106</sup> *ibid*, Article 31.

<sup>107</sup> *ibid*, Article 32.

<sup>108</sup> *ibid*, Article 38.

<sup>109</sup> *ibid*, Article 39.

Although these are the areas specifically covered by the regulations of the Council of Ministers, it still had full authority to legislate on any subject concerning the state. Only the subjects outlined above had, according to the regulation of 1958, to be issued solely by a Royal Decree. Legislation on matters could be issued as instructions or byelaws, or by a decision in Council. In fact, the Council of 1958 played a major role as a legislative authority in Saudi Arabia. The thirty-five years of the Council, from 1958 to 1993, was a period of rapid development in Saudi Arabia. Growth in the fields of education, transportation, industry, health and social services during that period was tremendous, and so there was a great need for laws to regulate and supervise that growth.<sup>110</sup>

Each Council of Ministers has been marked by its relationship to the Consultative Council. In sum, The Council of Ministers of 1954 was established in the period when the Consultative Council was at its highest point as a legislative authority. This made the stages of the legislation process rather vague and confused. In the Council of Ministers of 1958, King Saud greatly reduced the authority of the Consultative Council by making the legislative authority of the new Council definitive. Subsequently, King Fahad issued a Royal Order for a new dispensation under which both Councils would operate under specified articles of regulation, designed both to fix and give more

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<sup>110</sup> Al Johany, Eid, *The Council of Ministers in Saudi Arabia*, op.cit, p 109

coherence to their relationship. It was particularly emphasized that the regulations of the Council of Ministers should not contradict the Basic Law or the regulations of the Consultative Council. Rather, it says, in compliance with the Basic Law and the Consultative Council, the Council of Ministers will “draw” the internal, external, financial, economic, educational and *defence* policies, direct the general affairs of the state and consider the decision of the Consultative Council.<sup>111</sup>

The regulations do not explain the term “in compliance.” It does not explain how the Council of Ministers is to balance its function with that of the Consultative Council. Moreover, the regulations of neither Council illustrate the difference between “to draw” and “to express”: Article 15 of the Consultative Council’s regulations states that the Council will “express” opinions on the general policy of the state, as referred to it by the President of the Council of Ministers. From the regulations of both Councils, we can see that the Council of Ministers was effectively given more power than the Consultative Council, thus reducing the significance of the Consultative Council in the legislative process.

The respective position of the two Councils becomes clearer in the description of the legislative authority given to the Council of Ministers. The regulation of the Council of Ministers, in defining its legislative authority, states that “in compliance” with the regulations of the Consultative Council,

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<sup>111</sup> Saudi Arabia, *The Regulation of the Council of Ministers*, of 1993, op. cit., Article 19

laws, international agreements and treaties, and concessions will be issued and amended by Royal Decrees after being studied by the Council of Ministers.<sup>112</sup> However, the relationship between the two Councils of state, and their respective authority in essential questions, has reached a point of such complexity that it is no longer possible to say that one is clearly in the ascendant while the other plays a subordinate role.

The regulations of the Council of Ministers grant its members the right to propose any draft legislation on the one condition that the draft is related to the proposing member's ministry. On other matters, any member (including the King, his Deputies, state ministers, or the King's advisers) should have the right to propose for discussion any subject he feels should be discussed by the Council, subject only to the agreement of the President of the Council: "each minister will have the right to propose draft laws or byelaws for activities related to his ministry. Also, each member will have the right to propose anything that is worthy of discussion at the Council after the approval of the President of the Council of Ministers".<sup>113</sup>

Where a draft of a new law or byelaw is submitted to the Council for consideration, the Council will study the draft and vote on it, at first article by

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<sup>112</sup> *ibid*, Article 20

<sup>113</sup> *ibid*, Article 22

article, then as a whole,<sup>114</sup> regardless of whether it has been proposed by the Consultative Council or the Council of Ministers. There is no special treatment or procedure applied to a draft of law that is submitted by the Council of Ministers.

### **1.8. The Council of Ministers of 1993**

When Fahd became King in 1982, he set out to draw together a collection of instruments that, taken together in written form, would embody the constitution of Saudi Arabia. When the Regulation of the Council of Ministers was issued on 10<sup>th</sup> August 1993, this reformation of constitutional law was completed. It contained the Basic Law, the Regulation of the Consultative Council, the Regions Regulation, and the Regulation of the Council of Ministers, plus some customary laws. The constitutional packages of 1992 and 1993 could be described as establishing “the Fourth Saudi State”.<sup>115</sup>

The Council of Ministers regulation of 1993 contains thirty-two Articles divided into six parts. The first part, containing eighteen Articles, states that the King heads the Council of Ministers. It goes on to define the qualification, duties, and responsibilities of the Council’s Members: the Deputy Prime Ministers, the Ministers, and the King’s Advisers. It also makes provision for a number of “ministers of state” who do not have a specified portfolio. The King

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<sup>114</sup> *ibid*, Article 21

<sup>115</sup> *ibid*

is given the power of appointment and dismissal over all the Council's members, and can accept their resignation, all of which is done by a Royal Order. For the first time, however, the length of the term that each Council member can serve is restricted. Article 9 declares that the Council of Ministers must be reformed at least once every four years.<sup>116</sup>

Part Two sets out the jurisdiction of the Council. Like the previous Council, the Council of 1993 was given full authority over the state's affairs. It has the authority to draft internal, external, financial, economic, educational and defence policies; all aspects of executive authority are vested in the Council, and the Council is the final authority for the financial and administrative affairs of the state. The third part deals with the legislative authority. Part Four clarifies the executive authority of the Council. It includes supervision of the implementation of laws, byelaws, and resolutions; the establishment and organization of public services; following up the general development plan; and the formation of committees to oversee the actions of government institutions. Part Five deals with financial matters. This part gives the Council the right to approve or veto the state budget, and the right to approve any increase in government expenditure and loans. The final part vests the presidency of the Council in the King. The King, as Premier, announces the general policy of the state and ensures harmony, continuity and uniformity in the world of the

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<sup>116</sup>Al Johany, Eid, *The Council of Ministers in Saudi Arabia*, op.cit, p 154

Council. In addition, this part places the Prime Minister's Office, the General Secretariat of the Council, and the Experts Body within the administrative structure of the Council.

### **1.8.1.Procedural rules**

The 1993 Council of Ministers holds its meetings under the chairmanship of the King, as the President of the Council, or one of his deputies, but decisions are only final after they have been endorsed by the King.<sup>117</sup> Only Council members and the Secretary-General are entitled to attend the Council meeting, although officials and experts can attend the meetings at the request of the President or of any member having first gained his approval, to present specialized information or to clarify an issue. Even so, the right to vote is restricted solely to the Council members.<sup>118</sup>

As with the regulations that preceded it, the regulations of the Council differentiate between normal and extraordinary sessions. To convene a normal session, a quorum of two-thirds of the Council must be present, although the Council's regulation does not in fact specify exactly how many members may be on the Council at any one time. The Council's resolutions need a majority of votes cast to be passed. If there is a tie, the president of the meeting has the

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<sup>117</sup> Saudi Arabia, *The Regulation of the Council of the Ministers*, 1993, op. Cit, Article 7.

<sup>118</sup> *ibid*, Article 13.

casting vote.<sup>119</sup> One further important rule states that in a normal session, no subject can be discussed or investigated and the Council cannot pass a decision on a subject related to a particular ministry unless that minister or his deputy is present.<sup>120</sup> However, in the case of a minister's absence, the king has the power to appoint another minister to act in his absence. "Only a minister can act in lieu of another minister, and this will be on the basis of an order issued by the President of the Council, and the acting minister will have the authorities of the minister in his absence".<sup>121</sup>

In the extraordinary sessions which may be called as a result of an important event such as a major internal incident or external threat to the country, as determined by the President of the Council, the meeting can be convened with a quorum of only half the Council members being present. In this situation, the Council's decisions need to be approved by two-thirds of the participating members. In contrast to the rules governing the normal sessions, above, the Council can pass a decision related to an individual ministry in the absence of the minister concerned. Whilst the Council of Ministers mostly holds one normal session a week, it may hold an exceptional session at any time as judged necessary by the President of the Council. Although the Regulation of the Council differentiates between the quorums required for the normal and

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<sup>119</sup> *ibid*, Article 14.

<sup>120</sup> *ibid*, Article 15.

<sup>121</sup> *ibid*, Article 11.



exceptional sessions, the decisions adopted in each session are treated identically.<sup>122</sup>

### **1.8.2. The Legislative Process**

Draft legislation passes through various stages in the Council of Ministers before it becomes law. Although the regulations of the Council of Ministers do not specify the procedure in one article, five distinct stages can be determined.

**(a) Proposal.** Draft legislation can be submitted to the Council either by one of its own members or by the Consultative Council through the President of the Council of Ministers. Each minister has the right to submit a draft law only on subjects related to his ministry, although every member is entitled to table for discussion any subject he considers worthy of discussion at the Council:“Each minister will have the right to propose a draft of laws or byelaws for activities related to his ministry. In addition, each member will have the right to propose anything that is worthy of discussion at the Council after the approval of the President of the Council of Ministers”.<sup>123</sup>

**(b) Discussion.** When a draft law is accepted for discussion in the Council, it is first directed to the General Committee of the Council of Ministers. The committee studies that draft law and may then direct the draft to a more

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<sup>122</sup> King Saud University,“ The Regulation of the Council of the Ministers,” , Riyadh, King Saud University, 1994, p.39

<sup>123</sup> Saudi Arabia, *The Regulation of the Council of the Ministers*, of 1993,op.cit, Article 22.

specialized committee for close study. Once the specialist committee has finished studying the draft, it is returned to the general committee, which will undertake a further study of the draft. Once agreement has been reached, the draft is sent back to the Council for final discussion before the vote. All discussion in the Council is confidential.<sup>124</sup>

**(c) Voting.** After the final discussion of the draft, the Council commences with the procedure of proving the draft. In addition, it votes first to approve the draft article by article, before voting on the draft as a whole. It is at this stage that the difference between the normal and exceptional sessions becomes important as to approve the draft a majority of participating members is required in the normal sessions compared to two-thirds in the exceptional sessions. All members have equal voting power; the only exception is that the President has a second casting vote in a tie.<sup>125</sup>

**(d) Ratification.** Once the Council of Ministers has issued its decision, the approved draft is sent to the King to receive his signature. Whilst the Council's decisions are final in many respects, they still require the King's approval to become law. On receipt of the King's signature the draft becomes a Royal Decree.<sup>126</sup>

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<sup>124</sup> *ibid*, Article 16.

<sup>125</sup> *ibid*, Article 14.

<sup>126</sup> *ibid*, Article 20.

**(e) Publication.** This is the final stage of the legislative process. To take effect the Royal Decree must be published in the official gazette: “All Royal Decrees will be published in the official gazette and will be effective from the date of publication unless specified otherwise.”<sup>127</sup> All laws must be published; further, all other resolutions of the Council are to be made public, except for those that the Council has ruled should remain secret due to the subject matter of the resolution.<sup>128</sup> All the above stages must be followed in order to issue new laws through the Council of Ministers.

### **1.9. Procedures for approving international treaties**

Treaties are considered a direct source of law in Saudi Arabia. According to the regulations of the Consultative Council, Article 15,<sup>129</sup> the Council has the right to study international laws, charters, treaties, agreements and concessions. By virtue of Article 15 of the Council regulations, the Consultative Council is given a vast area of competence in foreign issues. After its initial signing, the President of the Council of Ministers presents the international treaty to the Consultative Council. The President of the Consultative Council, in his turn, passes the treaty to the Committee of Foreign Affairs. The committee studies the treaty and consults with the government departments affected by the treaty.

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<sup>127</sup> The Saudi gazette is *Umm Al-Qura*. Article twenty-three of the Council of Ministers Regulation.

<sup>128</sup> *ibid*, Article 16.

<sup>129</sup> Consultative Council, Article 15

When the committee has concluded its discussion, it returns the treaty to the council via the Plenum of the Consultative Council. The Chairman of the Committee of Foreign Affairs presents the discussion of his committee and its opinion, following which the Council, as a whole, discusses and studies the treaty and then votes on it. The president of the Consultative Council submits the council decision to the President of the Council of Ministers. In its turn, the Council of Ministers studies the treaty and if it is approved, the treaty is submitted to the King for signature and ratification.<sup>130</sup>

After the Consultative Council has studied the treaty, it is submitted to the Council of Ministers for further study. According to the Regulation of the Council of Ministers, the Council is responsible for directing the international policy of the state. As part of this, the Council of Ministers has the authority to study and approve international treaties. An international treaty must go through various procedures before the Council's approval for the issue of the Royal Decree ratifying the treaty to be given. These procedures were drawn up by a special committee (composed of the Political Department of the Royal Court, the ministers) and adopted by the Council itself in 1977.<sup>131</sup>

Besides laws and international treaties and agreements, the regulation of the Council of Ministers specifies certain other subjects that can only

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<sup>130</sup> *AL-Yamamah* weekly magazine An interview with the consultative council, Alfayiz, Abdul-Aziz, reported in no 1396, dated 16-04-1996

<sup>131</sup> King Saud University, op. cit. pp. 124-125

determined by a Royal Decree. For instance, any proposed loan to or by the government needs both the permission of the Council and a Royal Decree.<sup>132</sup> The Annual Budget is subjected to exactly the same five-stage procedure that is applied to draft legislation.<sup>133</sup> Moreover, any increase in the budget must be approved by a Royal Decree.<sup>134</sup>

### **1.10. The Experts Division**

The Experts Division is the technical advisory body, and contains a number of legal experts. When the Experts Division was first founded under the council of 1954, the President of the Council of Ministers was given the leadership of this Division. The Division was also linked both financially and administratively to the General Secretariat. In 1974, in accordance with a decision of the Council of Ministers, the Division came under the leadership of the Second Deputy President of the Council of Ministers,<sup>135</sup> and eventually became independent of the General Secretariat of the Council of Ministers in 1977.<sup>136</sup> Dr Al-Semery described the Division in this way: "It is part of the Council of Ministers, as well as the court of the Presidency of the Council of Ministers and the general secretariat of the Council of Ministers. It is linked to

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<sup>132</sup> Saudi Arabia, "The Regulation of the Council of the Ministers", 1993, op.cit, Article 25.

<sup>133</sup> *ibid*, Article 26

<sup>134</sup> *ibid*, Article 27

<sup>135</sup> King Saud University, op. cit., pp. 113-114

<sup>136</sup> Al-Senidy, Abdullah, *The Regulation of the Council of Governmental Administration in the kingdom of Saudi Arabia*, Riyadh, Almajd for pressing , 1999, p.203.

the President of the Council. The Experts Division is considered as source of reference to the Council on legal issues. It also drafts the Council's decisions. The Division discusses and studies the topics, which are submitted to it by the President of the Council or one of his deputies. It is also consulted along with other specialized experts by the departments concerned. The Division mostly studies all issues, even issues on Islamic matters, due to the Islamic background of most of its members. Where the subject under discussion relating to Islamic law is unclear, or variant, the Division will submit the subject to the Senior Board of Ulama for their opinion.”<sup>137</sup>

The President of the Experts Division, who is a legal expert, has a similar authority to that of the General Secretary in relation to the Secretariat General, excepting of course those areas where he reserves authority. The President of the Division is assisted by a Vice-President and by his numerous legal specialists. The main functions of the Experts Division are as follows:<sup>138</sup>

- To study all matters submitted to the members and the committees of the Council of Ministers.
- To review the draft laws and byelaws as submitted by the various government departments

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<sup>137</sup> *AL-Yamamah* weekly magazine An interview with Al-Semery, Nasir the Experts Division, reported in, no 1401, dated 20-05- 1996.

<sup>138</sup> King Saud University, op.cit., pp.113-114

- To suggest the appropriate formulation of laws and the decisions of the Council of Ministers including public rules.

### **1.11. Conclusion**

The legislative authority in Saudi Arabia has continued to develop and evolve throughout the history of the modern Saudi state.<sup>139</sup> In the early period, during the building of the ‘third state’, the legislative authority was very simple and concentrated around the first King, Abdul-Aziz, and the *Ulama*. With the annexation of the Saudi state, King Abdul-Aziz adopted a new legislative style, introducing constitutional institutions into the process. This was the single most significant factor in the development of the legislative authority in the Islamic world. “More than any other countries in Muslim world, the Saudi kingdom is identified with Islam. Today, the kingdom is considered to be fundamentalist, with the Qur’an as its constitution and the Sharia as the source of its laws and regulations”.<sup>140</sup>

However, above this rock-like structure, great changes have occurred. Even though the Council’s members are responsible primarily to the King rather than to their ministries, the Council of Ministers represents a radical development in the Constitution, for in taking on a markedly executive authority, its role has

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<sup>139</sup> Tuson, Penelope, and Burdett, “Record of Saudi Arabia”, : Primary Documents 1902-1960, volume iv, 1926-1932, p.532

<sup>140</sup> Al-Yasini, *Religion and State in the Kingdom of Saudi Arabia*, Westview Press, Colorado, 1985, p.44

shifted a long way from being merely the King's adviser. With the increase in governmental activity, the number of ministries has greatly increased since the creation of the first Council of Ministers in 1953. The original six ministries became nine in 1954, and increased to twenty by the 1970s. In 1993 the latest Ministry was established, namely the Ministry of Islamic Affairs, Endowment, Call and Guidance.

In the period of unification, Saudi Arabia was characterized by its indeterminate and fluid style of government, with very few formal institutions. The chief motive-force of government was consolidation. King Abdul-Aziz and each of the country's regional governors ruled as tribal chiefs, without any formal grant of authority. Their main objective was to secure the Saudi territories rather than concern themselves with the intricacies of constitutional law. When King Abdul-Aziz annexed *Al-Hejaz*,<sup>141</sup> he was faced with and chose to adopt a new style of governing very different to that which existed in the other regions. At this time, many factors handicapped the development of the Saudi constitution, but with the passage of time the country has advanced towards establishing more complex, centralized institutions.

The constitution has evolved over the last half century to meet the developing needs and demands of the country. A highly significant development in 1993 was the time limit of four years applied to how long

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<sup>141</sup> The western region of the Kingdom of Saudi called *Al-Hijaz*



members can serve on the Council of Ministers. This was made subject to extension by Royal Order. In July 1995, eight Royal Orders extended appointments and about two-thirds of the members were then retired.<sup>142</sup> This was the first time such action had been taken in Saudi Arabia. Two months later, King Fahd appointed fifteen new ministers and dropped thirteen. As the biggest change to have occurred since King Khalid formed his cabinet in 1975,<sup>143</sup> it was a direct result of the new law limiting length of service.

Finally, it can be said that it is not easy for an outsider, used only to a Western template of constitutional arrangements, to understand the way matters are disposed in Saudi Arabia. The eighteenth-century, European doctrine of the separation of powers has no place in its history, and for people from the English-speaking world it is only in the personal rule of the Tudor and Stuart dynasties, ruling largely through their Privy Councils and other agencies of the monarchy, that rough analogies can be found. Even so, there are striking differences as, for example in the laws of royal succession where inheritance is limited to the male line of King Abdul-Aziz, but within which the King has the right to choose any prince as Heir Apparent.

The kingdom of Saudi Arabia is a rapidly expanding and transforming country, and, as in many other countries, its legal system needs constant

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<sup>142</sup> For the whole text of the Royal Orders see *Arab News*, vol. XX, no.241, dated 27-7-1995.

<sup>143</sup> For the whole text of the Council formation see *Riyadh Daily*, vol.XI, no. 78, dated 3-8-1995.

refinement and updating. It can be argued that the kingdom has been slowly feeling its way towards establishing healthy checks and balances within the system by creating two parallel Councils of State. If, as at the present time, these Councils are in equilibrium, the King is able to profit by contrasts of approach and analysis. For a King who is a personal ruler, the quality of advice he receives is of paramount importance.

Although Saudi Arabia applies Islamic law, seen as a comprehensive legal system, it does not mean that the country has attained perfection. Islamic law itself needs a constant effort of renewal in a changing era through the interpretation of its texts. Some writers consider that the Saudi legal system has a ‘double system’, or bifurcation, as a result of compounding Islamic laws with ‘secular’ regulations. Where it is seen that the government has borrowed directly from the laws of other countries this view may seem justified. However, adoption does not in itself imply bifurcation. It seems unlikely that anyone would make the same observation when, for example, an EU traffic regulation is adopted in Singapore.

The distinctive character of Saudi *Sharia*, as represented in this chapter, is its integrative aspect or capacity. By contrast, a bifurcation in jurisprudence can be observed in the regulations of some of the emirates in the Gulf, where European laws effectively operate in parallel and in contradistinction to

received religious law. Arguably, this may lead to a perilous duality of outlook that will confuse and undermine the state. Nevertheless, the origin of a regulation is surely of little importance in itself. Religion demands that we focus on the improvement it can bring. Above all, any criticism of the introduction of new measures fails to comprehend some of the over-arching principles of Islam to be seen in the design of the state and its laws: that God intends our comfort not our discomfort, that all which is not forbidden is permitted, and that He has given us a creative faculty to find a way out of our difficulties which not to employ would be a defiance of His purpose.

New laws are created to address a social and not pre-existing need. Saudi law strives to establish a comprehensive legal provision. To achieve this within the constraints of religious tradition and teaching may not be a simple matter. Nevertheless, for a successful contemporary jurisprudence, it is necessary to reconcile and bring into harmony existing Islamic law with legal practices that are accepted as universal in other parts of the world. The thesis will, therefore, turn next to the first part of this equation, namely the ethical and juridical basis of contract in Islamic law.

## **Chapter Two: Sources and Principles of Contract in Islamic Law**

### **2.1 Introduction**

The question of authority is essential to an understanding of whether and how accommodations can be made in Islamic law to the trans-national regulations applied in other countries. In an exercise of this kind through Western perspective, consideration of ‘sources’ might be regarded as a small adjunct to the elaboration of ‘principles’. In the tradition of *Sharia*, however, this is not the case. Before principles can be derived it is necessary to consider first the font of sacred text, since this is the primary source of Islamic law in the KSA.

There is no explicit theory of contract in early Islamic legal sources, although there are many injunctions in the *Qur'an*<sup>144</sup> to guide Muslims into behaving in a trustworthy way. These are aggregated with the *Hadith* of the Prophet in explanation or as additional rules. Both types of injunction have been interpreted by schools of Islamic law and, consequently, huge numbers of legal judgements have been produced in relation to them.

Over centuries of practice and discussion, therefore, it can be said that a body of rules has been developed with regard to contract. These were not looked upon as a body of law since they referred only to a few, specified types of transaction known in the time of the Prophet. They were, for example, contracts of marriage, sale and donation. Islamic sources do, however, contain rules that establish a framework by which any non-nominated contract could be regulated and submitted to legal proceeding. Teaching, precedent and procedure are thus collated within the main sources of Islamic law, which the schools of law and scholars have had to interpret to establish the laws of contract.<sup>145</sup>

The word of God, as revealed to the Prophet, is the font of Islamic thinking on laws of contract, its rational and intellectual basis. This concept is difficult to grasp in a post-religious society because it appears to contain a contradiction,

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<sup>144</sup> Ansari, Zafar, "The contribution of the Quran and the Prophet to the development of Islam Fiqh", (1992), *Journal of Islamic studies*, 3:2, pp. 141-171

<sup>145</sup> R Al-Qurtubi, and Mohammed. Al-jame," *Leahkam Al-Koran*", 1952, 20 vols, Cairo: Dar al-kutub almasriah, VI, p. 32

namely that reason and intellect (hence laws and regulations) are purely man-made constructs. Contract law may seem to be an entirely secular concern, and a commentator from a society in Western Europe may instinctively feel that he has to search for a body of man-made contract theory and feel lost or disorientated when he cannot find it. Nevertheless, he is beginning from the wrong place and proceeding according to false predicates; to understand the principles of contract in Saudi Arabia, it is first necessary to grasp a different reality.

The Holy Qur'an says: "O ye who believe! Fulfil (all) obligations,"<sup>146</sup> "...and fulfil (every) engagement, for (every) engagement will be enquired into (on the day of reckoning)."<sup>147</sup> Examples of the Prophet's sayings are: "from among all the conditions which you have to fulfil, the conditions which make it legal to have sexual relations (which is to say, the marriage contract) have the greatest right to be fulfilled,"<sup>148</sup> and "the signs of a hypocrite are three: whenever he speaks, he tells a lie; whenever he promises, he always breaks his word; and if you trust him, he will prove dishonest, for what you have given to him he will not return."<sup>149</sup>

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<sup>146</sup> The Holy Book, the Qur'an: *Surat Al-Maidah*:1

<sup>147</sup> *ibid.* These two verses are very powerful principles in addressing the law of contract and the theory of obligation and thus they have been interpreted widely.

<sup>148</sup> Alzubaidi, Zinalden, *Sahith Al-bukhari*, Trans By *Khan, M*, Riyadh: Maktaba Dar-us-salam, 1994, p.563

<sup>149</sup> In another *Hadith* he added: "whenever he makes a covenant, he proves treacherous." *Ibid.*, pp. 68-69

In the last century, scholars and jurists, deducing a number of rules, proposed a general interpretation of contract law.<sup>150</sup> This governs all forms of conduct, whether in private actions as in marriage and wills, or in commercial transactions like sale and hire. These rules were not set out, of course, for the sole purpose of controlling conduct but also to define obligations. This chapter will look at the principles and elements of contract, examining them in the light of the framework of Islamic law.

## 2.2 Definitions

In Arabic, the word for contract is *al-aqd*, which literally means a ‘tension’ or ‘tug’.<sup>151</sup> The verb *aqad* means to make a strong joint between two parts. For example *aquada alhabil* refers to the splicing together of two pieces of rope, and *aqada alziwage* signifies the union between a woman and a man who contract to share a life together. It may also refer to the gathering of two or more things, and to the perfection and consolidation of conduct. *Al-aqd* also signifies guarantee and covenant.<sup>152</sup>

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<sup>150</sup> Liaquat Ali Khan Niazi, *Islamic law of contract*, Lahore, Research Cell, Dyal Sing Trust Library, 1991, p.33

<sup>151</sup> Rayner, S, *The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to Modern Legislation in Kuwait, Bahrain and the U.A.E*, London, Kluwer Law International, 1991, p.114

<sup>152</sup> Al-Faiumi, Ahmed, *Almuneer F Ghareb Alrafai Alkabeer*, Cairo; Alamiriah press, 1922, item *Aqada*, p 132

Formally, a contract was defined as a joining through the utterances of two parties.<sup>153</sup> These utterances are the offer and the acceptance (terms that will be discussed later on the formation of a contract). In relation to these, the contract is defined as “an action which is obligated as a result of binding two parties together by the offer and the acceptance”.<sup>154</sup> Thus the contract is formed between two parties according to an agreement in order to produce a legal consequence.

### **2.2.1. Contract and Conduct**

Contract is generally referred to as a conduct, so it is worth examining the legal meaning of conduct. It can be defined as a personal behaviour arising from one’s own volition, and may be performed orally or inferred from an action. As an action, conduct is that behaviour which results in tangible consequences, such as material harm.<sup>155</sup> Oral conduct, however, is manifested only by an utterance, as in a verbal agreement or a criticism. For a conduct to be legally considered requires that a reasonable adult perform it. There are three types of oral conduct.

Firstly, there is unilateral conduct, which consists of a single utterance uttered by one person out of a single volition. This type of oral conduct

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<sup>153</sup> Zedan, Abdulkareem, *Al-Madkhal Lederasat Al-Islamiah*, Beirut:Muasasat Aresalah, 1990, p.239

<sup>154</sup> *ibid*

<sup>155</sup> Al-Zarqa, Mustafa. *Almadkhal Alfiqhi Alaam*, Damascus:University press, 1965, p.194-195



originates or terminates an obligation merely by a single act of will, without the acceptance of another party. Examples of this are the conduct of making a trust or the initiation of proceedings for divorce.

Secondly, there is bilateral conduct, which consists of utterances that come from both contracting parties. This type establishes its obligation from the absolute agreement of the parties, as in the conduct of entering into a marriage or the conduct of a sales transaction.

Thirdly, there is a conduct which neither involves an obligation to bind two parties nor the obligation of a single person, although it may be a part of legal proceedings. An example of this would be the testimony of a witness.<sup>156</sup>

Thus, there is a clear relationship between conduct and contract, conduct containing the general sense of contract. Every contract is a conduct, but a conduct is not necessarily a contract.

### **2.2.2. Contract and Obligation**

In Islamic law, the term ‘obligation’ is a reference to the belief that human beings have a responsibility to behave according to a certain code, as a result of general and particular commitments made by the society in which they live. Under Islamic law, for example, parents have an obligation to bring up their children in a positive or responsible way. Other obligations may be created by a

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<sup>156</sup> Ayatullah al-Uzma S.M., *Islamic laws of worship and contracts*, U.S, Az-Zahra Islamic Foundation, ,1993, p.142

particular agreement between two parties. The resulting contract may result in a special liability for persons to do, or avoid doing, a particular thing, according to what has been specified in the agreement.<sup>157</sup> Thus, a contract is a source of obligation. It may initiate an obligation, or an obligation may be the consequence of a contract.

However, in an Islamic perspective, although a contract is considered to be a source of obligation, it must be understood that obligation pertains in the first instance to Islamic law, and is enforced by this law rather than by the terms of the contract itself.<sup>158</sup> A contract is an instrument for performing a legal obligation, and to pursue aims that are not merely individual aims but which follow and reinforce the public interest. It is said in this regard: “Islamic law does not recognise the liberty of contract, but it provides an appreciable measure of freedom within certain fixed types. Liberty of contract would be incompatible with the ethical control of legal transactions.”<sup>159</sup>

This is a statement of religious conviction. Islamic law connects its legal regulations with ethical values and morality in order to benefit the entire community, and not just individuals. This concept will be clarified in the

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<sup>157</sup> Almuzafar, M and Umran, M, *Al-Madkhal Lederasat Alanzemah*, Jaddah; Dar alafaq, 1993. p.310

<sup>158</sup> In this regard, breach of obligation between parties by any of them can lead to a sin and may require a punishment in the hereafter.

<sup>159</sup> Noor Mohammed, “Principles of Islamic Contract Law”, (1988), *Journal of Law and Religion*, 6 (1): 115-130

discussion below, which shows that most aspects of contract formation must satisfy the overarching requirements of Islamic law before it pays attention to the particular will of the parties concerned.

### **2.3. Formation of Contract**

A contract is formed of four elements: the agreement, the subject matter of the contract, the consideration (i.e. the benefit), and the parties who utter the agreement.

#### **2.3.1. Offer and Acceptance**

“An offer is the promise uttered to initiate a negotiation...an acceptance, what the promisee utters in reply to confirm the offer”.<sup>160</sup> Thus an offer is a demand from a person called an ‘offeror’ or ‘promisor,’ requiring a response from another person called the ‘offeree’ or ‘promisee,’ regarding the performance of a particular action in return for another specified action. For example, in civil law, the expression by a man of his desire to marry a woman

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<sup>160</sup> Saleh, N., "Definition and Formation of Contract under Islamic and Arab Laws", (1990), *Arab Law Quarterly*, 5(2): 101

is an offer or demand, and the contract of the marriage is confirmed as soon as she replies and agrees.<sup>161</sup>

### **2.3.1.1. The idea of *Majlis Alaqd***

*Majlis Alaqd* is a judicial practice providing a setting in which the offer and acceptance or rejection of a contract can be controlled. This means literally a 'sitting together' of the intending parties to decide whether or not a contract should be made and described legally as 'a meeting for negotiating a contract.'<sup>162</sup> *Alzarqa*, following Al Ibrahim, defines it as "the period after disclosure of an offer where the parties embark upon negotiation until the contract is settled by acceptance or rejection of the offer."<sup>163</sup> The 'sitting together' is intended to give space for either party to withdraw, but equally it allows the parties to proceed without interruption to the conclusion of their business. Thus, it averts both misrepresentation and inconvenience.

The *Majlis Alaqd* is nowadays as much a legal concept as a physical action. The 'sitting together' may be between attending parties, as when the parties directly concerned or their representatives are present at the time the contract is made. In this case, offers can be made at any stage, whether before or after

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<sup>161</sup> In this case civil procedures such as written registration and witness are required to perform the contract of marriage but are not essential for the contract to be finalised.

<sup>162</sup> Nabil Saleh, "Freedom of contract: what does it mean in the context of Arab laws?",(2001), *Legal Journals Arab law Quarterly*, A.L.Q. 16(4), p.346-357.

<sup>163</sup> Alibrahem, Mohammed, *Settlement of contracting by the new means of communication*, Jordan; dar aldhia, 1986, p.49

meeting the offeree, but acceptance should be confirmed before they separate. Time for negotiation is allowed for the meeting so that an instant response to an offer is not required but must occur within the time allocated to the sitting.<sup>164</sup> Where parties are not present, however, and no direct meeting is possible, the *Majlis Alaqd* is performed by other means of communication such as by telephone, mail or facsimile.

Whereas the ‘sitting together’ between intending parties is considered to be the time from when the offer is made up until an acceptance or rejection finishes the meeting, the ‘sitting together’ for contract between absent parties begins from the time of receiving the knowledge of the offer, by any means of communication, until it is rejected or confirmed by acceptance or refusal.<sup>165</sup> In the example of communication by telephone, the negotiating period is the time between when the discussion begins and the communication is physically disconnected. Customary practice between merchants plays an important role in determining the limits of this period. For example, the offeror may stipulate in advance, in his offer, a time-limit for acceptance, or the offeree may ask the offeror to allow him a specified time within which to reply.<sup>166</sup>

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<sup>164</sup> The majority of schools permit it. See Alzuhaili, Wahba, *Islamic Jurisprudence and its Authorities*. Beirut: Muassasat al-Resalah, 1987, p210

<sup>165</sup> M. A. Hamid, “Mutual Assent in the Formation of Contracts in Islamic Law”,(1977), *Journal of Islamic and Comparative Law*, 7(1), p11

<sup>166</sup> The Islamic schools of law agreed that custom can decide the rules for the sitting for contracting,

### **2.3.1.2. Provisions for the offer and acceptance**

There are several provisions, which are stipulated by the schools of law and scholars, regarding the parameters of offer and acceptance. These provisions must be adhered to in order to give legal force to the offer and acceptance, and to avoid any illegal proceedings.<sup>167</sup>

**1.** Both offer and acceptance must express the actual volition of the offeror and the offeree. This is because the actual relationship between the parties itself determines volition, and utterances are merely the outward expression of this volition. Offer or acceptance by a child, for example, does not lead to a contract because a child does not have complete volition. Any ambiguity in utterance can lead to the failure to create a contract. For example, a doubtful offer or a hesitant acceptance will not be considered as forming a contract.

**2.** A necessary correspondence must exist between the offer and the acceptance. This can exist if parties have agreed upon the consideration in the contract. For example, in the case of marriage, if both the man and the woman agree to marry but have a disagreement regarding the amount of the dowry, the contract of marriage is not made. Also, if there is a partial agreement, the contract cannot be successfully finalised. For example, the contract fails if an offeror says “I will sell you a car for one thousand pounds” and the offeree

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<sup>167</sup> M. A Hamid, “Mutual Assent in the Formation of Contracts in Islamic Law”, op.coit,

replies, “I can agree to buy your car for eight hundred pounds” or instead “I will agree to buy your caravan for one thousand pounds”.<sup>168</sup>

3. A party should both have the necessary knowledge of the other’s volition through which offer and acceptance are connected or confirmed. For example, if an offeror makes an offer apparently acceptable to the offeree, but in a language not understood by him, then a contract is not made.<sup>169</sup>

4. There should be a connection between the offer and the acceptance in the ‘sitting together’ where parties meet to finalise the contract. Thus, if the offer is not confirmed by the acceptance during the sitting, then the contract fails to be finalised. The aim of this stipulation is to give the offeror a chance to negotiate with another offeree.

### **2.3.1.3.The right to withdraw an offer**

Most scholars believe that the promisor has a right to withdraw his offer even in the ‘sitting together,’ as long as no acceptance has been made. This is called the right to withdraw. In return, the promisee has a right to accept or reject the offer in the ‘sitting together’ which is called the right of acceptance.<sup>170</sup>

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<sup>168</sup> Nabil A. Saleh, “Definition and formation of contract under Islamic and Arab laws”, (1990), *Legal Journals Arab law Quarterly, A.L.Q.*, 5(2), p 101-106

<sup>169</sup> Al-Kasani, Alauden. *Badaea’Alauden. Badaea’ Alsanai* Beirut; dar al kutub alelmiah, 2001, p.136

<sup>170</sup> Zysow, A ‘The Problem of Offer and Acceptance: A Study of Implied-in-Fact Contracts in Islamic Law and the Common Law’, (1985-1986), *Cleveland State Law Review*, 34(1) ,p 69

#### **2.3.1.4 The lack of capacity**

In essence, the promisor must have the capacity to make the contract (as will be discussed below). However, sometimes a competent promisor may lose his capacity after disclosing an offer as when, for example, a promisor becomes insane or dies after announcing the terms of his offer and before words of acceptance were uttered. In this case there is no obligation entered into and no contract is made.<sup>171</sup>

#### **2.3.1.5 Unilateral utterance in contracting**

This is an issue of permitted surrogacy. Legally, this can occur if surrogates express the volition of the principals concerned and make the required utterances for them. For example, a surrogate can appear for both parties in a contract of marriage uttering the phrase “I join X and Y as wife and husband”. This also occurs in a contract of sale when a surrogate sells something on behalf of the seller and at the same time buys it on behalf of the buyer. Thus, there are circumstances in which a surrogate is allowed to represent both parties to a contract when given the authority to appear for them.<sup>172</sup>

#### **2.3.2 The phrasing of a contract**

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<sup>171</sup> Ibn Abdeen Mohammed, “The acceptance of who isn’t sure for contract”, Beirut, dar alfikr, 1979, p.29

<sup>172</sup> This case is permitted only by the *Hanbalis* School of Law



The phrasing of a contract is the instrument by which an offer and an acceptance can be ascertained. It manifests the actual intentions of the parties, which are invisible and cannot be known without visible means, such as in an utterance or by writing. Thus, a contract is valid, whether entered into orally or in writing, as long as the means are evident enough to interpret the intention of the parties.<sup>173</sup>

### **2.3.2.1. Agreement by utterance**

Utterance is considered to be the principal medium in forming a contract, and instrumentally the most effective way to perceive and register a party's volition. However, there is no stipulation that an utterance must be in a particular form to establish whether a contract has been made. Any comprehensible phrase referring to the meaning of the subject matter can be considered valid. Also, any form of language, whether standard, local or slang, provided that it is understood by both parties, is permitted.<sup>174</sup>

A verb used in the past tense, indicating a completed action, is the most effective way of indicating that volition exists in a contract, as, for example, 'I married you' or 'I have bought my uncle's car.' It has been said that "the past

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<sup>173</sup> Adnan Amkhan, "Specific performance in Arab contract law" , (1994), *Legal Journals Arab law Quarterly*, A.L.Q. 9(4), pp. 324-338

<sup>174</sup> Nabil A. Saleh, "Definition and formation of contract under Islamic and Arab laws", *op.cit*, p 101-116

tense is a clear means of interpreting the party's volition in its final stage"<sup>175</sup> for the reason that the past tense implies an acceptance. No further steps are needed, therefore, in offering or negotiating a contract, only the requirement to finalise it. Other tenses or sentences may lead to the initiation of a contract when a definite, subordinate clause is attached. For example, "I will marry you" or "I will sell my car" will not create a contract without a clause determining the exact time of marriage or the exact time of selling. Thus, phrasing, in both the offer and the acceptance, must be sufficiently clear to exclude any possibility other than the intention of each party, and even the grammatical status of words used in the conduct of a contract has relevance to its satisfactory fulfilment.

#### **2.3.2.2. Agreement in writing**

Writing is the second means by which a contract can be created. It can be executed in any understandable language and via any means, such as a letter or electronic mail.<sup>176</sup> As with oral utterances the words must be clear enough to avoid any ambiguity of meaning. Writing is considered to be a substitute for spoken utterance in all types of contract, except marriage contracts, which must present a spoken utterance as well as a written one.

#### **2.3.2.3. Agreement by signs**

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<sup>175</sup> Alsanhuri, Abdulrazaq, *Source of right in Islamic law*, Cairo; Dar Alhana, 1960 ,p.85

<sup>176</sup> This is also discussed in Chapter 4 under electronic contract.

The only exception to these rules is where a party is unable to speak, in which case a written document is sufficient.<sup>177</sup> Normally, a sign does not constitute a valid statement of a party's intention, but can be considered in interpreting the intention of a party who, as the result of some reasonable cause, is unable to speak.<sup>178</sup> A party able to speak is not allowed to use signs to represent his intentions. However, there is an argument among scholars regarding a person who cannot speak, but who can write, as to which the appropriate form in which to make his intentions is known. Is it by signs or by writing? In view of the wide availability of new types of graphic representation through modern technology, writing is surely more acceptable and unambiguous than making signs, when a party is able to read and write. As has been mentioned, only in the exception of marriage contract are both signs and writing required of a handicapped person.<sup>179</sup>

#### **2.3.2.4. Agreement by acts**

There is some dispute in the schools of law regarding agreement by acts. However, according to the authoritative *Hanbali* School of law,<sup>180</sup> agreement by acts is permitted in contracts of sale and hire, but is not permitted in a

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<sup>177</sup> Hamid, Mohamed El Fatih, "The Freedom to Make Stipulations in the Islamic Law of Contract", (1969), 6 *Journal of Islamic and Comparative Law*, -76, pp.22-32

<sup>178</sup> Nayla Comair-Obeid, "Particularity of the contract's subject-matter in the law of the Arab Middle East", (1996), *Legal Journals Arab law Quarterly*, A.L.Q. 11(4), pp.331-349

<sup>179</sup> Abdullah , Hassan, *Sales and Contracts: In Early Islamic Commercial Law*, Pakistan, Islamic Research Institute, 1994, p.9

<sup>37</sup> M.E Hamid, "Islamic Law of Contract or Contracts?", (1969), *Journal of Islamic and Comparative Law*, 3, pp.1-10

contract of marriage, which, as we have seen, must be explicit. A common instance of an agreement by acts is called *al-Mu'atah*, or sale by the act of giving. This occurs when goods are taken and the required money handed over - as when a customer selects a suit in a shop and pays for it at the price stated on the label - without the need for uttering, writing or even making a sign. Similarly, the act of sending a parcel and paying the postage constitutes an agreement by act. Nowadays, of course, there is widespread practice of this method of agreement to facilitate the more mundane types of contract.<sup>181</sup>

#### **2.3.2.5. Agreement by silence**

In principle, agreement must be performed by positive actions such as utterances, writing or signs. The act of silence cannot initiate a negotiation of contract, and an offer cannot be constituted by silence. However, in some cases an acceptance can be considered as indicated by silence. For example, a virgin girl can signify her acceptance of marriage by silence and a poor person likewise can accept a donation by silence.<sup>182</sup>

#### **2.3.3 The distinction between internal and external volition**

Since volition is an essential element and foundation in the creation of a contract, and because it is intrinsically a non self-evident, or hidden, matter, it

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<sup>181</sup> M. Alnajdi, *Alfatawi Ibin Taimiah, Ahmed*, Riyadh; Ministry of Islamic Affairs, 1997, pp.267 & 274

<sup>182</sup> El-Hassan Ahmed, "Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contract in Sudan Law and Islamic Law", 1985, *Arab Law Quarterly*, 51(1), p21

must be disclosed. The initial state of a party's willingness is called his internal volition, or intention. To disclose this intention requires an instrument or vehicle to interpret it, and this is supplied by the requisite acts of offer and acceptance, referred to as the party's external volition. Thus, a person's external volition represents or interprets his internal volition.

However, Dr. Zedan points out that there can be a number of cases involving disagreement between external and internal volition that invalidate the formation of a contract.<sup>183</sup> These are:

1. Where someone, such as an insane person, a child or a drunken person, utters a phrase of obligation without the intention of doing so, then his or her phrase is not considered as binding and there will be no contract.
2. If someone intended to utter a phrase of obligation without understanding its meaning, then the phrase is not considered and there will be no contract. For example, if a person makes an offer in a different language, which the other person does not understand, even if this offer is met with acceptance, there will be no contract. This is because his offer does not match an internal volition.
3. If someone intended to utter a phrase of obligation and understands its meaning, but did not intend to initiate a contract, there will be no contract. For

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<sup>183</sup> Zedan. M, "Definition and scope of the Islamic concept of sale of goods", (2001), *Legal Journals Arab law Quarterly*, A.L.Q. 16(3), pp.215-238

example, if a teacher says to his students by way of grammatical or philosophical exposition “I will sell you my car,” there will be no contract because of the absence of any internal volition to make a real sale.

4. If someone uttered a phrase of obligation accidentally, for example a person intended to say to his wife, “you are devout”, and instead he said “you are divorced,” in this case, there will be no obligation for the same reason of the difference between the external and internal volition, so the contract of marriage will not be dissolved.<sup>184</sup>

5. If the utterance of a phrase is in jest, which means a person intends to utter this phrase and understands its meaning, but without the intention of creating a contract, there will be no contract. The only exceptions to this are in cases of marriage and divorce, which are not rendered invalid even though the intention behind the utterance was frivolous.<sup>185</sup>

6. If someone is coerced into uttering a phrase of obligation, then his utterance is not considered valid and there will be no obligation. This is because his internal volition was not to enter into a contract, but to avert a threat and remove his fears. However, in order for a person to be considered coerced, the

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<sup>184</sup> In Islamic law, a husband has the authority to pronounce divorce unless the authority of divorce is stipulated in the contract to be the right of the wife. Moreover she can cancel the contract of marriage in the way of *khul* by returning her dowry.

<sup>185</sup> This is based on the Prophet’s saying, “there are three things which whether undertaken seriously or in jest, are treated as serious: marriage, divorce and taking back a wife after a divorce which is not final”, see Al-asqalani, Ibn Hajar. *Bulugh Al-Maram: Attainment of the objective according to evidence of the ordinances*”, Riyadh: Dar-us-salam, 1996, p.379

person who threatens must be in a position to carry out his threat and be a real danger to the person he is threatening.

7. If someone puts himself under an explicit obligation, but his internal volition is for a different obligation, then the explicit obligation is the one contracted. For example, if a person says to his partner “I will give you my car,” really intending to sell not donate it, he creates a contract of donation because of the words that he has used.

8. If someone undertakes a clear obligation but his internal volition leads to an illegal purpose – as, for example, a person who makes an offer to sell to terrorists weapons they intend to use to start a local war - then the contract is null and void. Or when a dying man legally divorces his wife according to his external volition, but it can be shown that his internal volition was to debar her from inheriting from him, there is no contract. Thus, if an illegal internal volition is disclosed for which there is evidence to prove it, a contract is not considered valid.

## **2.4 Considerations**

The consideration of contract is a promise, delivered by both parties according to a permissible exchange of obligation. It differs according to the purpose of the contract. In property, for example, it might be valuable land under contract of sale, or usufruct as in a contract of hire. It could be to do with

a person's life or work, as in a contract of marriage or contract of employment. It could be a service, as in a contract of maintenance. So, the consideration of contract depends on the purpose for creating that contract, and there are, in Islamic law, illegal purposes that lead to a rejection of consideration. In Islamic law, a consideration is defined by what both parties present in exchange. For example, both the price and the goods sold are considerations in a contract for the sale of goods.

#### **2.4.1. Stipulations of legal consideration creative mode**

In order to control legal conduct between people, Islamic law provides general stipulations,<sup>186</sup> by which contracts can be clarified. These stipulations aim to avoid the risk of dispute arising from the contract.<sup>187</sup>

1. Consideration must be a legal matter, which means that it is not one forbidden by Islamic law, such as trading in illegal drugs. Moreover, it must legally match the purpose of the contract. For example, fruit and vegetables cannot be legally considered as a consideration for the contract of mortgage, which is only satisfied by consideration of money or goods that are lasting and do not decay.

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<sup>186</sup> A. Almahdi, *Almaqdasī, Ibn Qudamah, Al odah*, Damascuse; dar Alketab Alarabi, 1996,p301-307.

<sup>187</sup> Arabi, Oussama, "Contract Stipulations (*Shurut*) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya", 1998, *International Journal of Middle East Studies* , 30 ,p29



2. It must exist at the time of contracting, or be capable of existing in the future. Otherwise the contract will be invalid.
3. The consideration of the contract must be adequately known and certain, therefore a lack of knowledge can invalidate a contract. For example, marrying an unnamed person or selling an unborn animal cannot initiate a contract until the consideration can be actually perceived.
4. Finally, the consideration of a contract must be able to be presented in a form which expresses the purpose of a contract. Thus, it is not a consideration to randomly sell fish that are still in a river or birds that fly about in space. Equally, a contract of marriage cannot exist without the presence of the bride and the groom, other than the special circumstances of proxy as previously outlined.

### **2.5. The subject matter of a contract**

Subject matter is the third essential component which must exist in a contract. It derives its validity from the 'real aims' (i.e. both purpose and authority) of Islamic law.<sup>188</sup> Thus, a mistake in the subject matter can lead to negation of the contract. For example, a contract of marriage cannot be finalised if the subject matter is the transfer of the ownership of a person, which would constitute a contract of slavery. Also, it would be invalidated if it were

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<sup>188</sup> Mahdi Zahraa, "Negotiating Contracts in Islamic and Middle Eastern laws", (1998), *Legal Journals Arab law Quarterly*, .L.Q. 13(3), 265-277

determined by a limited time-period, which might constitute a concubinage not a marriage. Thus, the subject matter must be aligned with and promote the ‘real aims’ of Islamic law. Moreover, the subject matter is regarded as being at once the intention of the contract before finalisation and the effect of the contract after it has been finalised.<sup>189</sup>

In a contract of sale, the subject matter can be the transfer of ownership of a property that has value as a result of acquiring a legal consideration. In a contract of hire, it could be usufruct, caused by the will of a party wanting to obtain a rent. In a contract of employment it could be a performance of service, caused by the need to repay money. Thus, the subject matter of a contract depends on the purpose for which the contract has been created.

The main difference between ‘real aims’ and causation is that the law determines a ‘real aim’, while the causation connects and correlates with the volition of those forming the contract. Thus, it may be a woman’s character that causes a man to share his life with her, but the authority to share and enjoy life with her is decided by the law. While legal consideration may be similar in different types of contract, such as contracts of sale and hire, the subject matter differs between them. In sale, the consideration refers to the price of the property, while the subject matter is the transfer of ownership.

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<sup>189</sup> Ibid.

## **2.6. Parties (Contractors)**

A party is a person who creates a contract by uttering an offer or an acceptance. For example, the parties in a contract of marriage are the bride and the groom, or the parties in a contract of mortgage are the mortgagor and the mortgagee. Yet, as we have seen, not all individuals are legally capable of creating and entering into a contract, or of initiating and accepting any form of legal obligation.

### **2.6.1. Capacity**

A legal capacity, or competence, refers to the ability to perform a certain task. For instance, the capacity of a person is his ability to claim rights and to fulfil duties.<sup>190</sup> However, legally, this can be divided into two parts. There is the natural human capacity of personality, which is the competence of deserving rights derived from a notion of inherent rights and obligations. There is also the capacity which is the competence to embark upon obligations. Both capacities are qualified by age criteria.

#### **2.6.1.1. The capacity of natural and artificial personality**

This refers to the aptitude for human beings in general to hold rights and to be subject to obligations. It starts from the time of birth and finishes at the time of

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<sup>190</sup> Liaquat Ali Khan Niazi, *Islamic law of contract*, op.cit, p.55

death.<sup>191</sup> The ‘natural personality’ of children means they have a right to be brought up and provided for by their parents. In return they have the obligation to respect their parents.

A ‘natural person’ has the capacity to act in a legal way, and be subject to civil processes and criminal actions. An ‘artificial person’ is a personified ‘*bayt almal*’, or charitable foundation,<sup>192</sup> like a pension fund, that also has a legal capacity.<sup>193</sup> For example, an ‘artificial person’ has the right to benefit from a trust and is obligated to use this trust in a certain way. A *Bayt almal* can legally inherit from people who do not have natural heirs and has obligated them to distribute its funds according to rules specified by Islamic law. Capacity is, however, based on the age of majority of a natural person,<sup>194</sup> and in the case of artificial persons, capacity refers to the authorisation and the legal registration they possess.

#### **2.6.1.2. Stages of capacity**

There are four stages in which capacity must be considered. These represent the stages of life: namely, the foetus, the infancy, the years of discretion and,

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<sup>191</sup> Ibid

<sup>192</sup> *bayt almal* literally means the house of money and its task is to save alms and properties which do not have an owner in order to distribute them for people in need.

<sup>193</sup> Parviz Owsia, *Formation of Contract: A Comparative Study under English, French, Islamic, and Iranian Law*, London: Graham & Trotman, 1994, p.164

<sup>194</sup> The age of eighteen is the age of capacity regarding obligations between people but in fact it starts early in the young adulthood regarding the obligations of the god such as prayer and fasting

finally, the majority.<sup>195</sup> These stages categorise us as either incomplete or complete natural persons, and as having an incomplete or complete capacity.<sup>196</sup>

A natural person has an incomplete personality as a foetus. This is because an unborn baby is a dependent body although, at the same time, he or she has a separate life. A separate life implies the legal rights pertaining to a natural person not requiring an acceptance. For example, it is legal for an unborn baby to own money or property through inheritance. On the other hand, because he or she is a dependent body, the foetus is not entitled to certain other rights: an unborn baby may not own property through a bestowal or grant requiring an acceptance.

Secondly, a natural person has a complete personality from birth. It is his for as long as he lives, but it is the only competence he can hold during his first seven years, which is known as the age of infancy, after which he passes to the age of discretion.<sup>197</sup> A child up to seven years has rights which bear reciprocal duties that he must perform. Some duties and obligations,<sup>198</sup> such as security for damages or any civil liability, are performed on behalf of the infant by his or her parents or legal guardians. This is because an infant has no capacity to

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<sup>195</sup> Adnan Amkhan, "Specific performance in Arab contract law", (1994), *Legal Journals Arab law Quarterly*, A.L.Q. 9(4), pp.324-338

<sup>196</sup> *ibid.*

<sup>197</sup> In Islamic law the age of discretion is determined at the age of seven at which the child can know and recognise things

<sup>198</sup> Duties are adhered by law; obligations are obligated as a result of contracting.

perform these obligations. However, criminal liability is disregarded in an infant for two reasons. The first reason is that a child of this age cannot be characterised as a criminal. The second reason is because parents or guardians bear civil liability, but not criminal liability for their children.<sup>199</sup>

Thirdly, there are the years of discretion, which end at the age of majority. At this age, a minor is able to benefit from the status of having a complete natural personality despite having an incomplete capacity. Accordingly, there are three possibilities of involvement in financial transactions at this age:<sup>200</sup>

(a) transactions that are absolutely advantageous to him, such as accepting a bestowal or charity. This acceptance is an unqualified right and can be performed on his behalf without permission from his parents or guardians;

(b) transactions which are absolutely disadvantageous to him, such as a bestowal or donation to other people of his property. These conducts are not legally sound and are not considered as lawfully performed even if they are approved by parents or guardians;

(c), transactions that might be either advantageous or disadvantageous to him, such as selling, buying or hiring. Since a person at this stage has an incomplete capacity, parents or guardians can approve or disapprove these transactions according to their own discretion and judgement as to the benefit of the minor.

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<sup>199</sup> Jamal J. Nasir, *The Islamic Law of Personal Status (Arab & Islamic Laws)*, London: Graham and Trotman, 1990, p.85

<sup>200</sup> Ibid

Fourthly, a person, having a complete natural personality, attains to a complete capacity by reaching the age of majority, which is eighteen. However, according to Islamic law, this stage is acquired either by reaching the stage of adulthood or by the age of fifteen.<sup>201</sup> Any difficulty arising from this anomaly or conflict of authority can be settled by distinguishing between their domains. Whereas religious duties must be performed by the stage of adulthood, being the legal age for religious obligations, civil liability is only embarked upon at eighteen, the legal age for civil obligations. For example, all religious obligations, such as prayer, fasting during the month of Ramadan, and paying alms (*Zakat*) must be done at the stage of adulthood, but independent civil or commercial transactions can only be embarked upon at the age of majority.<sup>202</sup>

## **2.7. Defects in a contract**

As discussed above, a contract is a legal method of uniting the volition of two parties in order to initiate a legal action. The agreement includes the desire of both parties to be bound by a certain act. However there may be obstacles which prevent the contract from being performed, and can lead the contract to

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<sup>201</sup> Most scholars consider the age of fifteen to make adulthood

<sup>202</sup> Decision No 114 – of the Consultative Council, on 5/11/1954- has decided the capacity to undertake a legal action is attained at the age of 18.

be unsound. These are mistakes, duress, distress, misrepresentation and fraud.<sup>203</sup>

### **2.7.1. Mistakes**

Mistake as a defect in a contract is a state of misunderstanding. A mistake concerns the subject matter of the contract, whether by type or by description. For example, it is a mistake by description if someone intends to buy a brown leather bag and is delivered a black leather bag. However, it is a mistake by type if someone intends to buy a brown leather bag and is delivered a brown woollen one.

Mistake of both kinds can be either internally conceived or arise from an external, objective misdirection in the contract. A mistake internally conceived occurs when a party's understanding of the consideration is different from the actual state or description, even if there is no clause in the contract corresponding to his particular understanding. An example would be where someone buys, via a magazine, a personal computer which he assumes to be UK-made and, on delivery, finds it to have been made in Taiwan. A mistake is external, or objective, however, when, for example, a contract states that the PC is UK-made and finds it was made in Taiwan.<sup>204</sup>

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<sup>203</sup> M.E Hamid, "Islamic Law of Contract or Contracts?", op.cit, pp.1-10

<sup>204</sup> Ibn Qadamah. *Almoghni, Almaqdasi* , Cairo; Hajar, 1992 p.16



An internal mistake does not affect the contract because validity of the contract is based on its actual clause and the external situation, and not by misapprehension. However, an external mistake can lead to revocation of the contract. A mistake by description suspends the contract so that it is revocable by the party suffering damage from the mistake. Thus, he can obtain remedy for the mistake.

### **2.7.2. Duress**

Duress involves an action performed through illegal pressure of enforcement and threat. Attempting to make a contract under duress means forcing a party to enter into an obligation against his will. Consequently, the element of volition is missing and the agreement justly negated.

The criteria for establishing duress are that the party seeking the contract must be able to execute what he threatens against the other party; that the threat must result in the party becoming afraid; that a contract has been entered into as a result of the pressure from the threat; and that the threat would constitute a damage to that party's life, person or property should he refuse to engage in the contract.

#### **2.7.2.1. Types of duress and their effects upon contract**

Duress can be complete, as in a killing, a bodily injury inflicted or a damage to property, or it can be incomplete, as in a party beaten or imprisoned.

In either type, duress does not affect a party's legal capacity but it can lead that person to lose his volition and freedom to act. Accordingly, a contract or conduct leading to an obligation under proven duress is not binding.<sup>205</sup>

### 2.7.3. Misrepresentation and fraud

These terms refer to unfair consideration in a contract. Misrepresentation is a sort of adulteration designed to prompt the offeree into entering a contract in the belief that it will benefit him. This can arise from an act such as hiding defects in goods in order to sell them more easily. It can also result from the offeror, or a third party colluding with the offeror, advertising untrue features in the consideration in order to prompt the offeree to finalise the contract.

There are two consequences of misrepresentation in a contract: either it can be revoked or it is resolvable.<sup>206</sup> In a contract of sale, a proven misrepresentation can lead to two choices for the party suffering damages. He can agree to property compensation (*Arsh*), being the difference in value between the property with defects and the property in good condition,<sup>207</sup> or he can revoke the contract and return the property.<sup>208</sup>

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<sup>205</sup> Nabil A. Saleh, "Remedies for breach of contract under Islamic and Arab law", (1989), *Legal Journals Arab law Quarterly*, Sweet & Maxwell Ltd, A.L.Q. 4(4), pp.269-290.

<sup>206</sup> This is according to the *Hanabli* School of law. However the *Hanafi* School considers a contract only to be remediable by claiming compensation. See Albuti, M. Tawfeeq , *the common sales: The effect of the sale restrictions on their legality*, Damascuse: Dar Alfikr, 1998, pp. 128-131

<sup>207</sup> M.E. Hamid , "Does the Islamic Law of Contract Recognize a Doctrine of Mistake?" (1969), *Journal of Islamic and Comparative Law*, 4 ,pp.1-16

<sup>208</sup> *Ibid.*

Fraud (*Ghabn*) is “an extraordinary, unpredicted rise or fall in value.”<sup>209</sup> Price differences can be customary or non-customary. A customary increase or decrease in value is one that would not be disputed or disapproved by the public. Conversely, a non-customary price fluctuation is one that the public would consider unfair and unreasonable. Non-customary price changes are the only type of fraud that can affect a contract and lead to that contract being non-revocable by the injured party.<sup>210</sup> This can happen in several ways.

1. Those buying from traders in mercantile caravans who do not know the customary market price have the right to revoke their contract if significantly deceived.<sup>211</sup>

2. *Alnajash*, sales by auction that includes a false bidder, bidding not to buy but to increase the price and thereby colluding with the seller, gives the injured buyer the right to revoke his contract.<sup>212</sup>

3. A person who, not knowing the market price, and not skilled in the ways of the market, has the right to revoke his contract.<sup>213</sup>

## 2.8 Options under a contract

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<sup>209</sup> Islam, Muhammad , "Dissolution of Contract in Islamic Law", (1998), *Arab Law Quarterly*, 13, p336.

<sup>210</sup> The Maliki School of law considers that the contract in these cases is a second action that can lead to the committing of sins.

<sup>211</sup> Islam, Muhammad , "Dissolution of Contract in Islamic Law", (1998), *Arab Law Quarterly*, *ibid.*

<sup>212</sup> *Ibid*

<sup>213</sup> *Ibid.*

Contracts are a binding and obligatory conduct. However, sometimes the law confers a right to opt out or revoke before the finalising of a contract. Thus, options under a contract refer to the right of a contractor to have the choice whether to finalise or revoke. By this right, a contractor can provide for a condition to be withdrawn from his obligation. Moreover, these options are authorised by the law to ensure that both the parties enter the contract in full agreement. Some options are declared explicitly, while others are conceived implicitly.

### **2.8.1. Option to withdraw**

In a revocable contract, the contractor has the right to withdraw his obligation if one or both parties stipulate this condition in the contract.<sup>214</sup> The duration of this right must be known and made explicit in the contract,<sup>215</sup> and a period not specified will be ignored and considered unsound in relation to any claim made over the finalisation of the contract.<sup>216</sup> Contracts of sale and hire are revocable contracts, but not contracts of marriage and divorce. Non-obligatory contracts, such as bailment, are not considered revocable and the option to withdraw does not apply. The option to withdraw can make a contract non-

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<sup>214</sup> Abdullah Alwi Haji Hasan, *Sales and Contracts in Early Islamic Commercial Law*, Islamabad, Islamic Research. Institute, 1994, p. 41

<sup>215</sup> This is under *Hanbalis* school of law. *Hanafi* and *Shafi* school considers three days and *Maaliki* considers it to be decided by custom

<sup>216</sup> Nayla Comair-Obeid, *The Law of Business Contracts in the Arab Middle East (Arab and Islamic Law Series)*, Springer, 1996, p.211

obligatory for the contractor who stipulates this condition, so that he can finalise or revoke it by any legal means, whether through utterance or action. The option to withdraw leads to a freezing of the consideration for the duration specified.<sup>217</sup> For example, in a contract of sale, if the buyer stipulates this condition, he can freeze the price and possess the property; and he can maintain the price until he is legally compensated.<sup>218</sup>

The option to withdraw from a contract can be satisfied in four cases. Firstly, it can be satisfied if the contract is finalised, or repealed by the party stipulating it. Secondly, it can be satisfied if it runs its duration without any additional action, in which case the contract is considered to be concluded. Thirdly, damage of the consideration satisfies the option of withdrawal. In the case of a contract of sale, the option of withdrawal is satisfied if the consideration is damaged while within the stipulator's possession. If the seller stipulates the option then the contract is cancelled and the option is satisfied, if the buyer then the contract is valid and the option is valid. Fourthly, the death of a contractor who stipulates the condition can also lead to the validation of the option.<sup>219</sup>

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<sup>217</sup> Ahmad Hidayat Buang, *Studies in the Islamic law of contracts*, Kuala Lumpur, Sole distributor, Golden Books Centre 2000, p.109

<sup>218</sup> Ibid

<sup>219</sup> Ballantyne, William, "The *Shari'a* and its Relevance to Modern Transnational Transactions", in International Bar Association, *Arab Comparative and Commercial Law - Proceedings of the Arab Regional Conference 43*, Cairo, 15-19 February 1987.

### 2.8.2. Option to view

This refers to the right of the party purchasing to view the property, which was described at the time of negotiation, but which he has been unable to see before deciding whether to finalise or revoke his contract. This is authorised by law, and hence has the status of an implied clause. To view means to be made aware of and know about the consideration, which is ascertainable through one or more senses. Viewing is executed upon the whole or part of the property, as for goods that can be measured, weighed or numbered.<sup>220</sup>

The option to view can be stipulated in any contract that is revocable and whose consideration requires it to be ascertained as to quality. Hence, irrevocable contracts such as the contract of marriage do not involve this option. For example, in a question of whether a dowry is real or the personal property of the contracting party, there is no option to revoke. Contracts legally provided for by an option to view by the party purchasing the consideration are as follows:

1. A contract of sale of a real property, such as land or a house, where the consideration has special features that need to be verified.<sup>221</sup>
2. A contract of sale of personal property, such as goods, where the consideration has a required quality that needs to be ascertained.<sup>222</sup>

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<sup>220</sup> Ibid.

<sup>221</sup> Ballantyne, William, "The *Shari'a* and its Relevance to Modern Transnational Transactions", *ibid.*

3. A contract of exchange, where both parties need to verify the consideration exchanged.<sup>223</sup>
4. A contract of hire, where the rental property, such as a car, needs to be ascertained.<sup>224</sup>
5. A contract of reconciliation, where the consideration is compensation to the damaged party who needs to ascertain it.
6. A contract of company, where the consideration are assets that need to be verified.

The option to view renders the contract non-binding upon the party who stipulates the said conditions. However, it is executable and can be finalised. In other words, the option to view affects the condition of the contract, in whether it is binding or not, but it does not affect its performance.<sup>225</sup> For example, in a sale of goods, ownership of the property can be directly transferred to the buyer and the price can be submitted to the seller, but the buyer has a right to revoke the contract after viewing. After the specified time has elapsed, the option is satisfied.<sup>226</sup> This protects the right of the second party who may have another obligation to perform, without which his situation may be prejudiced and suffer harm. The following reasons will satisfy the option to view:

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<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> This view is established by the *Hanabali* School.

1. The agreement of the parties in stipulating the option will satisfy the option. Likewise, any implied action referring to the meaning of the agreement, such as receiving, using or even carelessness involving rejection after viewing, will also satisfy the option.<sup>227</sup>
2. Any legal action by the party that has the right to this option will fulfil the option's requirement, as for example in the person who sells, hires or donates.
3. Any damage to the consideration after delivery, or where the stipulating party fails to return it in its original condition, fulfils the requirement of the option.
4. The death of the stipulating party leads to the fulfilment of his right to the option since the right to that option relates to himself and not to his heirs.<sup>228</sup>

### **2.8.3. The option of fault**

The option of fault is an explicit or an implied clause giving a party the right to finalise or revoke the contract if he finds a fault in the consideration. The option can be stipulated if the consideration is nominated and has certain features, but a consideration that is generalised and has approximate features, cannot be stipulated. Thus, the option of fault can be stipulated in contracts that are revocable and when the consideration requires them to be ascertained as to

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<sup>227</sup> Ahmad Hidayat Buang, *Studies in the Islamic law of contracts*, Kuala Lumpur, Sole distributor, Golden Books Centre, 2000, p186.

<sup>228</sup> Ibid.



quality. Examples of this can be found in contracts of sale and hire, the contract of reconciliation and the contract of company, as previously mentioned.

For the option of fault to be considered as grounds for revocation, the contract must have been liable to customary rejection and the acceptance affected, had the fault been recognised prior to drawing up the contract.<sup>229</sup> Thus, the fault in consideration would have led to an unfair bargain in the price of the goods in a contract of sale, of a rent in a contract of hire, or of damage and compensation in a contract of reconciliation. Accordingly, a fault in consideration is grounds for stipulating the option of fault, and in a contract is either implied by law or explicit as a clause. However, there are certain conditions to be met for the option of fault to be valid.<sup>230</sup>

1. A fault in the consideration must exist before delivery, but if the consideration is damaged while in the possession of the person who has the right to this option, then there is no right to revoke.<sup>231</sup>

2. There must be no anti-clause, or disclaimer, from the party selling to acquit himself of any potential fault. Such a stipulation would lead a party otherwise entitled to an option of fault to lose his right of revocation and of claiming compensation.

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<sup>229</sup> M.E Hamid, , “Does the Islamic Law of Contract Recognize a Doctrine of Mistake?”, op.cit, pp21

<sup>230</sup> Nayla Comair-Obeid, “Particularity of the contract's subject-matter in the law of the Arab Middle East”, (1996), *Legal Journals Arab law Quarterly*, A.L.Q. 11(4), pp.331-349

<sup>231</sup> Ibid.

3. The fault must not be removed before a party revokes the contract. For example, in hire, if a rental car does not work it may lead to the revoking of the contract, but if, before revoking, the car works properly, there will be no grounds for revocation.<sup>232</sup>

No time-limit applies to revoking a contract due to a fault in the consideration, but it must not exceed what is customarily acceptable or what is publicly approved. The option of fault does not affect the performance of a contract, and can therefore be performed by transferring the consideration to the buyer, as may happen in a contract of sale. Moreover, the option of fault means that the contract will not be binding on a party, as it gives him the right either to revoke the contract and return the faulty consideration, or conversely to accept it with the loss of any further rights. Obligation incurred to the seller in the case of a contract of sale can only be enforced by a court decision, and requires proof if he is to dispute the fault.<sup>233</sup>

However, a party cannot hold consideration and claim for a fault unless the first party approves his doing so. This is to avert arbitrary damage being suffered by the other party. Where the parties are agreed, compensation can be

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<sup>232</sup> Ibid.

<sup>233</sup> J, Mohammed, "Compensation for Damages and its Elements in the Islamic Sharia in Contractual Liability in International Bar Association", *Arab Comparative and Commercial Law - Proceedings of the Arab Regional Conference 43*, Cairo, 1987.

determined by estimating the difference between the value of a sound consideration and the value of a faulty consideration.<sup>234</sup>

The option of fault is a heritable right because it is a matter that relates to the consideration rather than to the individual. However, it can be discharged for several reasons.

1. An explicit or implied acceptance by the party that has the right to revoke a contract can satisfy the option of fault in a consideration. Explicit acceptance can be made by utterance or in writing. Implied acceptance can be by any conduct referring to this meaning, such as reference to the consideration.

2. Cancellation of the option of fault, by whoever has the right, can also lead to a fulfilment of the option. This can be explicitly announced, as by utterance or in writing, or it can be implicitly conceived, as in repudiating that fault.

3. Any other fault or any changes caused by the party who has a right to this option, for example the buyer, leads to a satisfaction of the option and confirmation of the contract.

#### **2.8.4. The option of ‘sitting together’ (*Al-Majlis*)**

A ‘sitting together’ refers to the time of negotiating a contract and before direct communication between the parties is ended. Thus, if they meet in one

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<sup>234</sup> Ibid.

place, it refers to the time before they separate, or if they are communicating by phone, it refers to the time before they hang up. The option of sitting together refers to the right of a party to revoke the contract before the end of the sitting. The aim of this right is to give a party who may agree without sufficient reflection an opportunity to reconsider the contract, but this right must be exercised at the time of sitting, otherwise it will not be considered.

## **2.9. Fulfilment of contracts**

Fulfilment in the sense used in *Sharia* is a set of criteria which follow specific requirements in the satisfaction of a contract. Contracts can be fulfilled in one of five ways.<sup>235</sup>

1. A contract can be fulfilled if it has an uncompleted element, such as the inclusion of a minor, or if it has an unsound clause, such as an unknown consideration.
2. It can be fulfilled by '*Iqalah*', which is a revocation by the agreement of both parties.<sup>236</sup> This returns both parties to the same situation as before contracting, but fails to do so if the consideration is damaged, or a party dies.
3. It can be fulfilled by a breach of contract by any party that fails to perform the obligation.

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<sup>235</sup> Ibid, note 79.

<sup>236</sup> Sayd, Sabiq. *Fikh Al-Sunnah* 3, US, American Trust Publications, 1995, p32

4. It can be fulfilled by the performance of its purpose, such as acquitting the debts of a mortgage, or by the termination of its period, such as the end of a hiring period.
5. In certain types of contracts the death of a party leads to a fulfilment of the contract.

## **2.10. Classification of contracts**

According to Islamic law, there are various classifications of contract.<sup>237</sup> There are those that concern description of the contract, while others consider the effect of the contract. There are sound and unsound contracts, and within these the sub-categories of performing and dependent, and binding and non-binding contracts, as listed below.

1. A sound contract is a contract which is finalised by a sound clause and there are no defects in the requirements of the contract or anomalies in the contractor's consideration or in the subject matter. Such contracts can be finalised, and their effects immediately discharged.
2. An unsound contract is a contract which has a defect in at least one of its requirements or clauses.<sup>238</sup> A minor, for example, cannot finalise a contract

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<sup>237</sup> AHRAA, M and MAHMOR, S 'The Validity of Contracts when the Goods Are Not yet in Existence in the Islamic Law of Sale of Goods' (2002), *Arab Law Quarterly*, p.379

<sup>238</sup> According to *Hanaf* is school, unsound contracts can be divided into invalid contracts and corrupted contracts which means that an invalid contract is void, and a corrupted contract can be remedied but it is voidable.

because of his lack of capacity, nor can a sound contract be formed on the consideration of selling unlawful goods, such as drugs.

3. A performing contract is a sound contract which is finalised according to all its legal requirements and can be performed directly.

4. A dependent contract is a sound contract that needs to be ratified, by whoever has this authority, because one of its parties has an incomplete capacity, as in the case of a minor who is below the age of discretion. It is thus a revocable contract.

5. A binding contract is a form of performed contract which no party can revoke without the acceptance of the other. This only applies to revocable contracts, such as a contract of sale. However, in the case of an irrevocable contract such as marriage, the contract can be discharged by divorce.<sup>239</sup> A revocable contract in this instance would have returned the parties to their situation before marriage without any effect, or consequence, which would have been inequitable. Conversely, fulfilling a contract by divorce does entail consequences, such as the requirement to repay a dowry to the wife, and the maintenance (*Nafaqah*) of any children of the marriage.

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<sup>239</sup>C. Allat, 'Commercial Law in the Middle East: Between Classical Transactions and Modern Business', (2000), *American Journal of Comparative Law*, (48), p.81

6. An unbinding contract is a performed contract that can be revoked by a party, being revocable by his will. An example is the contract of bailment,<sup>240</sup> that is revocable by one party and binding for the other. In a contract of mortgage,<sup>241</sup> it is unbinding for the mortgager and binding for the mortgagee because of his debt. Also, in a contract of surety, the contract is binding on the insured party made subject to forfeiture because of his obligation, but not binding on the principal, who can repudiate his promise and revoke the contract.<sup>242</sup>

#### **2.10.1. Classification according to the effects of contracts**

Contracts can be classified according to the effects resulting from their performance. These may be performed directly, as in a performing contract. They may be performed at some time in the future, as contracts that are stipulated in the future. Other effects, however, may not be performed because they are excluded in a clause.

Executable contracts are sound contracts whose effects can be performed immediately according to the agreement without the need for consideration to be delivered. For example, ownership in a contract of sale is transferred as soon

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<sup>240</sup> This is a benevolent custody where the property of a person, called the *Bailor*, is to be kept for a certain period by another person, called the *Bailee*, without consideration.

<sup>241</sup> This is the attachment of a property belonging to a debtor in favour of the creditor, as security for a money debt (ibid).

<sup>242</sup> This is a promise by a surrogate to stand forfeit to debts, or any legal matter, in place of the debtor or principal (ibid).

as the agreement is achieved. Future executable contracts are sound contracts, whose effects will be performed at a future time. They can be classified as:

- a-** Contracts that naturally come into effect in the future, such as a will.<sup>243</sup>
- b-** Contracts that will not naturally or automatically come into effect in the future, but may be performed immediately, as in a contract of sale.
- c-** Contracts whose effects may be performed either in the future or immediately, such as in a contract of hire.<sup>244</sup>

A suspended contract is one dependent on an additional clause whose performance lies at some time in the future. In consideration of the clause, therefore, the contract cannot be carried out immediately. At the same time, the subject of any additional clause must not be impossible of performance or the contract is void. A person who suspends his will, for example, while travelling abroad is employing a secondary, or additional, clause. Proxy, will, divorce and surety can all attach suspended clauses.<sup>245</sup> However, beneficial contracts may not attach suspended clauses, as in sale, hire and mortgage, in order to avoid the possibility of gambling in these transactions.

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<sup>243</sup> Ahmad Hidayat Buang, *Studies in the Islamic law of contracts*, ibid, p191.

<sup>244</sup> Ibid.

<sup>245</sup> Abdullah Hassan, *Sales and contracts in early Islamic commercial law*, Islamabad, Islamic Research Institute, International Islamic University, 1994, p.98



### **2.10.2. Classification according to the purpose of contracts**

- Contracts can be classified according to their purposes. These include ownership, abandonment, replacement authority, limitation, security, partnership and custody.<sup>246</sup>
- Contracts of ownership are those contracts, whose purpose is to possess the ownership of a property, such as under a contract of sale, or usufruct as in a contract of hire. They also include contracts made without consideration, as in a will or donation.<sup>247</sup>
- Contracts of abandonment refer to a surrendering of rights to a person or thing, as in divorce or a discharging of debt.
- Contracts of replacement authority refer to the authorising of a third party to act as substitute in a certain conduct, as in proxy and guardianship.
- Contracts of limitation are used to confine a party's conduct, as in an attachment of privilege.
- Contracts of security are used to secure a creditor's money against the debtor, as in a mortgage.

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<sup>246</sup> Al-Uzma Ayatullah, *Islamic laws of worship and contracts*, ibid, p142

<sup>247</sup> Ibid.

- Contracts of custody are used to protect the possession of property, as in bailment.<sup>248</sup>

### **2.10.3. Classification according to the nomination of contracts**

Contracts can also be classified as nominated or non-nominated. Islamic law regulates particular types of contract for which detailed rules exist. However, there are frequently new types of contract, originated to satisfy people's needs and requiring legislation.

Nominated contracts are contracts newly legislated, as in sale and hire, company, donation, insurance, agency, mortgage and non-interest bearing loans. Non-nominated contracts are those not legislated by the main sources of Islamic law but made with reference to its primary sources according to the need of society. This is a contentious issue. There is an argument<sup>249</sup> regarding whether it is permitted to initiate a new type of contract or a new stipulation in it that is not legislated by the main sources of Islamic law. However, this study

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<sup>248</sup> Ibid.

<sup>249</sup> This argument has been debated between the schools of law. One school nullifies any contract or stipulation that is not legislated by the main sources of Islamic law. Another decides to nullify any contract that contradicts these sources. A third opinion allows a freedom to establish a contract, or stipulation, on the grounds that it is permitted unless specifically prohibited by the main sources of Islamic law.

will follow the precepts of the *Hanbali* School which permit initiation of any new contract, or stipulation, providing it is not specifically forbidden by the main sources of Islamic law.<sup>250</sup>

## **2.11. Conclusion**

The theory of contract in Islamic law derives from deductions made by scholars based upon actual judgements in cases before the courts. Thus, their work is based on the use of precedent. Over time, common rules were aggregated according to types of contract. In Islamic legal theory (*Usool Alfikh*) some rules have become sufficiently expanded and elaborated by Muslim scholars, to become general principles of contract.<sup>251</sup> At the present time, contemporary jurisprudents and counsellors have addressed the problem of contract law as a discrete issue without being bound too tightly by established precedent. This has greatly facilitated resolving the complex problems that surround each particular nominated contract, as well as helping us to think about the implications of new types of contract.

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<sup>250</sup> Al-Uzma Ayatullah, *Islamic laws of worship and contracts*, ibid, p176.

<sup>251</sup> The late centuries in Islamic jurisprudence started after the schools of law had become well established and the source of *Ijtihad* had decreased.

Commercial transactions are much more various than in the past and, in view of global interchange, contract law must be flexible if it is to function. Huge numbers of industrial, service and supply enterprises need special types of contract, and parties need some freedom to deal with changes occurring in this sphere. The current situation demands urgent examination of what may be approved or disapproved in contemporary commercial transaction.

To sum up, it is axiomatic that the theory of contract, in all its modern versions, plays a crucial role in civil transactions. The evidence of success that has so far been achieved in applying theoretical analysis to the discussion of contract under Islamic law strongly supports the continuation of this process. These findings bring us to the examination of the second conceptual pillar of the research hypothesis, namely the phenomenon of electronic commerce itself.

## **Chapter 3: The Advent of Electronic Commerce in International Legal Systems and the Initial Responses of Islamic jurisprudence**

### **3.1. Introduction**

In treating such a comparatively recent phenomenon as the use of electronic means of communication in international transactions, it is essential to obtain a clear picture of the origins, motives, applications and contemporary importance of electronic commerce.

The world is witnessing an overwhelming and accelerating development in the technology of communication, arising from scientific innovation in digital communication networks. Newly-created media, especially the internet, have become indispensable. For a great deal of exchange that until recently depended upon the telephone, fax or telex, the internet now provides more effective methods of communication, delivery and presentation. In important aspects, these networks abolish geographical borders, and the world has become smaller to the degree that it is often now referred to as the ‘electronic global village’.<sup>252</sup>

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<sup>252</sup> Roger Leroy Miller & Gaylord A. Jentz, *Law for Electronic Commerce*, New York, Thomson Learning, 2000, p.27

Out of these developments in computer science and communications, and alongside inter-personal, academic and other uses, electronic commerce, or e-Commerce, has emerged as one of the principal nodes of growth. Since the internet - which originated in military-security applications at the U.S Department of Defence and Scientific Research - became freely and globally available, not only has it reached into almost every house, store and company in large areas of the world, but it has become a kind of central nervous system for advanced society, revolutionising transactions from government-scale exchanges down to the activities of small business. Of crucial importance to this development has been an acceptance of the electronic contract, or e-Contract.<sup>253</sup>

With the spread of internet use in business transaction, the term e-Commerce has become commonly known. In concept, it has several distinct features and applications. Firstly, it implies a great saving in human and financial resources. Businessmen are now able to avoid the trouble and expense of physical travel to meet their partners and clients: video-conferencing, both relatively simple to achieve and inexpensive, is now employed as standard methodology in larger businesses and other corporate entities. The same virtual reality environment is routinely used to display, promote and sell a wide range of products and services, from supermarket browsing to the evaluation of

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<sup>253</sup> David I Bainbridge, *Introduction to Computer Law*, UK, Longman, 2004, p.23

military hardware. This obviously denotes a cultural change in commercial transaction: customers are able to find what they want without having to travel to different places. In product comparison, the internet provides a highly effective method of brokerage. Purchase is carried out without requiring traditional forms of money or physical exchange. To trade effectively, the consumer needs only to be supplied with a computer, an internet browser and a subscription to a service provider.<sup>254</sup> Yet electronic commerce is not restricted to the selling and buying of products, services, and information via the internet. Since e-Commerce was first launched, it has included operations to monitor the ups and downs of selling, buying and renting, the transferring of funds as well as many other services. E-Commerce can be likened to an electronic marketplace in which importers, consumers and intermediaries can meet each other to select items, introduced digitally or virtually, and paid for by newly-introduced means of exchange such as 'cyber cash'.<sup>255</sup> Thus, e-Commerce uses the internet as an instrument of promotion.

The internet comprises a unique mechanism of exchange and distribution. There is no central computer, or even a central departing point. It is run by a number of computer networks pertaining to large corporations and operating

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<sup>254</sup> Lance Loeb, *Your rights in the on-line world*, New York, USA; Osborne McGraw-Hill, 1995, p.17

<sup>255</sup> Paul Todd, *E-Commerce Law*, UK, Routledge Cavendish, 2005, p.39

simultaneously from all over the world. Instant access to the internet is what makes e-Commerce internationally attractive, and it is expected that the internet will have a powerful impact not only on great corporate entities but on medium-sized and even small commercial ventures. Since the internet affords information about markets and its potential customers,<sup>256</sup> it has the signal advantage that it can help smaller establishments both to expand their geographic range and find new customers through types of marketing known previously only to large-scale business.

Companies obtain clear benefits from using e-Commerce, namely more effective, high-yielding promotion, reduction of expenses, and direct contact with other companies and clients through the reduction or elimination of intermediaries. At the same time, e-Commerce offers many positive benefits to customers: e-markets are open all year, 24/7, and the consumer does not, in principle, have to queue to inspect or purchase any item or service. All he is required to do is identify and cue his particular requirements, enter information for the search, and select from the goods and services that are available.<sup>257</sup> The most salient features that give e-Commerce an advantage over traditional commerce are the tools by which it is conducted. E-Commerce inhabits a

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<sup>256</sup> Michael Rowe, *Electronic Trade Payments*, London, International Business Communications Limited, 1997, p. 6

<sup>257</sup> Maryo Komenor, *Electronic Marketing- a reference of marketing techniques to help you reach a broader market*, New York, Wiley Computer Publishing, 1997, p.28



neutral, electronic world in which its dealings are effectively conducted in private - as within a closed room – notwithstanding the enormity of the transactional environment in which viewing and exchange take place. Thus, it can be said that e-Commerce combines the privilege of personal brokerage with the opportunity to stroll around the largest trading floor in the world.

In new developments, however, few things come without resistance or downside. One obstacle to the development of e-Commerce has been the inflexibility and backwardness of pre-existing legal regulations. Laws that were framed to regulate traditional commerce were reliant upon material items, notably traditional forms of payment, and paper-based instruments that gave evidence of contract. E-Commerce, of course, being intrinsically different, does not possess these instruments but delivers its services electronically. Yet, looking around the world these problems has either already been largely overcome or stand at the threshold of being resolved. New methods of payment, like cyber cash or digital money credits, are effective replacements for traditional money.<sup>258</sup> Contracting parties can prove the basis of their transactions by using ‘electronic supporters’ in place of paper.

A much more intractable issue affecting e-Commerce, however, is criminality - whether in the form of fraud, burglary or acts of internet piracy. To

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<sup>258</sup> James V. Vergari, *Computerized Payment Operations Law*, New York, Irwin Professional Publishing, 1998, p.46

protect themselves against activities that threaten the credibility of electronic commerce, service providers have designed security systems such as Socket Layers (SSL)<sup>259</sup>, and Secure Electronic Transaction (SET).<sup>260</sup> It is in the nature of current electronics, however, that innovation is extremely rapid and, given the high potential of reward to the criminal, defensive systems have to be constantly upgraded.

### **3.2. The phenomenon of e-Commerce**

The volume of trade generated through e-Commerce is now calculated in billions of US dollars. The take-up in electronic commerce, as a standardised practice, has grown to the extent that many international and commercial establishments now refuse to deal with new partners unless they can demonstrate their ability to use e-Commerce and electronic exchange of data.<sup>261</sup> Accordingly, companies that do not engage with this field, and remain bound to traditional methods, can quickly find themselves isolated in the market. It may be difficult for them to locate other entities with which to do business, at least at an international level.

The growth of e-commerce transactions rapidly imposed itself internationally, obliging the United Nations - represented by the UN

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<sup>259</sup> Grady N. Drew, *Using Set for Electronic Commerce*, New York, Prentice Hall PTR, 1998,

p.5  
<sup>260</sup> *ibid.*

<sup>261</sup> Jean Camp, *Trust and Risk in Internet Commerce*, London, The MIT Press, 2001, p.96

Commission on International Trade Law - to issue in 1996 a Model Law on electronic commerce (UNCITRAL Model Law). This was intended as directory law, and as a template for the issuance of individual member state legislation.

The intrinsic difficulty of producing a law for variable international consumption and application is at once announced in the General Provisions, Article 1. Sphere of Application. Its states, innocently enough, that “this law applies to any kind of information in the form of a data message used in the context of commercial activities;”<sup>262</sup> yet this opening sentence is productive of no less than three caveats. These refer to the nature of the transactions described but, more crucially, to individual applicability in any signatory state. As in many other forms of international convention, such a qualification calls into question the use of the word ‘law’. Thus, the Model Law does not propose an agreement that shall be equally binding upon all signatories, because it recognises from the outset that different conditions and customary practices must be respected. It might, therefore, more properly be called ‘emerging law’ whose final, but as yet far from achievable, purpose is one of universal convergence. This fundamental approach is not changed by the 2005 UNCITRAL Convention on the use of Electronic Communications in International Contracts (UNCITRAL Convention)<sup>263</sup>. The Convention was the

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<sup>262</sup> UNCITRAL, Doc. No. A/CN.9/426, 14<sup>th</sup> June 1996

<sup>263</sup> UNCITRAL, A/RES/60/21, 9<sup>th</sup> December 2005

culmination of nearly a decade's consultative work after the proposals published in the Model Law, yet in the view of some commentators<sup>264</sup> it may make the question of uniform application even more problematic than the provisions envisaged in the 1996 proposals.

The UNCITRAL Model Law was based on a concept referred to as the 'functional equivalent approach,'<sup>265</sup> meaning an acceptance of equivalent status as between physical and electronic transaction (i.e. paper and non-paper instruments).<sup>266</sup> This includes a set of rules and directions aimed at establishing a more suitable legal environment for e-Commerce by way of the recognition of Electronic Data Interchange (EDI), acceptance of electronic data messages, and recognition of electronic evidence. The UNCITRAL Model Law on Electronic Signature was issued in 2001 with a view to the recognition of the reliability of electronic signature, and to make a description of its conditions and requirements.<sup>267</sup>

All these developments led the international community to progressively abandon paper-based instruments, and to use electronic data interchange.<sup>268</sup> However, it is worth noting that this was never likely to prove an easy option

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<sup>264</sup> Cf. Connolly, C. and Ravindra, P. 'First UN Convention on eCommerce finalised', 2005 p. 6

<sup>265</sup> *ibid*, no.16

<sup>266</sup> *ibid*

<sup>267</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_signatures.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html). 15-09-2006.

<sup>268</sup> Catherine L. & Sue E., *Global Electronic Commerce*, Washington DC, Institute for International Economics, 2000, p.56

because the difficulties international legal projects have encountered have led to variant laws on electronic transaction being formulated in different parts of the world.

The new era of information and communication technology led to the emergence of e-Commerce as a central pillar of the digital economy. However, it is necessary to point to a distinction between the terms “electronic commerce” and “electronic business” which are not synonyms, as some commentators have assumed. The term “electronic business”, or e-Business, represents a sphere both wider and more comprehensive. It comprises applications of electronic communication in banking, government and insurance as well as in commercial activity. The specific activity of e-Commerce is, therefore, subsumed within what is more generally referred to as e-Business.<sup>269</sup>

E-Commerce is roughly definable as a commercial activity covering contracts made for the order of products and services via electronic media in an electronic environment.<sup>270</sup> Yet to find and agree upon a strict definition is not easy, especially if we take into account the technical nature of this type of commerce. In giving a definition of e-Commerce, we have to take into consideration three factors characterising electronic commerce, namely

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<sup>269</sup> Ibid.

<sup>270</sup> Jon A. Baumgarten, Buiness & Michael A. Epstein, *Business and Legal Guide to Online Internet Law*, New York, Glasser Legal Works, 1997, p.19

commercial activity, electronic supporters, and globalisation. These factors are:<sup>271</sup>

(a) Commercial activity. The notion of commercial activity is the foundation of e-Commerce; it deals with the same sort of commercial activities as traditional commerce.<sup>272</sup>

(b) Electronic supporters. Electronic supporters are replacements for paper, and there is now a broad assumption that paper-based correspondence between contracting parties is likely to disappear. The entire written contract, invoice of delivery, price fulfilment and freight instruments become on-line a database of information made accessible through the internet. This transformation does not affect or in any way diminish the legal status of the transaction itself.

(c) Globalisation or internationalisation. E-Commerce is an implementation of these phenomena.<sup>273</sup>

The legal relations stemming from this type of commerce are not restricted to a specific country but move freely between states.<sup>274</sup> As a result, a seller of a product can be in the UK while the buyer is in Saudi, or the service provided

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<sup>271</sup> Muhammad Arafa, "International trade via the Internet", *a research presented to Law and Computer Conference*, The College of Sharia and Law, United Arab Emirates University, from 1/3 May 2000, p.2

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> Jurgen Basedow & Tosiuyuki Kono, *Legal Aspects of Globalization*, Boston, Kluwer Academic Publishers, 2000, p.51

might be US-based while the consumer is in France. Such transactions will and, in many cases, can only, take place between the parties through the internet.<sup>275</sup>

In the real world, there is no fixed and codified definition of e-Commerce to date since a number of different bodies and international organizations have offered their own definitions. Among these are the United Nations (UNCITRAL) and the World Trade Organization (WTO). Hence, disagreement may arise on the definition of e-Commerce in jurisprudence. To elaborate this further, we must consider the definition of e-Commerce by international organizations, the definition of e-Commerce in comparative law, and the definition of e-Commerce in jurisprudence.

### **3.2.1. Definitions of Electronic Commerce by International Organizations**

#### **A- United Nations (UNCITRAL Model Law; UNCITRAL Convention2005)**

Preeminent among international projects to create inter-state agreement on e-Commerce are those of the United Nations. The UNCITRAL Model Law, issued 16<sup>th</sup> December, 1996,<sup>276</sup> did not include a specific definition of e-Commerce and left this task to each nation's jurisprudence. However, in Article 2.i., it stipulated: "e-Commerce is carried out by various media of

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<sup>275</sup> Dennis Campbell, *The Internet: Laws and Regulatory Regimes*, US, Lulu.com , 2007, p.22

<sup>276</sup> [WWW.UN.ORG](http://www.unctral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf), available at [http://www.unctral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.unctral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

communication such as, but not exclusively, e-mails, telexes and cables other than the Electronic Database Interchange”.<sup>277</sup> Thus e-Commerce is not seen here as confined to the internet alone; other media that perform this function, including Fax, Cable and Telex are also included. Hybridity of communication is also covered as, for example, where an offer is received via the internet and an acceptance made by Fax.<sup>278</sup>

Following the issuance of the Model Law,<sup>279</sup> many states went on to endorse it, or issued their own laws governing e-Transactions using the Model Law as their guide. Singapore was the first to enforce the Model Law on e-Commerce, promulgating its own Electronic Transaction Law in 1998. Within a few years, other states had followed suit: the USA and Italy in 1999, France, Tunisia, and China in 2000, Ireland in 2001, the Emirate of Dubai and Bahrain in 2002.

In its Resolution (adopted 23<sup>rd</sup> November, 2005), the Convention notes first its satisfaction at how far productive discussion and actual conformity of practice have come since the issuance of the Model Law. The Model Law was explicitly represented as a guide, and, beyond that an influence, the perception of whose beneficial effects would spread. Hence, the parties to the Convention

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<sup>277</sup> The UNCITRAL Model Law Article 2.1

<sup>278</sup> Ronald J. & Jane K. , *Electronic Commerce*, New York, Aspen Publishers; 2nd edition, 2004, p82

<sup>279</sup> The Model Law consists of 17 Articles divided into two sections. The First is about e-commerce, while the second is about e-commerce in different fields.



felt emboldened to draw up a document that had more of the appearance of a binding agreement. How far this is vitiated by the escape clauses, especially in Article 19, open to contracting states remains an open question. Complete discretion to vary or derogate from the Convention “gives the potential to re-introduce the very legal ambiguities that the Convention is designed to avoid.”<sup>280</sup> On the other hand, the phrasing of the Resolution reiterates the sense of incremental progress that is a signal feature of the Model Law; by process, the stated aim is to ‘enhance legal certainty,’ and to ‘remove obstacles’ to the use of electronic media in international contract; it is a work in hand.

## **B - World Trade Organization (WTO)**

According to the WTO, e-Commerce "is the production, advertising, sale and distribution of products via telecommunication networks".<sup>281</sup> This is more specific as a definition than the description of UNCITRAL. It recognises that e-Commerce is not confined only to the internet but can be carried out also via telecommunication networks. For example, e-Contracts can be carried out via Minitel in France,<sup>282</sup> Viditel in Holland, Prestel in England and Bildschirmtext

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<sup>280</sup> Connolly, C. & Ravindra, P. op. cit. p.6

<sup>281</sup> The World Trade Organization works on the development and liberalization of e-Commerce. It includes more than 130 member states

<sup>282</sup> The service of Minitel is provided via a machine that carries the same name. It was commonly used in France during the 1980s. This machine is like a PC but small and includes a small screen, and buttons like a computer. It is also a visual medium of communication that transfers writing without pictures, which means it is a communication medium connecting writing to a telephone line. It occupies a high position in information and communication and is

in Germany. During the presidency of Bill Clinton, the United States made use of telecommunication and receivers in offering the same service to the public.<sup>283</sup>

We can further extrapolate that e-Commerce includes all activities resulting from commercial relations, whether contracting ones or not, for example, in the exportation, exchange or sale of products, in distribution agreements, representation agreements, and commission agencies. Yet, this description has some shortcomings. It restricts commercial activities to products other than services, so that consultation services, licensing, and banking services do not fall within the definition.

### **C - Organisation for Economic Cooperation and Development (OECD)**

According to an OECD report, "electronic commerce refers generally to all forms of commercial transaction involving both organizations and individuals based upon the electronic processing and transmission of data including text, sound and visual images. It also refers to the effects that the electronic

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used to finalise contracts. Cf. Usama, Mujahid, "The use of the computer in the judicial field", *al-Qada Magazine*, 1999, p.16

<sup>283</sup> Ravi Kalakota, *Reading in the Electronic Commerce*, Boston, Addison Wasely, 1997, p.35

exchange of commercial information may have on the institutions and processes that support and govern commercial activities”.<sup>284</sup>

This report indicated that e-Commerce would dominate all aspects of commercial exchange such as negotiations, commercial contracts, and financing agreements. However, some aspects of e-Commerce may not be in deal-making, as in the case of advertising or presentation of information about items and services, while others may be commercial, such as those involving contracts in goods and services.

As a matter of fact, this report did not confine itself to the definition of e-Commerce; it also covered issues resulting from e-Commerce, such as information infrastructure, services, taxation, consumer protection, and privacy via international networks. In addition, the report encompassed issues pertaining to the protection of intellectual property, as well as the protection of website addresses on the international network, and law enforcement regarding legal behaviours via e-Commerce, taking into consideration the international nature of such transactions. The report also discussed the competent courts concerned with issues pertaining to the execution, interpretation and settlement of disputes in e-Contracts.

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<sup>284</sup> OECD Organisation for Economic Co-operation and Development, *Report of Electronic Commerce Opportunities and Challenges for Government*, 1998, p.20

It is obvious that this report did not deal with the function, whether commercial or not, of e-Commerce alone, but dealt with its more important obstacles, legal and financial, as well as access to the market. On the legal side, a legislative environment must be created that is congenial to e-Commerce. This is best achieved by drafting specific law concerned with electronic and commercial transaction.<sup>285</sup> Within free-trade blocs, such as the European Union, the zero cost aspects of electronic commerce greatly encourage its growth. Also, many states within the USA do not impose customs, duties and taxes on products and services traded over the internet,<sup>286</sup> which is a strong incentive to e-Commerce. On the other hand, to reach markets, there must be a robust information infrastructure to connect the seller, the consumer and the banks for payments to be made electronically.

#### **D - Asia-Pacific Economic Co-operation**

APEC offers a comprehensive definition of the transactional possibilities of e-Commerce as follows: “e-Commerce is the business process of dealing with

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<sup>285</sup> Some believe that when drafting a law on electronic transactions, a set of rules and regulations in relation with information flow via communication networks, called *lex informatica* (Informatics Law) should be taken into consideration. Legislators framing such a universal law must be fully understanding and comprehensive in their approach so that the rules of a *lex informatica* should be comparable to those unanimously agreed upon in the *lex mercatoria*. Robert Frieden, *Managing Internet-Driven Change in International Telecommunications*, Artech House, 2001, p.33

<sup>286</sup> Gerald Spindler, *E-Commerce Law in Europe and the USA*, Berlin, Springer-verlag, 2002, p.45

commercial activities through the internet or other ICT. E-Commerce may be classified as business to business, B2B, business to customer, B2C, customer to business, C2B, or customer to customer, C2C, depending on the transaction parties, recently expanding to business to employee, B2E, and business to government, B2G.”<sup>287</sup> Contracts might be sales of goods, tickets or the supermarket products, or electronic services like buying software programs and engineering consultation. This definition also brings into play the concept of the electronic agent, or third-party intermediary.<sup>288</sup>

## **E - The European Union**

According to the European Commission, “electronic commerce is about doing business electronically,”<sup>289</sup> perhaps as open a definition as it is possible to make. Its description then elaborates on the electronic processing and transmission of data, including text, sound and videos.<sup>290</sup> This, in turn, encompasses many diverse activities including trading of goods and services, on-line delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design

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<sup>287</sup> The Co-Chairs of the Asia Pacific Economic Cooperation-APEC K Sharma, N Ahmed, N Wickramasinghe, “E-Commerce adoption in small and medium enterprises (SMEs) in Asia: a study of the early stages of e-Commerce uptake in “, (2004), *International Journal of Internet and Enterprise Management*, 2 (3), p221-224

<sup>288</sup> Chris Reed, *Internet Law*, Cambridge, Cambridge University Press; 2nd edition, 2004, p.55

<sup>289</sup> European Commission 1997, COM (97)157, available at :

[http://aei.pitt.edu/5461/01/001338\\_1.pdf](http://aei.pitt.edu/5461/01/001338_1.pdf)

<sup>290</sup> Ravi Kalakota & Andrew B. Whinston, *Frontiers of Electronic Commerce*, Boston , Addison Wesley Publishing, 1996, p.225

and engineering, on-line sourcing, public procurement, direct consumer marketing and after-sales service. It involves both products (e.g. information services, financial and legal services); traditional activities (e.g. health care, education) and new activities (e.g. virtual malls). In the light of this definition, e-Commerce also encompasses electronic ordering of tangible goods that can be delivered by traditional channels such as postal services or commercial couriers (indirect e-Commerce). In short, delivery in e-Commerce may be both corporeal and incorporeal.<sup>291</sup>

### **3.2.2. Definition of e-Commerce in Comparative Law**

Because of the importance of e-Commerce both internationally and locally, many states have been concerned with adopting new legislation, and interpreting transaction provisions. These include France, U.S.A, Canada, Italy, Singapore, Tunisia, Jordan, Egypt and the Emirate of Dubai. We will look at some of these, beginning outside the Muslim world before turning to the Arab states. There are other states like Singapore, Australia, the UK, and Ireland, which have enacted laws regulating e-Commerce. However, their laws do not define the nature of e-Commerce, leaving this task to their own jurists.

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<sup>291</sup> S. Dutson, “ E-commerce-European Union”, (2000), *Computer Law & Security Report*, 13(2): p 106

**(a) The United States of America**

The United States was one of the first countries in the world to encourage the use of e-Commerce to make deals through the internet. The number of internet users in America had already reached about a hundred million.<sup>292</sup> The volume of transactions in e-Commerce was worth about \$115 billion in 2001, rising to \$250 billion by 2005. The e-commerce transaction value recorded 629,967 billion won in 2008. This figure rose by 113,453 billion won or 22.0 percent from 2007.<sup>293</sup>

On 14<sup>th</sup> February, 2001, US legislation was passed on the Uniform Electronic Transactions Act, which is divided into twenty-one sections. This Act did not establish a clear-cut definition of e-Commerce, but Article 2, paragraph (ii) illustrates the nature of e-Commerce transactions.<sup>294</sup> US regulations had already endorsed the Uniform Commercial Code (UCC) before the passing of this Act.<sup>295</sup> The UCC provides in Article (4) for Electronic Funds Transfer (EFT) whether between banks, or on-line payments and obligations which are considered the cornerstones for the growth of e-

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<sup>292</sup> OECB Report of Electronic Commerce Opportunities and Challenges for Government, 1998, also in Cunningham .P, Frosch .F, *The Electronic Business Revolution: Opportunities and Challenges in the 21st Century*, Springer-Verlag Berlin and Heidelberg GmbH & Co., 1999.

<sup>293</sup> Government News, E-commerce and cyber shopping stats for 2008, *Source: Korea National Statistical Office* , available at [http://www.korea.net/news/News/NewsView.asp?serial\\_no=20090227001&part=101&SearchDay](http://www.korea.net/news/News/NewsView.asp?serial_no=20090227001&part=101&SearchDay)

<sup>294</sup> Uniform Electronic Transactions Act, Article 2

<sup>295</sup> Gerald Spindler, *E-Commerce Law in Europe and the USA*, op.cit, p.178

Commerce.<sup>296</sup> This was to be achieved by way of electronic clearinghouse, credit cards, Automated Teller Machines (ATMs), and Digital Money between banks, individuals and business units.<sup>297</sup>

This definition presented different ways in which e-Commerce can be carried out. It also provided for EFT to be conveyed by any other similar electronic method, giving a hint of what might come in the future in this field.

#### **(b) E-Commerce law in Arab States**

Although legislatures in Arab states have not produced a general draft law to regulate electronic transactions, some states have laid down a specific draft law for transactions in e-Commerce. Examples are Tunisia, Jordan, and the Emirate of Dubai, Moslem countries whose models of contract law derive from English or French law.

#### **(c) Tunisia**

Tunisia was the first Arab state to pronounce on e-Commerce law, in No.2000/83 “Electronic Exchanges and Electronic Commerce bills”.<sup>298</sup> This law consists of 53 Articles, divided into seven Chapters. Article 2, in Chapter I,

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<sup>296</sup> Thomas C. Baxer, Jr-Sephanie A. Heller, The ABCs Of The UCC, Article 4A, “Fund Transfer”, *American Bar Association*, 1997, p.3

<sup>297</sup> It is worth mentioning here that The US Department of Defense as a result of dealing with EDI defined e-commerce as: interchange of transaction via EDI, E-mail, EFT or via any similar electronic medium”. A research publishes on [WWW.ACQ.OSD.MIL/EC/WHY.EC](http://WWW.ACQ.OSD.MIL/EC/WHY.EC), 13-11-2006.

<sup>298</sup> The Tunisian Parliament endorsed this draft Law on 27/July/2000. This Draft Law was issued on 9<sup>th</sup>/August and published in *Al-Raed Official Gazette* in Tunisia on 11/August /2000.



defines electronic exchange and E-Commerce Bills as follows: “electronic commerce: commercial transactions that are accomplished using electronic exchanges”<sup>299</sup> and “electronic exchange: exchanges that are accomplished using electronic documents and files”.<sup>300</sup> In its definition, e-Commerce is considered a commercial transaction providing a product, service or performance carried out by electronic exchanges. This is because any commercial transaction is an exchange of a product against its price, service against its value, or performance of an action in an electronic way at the interface of the contract where parties enter into negotiations, and have mandatory offer and consent to conclude the contract. We also notice, however, that the above definition does not stipulate the electronic tools by which the distance contract is carried out.

**(d) Jordan**

Jordan's Electronic Transaction Law No (85/2001) does not provide a definition of e-Commerce but defines electronic transactions as “transactions implemented and conducted by electronic means”.<sup>301</sup> Although broad, this avoids specifically referring to commerce but prefers the wider domain implied by the term transaction.

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<sup>299</sup> The Electronic Commerce Act of Tunisia, [www.uneca.org/aisi/docs/tunisia-e-commerce%20bill.doc](http://www.uneca.org/aisi/docs/tunisia-e-commerce%20bill.doc), 11-09-2006.

<sup>300</sup> *ibid*

<sup>301</sup> This Draft Law was published in Jordan's *Official Gazette* vol. No 4524 dated 31/12/2001. This Draft Law consists of 41 Articles that deal with the nature of e-transactions, the electronic contract, movable electronic instruments, and the authentication of the register as wells the electronic signature.

**(e) The Emirate of Dubai**

Dubai's law of Electronic transaction and Commerce no.2/2002, Chapter I, defines e-Commerce as “commercial transactions which are concluded through electronic communication”.<sup>302</sup>

This definition agrees with others that e-commerce is merely supplying the function of traditional commercial transactions via electronic means. It is also not restrictive as to methodology, but allows for the pursuit of e-Commerce by other means to cover whatever might emerge in the future.

**(f) Egypt**

Up to this moment, no law has been issued in Egypt to regulate contracts of e-Commerce. However, Egypt's Electronic Signature Law of Electronic Transactions and Contracts defined e-Commerce as “exchanging commodities and services through electronic media”.<sup>303</sup> This definition does not confine the

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<sup>302</sup> This Law was issued in The Emirate of Dubai on 12/2/2002. This law consists of 39 Articles divided into 8 Chapters which tackled the requirements of the electronic transactions and contracts, their reliability side by side with reliability of the electronic signatures, services of certification,. Before this law, another law was issued, Law No. 1/2000 in respect of Dubai Free Zone of Technology, E-Commerce and Media. The purpose was to pave the way to create a suitable environment for the implementation of Electronic Commerce law.

<sup>303</sup> Law No. (15) /2004 was issued on The Regulation of Electronic Signature and the Establishment of the Commission of The Technological, Industrial Development of Information. It was issued in the *Official Gazette*, vol. 17 annex D on 22/4/2004.

media of e-Commerce to the internet. The draft law is directed towards the security of information via electronic means.<sup>304</sup>

### 3.2.3. Definition of e-Commerce in Jurisprudence

Jurisprudents have made extensive efforts to provide a specific definition of e-Commerce from different perspectives. Definitions that look at first sight quite straightforward and objective may be carefully nuanced. One of the more comprehensive is: “e-Commerce is any business transaction carried out electronically, be it between business partners or between the company and its clients”.<sup>305</sup> Another defines e-Commerce as “transactions carried out via digital process by the international network,”<sup>306</sup> focussing upon the process of delivering information, products, services, payments and the closing of deals electronically via the internet or other international medium. Yet another defines e-commerce as “the delivery of information, products, services or payments via telephone lines, computer networks, or any other means”<sup>307</sup>. This suggests that electronic commercial activity amounts to an interchange of data,

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<sup>304</sup> The e-Commerce Draft Law is divided into 12 Chapters with 35 Articles. The first chapter is devoted to definitions, while the second, the third, and the fourth to electronic contracts, signatures and codification. The fifth is on evidence, the sixth on domain names, and the seventh on protection of the consumer. The eighth to eleventh chapters are about taxes, customs, crimes, penalties and concluding provisions.

<sup>305</sup> Debra Cameron, *Electronic Commerce: the New Business Platform for the Internet*, Charleston, USA, Computer technology Research Corp. Second Edition, 1999, p.5

<sup>306</sup> R. T Wigand, “ Electronic Commerce: Definition, Theory, and Context”,(1997) ,*The Information Society*, 13 (1), p. 1-16

<sup>307</sup> Ravi Kalakota & Andrew Whinston, *Electronic Commerce: A Manager’s Guide*, USA, Addison Wseley, 1996, p3.

the finalisation of deals and contracts, and the electronic transfer of funds. Still other jurists have defined e-Commerce as "a project that aims at offering products and services via a website for the purpose of getting orders from customers".<sup>308</sup> Here the nub of the definition is that e-Commerce must be considered as a special form of advertising, as well as existing for the ordering of products or services electronically.

E-commerce has also been defined as a transaction that shall have offer, consent and agreement to all provisions of the transaction between the contracting parties via computers connected with each other via the internet. This definition goes on to specify the corporeal delivery of items transacted by land, sea and air.<sup>309</sup> However, a deficiency here is that it restricts the process of the delivery of goods and services in e-Commerce to corporeal delivery only. The question of incorporeal delivery is not clarified, as, for example, to whether the process of downloading software satisfies the completion of a contract.

Mostly, we see that e-Commerce encompasses the process of receiving requests as well as the process of payment for items bought whether the items are funds or services. At the same time, funds or services, such as information services, can be obtained via the internet. The American Management

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<sup>308</sup> Anita Rosen, *The E-Commerce-Question and Answer Book, A survival Guide for Business Manager*, New York, American Management Association, 2ed edition, 2002, p.87

<sup>309</sup> Ahmad Abd al-Kareem Salamah , *Private International Law (Electronic-Tourism-Environmental)*, Cairo, Dar al-Nahdah al-Arabyah ,2000, p.19

Association also gave e-Commerce a broad definition that includes “the commercial uses of media communication like the project may offer its goods that are requested via telecommunication media”.<sup>310</sup> What can be inferred from this is that all commercial transaction components can be carried out by e-Commerce, starting from the negotiation stage, striking deals, on-line payments; and ending with the delivery of products or goods in a corporeal or incorporeal way.

It is obvious that e-Commerce combines two distinct elements, commerce and electronics. Commerce, as a concept, denotes the activities of presentation, offer, negotiation and transaction between buyer and seller. These activities, in which products and services are circulated, are governed by rules and agreed-upon conventions. The term ‘electronic’ modifies and determines the scope and means of these activities. It denotes the precise method used to conclude contracts and to strike deals. Thus, e-Commerce is the exercise of commercial activities in an electronic way.

Electronic commerce may, therefore, be defined as ‘all commercial activities including products and services carried out via the use of information technology and electronic data interchange to execute transactions carried out individual-to-individual, and individual-to-corporate entity, whether locally or internationally.’ This comprises the components of electronic commerce as

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<sup>310</sup> Ibid, p21

presently practised and envisaged. However, there is merit in preferring the more succinct and open-ended definitions made by the European Union and the Arabic states cited. It is worth repeating that definitions should not confine the exercise of commercial activities to activities via the internet only.<sup>311</sup> There are other networks similar to the internet such as BIT Net and UU Net, that may present new markets for electronic business.<sup>312</sup>

### **3.3. The environment of e-Commerce**

Since e-commerce and electronic contracts made via the internet are new topics, it is necessary to take account of the electronic environment that led to the emergence of the electronic contract. Over the last decade, the world has witnessed a technological revolution whose effects and importance are scarcely less than those of the industrial revolution.<sup>313</sup> This revolution is largely based on communication and information, and the world is undergoing unprecedented development in this field. These transformative changes have contributed to strengthening the relationships among markets in the world, giving substance

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<sup>311</sup> According to UNCITRAL , the term ‘ commercial activities shall have a very broad definition including all issue resulting from commercial relations whether contractual or not which encompass many diverse activities including trading of goods and services, Distributing Agreements, Commercial Agency, Commission Agency ,constructional services, consultation services, collaborative design and engineering services, Licensing, Investment, Financing, Bank exchange, Insurance, on-line sourcing public procurement, other forms of industrial , commercial and cooperative projects, the transportation of passengers or goods by sea, train, or land.

<sup>312</sup> Michael S. Baum &Henry H. Perritt, *Electronic Contracting, Publishing and EDI Law*, New York,Willy Law Publication, 1991, p.7

<sup>313</sup> Janine Hiller &, Ronnie Cohen, *Internet Law and Policy*, New Jersey, USA, Prentice Hall, 2002, p.16

and definition to the anticipated age of globalisation in commercial transactions. The technological, or digital, revolution is based on constituents such as the creation of methods used in storing data, voices, and pictures, made possible by progress in such developments as transmission via space orbiting satellites.<sup>314</sup>

Because of the emergence both of computers and communication technology, the internet came into being in the form of a compound Communication Network or federation of networks. The internet depends on electronic data interchange, made possible by computers, to serve different fields of human activity like commerce. Since fields such as advertising and negotiation of contract are greatly facilitated by methods in which paper-based or traditional instruments are not required, the number of internet users has increased exponentially.<sup>315</sup>

Because of the strong connection and relationship between the internet and e-Commerce, this chapter will next examine the internet in terms of its emergence, development and effects upon e-Commerce, in order to give a general understanding of its nature. It will not elaborate on the technological or technical development of the network which, as an engineering issue, lies outside the scope of this study.

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<sup>314</sup> J. Dianne Brinson & Benay Dara Abrams, *Analyzing E-Commerce & Internet Law*, New Jersey, USA, Prentice Hall , 2001, p.87

<sup>315</sup>S. R. Sharma, *Laws on E- Commerce*, New Delhi , Anmol Publications Pvt Ltd, 2004, p.78

### 3.4. The Internet

The internet is central to all current discussion of electronic commerce, which, in the current state of technology and for the foreseeable future, is the paramount instrument of the new forms of distance transaction.

States, governments, commercial establishments and consumers all over the world are connected by the internet and today any establishment, regardless of size, has the possibility of succeeding as a global one simply by posting a website.<sup>316</sup> This network, consisting of millions of computers connected by telephone lines, affords access to humanity in the fields of marketing, communication and exchange.

It took only four years for the internet to reach its first fifty million users, a figure that took, for comparison, seventy-four years for the telephone and thirteen for television.<sup>317</sup> Three principal factors have affected the growth of the internet: a rapid decrease in the cost of IT equipment (both hardware and software); ease of use (in contrast to the early days of individual computer programming) especially after Microsoft Corporation designed its Windows program; and speed of communication.<sup>318</sup>

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<sup>316</sup> Catherine L. Mann & Sue E. Eckert, *Global Electronic Commerce, A policy Primer*, Washington DC, Institute for International Economics, 2000, p.9

<sup>317</sup> Preston G, *How the Internet Works*, USA, Que Pub, 8th edition 2006, p.117

<sup>318</sup> Jean Camp, *Trust and Risk in Internet Commerce*, Cambridge, The MIT Press, 2001, p.4



**(a) Definition of the Internet**

The term internet is an abbreviation of two words, the first implying its internationality and connectedness, the second its network.<sup>319</sup> A working definition is "a huge network of computers connected with each other by communication lines all over the world".<sup>320</sup> The internet is a group of networks connected by electronic communication systems used to transfer data such as Transmission Control Protocol (TCP) and Internet Protocol (IP). These are data transformation systems. Any person who has a PC supplied with a modem, internet access and a telephone line, can easily use the internet.<sup>321</sup>

**(b) Growth of the Internet Network**

The nucleus of the internet was born in the late 1960s, more especially in 1969.<sup>322</sup> This was when US Department of Defence (the Pentagon) asked computer experts to find the best way to make contacts among an indefinite number of computers without depending on the control of one central computer.<sup>323</sup> The reasoning behind this was that a centralised network presented

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<sup>319</sup> Jeanne M. Follman, *Getting the Web: Understanding the Nature and Meaning of the Internet*, Chicago, Duomo Press, 2001, p.25

<sup>320</sup> Roger Leroy Miller & Graylord A. Jemtz, *Law For Electronic Commerce*, Minnesota, West Legal Studies/Thomson Learning, 2001, p.149

<sup>321</sup> The word Modem is an abbreviation of Modulator Demodulator, which means a machine that enables data to be sent and received between the computer and media by virtue of telephone wires.

<sup>322</sup> Clive Gringeras, *The laws of the internet*, London, Butterworth press, 1997, p.2

<sup>323</sup> Chris Reed & John Angel, *Computer Law: The Law and Regulation of Information Technology*, Oxford, Oxford University Press, 6<sup>th</sup> ed, 2007

an easy target for sudden nuclear attack, rendering it vulnerable to complete destruction. Therefore, the Pentagon looked for a new technology of communication, and was prepared to finance the establishment of a network.<sup>324</sup> Its specific objective was to achieve the strategic target of being able to relay firing instructions to missiles: even if parts of the defence network were destroyed, others would remain intact. The US Defence Department took responsibility for carrying out this project, called ARPANET (Advanced Research Project Agency Network), also known as the Backbone Network project.<sup>325</sup> Use was restricted to the Department itself.<sup>326</sup> ARPANET first came on-stream in 1972, consisting then of just forty networked computers.<sup>327</sup> The turning-point for the wider project, however, came in 1980 when the National Science Foundation (NSF) requested it for the academic community to make available all the information on its database.<sup>328</sup> Afterwards, the ARPANET

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<sup>324</sup> *ibid*

<sup>325</sup> Warick Ford & Michael S. Baum, *Secure Electronic Commerce ,Building the Infrastructure for Digital Signature and Encryption* ,USA, Prentice Hall,p.107

<sup>326</sup> *Ibid*, p110

<sup>327</sup> The Act of International Telecommunications Union ( ITU) defined Telecommunications as “ the transmission ,broadcasting, and sending signals, writings, videotexts, and voices; and communicating by using any form be it wired, wireless, visual, or by any electromagnetic systems”. This definition is referred to in Abbas al- Abudi, *Contracted via electronic communication and authoritative in the Evidence*, Jordan, Dar al-Thaqafa Li al-Nashr Wa al-Tawzi‘ ,1997, p.18

<sup>328</sup> J. Dianne Brinson ,“*Analyzing E-Commerce &Internet Law*”, Prentice Hall PTR, 2001, p93

became known as the NSFNET,<sup>329</sup> though nowadays we are more likely to hear this project referred to as the Information Super Highway.<sup>330</sup>

The internet quickly grew to include over 2500 networks with 40 million users worldwide. The military network, separated from the central one in 1983,<sup>331</sup> is considered the birthplace of international electronic communications. ARPANET's networks were connected to other communication networks by using identical protocols of communication, the NT or UNIX. By 1986, the internet network had expanded to cover hundreds of universities, institutions and academies. Shortly afterwards, the internet moved into commercial applications, establishing in the process thousands of new networks. In 1990,<sup>332</sup> e-mail service providers started to publish information from international stock markets, as well as data on banking business. Consequently, the internet came to be used in other fields and the number of electronic contacts increased enormously. Thus, after initially being used only by military strategists and groups of scientists and researchers, from the end of the Cold War it became a primary instrument of trade.<sup>333</sup> The

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<sup>329</sup> Ibid.

<sup>330</sup> The Information Super Highway is “neither material nor tangible, it contains data, information communication messages, pictures via satellites”. Ejan Mackway & Daniel Poulin, *The Electronic Super Highway, The Shape of Technology and Law to Come*, Boston, Kluwer Law International, 1995, p.135

<sup>331</sup> Clive Gringras, *The Laws of the Internet*, Butterworth-Heinemann, 1996, p.4

<sup>332</sup> *ibid*

<sup>333</sup> Benjamin Wright, Jane K. Winn, *The Law of Electronic Commerce*, New York, A division of Aspen, Publishers, Inc. Gaithersburg, Third Edition 2000, p.207

concept of "cyber space" or "manufactured space" had come into being and its emergence led to the Electronic Data Interchange system, a key instrument in electronic commerce.<sup>334</sup>

#### **3.4.1. The Internet and e-Commerce**

The emergence of the internet has led to a remarkable growth in fields that could not have prospered without it. Among these is electronic financing, carried out between banking institutions. This has deepened and increased the spread of financial services in banking, insurance, mortgages, and market trading, using digital money and on-line payment.<sup>335</sup>

Two opposite responses have accompanied the spread of the internet; the first is enthusiasm, the second, concern. Enthusiasm is generated by the freedom to make new contacts with people who could not otherwise be readily contacted, and the potential for striking new deals. What most arouses concern, on the other hand, is that access to the internet makes it easier to acquire confidential information. This should be legally preventable under the laws of privacy, but is in practice not easy to deter. Acts of piracy have sprung from the accessibility of personal data, especially in banking details, and even worse manifestations of criminality have used electronic means of information and

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<sup>334</sup> Fred H. Cate, *Privacy in the Information Age*, Washington, DC, Brookings Institution Press, 1997, p119

<sup>335</sup> Donald R. Fraser, *Commercial Banking*, USA, Thomson South-Western; 2nd edition 2000, p.162

exchange to pursue an illegal trade in drugs, weapons and the trading of women and children. Finally, the use of the internet in state surveillance and intelligence-gathering may sometimes have an adverse impact on matters of national security.<sup>336</sup>

The use of the internet in e-Commerce has undergone three stages, each of which is directly connected with stages in the internet's growth.<sup>337</sup> These can be summarised in the following way:

- commercial establishments use the internet for advertising and familiarizing customers with their activities and products;<sup>338</sup>
- as the number of internet users increases, commercial establishments recognize the importance of having their own websites on the internet;
- through the use of the latest programmes and technologies, it becomes easier for the client to look at websites by using simple browsers.<sup>339</sup>

Despite these acknowledged benefits, thieves can hack into the internet to gain access to other people's money.<sup>340</sup> They also use the technical weaknesses of the network to launder money, manipulate bank accounts, forge credit cards, spy on personal data and forge currencies. Whether for malice or gain, some

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<sup>336</sup> David Johnston & Sunny Hanada, *Cyber Law-What you need to know about doing business on line*, Toronto, Stoddart Publishing Co, Second edition 2002, p118

<sup>337</sup> USA International Business Publications, *Global E-Commerce Laws and Regulations*, USA, International Business Publications, 2006, p.56

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Larry Loeb, *Secure Electronic Transactions, Introduction and Technical Reference*, Boston, USA Artech House Publishers, 1998, p.123.

hackers also destroy programmes and data by sending viruses to PCs around the world.<sup>341</sup> Hackers use the codes of information centres, or passwords, or receive electromagnetic signals from a computer when it is turned on.<sup>342</sup> This is a serious problem which has not yet been, and may never be, solved. It could be argued, of course, that it is unrealistic and even a historical error to expect total security: firewalls and anti-theft devices are neither better nor worse than castle walls with locks and keys, or bank vaults with safes – criminals will always find ingenious ways to penetrate them where profit can be made. And despite these disadvantages or failures in security, electronic communication continues to bound inconceivable distances (as currently between the Phoenix explorer on Mars and the Houston Space Centre), breaking down barriers between producer and client - including language barriers – without need of intermediaries. Sitting in front of his PC, a client can move back and forth between countless websites, and search thousands of products, without rising from his desk or chair, and without incurring the high cost of service from specialised importers, middlemen, brokers or couriers.<sup>343</sup>

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<sup>341</sup> Abdalla Ahmed Abdalla, *International Protection of Intellectual Property Rights: In Light of the Expansion of Electronic Commerce*, US, Trafford Publishing, 2006, p.31

<sup>342</sup> Aaron Schwabach, *Internet and the Law: Technology, Society, and Compromises*, Santa Barbara, Calif, ABC-CLIO, 2005, p.156

<sup>343</sup> Chris Reed , John Angel, *Computer Law: The Law and Regulation of Information Technology*, op.cit, p.110

### **3.4.2. The Internet Service**

Many new services have been developed, notably e-mail, the international spider network,<sup>344</sup> the World-Wide Web (WWW or W3), Internet News Groups, File Transfer Protocol- FTP, and communications via the Internet, such as Internet Relay Chat (IRC), video conferencing, and the Telnet.<sup>345</sup> The most important of these are:

#### **(a) The World-Wide Web**

This is considered a major network of the internet, and usually referred to simply as “the Web”. It uses an international language, "Hyper Text Mark Up Language", or ‘bright words’. Programs of Web browsers commonly used on the internet can read this language. It is possible to browse many web pages at the same time in a variety of ways. They can be written or drawn, and also voices or pictures used to convey particular types of information. There are millions of websites with their own addresses in the form of abbreviated letters standing for the address or telephone number of the user.<sup>346</sup>

#### **(b) Electronic Mail**

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<sup>344</sup> Alain Bensoussan, *Internet Aspect Juridiques -2*, Paris, Hermes, 1998, p.21

<sup>345</sup> In spite of the spread of the internet, many are imperfect or still at an early stage of development. They suffer from congestions and information disorder. We also hear about the emergence of a second generation that will exceed the first in terms of speed and/or technological capability, and which may provide a very great and fast flow of information by means of electronic fibres. The result of this would be more services via the internet. Cf. Jonathan D. Hart, *Internet Law: A Field Guide*, Washington, DC, BNA Books; 2006, p.66

<sup>346</sup> Angus J. Kennedy, *The Internet & World Wide Web*, US, Rough Guides, 5<sup>th</sup> Edition, 2000, p.108

This is the use of the network as a mailing box, by which the user can send electronic messages to as many people as are required via the internet.<sup>347</sup> This service is free of charge. Sending or receiving even an extensive message takes only a few seconds. The internet user should have an e-mail programme included in his PC programmes. E-mail is also used in the negotiation and finalising of contracts.<sup>348</sup>

**(c) File Transfer Protocol (FTP)**

FTP can transfer any amount of files or programmes to any company, business establishment or other, to be placed or stored in the other party's memory. In comparison with the process of transferring files and programmes by means of discs or CDs, this method is simpler.<sup>349</sup>

**(d) Electronic Mailing Lists**

These can be used to exchange points of view or discussions between people on specified topics. They are similar to Internet Relay Chat (IRC).<sup>350</sup>

**(e) Telnet**

This is a special programme used to connect computers all over the world. It is characterised by the potential to use the database of other

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<sup>347</sup> Lillian Edwards & Charlotte Waelde, *Law and the Internet, Framework of Electronic Commerce*, Oxford HART Publishing second edition, 2002, p.103

<sup>348</sup> Chris Oxlade, *Internet and E-mail (Communicating Today)*, UK, Heinemann Library, 2002, p.49

<sup>349</sup> Jonathan L. Zittrain, *Internet Law Technological Complements to Copyright*, New York, Foundation Press, 2005, p.55

<sup>350</sup> Steve M. Dorman, "Electronic Mailing Lists", (1999), *Journal of School Health, American School Health Association*, 69 (1), p39(1)



computers. This service is sometimes called "remote login" and is typically employed in commercial transactions. However, the programme is now gradually disappearing because of the large number of internet users who have turned to the Web network for its greater simplicity.<sup>351</sup>

### **3.4.3. Who owns the internet?**

Some people believe that the internet is owned by a state or by an international organization. However, no one specific association actually owns it.<sup>352</sup> Moreover, this network is not governed by a specific organizational, governmental, non-governmental or central administration.<sup>353</sup> To use an analogy, the internet is like a fishing net;<sup>354</sup> and not a spider's web, because it does not have a central starting point. It is the centre of governmental connected computers owned by all nations of the world, being run via hundreds of universities, and large commercial establishments such as IBM, Microsoft, and America Online (AOL). In short, no one controls the internet's activities, despite the fact that there are governments, like China's, which for social and political reasons try to reduce or censor certain types of contact.<sup>355</sup>

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<sup>351</sup> Preston Gralla, *How the Internet Works*, op.cit, p.135

<sup>352</sup> Ibid, p.141

<sup>353</sup> Jon A. Baumgarten & Michael A. Epstein, *Business and Legal Guide to on line –Internet Law*, NJ, Glasser Legal Works, 2000, p.112

<sup>354</sup> ibid

<sup>355</sup> Lillian Edwards & Charlotte Waelde, *Law and the Internet, Framework of Electronic Commerce*, Oxford-Portland Oregon, Hart Publishing, 2000, p.33

As a result, the internet is now considered the pre-eminent international transactional space not owned by any government. On the other hand, a provider of main services, called an Internet Service Provider, or Server, has some authority or responsibility in the sense that it is legally answerable to the laws of the state in which the internet is used.<sup>356</sup>

Various entities can be said to ‘manage’ the internet. In the highest position are a number of organizational bodies responsible for the technology and engineering. They include Web designers, operators, researchers and people concerned with the technical development of the medium. In addition there are corporations entitled to register domains names or numbers (ICANN).<sup>357</sup> ICANN is a non-profit making corporation, which registers the owners of websites on the internet. There is also a Geneva-based international group called the "World Wide Web Consortium,"<sup>358</sup> established for the purpose of developing and amending international treaties in line with the internet’s technological progress. These consortia work together and effectively control the internet.<sup>359</sup>

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<sup>356</sup> Lillian Edwards , *The New Legal Framework for e-Commerce in Europe*, Oxford-Portland Oregon, Hart Publishing, 2005, p.35

<sup>357</sup> ICANN means Internet Corporation for Assigned Name and Numbers.

<sup>358</sup> World Wide Web Consortium- W3C.

<sup>359</sup> Jonathan D. Hart, *Internet Law: A Field Guide*, Washington, D.C, BNA Books, 2006, p.23

### **3.5. Electronic commerce is here to stay**

At present, the scope of e-Commerce is very wide. It covers electronic and commercial transactions via information and communication networks, electronic data interchange (which is considered as the main nerve of e-Commerce), advertising and promotion via websites on the internet, negotiation of deals via electronic media, finalisation of contracts, and electronic settlement of financial liabilities and debts resulting from such contracts.

Despite the fact that e-Commerce is hindered by obstacles such as the lack of an adequate legal or legislative environment, or the continued reliance of some businesses in their dealings on paper-based instruments, e-Commerce still has unique advantages in savings of time and expense because of its facility to process and communicate messages in 'real time' and, typically, without an intermediary. Although its impact on transactions is plain enough, it is impossible to predict how much further e-Commerce will go or what its effects might be. The only certainty is that e-Commerce is here to stay. Without question, its development constitutes a step change in the concept of international trade and it is, therefore, necessary and appropriate here to give further attention to its features, forms and tools.

### **3.5.1. Forms of E-Commerce**

E-commerce, viewed from different perspectives, is practised in six distinct forms:<sup>360</sup>

#### **(a) Business-to-Business (B2B)**

This refers to transactions carried out via information and communication technologies. This is the most common form at present, whether inside or between states, in order to reduce expenses, improve practical and commercial competency, and achieve higher profits.<sup>361</sup>

#### **(b) Business-to-Customer (B2C)**

This form of e-Commerce has spread very widely and is used to buy products and services via the Web, made possible by the emergence of so-called ‘Shopping Malls’ or ‘Virtual Malls’ on the internet. Such malls offer all types of products and services, and are used by businesses to reach new markets.<sup>362</sup>

#### **(c) Business-to-Administration (B2A)**

This form covers all procedures used by business departments and government offices (such as those of the U.S.A. and Canada) which furnish lists, procedures, and application forms so that companies can look at them and

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<sup>360</sup> S J. Berwin, *E-commerce: Information Technology*, London, Tottel Publishing; 4<sup>th</sup> ed, 2007, p.19

<sup>361</sup> Ian Lloyd, *Information Technology Law*, LexisNexis UK; 2004, p.114

<sup>362</sup> Margaret Eldridge, *Security & Privacy For E-Business*, Canada, John Wiley , 2001, p.108

perform all procedures electronically without the need to deal with any governmental office.<sup>363</sup>

**(d) Administration-to-Customer (A2C)**

This form has spread recently in many states. Its applications are, for example, paying taxes (currently practised in Malaysia), and obtaining driving licences (as in Dubai). It is now commonly referred to as e-Government.<sup>364</sup>

**(e) Customer-to-Customer (C2C)**

The main use of this form takes place via the Electronic Bay (e-Bay),<sup>365</sup> in which customers introduce goods for auction, and the person making the highest bid purchases the item. E-Bay plays the role of the intermediary, enabling clients to introduce their goods for sale. This form is indirectly in competition with e-Commerce as practised between business departments and consumers.<sup>366</sup>

**(f) Intra-Organizational e-Commerce (IOC)**

Some American jurists see IOC as a sixth distinct form. This describes the use made by some international operators of the technology of electronic communication, between its branches and departments or sub-branches. For example, a computer might be programmed to monitor a

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<sup>363</sup> Charles Trapper, *Electronic Commerce Strategy*, op. cit., p.153

<sup>364</sup> Ronald J. & Jane K, *Electronic Commerce*, op.cit, p.117

<sup>365</sup> www.eBay.com

<sup>366</sup> Ronald J. & Jane K, *Electronic Commerce*, op.cit, p.120

company's stocks. If they decrease below a given level, their computer will automatically send a message to the central one in the company's main warehouse, via e-mail or an internal network, to send the required quantity of replacement stock. The central computer, on receiving the message, issues an order showing the goods needed, and gives another order at the same time to perform an electronic deduction between the company's branch and the main warehouse to pay the price of the goods dispatched.<sup>367</sup>

### **3.5.2. The tools of electronic commerce**

E-Commerce not only has different forms but various tools as well. Some of these offer products and services, others are concerned with the delivery of goods, and still others deal with post-sale or pre-sale services. The most important are Electronic Funds Transfer (EFT), Interbank Transfers, Smart Cards, Mondex, E-Wallet, Digital Money, and Cyber Cash.<sup>368</sup>

### **3.6. Features and applications of e-Commerce**

Enterprises that do not use e-Commerce cannot keep up with their competitors in the market, and e-Commerce now unfolds a strategy for business transactions.<sup>369</sup> Its pre-eminence in some domains is such that even where a

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<sup>367</sup> Margaret Eldridge, *Security & Privacy For E-Business*, op.cit, p.15

<sup>368</sup> Charles Trapper, *Electronic Commerce Strategy*, op, cit., p.169

<sup>369</sup> Anita Rosen, *The E-Commerce-Question and Answer Book*, New York, American Management Association; 2nd edition , 2002, p.143

customer is free to choose between on-line and non-electronic method, he may pay a premium for preferring the traditional form of purchase. Ticketing with low-cost airlines offers a clear example of the savings available. This may not be the sole motive for preferring e-ticketing, since the customer effectively gains free insurance against losing or forgetting any physical evidence of his proof of purchase.

There are seven distinctive features of e-commerce, enumerated as follows:

**(a) The disappearance of paper-based instruments in e-Commerce**

Paper documents have long played a crucial role in commerce especially in international trade, conveying information and regulations used for both verification and authentication. Paper is cheap and easy to use, but it needs space. Large quantities of paper create high freight costs. Paper in any substantial volume also contains intrinsic problems of presentation and decipherment. It can be very difficult to reach the required information quickly, a factor that makes it unacceptable to the present age.<sup>370</sup>

The function of e-Commerce is to “create the paperless community,” using electronic supporters, and aiming for the abandonment of paper-based instruments whose disadvantages are self-evident. Some of these disadvantages are slow movement, the possibility of delay in customs procedures that may

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<sup>370</sup> Dennis Campbell, *E-Commerce & the Law of Digital Signatures*, USA ,Oxford University Press, 2005, p.91

destroy and damage goods, the need for storage space and the difficulty and expense of handing over instruments (often by an individually-assigned courier). Correspondence and procedures exclusively carried out between parties electronically is the overall and logical objective of e-Commerce. It is necessary to have a sole, recognised legal instrument for all parties to a contract in case of disputes that may later arise between them.<sup>371</sup>

**(b) Difficulty in the determination of the contractors' identities**

E-Commerce enables enterprises to undertake transactions efficiently from any place in the world since information about a company can be made available everywhere. Differences of place and setting often result in insufficient knowledge by contracting parties about each other. This may concern financial status, age, legal competency or some other aspect.<sup>372</sup> E-Commerce offers the possibility of finding out detailed information for the parties concerned to form their assessment. Nevertheless, it would be naive to claim that electronic commerce is uniformly more conducive to contract formation than conventional methods. Fraudulence as well as other forms of

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<sup>371</sup> The connection between e-Commerce and e-instruments is clear. If the bases of this commerce are the interchange of goods and services, the legal requirements shall be achieved such as offer, consent, and a signature linked to his signatory to have legal effect. This contract in e-Commerce is an electronic instrument in which all these conditions are available. Ashraf Al-Deen, 'Legal protection of the electronic document', *a research paper presented to the Conference of The Electronic Banking Exchange between Sharia and Law*, held in Dubai between the 10<sup>th</sup> and 12<sup>th</sup> of May 2003.

<sup>372</sup> J. Dianne Brinson & Benay Dara-Abrams, *Analyzing E-Commerce and Internet Law*, Prentice Hall PTR, 2001, p.44



deleterious behaviour are endemic to transaction involving matters of financial value. Electronic commerce opens new means of criminality as well as offering methods of circumscribing it. To establish and verify identity are natural concerns of long-distance transaction where parties cannot meet face to face. On the other hand, electronic communication facilitates not only the possibility of rapid, distance contracting but access to independent confirmation or disconfirmation of the contracting partner.<sup>373</sup>

**(c) The delivery of products electronically**

The internet makes possible incorporeal delivery of products like software programs, music recordings, videos, books and electronic research, as well as services such as medical and engineering consultations. This presents a challenge to fiscal authorities because of the absence of agreed mechanisms for customs or taxation that apply to digital products.<sup>374</sup> Some traders will opportunistically use this legal vacuum to avoid having to record transactions in their accounting books, and thus evade taxes and duties.

**(d) The absence of direct relations between contracting parties**

Bargaining and negotiation between the contracting parties is a normal preliminary to any contract. Entering into the contract may need one or more

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<sup>373</sup> Ibid.

<sup>374</sup> Ra'fat Radwan, "Taxes in electronic transactions", a research presented to The Arab Institute of Planning in Kuwait, a workshop on the assessment of tax policies in Arab States, held in Kuwait, 11-12<sup>th</sup> April, 2000, p.7

meetings to agree upon conditions and details. The case of e-Commerce contracts is different because there is no real council between the parties, or rather, the electronic contract's council is virtual and hypothetical. Both time and place, with respect to the parties, are notional. The human agent might be absent altogether and could be substituted by an electronic data message, referred to as the Electronic Agent. For this reason, some argue that e-Commerce might have negative consequences for social relations between individuals, resulting from the absence of intimate, face-to-face contact between the contracting parties.<sup>375</sup>

**(e) The electronic intermediary**

The electronic intermediary linking the contracting parties is the computer, which is connected with the international communication network that transfers expressions of will electronically to parties in a contract, irrespective of distance. The data message reaches the other party at the time of sending unless there has been an error or deterioration in the network, in which case either the data message will not have arrived or it may reach the addressee with errors inside. It might indeed be unreadable. Responsibility for errors rests with the internet service provider.<sup>376</sup>

**(f) Speed in carrying out business**

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<sup>375</sup> Kamath Nandan, *Law Relating to Computers Internet and E-commerce: A Guide to Cyber laws and the Information Technology*, Universal Law Publishing Co Ltd; 2007, p. 192

<sup>376</sup> Ibid, p199.

E-Commerce facilitates the conduct of business between parties very rapidly because the stages of any business - from negotiation, through entering into the contract, to on-line payment and the delivery of products or services - can be achieved without the need for parties to meet each other in a specific place. This has not merely reduced cost implications, but indicates huge savings in time and effort.<sup>377</sup>

**(g) A collective-reaction tool between parties**

One party in a transaction can send an e-mail to an indefinite number of recipients at the same time. There is no need to send the same e-mail many times. In this respect, the internet affords an unlimited audience, at a scale unprecedented in any previous collective-reaction tool. The specific internet facility is Carbon Copy (Cc) or accessed mailing lists.<sup>378</sup>

**3.7. Islamic jurisprudence (Fiqh) and electronic commerce**

Because of their recent emergence, it has only been in the last few years that e-Commerce and e-transactions generally have attracted attention and their legality needs to be considered on the basis of the rules and principles of Islamic jurisprudence. The Prudent Legislator (Allah)<sup>379</sup> has provided principles and rules by which to judge any newly-occurring social, economic, political, or

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<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

<sup>379</sup> There is only one Prudent Legislator in Islamic religion, which is Allah (God).

judicial issue facing Muslims. As long as decisions concerning these issues are in harmony with His rules and principles, and do not conflict with Islamic evidence or its explicit teaching, they are deemed permissible. Islamic jurisprudence (*Fiqh*) regards e-Commerce, on the basis of Islamic rules and principles, in the following way:

(i). *Al Aseel Alebaha*<sup>380</sup> (the basic rule of Islam) states that everything is permissible except those things which are forbidden. This quintessential rule is relied on in entering into contracts and carrying out transactions. It is taught that everything on Earth is permissible and should be made use of in different aspects of human life. This includes every aspect of our daily existence such as eating, drinking, dealing with others, or doing anything that is useful to humanity, unless the context dictates otherwise.<sup>381</sup> Ibn Taymyyah has commented that “contracts shall be deemed permissible, and nothing shall be prohibited, unless there was an order by Allah and his Prophet (PBUH). Allah has never prohibited anything useful to Muslims.”<sup>382</sup> He also said: “habits are

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<sup>380</sup> The principle is derived from one of the most important sources of Islamic law, *Al estishab*. It means that the rule of Islamic law will continue to be effective and applicable until the existence of a new rule to amend or abolish it, and that if there is no prohibition of any act or omission, it will be permitted according to the basic and original rule of Islamic law, which states that every act or omission is permitted unless specifically forbidden. A.Khallfa, *Islamic jurisprudence*, Cairo, Al Naser printing house, 6<sup>th</sup>ed, 1954, pp. 100-102

<sup>381</sup> A. Khallfa, *Islamic jurisprudence*, Cairo, Al Naser printing house, 6<sup>th</sup>ed, 1954, p122

<sup>382</sup> Shaikh al-Islam Ahmad ibn Taymyyah is a very famous Muslim scholar, his most famous Fatwa (contains discussion on Islamic jurisprudence and legal opinions), see Fatawa Sheikh al-Islam Ibn Taymyyah by Ahmad ibn Abd al-Halim, Ibn Taymyyah, *ftawa al-nisa lil-Shaykh al-Imam Ahmad ibn Taymyyah*, Dar al-Dayyan lil-Turath 1988, 220/226.

what people are used to doing in their lives that originally are not prohibited because the prohibited action is that which is prohibited by Allah”.<sup>383</sup> This is a basic precept. He goes on: “selling, charity, tenancy, and other issues are habits needed by people in aspects of their life, like eating, drinking and dressing; therefore, Islamic Law *Sharia* is brought about in such well-mannered behaviour by which people trade with each other, and lease anything that *Sharia* has not prohibited”.<sup>384</sup>

Many *Qur'an* and *Hadith* texts attest this, among which, in the words of Allah, “*He* it is who created for you all that is on earth”.<sup>385</sup> In other words, since God is responsible for all creation, nothing that He has created can be inherently wrong or out of place; and since He has put all this life into our hands, it is for us to do the best with it that we can. Also it is said in the *Quran* that *Allah* “has made all things subject, all that is in the heavens and all that is on the Earth.”<sup>386</sup> It follows from this that God enjoins us to use our given faculty of mind, our intelligence; to pursue all that is not proscribed or deemed illegitimate. As a matter of fact, the particle *ma* (‘that’ in English) in both verses quoted above has a general interpretation, while the letter *lam* (‘you’ in English translation) is intended to convey the meaning of utility for

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<sup>383</sup> Ibin Taymyyah, *Al-Qawa'id al-Nwranyyah*, , 2/306.

<sup>384</sup> Absan Khan Nyazee, *Islamic Jurisprudence*, Malaysia, Islamic Book Trust, 2007, p284

<sup>385</sup> The Holy Book: Quran: Al-Baqarah: 1:29.

<sup>386</sup> The Holy Book: Quran :Al-Jathiyah:45:13

(specifically) the people on Earth. Therefore, the final meaning of the two verses is “the permissibility of all things created for human beings, unless the context dictates otherwise.”<sup>387</sup>

According to *Sunnah*, the Prophet Muhammad has said "the most sinful person among the Muslims is the one who asked about something which had not been prohibited, but was prohibited because of his asking."<sup>388</sup> This *Hadith* dictates that permissibility is the rule and proscription the exception. In addition, The Prophet answered, when asked about cooking butter, cheese and fur, “admissibility (*Halal*) is what Allah has not prohibited in His book, while, forbiddance is what Allah forbade in His book.”<sup>389</sup> Thus, the Prophet answered with a general rule in a way that has application to any new issues arising in human experience.

Applying this rule to e-Commerce, there are now new types of trading permissible since no objection exists that would render it forbidden.

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<sup>387</sup> Faruq Abu Dunya *Istihab al-Hal Wa Atharuhu Fi al-Fiqh al-Ilami*, Cairo, Dar al-Nahda al-Arabya , 1990,p.135

<sup>388</sup> Sahih Bukhari, Book: *Holding Fast to the Qur'an and Sunnah: 6859*.Allah says in the Holy *Quran* “Ask not about things which, if made plain to you, may cause you trouble.” Examined also in Sahih Muslim, Book: *Do not ask about unnecessary matters: 2358*.

<sup>389</sup> Examined by *Al-Tarmidhi, Sunan al-Tirmidhi, Book: issues under waering fur:1726*. Al-Tirmidhi said that an unfamiliar *Hadith* which is untraceable. It was examined by al-Hakim, and corrected by al-Mustadrak in *al-Ati'imah :7197*, Ibin Maja unber, book on eating butter and cooking butter :3367. Also, Faruki Kemal A, *Islamic Jurisprudence*, New Delhi, Purana Books, p311

(ii). The concept of *al msalh Almorsalah*.<sup>390</sup> Before examining this, it is necessary to explain the types of benefit or usefulness as viewed by the ‘Legislator’ (collective legislature).

(a) ‘Considered beneficial’ (*al-Maslaha al-Mu‘tabarah*). This is what is approved by the Legislator either by way of text and consensus or placement of the judgment on the basis of a suitable and considered description. This type of benefit encompasses anything that brings about the public good, for the nation or individual, as viewed by the Legislator. Examples of this type are religious obligations, congregational prayers, and the Friday prayer (*al-Jum‘a r*) prayer.

(b) ‘Considered harmful’ (*al-Maslaha al-Mulghah*). This is the type of activity or behaviour considered by the Legislator to be unhelpful to human life. Examples are heresy, and additions to religion that claim that such ideas or practices deepen the principle of obedience and lead to submission. This type is denounced by the Legislator, who directs the faithful to pray and worship as commanded in *Sharia*.<sup>391</sup>

(iii). *Almsalh Almorsalah* (mutual wellbeing), denotes the issuing of laws to satisfy the needs and interests of the people which are permitted, provided

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<sup>390</sup> *Almsalh Almorsalah* is one of the sources of Islamic law which would permit the issue of laws to satisfy the needs and interests of the people provided they did not contradict the provisions of the Quran, *Sunnah*, or other sources of Islamic law. See Al emam Mohammed abou Zahrah, *Asul Al Fakh*, , Beirut, Dar El kifr el Arabi, 1999 p. 219

<sup>391</sup> F Nur Al-Din Al-Khadami, *al-Maslaha al-Mursalah Haqiqatha Wa Dawabitha*, Damascus: University press, 1986, p. 25-30

they do not contradict the provisions of the *Quran*, *Sunnah*, or other sources of Islamic law. Scholars of jurisprudence provide many examples of this type, for example, of any absolute interest not condemned by the Legislator but allowed for the public good. Anything conveying benefit to humanity, of which nothing has been mentioned to prohibit or forbid it, is regarded as an absolute interest.

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Scholars of jurisprudence, who have agreed on considering absolute interest as an evidence of legitimate legislative resource, are also able to pass judgment on the observation of established standards.<sup>393</sup> They have established legal principles on the basis of the evidence interpreted with a view to the accomplishment of beneficial interests and the prevention of corruption, risks and harms. The evidence lies in what God says: “Allah intends for you ease, and He does not want to make things difficult for you,”<sup>394</sup> and “He has not laid upon you in religion any hardship”.<sup>395</sup> The use of absolute interest is in line with people’s dealing and affairs in life. However, the use of absolute interest is subject to the conditions that it must not:

- have any effect on worshipping the Exalted Allah;
- ignore or stand in sharp contrast with the texts;

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<sup>392</sup> Kemal A. Faruki, *Islamic jurisprudence*, Pakistan Pub. House, 1962, Original from the University of Michigan Digitized, 2006, p 211

<sup>393</sup> *Ibid*, p.272

<sup>394</sup> The Holy Book: *Quran:Al-Baqarah:1:185*.

<sup>395</sup> The Holy Book: *Quran:Al-Hajj:22:78*.



- conflict with an established principle;
- break with the intentions of *Sharia*;
- ignore any interest at the expense of a more important one;
- be confined to the hereafter.<sup>396</sup>

If business transaction, including e-Commerce, operates within these rules, there is no inconsistency or incompatibility with the existence that *Allah* has created for mankind. New technologies are all to the good if they shorten the distances we must run, thus conserving our time for more important matters such as assisting other people. The interchange of electronic trade can generate wealth and a greater well-being for all humanity.

### **3.8 The Status of Saudi Trade Laws**

After noting the flexibility of fundamental Islamic law with respect to electronic commerce, it is necessary to examine the Saudi legal system and to see how current legal practice can accommodate these new developments. The present status of the system provides very limited legal and civil allowance for e-Commerce. In addition to requiring a new system, some amendments to legal texts are needed to complete the legal matrix of e-commerce. This is to avoid

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<sup>396</sup> Mohammad Al-Buti, *Dawabit al-Maslaha Fi al-Sharia al-Islamyyah*, Beirut, Muasasat Aresalah, 1980, p132

any conflict in procedures or systems, and to produce a positive and favourable situation.

**(a) Commercial Laws**

The Law of Trade Names issued in accordance with Royal Decree No. M/15 on 12/8/1420 H<sup>397</sup> and The Law of Trademarks issued in accordance with Royal Decree No. M/21 on 28/5/1423 H.<sup>398</sup> The desired status for both laws in the future necessitates their amendment by the Legislator to include: registration and protection of names and domains of websites, and trademarks on the internet. The above laws must include what governs the conditions and process of the registration, the provisions and the property of the website owner of the trade-name. In addition, no-one should be entitled to register or use a trade-name other than the owner. Such laws should also include established penalties in case of violations, as well as specifying the relationship between website names on the internet and the registered trade marks, in terms of seniority of registration. It must address the question of legal precedence in registering a website address. Should this be the first to register on the internet, or the owner of the registered trade mark? The issue of property and ownership of the trade-mark on the internet necessitates direct intervention by the Legislator to clarify the situation, because this is one of the issues that

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<sup>397</sup> Royal Decree No. M/15 on 12/8/1420

<sup>398</sup> Royal Decree No. M/21 on 28/5/1423 H

frequently gives rise to dispute. The object in relation to both trade-names and trade-marks should be to protect them in cyber-space. It seems a matter of common equity that the rights of the first person or corporate entity in possession of a trade-mark be upheld against one that attempts to register an existing trade-mark in their own name as a website address.<sup>399</sup>

The Law of Commercial Data was issued in accordance with Royal Decree No. M/15<sup>400</sup> on consumers and purchasers for the purpose of assuring more security and confidence in the product via the reading of data written on the product. Providing the consumer with such data via electronic means is advantageous because of the nature and privacy of electronic trading; and because there is no actual inspection at the time of the contract being made. Yet, inspection depends on the description and data given on the product. This necessitates the amendment of The Law of Commercial Data to achieve the following: to oblige the seller to provide all the necessary data about the offered goods on the internet; and to organise the necessary commercial data for the products offered to comply with the nature of distance electronic trading.

The Combating Commercial Fraud Law was issued in accordance with Royal Decree No. M/11 on 29/5/1404H,<sup>401</sup> with its executive regulations in

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<sup>399</sup> Rami 'Olwan "Disputes over trademarks and domain names", *Magazine of Law and Sharia*, 22-11/1425, 2005.

<sup>400</sup> Royal Decree No. M/15

<sup>401</sup> Royal Decree No. M/11 on 29/5/1404H

accordance with Ministerial Resolution No 1/3/1327 on 1/6/1405.<sup>402</sup> As to required status in the future, it is recognized that fraud via electronic means is a common phenomenon. As a result of the digital economy, the consumer is subject to the manipulation of his interests, and by attempts to deceive through the use of sophisticated technology. There are those who undertake fraud by ascribing non-existing features to products or services, and others whose deception takes the form of ignoring or failing to acknowledge deficiencies. Practices that tend to weaken the consumer's confidence in the information he receives, weaken e-Commerce. Yet the fight against fraud is only likely to succeed through systematic intervention, and by constantly developing a sophisticated armoury of technical counter-measures.

#### **(b) Judiciary Systems**

The Law of Procedure before *Sharia* Court issued in accordance with Royal Decree No M/21 on 20/05/1421 H<sup>403</sup> deals with evidence in specific. This law enshrines the principle of freedom of evidence, gives judges the authority to identify errors and shortcomings in a lawsuit, as well as to examine witnesses and petitioners and other types of evidence, to inform their judgments. However, Article 38 distinguishes between two kinds of written evidence

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<sup>402</sup> Ministerial Resolution No 1/3/1327

<sup>403</sup> Royal Decree No M/21

(i) “An Official Paper in which a public officer, or person assigned to public service, records what he has done or what he has received from those concerned in conformity with legal conditions and within his authority and jurisdiction.

(ii) An Ordinary Paper is a paper signed, stamped, or thumb-printed by the person issuing it.”<sup>404</sup>

As to required status in the future, the Saudi Legislator specifies one condition, which is for writing to be considered as complete evidence it shall carry the signature, determined as signature, fingerprint, or seal of the person responsible. This definition of signature indicates that an electronic signature, which does not take the form of a physical signature, fingerprint, or seal, cannot be definitively linked to the person who issues the signature and is therefore not valid. (This issue will be discussed at more length in Chapter 6). An amendment to this Article is necessary by either admitting the addition of the electronic signature as one recognized type, or cancelling the current definition of signatures.<sup>405</sup>

**(d) Criminal Laws**

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<sup>404</sup> Royal Decree No M/21

<sup>405</sup> Salvatore Mancuso, “Consumer Protection in E-commerce Transactions: a First Comparison between European Law and Islamic”, (2007), *Journal of International Commercial Law and Technology*, .2 (1), also available at <http://www.jiclt.com/index.php/JICLT/article/viewFile/27/14,13-02-2007>

Law of Criminal Procedure issued in accordance with Royal Decree No.M/39 dated on 28/7/1422 H<sup>406</sup>. As to required status in the future, internet crime differs from traditional crime in terms of its nature, tools, number or types of people involved and motivation. In fact, the internet has produced new concepts in crime, and new forms and means for criminals to exploit, such as intangible data and cyber cash.<sup>407</sup> These facts necessitate amendment to the Law of Criminal Procedure which comprehends only the conventional scenarios of crime in terms of control, follow-up, investigation, trial and execution of sentence. Such amendment must address the distinctive nature and actuality of crime in an electronic form. Alteration in procedures to be followed involves methods of collecting evidence, investigation, inspection, and criminal evidence, as well as procedures of inspection, trials, and penalties. Amendments should contribute to strengthening and determining the efficiency of criminal and electronic responsibility, thus establishing protection and security, as well as confidence in the system. Without laws to which the perpetrator of crime may be held accountable, he is very unlikely to be deterred from continuing with his activities.<sup>408</sup>

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<sup>406</sup> Royal Decree No.M/39

<sup>407</sup> Roderic G. Broadhurst, Peter N. Grabosky, *Cyber-crime: The Challenge in Asia*, Hong Kong University Press 2005, p.27

<sup>408</sup> Jamil al-Saghir, *Internet and Criminal Law*, Jordan; dar aldhia, 2002, p7, Muhammad Subhi Najin asks, “ *Are we really in need of a procedure code provide for the support and protection against internet crimes which spread all over the world with wide strides? Or do the traditional texts in the penalty law guarantee this protection.... It is out of the question that the*

The Forgery Law issued in accordance with Royal Decree No.114 dated on 26/11/1380<sup>409</sup> and amended in accordance with Royal Decree No. 53 dated on 5/11/1382.<sup>410</sup> As to required status in the future, the present dispensation of the law does not provide sufficient protection against crimes of forgery. Legal texts were designed to protect against traditional, tangible forms of forgery. Forgers have little risk of punishment for electronic raids, as in the forgery of stored data or signature, since the law does not comprehend intangible features in the field of information. To address this, the Saudi Legislator established a sub-committee, including a number of dedicated, Saudi anti-forgery agencies, for the purpose of examining the issue of forged credit cards and related matters. This sub-committee produced an amendment to the Anti-Forgery Law by adding to the existing codification of electronic forgery, and by determining the tariffs and penalties for these offences. The text of the amended article reads: “any person who imitates or forges bank papers or corporate bonds, whether such banks or corporations are Saudi or foreign; or imitates or forges Saudi postal or revenue stamps and payment orders drawn on the treasury and

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*restricted and restrained texts can not comply with the Scientific and technological development unless they are amended or some texts were added to be in line with the new happenings, changes, and events continuously. This is because The Penalty Law may not guarantee the necessary criminal protection in e-Commerce regardless of how much we enforce and make such laws effective which necessitates that the legislator shall add new texts that guarantee the criminal protection “ . Muhammad Subhi Najin, ”Legal responsibility for the illegal use of credit cards”, Conference of Electronic Banking Transactions between Sharia and Law, 2001, Vol. 3 1159*

<sup>409</sup> Royal Decree No.114

<sup>410</sup> Royal Decree No. 53

treasury receipts; or makes or acquires instruments for forging said bonds and stamps with the intention of using them for himself or by others, shall be subjected to imprisonment for a term of three to ten years and a fine ranging from SR.3,000 to SR 10,000".<sup>411</sup>

### **3.9. Saudi law and the bright future of electronic commerce**

To create a systematic environment for electronic transactions in general and e-Commerce in particular, are very important since a systematic umbrella would establish the necessary degree of confidence, protection and privacy. Electronic transactions can never be successful unless they are governed by a framework that stipulates the rules of contract, evidence, execution, and finalisation. There must be responsibility for application and enforcement, as well as the existence of competent courts and authorities to settle disputes. Therefore, all official bodies in Saudi Arabia should be concerned with this matter and pursue means of establishing and issuing an Electronic Transactions Act.<sup>412</sup>

Apart from the intrinsic importance of codification and the regulation of transactions in e-Commerce, there are some principles which should be taken into consideration before the establishment of any system. To amend or even

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<sup>411</sup> Royal Decree No. 53 ,In accordance with the recommendation of the sub-committee No. 284/1 dated on 7/4/1424 H.

<sup>412</sup> Prepared by Ministry of Telecommunications and Information Technology, which includes 3 articles divided into 9 chapters.



promulgate a system cannot be the first objective. That should be to organise its priorities, in accordance with complementary studies and trials, to produce systematic intervention. As the situation requires the establishment of a system specializing in e-Commerce, it also necessitates amendments to some other systems relating to electronic commerce. Discussion of the subject must therefore take place at a number of levels.

Development in the field of e-Commerce requires a strong and flexible infrastructure. For companies and individuals to be convinced they should use electronic media and e-Commerce, they must feel secure in this type of transaction. That feeling can only be achieved by the availability of systematic rules covering all important aspects. Transition from paper-based instruments to digital or paperless ones, without establishing a suitable environment in line with current best practice, threatens the rights of dealers and undermines the future of electronic commerce. One study suggests that it risks banishing e-Commerce to the margins of the international economy.<sup>413</sup>

Looking at the international scene, we find that The United States ranks foremost in terms of preparation for e-Commerce, and is classified by the

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<sup>413</sup> A study prepared by UNCTAD, quoted from a research , Ahmad Al-Din, “The legal aspects of electronic trade and dispute mechanism” , taken from studies of the *conference of e-banking between Sharia and Law*, 2001, p 1575

Economic Information Unit at an index of 8.73.<sup>414</sup> This ranking is largely explained by the establishment of a congenial, systematic environment and requisite legal cover. These factors alone provide the confidence and reliability in which e-Commerce can thrive, and have greatly contributed to its spread and development, as well as the attraction of new partners. The US government has enacted a series of laws and protocols in this field, which include:

- Computer Crimes and The USA Patriot Act
- Telecommunications Act (endorsed in February 1996)
- Electronic Communications Privacy Act (1996)<sup>415</sup>
- Electronic Signatures in Global and National Commerce Act (e-Sign) (issued June 2000)
- Code of Federal Regulations (Electronic Records and Electronic Signatures) (endorsed 30<sup>th</sup> March, 1997)

One White House publication, called “Framework for Global and Electronic Commerce,”<sup>416</sup> deals with several legal aspects, including the intellectual property rights of e-Commerce. It also emphasized the issue of website

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<sup>414</sup> Cf. Saudi National Plan of Information Technology, [www.itu.int/dms\\_pub/itu-s/md/03/wsispc3/c/S03-WSISPC3-C-0025!!MSW-E.doc](http://www.itu.int/dms_pub/itu-s/md/03/wsispc3/c/S03-WSISPC3-C-0025!!MSW-E.doc), 04-03-2007.

<sup>415</sup> David Bainbridge, *Introduction to Computer Law*, op.cit, p.223

<sup>416</sup> On July 1, 1997, the federal government published a report titled "A Framework for Global Electronic Commerce", available at : <http://www.w3.org/TR/NOTE-framework-970706.html>

addresses, proposing an Electronic Court with the power to execute rules.<sup>417</sup>

The American Arbitration Association has also initiated a very important project to interdict malfeasance and other crime on the internet, in co-ordination with competent authorities specialised in electronic arbitration.<sup>418</sup>

On the part of Arab states, the Dubai Government embraced at an early stage the concept of e-Government, followed by the project of e-Commerce and electronic authentication. Progress in these has flowed from the establishment of a suitable, domestic legal environment. The government of Dubai issued Dubai Technology, Electronic Commerce and Media Free Zone Law No. 1 of 2000 in 30 Articles,<sup>419</sup> followed by Dubai Electronic Transactions and Commerce Law No. 2 of 2002 in 39 Articles.<sup>420</sup> These laws have imbued electronic transaction with features of formality, systemic strength, confidence and reliability. The reactions of business society in Dubai after the promulgation of this legislation have been positive, especially among sectors dealing with e-Commerce. They reflect the need for such laws.<sup>421</sup>

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<sup>417</sup> Peter B. & John T, *Internet and Computer Law*, New York, West Publishing Company, 2000, p.188

<sup>418</sup> <http://vmag.vclip.org>, 12-03-2007.

<sup>419</sup> [http://www.tecom.ae/law/law\\_1.htm](http://www.tecom.ae/law/law_1.htm), 12-03-2007.

<sup>420</sup> Dubai Electronic Transactions and Commerce Law No. 2 of 2002, [www.awiglaw.ae/pdf/etclno\\_2\\_02.doc](http://www.awiglaw.ae/pdf/etclno_2_02.doc)

<sup>421</sup> USA International Business Publications, *United Arab Emirates Internet and E-commerce Investment and Business Guide: Regulations and Opportunities*, USA, Intl Business Pubns; 6<sup>th</sup> ed ,2007, p166

### 3.10 Conclusion

Some specialists in e-Commerce advise that “it is unwise to be in a rush to issue legislation and create new administrative organisations before considering the principles of e-Commerce.”<sup>422</sup> These principles include caution in the issuance of any new system until both the image and vision of such a system becomes clear to everyone in society, and hence legislative intervention is gradual and consensus-based. Interventions should be restricted in scope to avoid negative impact, and this can only be achieved by thorough examination of all pertinent aspects. Not only e-Commerce needs to be considered but also, broader issues concerning the nation’s culture, economy and fiscal regime. Serious, technical work is also required on the formulation of any law if it is to be sufficiently flexible and comprehensive. Not least, it should avoid straying - by adding inappropriate detail or missing essential points – into areas that could in future have the unintended consequence of restricting trade.

A country such as the Kingdom of Saudi Arabia should profit from the experience of other developed countries in the field of electronic commerce because such states have laws based on direct experience and actual practice. Nevertheless, the Legislator needs to review that evidence carefully before adopting any new regulations. The local applicability of new law has always to

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<sup>422</sup> Ahmad Al-Din, “Legal aspects of e-commerce and ways of settling its disputes;” *the Conference of Electronic Banking Transactions*, 2001, vol. 4, pp.1576-1577

be taken into account, and the intelligent application of another country's experience can never be simply a matter of trying to copy it. Incorporating foreign experience can mean imposing values that are alien or inimical, and deleterious to the adoptive society. At the same time, the Legislator should make every effort to bring about compliance with existing agreements and treaties to avoid heterogeneity and incompatibilities in the system worldwide. It seems likely that universal and international features of e-Commerce will, in most aspects, effectively oblige the Legislator to comply with many of the practices agreed to elsewhere.<sup>423</sup> The Legislator has, in effect, to strike a balance between the experience of other countries and his own prevailing conditions before presenting legal texts based on both.

Particular care is required to avoid the interdiction of subsequent technologies. On the understanding that technology is in a constant state of change, restriction of commercial transactions to the current mode of e-Commerce would be unwise. It might also lead to a monopolistic situation favouring an existing provider in a way that would be regressive.<sup>424</sup>

As previously related, Islamic jurisprudence supports any system in conformity with *Sharia*, and that is issued by the guardian or the ruler. Zin al-

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<sup>423</sup> *ibid*

<sup>424</sup> International Bureau Staff Permanent Court of Arbitration, *strengthening Relations with Arab and Islamic Countries Through International Law: E-Commerce, the WTO Dispute Settlement Mechanism, and Foreign Investment*, New York, Kluwer Law International, 2002, p.211

Din Ibin Nujaym has defined as being the policy of *Sharia* "action by the ruler for a specific interest even it was not for something specific".<sup>425</sup> Ibin Aqeel al-Hanbali also called it "any action through which people are in a right state of being and do not become involved in corruption even if this action was not established by the Prophet (PBUH) or was not revealed".<sup>426</sup> Others have taken the view that *Sharia* policy resides in "measures adopted by the ruler for the interest of the people to prevent corruption in their lives."<sup>427</sup> Thus, any action adopted by the Ruler, viewed by him as for the public good, can be legislated under *Sharia* providing that it meets its fundamental stated conditions.<sup>428</sup>

This viewpoint has been consistently argued in the thesis. In the wider framework of scholarly thinking, however, it has not been without hostile criticism. Imam *Ibin al-Qayyim* has called this liberal approach "a slippery ground, or the place where people might be misled in a very hard and difficult situation, where some people have ignored Islamic obligations, abandoned their duties, encouraged corrupt people to practice depravities; made *Sharia* unable to fulfil the interests of worshippers; blocked the right path against them, making them unable to distinguish the right from the wrong; disabling *Sharia*,

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<sup>425</sup> Zin al-Din al-Hanafi , *Policy legitimacy*, Beirut: Aldar Aljama'aih, 2000 p.88

<sup>426</sup> Ibin al-Qayyim, *al-Turu al-Hakimah* .

<sup>427</sup> The definition of Abdullah al-Hudaythi, see , *Policy legitimacy*, by Zin al-Din Ibraheem Ibin Nujaym al-Hanafi, examined by Abdulla Ibin Salih al-Hudaythi, p13, margin ( 1).

<sup>428</sup> Abdulal Atwa, " *introduction to Policy legitimacy* , Beirut: Aldar Aljama'aih, 1999, pp.71-108

while even believing themselves righteous in confronting the rules of *Sharia*".<sup>429</sup> Yet on the basis of what has been discussed here, if the ruler lays down any special provision concerning e-Commerce in line with the rules and principles enshrined in *Sharia* law, it should be considered *Sharia* policy as comprehended in the founding statutes of the Kingdom of Saudi Arabia, for "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book the holy *Quran* and the *Sunnah* of His Prophet, God's prayers and peace be upon him, are its constitution; Arabic is its language, and Riyadh its capital."<sup>430</sup>

Thus, by the close of this chapter, the nature of electronic commerce has become intertwined with an on-going examination of the roots of legal thinking in the KSA. Elaboration of the informational content or building blocks of this thesis necessarily involve periodic returns to this dialectical 'conversation', although the focus at this point narrows from electronic commerce to the requirements of the electronic contract.

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<sup>429</sup> Imam Ibin al-Qayyim, *Ealam almogaaen an rab alalmeen*, Riyadh, Dar Al-Lewaa, 1978, p 204

<sup>430</sup> Article (1) of the Statute of Saudi Arabia adopted in accordance with the Royal Directive No. A/90 dated 27/8/1412 Hijri.

## **Chapter 4: The Nature of the Electronic Contract in International Legal Systems: Similarities and Differences**

### **4.1. Introduction**

The necessity of discovering whether the electronic contract as currently practised constitutes a significant divergence from the conduct of the traditional contract is surely self-evident. Evidence of radical difference would at once impose a serious, psychological obstacle to any society concerned that its essential traditions were in danger of being overturned.

Consent in a contract is constituted by a concordance of offer and acceptance as a means to express the volition of the contracting parties. It must be conveyed in a serious and not a careless expression. For a contract to be legally effective, whether electronic or not, it must contain an expression of the will of both parties. However, where it is clearly implied, the law is not exacting as to the expression of volition, that is to say, of external volition. For consent to be satisfied in a contract, it is sufficient that the implication of will on the part of the contractor is made in a recognised form. This may be by either tangible or incorporeal proofs, including speech, writing, signs or any other form that is permissible within a national code of law.<sup>431</sup>

Electronic contracting presents a challenge to existing legal systems because it is based on non-traditional modes of negotiation, and new forms of

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<sup>431</sup> Nimmer, R. T. 'Electronic Contracts: Part I', *Computers and Law*, 1996, 7 (1), p. 36-42



presenting both offer and acceptance. It is concluded without the physical presence of the parties concerned because each is in a different place at the time of negotiation. The parties cannot form a contractor's council in the 'sitting together' (*Majlis*), though they can convene a virtual or hypothetical council.<sup>432</sup>

An electronic offer also differs from a traditional one in that it is carried out via an electronic intermediary, as in the use of the internet. Since, however, this intermediary is entirely passive, or notional, the electronic contract is conducted in an actual state of privacy. Yet privacy raises qualitative problems. The summary nature of electronic business involves, after all, nothing more than a click. Pressing 'enter' on a keyboard or touching 'accept' on a computer screen means that the client has declared his acceptance to the conditions of the contract.<sup>433</sup> A scholar of the *Safini* School claims that contracts made between absent parties are legally problematic since it is easy for doubt and difficulty to arise between them. Ahring says in this respect that "entering into contracts among absent parties encompasses a special danger concerning the one who was given the offer"<sup>434</sup> (i.e. the purchaser). It must be asked, therefore, whether a virtual council provides an adequate substitute for an actual one.

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<sup>432</sup> Abdullah Al-Naser, "*al-'Oqud al-Electronyyah Dirasa Fiqhiya Tatbiqyyah Muqaranah*", a research presented to *e-banking Between Sharia and Law* held in UAE from 10th to 12<sup>th</sup> May, 2003

<sup>433</sup> Lloyd, Ian J, *Information Technology Law*, s London, Butterworth', 2000, 3rd ed ,p.571-591

<sup>434</sup> Osam Abu al-Hassan, *Mujahid, Khususyiyat al-Ta'auqud 'Abra al-Internet*, Cairo, Dar al-Nahda al-Arabyya, 2000, p.39

This chapter will consider the following aspects: the meaning of the electronic contract, the electronic offer, the electronic acceptance, and the general environment of electronic transaction.

#### **4.2. The meaning of the electronic contract.**

Concerned with the protection of the consumer in remote contracts, Article 2 of the EU Commission Directive 1997/7EC, issued 20<sup>th</sup> May 1997, defines a distance contract as “any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or means of distance communication up to and including the moment at which the contract is concluded.”<sup>435</sup> Directive 2000/31/EC Article 9, Treatment of Contracts, requires that Member States “shall ensure that their legal system allows contracts to be concluded by electronic means,”<sup>436</sup> and that they shall not “create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.”<sup>437</sup>

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<sup>435</sup> EU Directive 1997/7/EC, Article 2.

<sup>436</sup> EU Directive 2000/31/EC, Article 9

<sup>437</sup> Ibid.

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 techniques until the closing of the actual contract.”<sup>438</sup>

Whereas electronic contract is carried out via remote communication media, this directive also defines it as “any means which without the physical and simultaneous presence of the supplier and consumer may be used for closing a contract between parties.”<sup>439</sup>

Another variant is (according to American jurists): “a contract that includes the interchange of data message between the seller and purchaser in the form of a previously prepared list and electronic processing leading to contractual obligations,”<sup>440</sup> and “an agreement in which both offer and acceptance cross each other by an international communication network via an audiovisual medium as a result of interaction between the offerer (offering party) and acceptor”.<sup>441</sup>

These definitions may seem incomplete in failing to specify the point at which the offer and acceptance are made, that is to say when legal effect obtains and when a contractual obligation is made. Whereas an electronic contract is mostly carried out internationally via the internet, some

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<sup>438</sup> Directive 97/7/EC of 20<sup>th</sup> May, 1997.

<sup>439</sup> *ibid*

<sup>440</sup><sup>440</sup> Michael S. Baum & Henry H. Perrit, *Electronic Contracting Publishing, and Edi Law*, New York, Wiley Law Publications, 1991, p.6

<sup>441</sup> *ibid*

commentators have also defined an international electronic contract as “the crossing point of offers of goods or services with acceptance of individuals in other countries via various communication media one of which is the internet with a view to concluding the contract”.<sup>442</sup> Nevertheless, there is an intrinsic difficulty with striving to make definitions too inflexible, for in this field provision needs to be made for expanding possibilities. Too closed a definition produces the effect of limiting legislation to a point in time that might prove short-lived. For example, specification of “an international communication network via an audiovisual medium” (in the U.S. jurisprudents’ version) may quite rapidly become definitionally inadequate to describe the technology of, say, a 3-D ‘virtual reality’ transmission.

In the light of the above, however, we might define the electronic contract currently as a contract where both offer and acceptance cross with each other via an international communication network by the use of electronic data interchange (EDI) with a view to establishing contractual obligations.

It is axiomatic that the offer must receive acceptance from the offeree by the same channel of communication to enter into a specific undertaking. In addition to offer and acceptance, the electronic contracting process is accompanied by a number of ancillary or proposed transactions involving the

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<sup>442</sup> Jane K. Winn & Benjamin Wright, *The Law of Electronic Commerce*, New York, Aspen Law & Business Publishers; 4<sup>th</sup> ed, 2000, p 102

advertisement of goods and services, electronic orders of purchase, electronic bills, and on-line payment orders. Within the domain of the electronic contract, there are correspondences, communications, and interchange of electronic data between businesses. This does not, of course, include internal communications within the same business since these only represent an interchange of data.<sup>443</sup>

### **4.3. The offer**

In all contracts, the offer is the first step to entering into a contract, and the first to be manifested. Expression of the intention to proceed must be definite, summary and decisive, indicating a clear desire to conclude the contract. It must also include the essential conditions of the contract. This raises the question of the necessity to distinguish between an offer and an invitation to negotiate. If a person does not intend to conclude the contract, the expression of his will is invalid.<sup>444</sup>

Another issue is the sending of goods neither ordered nor contracted for. This may occur as when, for example, a client sends a tradesman an e-mail enquiring about a product, only to find, to his surprise, that the tradesman's reply takes the form of despatching the goods to him.

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<sup>443</sup> Nimmer, R. T. 'Electronic Contracts: Part II', (1996), *Computers and Law*, 7 (2), pp. 37-40.

<sup>444</sup> Glatt, C. 'Comparative Issues In the Formation of Electronic Contracts', (1998), *International Journal of Law and Information Technology*, 6 (1), pp.34-68.

An offer is defined as “a final, decisive and evident expression showing the will from whom it was expressed by to enter into a contract under specific conditions.”<sup>445</sup> It is axiomatic that this expression is not valid unless joined to an acceptance that describes all the components of the contract. A contract is invalidated or suspended by the unavailability of the product or by an alteration to the price. In most legislation and by international convention there are no established conditions for the specific framework of an offer.<sup>446</sup>

The UN Convention on the international sale of goods (Vienna Convention 1980, Article 14.1) stipulates the following criteria to determine offer: “a proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”<sup>447</sup>

#### **4.3.1. Nature of the electronic offer**

UNCITRAL Model Law 1996, Article 11, Formation and Validity of Contracts, states: “in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by

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<sup>445</sup> Alan Taylor and Linda Mulcahy, *Contract Law in Perspective*, London, Routledge Cavendish; 4<sup>th</sup>, 2004, p.82

<sup>446</sup> *ibid*, p.84

<sup>447</sup> The UN Convention on the international sale of goods (Vienna Convention 1980, Article 14.1)

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.”<sup>448</sup> Further to this, UNCITRAL Convention 2005, Article 9, Form Requirements, stipulates that “nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.”<sup>449</sup>

These definitions provide for any means to be employed in distance contract. They show the base characteristics of an electronic offer. Article 9 of the Convention is not intended to supersede the definition of the Model Law, but by restricting itself to saying the very minimum on this point of law, it leaves the door open as wide as possible to be both non-restrictive and non-prescriptive.

Conveying an offer electronically via a communications network does not change the nature of it. The addition of the term “electronic” to the description of an offer does not affect any intended or implied meaning or alter any traditional obligation in the laws of contract. The only way that it differs from a conventional form is in the means used to express the will of a contracting party. The offeror’s will is directed towards bringing the contract to a successful conclusion provided there is an acceptance. The offeree reserves the

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<sup>448</sup> UNCITRAL Model Law 1996, Article 11

<sup>449</sup> UNCITRAL Convention 2005, Article 9

right to declare his unwillingness to commit himself to the offer. The framework is, therefore, only an invitation to enter into a contract.<sup>450</sup>

An electronic offer may become void for a number of specific reasons: (i), if the offer was conditional and this condition was not implemented; (ii), at the expiry of the determined duration without any acceptance being made; (iii), at the refusal of the offeree, either directly, as via an e-mail, or as a refusal that can be inferred by that person voluntarily shutting down his PC or going to another website.<sup>451</sup> The assumption that electronic offers can only be conveyed by a single method is incorrect. There are now other modes and locations such as e-mail and chat-rooms, as well as internet websites. Thus, it is important to look into all means of electronic expression.

An electronic offer might be specifically targeted towards an individual, which is usually the case with e-mail or chat-room software, or it may be sent to an unlimited number of unknown people as normally happens via websites. The offeree, himself, is in this context unimportant because unknown in any individual sense to the offeror. The offeror must know certain details, to assure

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<sup>450</sup> David Bainbridge, *Introduction to Computer Law*, London, Longman, 5<sup>th</sup> ed, 2004, p.308

<sup>451</sup> Lilian Edwards, Charlotte Waelde, *Law and the Internet: A Framework for Electronic Commerce*, op.cit., p 122



himself that the offeree has legal and financial capacity, but the transaction is effectively impersonal.<sup>452</sup>

Some commentators also make a distinction between an offer issued via commercial websites and one issued from virtual shops. Their contention is that access to a commercial website is open to the public, whereas access to a virtual one requires a subscription by the client and a password, and therefore such shops are not open to everyone. Rules and regulations for the promotion of products and services in virtual shops are also required. At present, accuracy and reliability in advertising can only be relied on in commercial websites; virtual shops should comply with the same rules.<sup>453</sup>

#### **4.3.2. Validity of the electronic offer**

In any form of contract an offer has in itself no meaning or legal effect without contact with an offeree. Although traditional and electronic offers are effectively identical, process dictates that an electronic offer has no effect until the offeror is informed of the acceptance of his offer. Up to that point, the electronic offeror has the right to withdraw his offer from the website providing that he declares his intention to withdraw the offer, thus legally ending the effect of the offer. An offer without a specified time-limit can be withdrawn by

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<sup>452</sup> Chris Reed, *Internet Law: Text and Materials*, Cambridge: Cambridge University Press; 2nd, 2004, p83.

<sup>453</sup> *ibid*, p.88

e-mail at any time. However, where an offeror specifies a time-limit, he is bound to keep his offer open for the time specified. Equally, at the expiry of this limit, the offer is automatically cancelled.<sup>454</sup>

In accordance with general rules and principles, an offer is never obligatory unless accompanied by an explicit or implied time-limit, for without such a limit an offer is open to abuse or misunderstanding.<sup>455</sup> This protects both parties. It also assures the settlement of electronic transactions and provides for confidence in deals, by committing the offeror to a meaningful and serious offer within an acceptable time-frame. Thus, the offeree receives the protection of the offeror's genuine commitment to creating a transaction, which assists him in the process of deciding whether to accept or refuse and how he should conduct his side of the affair.

Concerning the legal obligation of the offer, the obligation results from the external volition of the offeror.<sup>456</sup> It is also axiomatic that the offer is only binding on the offeror at the point that the offer is made. Any change on the part of the offeror in the terms and conditions of the offer implies a violation of trust and may lead to compensation to the offeree. Hence it may be in the

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<sup>454</sup> A. M. Balloon, "From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer protection in Internet Transactions", (2001), *Emory Law Journal*, Vol. 50, pp. 905-937.

<sup>455</sup> R. T. Nimmer, "Electronic Contracts: Part III", (1996), *Computers and Law*", 7 (3), p. 31-36.

<sup>456</sup> Sulayman Murqus, *Theory of contract: concept of offer and acceptance*, without a publisher, 1987, p.155

offeror's interest to conclude the contract on the original terms rather than risk losses through compensation. Another view is that the legal effects of the offer depend on the limited time determined by the offeror for the offer to be valid, and thus the offeror's expressed volition to keep the offer open is an essential factor.<sup>457</sup>

#### **4.3.3. Characteristics of the electronic offer.**

An electronic offer is subject to the same rules as a traditional one, but is characterised by a quite different sense of privacy in that it is carried out, as an international communication, through the passive, notional agency of an information network.

An electronic contract is classified as a remote or distance contract. As far as distance electronic offers are concerned, they must comply with existing principles regarding the protection of the consumer.<sup>458</sup> Such principles impose on the service-provider a number of duties and restrictions. Prior to the conclusion of any distance contract, the consumer shall be provided with the following information: "The identity of the supplier and, in the case of contracts requiring payment in advance, his address; the main characteristics of the goods or services; the price of the goods or services including all taxes; delivery

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<sup>457</sup> N. Stephan & Andrew Simpson, *Online Contract Formation*, USA, Oxford University Press, 2004, p.83

<sup>458</sup> N. Bockanic, William, and P Lynn, Marc, "Electronic contracts - Law and technology", (1995), *Journal of Systems Management*, 46 (4); p. 64

costs, where appropriate; the arrangements for payment, delivery or performance; the existence of a right of withdrawal; the cost of using the means of distance communication, where it is calculated other than at the basic rate; the period for which the offer or the price remains valid; where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently”.<sup>459</sup> These obligations can be found in authoritative, internationally-agreed documents such as the European Directive No.97/7. The characteristics and obligations so described are not different in kind from that which must be performed in a traditional form of contract. They are likely to be, however, more exacting in every point of detail to counteract any hazardous aspect of distance transaction. The positive aspect of privacy must also be evaluated obversely in the negative potential of anonymity. In general, it can be said that where the two parties in a contract have no possibility of meeting, other than through a notional third party, every ‘i’ must be dotted and every ‘t’ crossed.

#### **4.3.4. Electronic offers carried out via electronic intermediaries**

An electronic offer necessitates the existence of an electronic intermediary which is likely to be the Internet Service Provider (ISP). It is carried out by a network. There is nothing that prevents the offeror being the service-provider

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<sup>459</sup> Christopher T. Poggi, “Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation”, (2000) 41 *Va. J. Int'l L.* 224, p 227.

itself, as can be seen from the many advertisements to be found on the internet and telecom companies.<sup>460</sup> Electronic offers may also be made through television for which, again, there are no paper-based documents. The offeree can read a catalogue whenever he wishes, view advertisements on a website, or the messages sent to him by e-mail. An offer through the television, however, is subject to a time-limitation to the offeree's perception of the product or service, since television advertising is characterized by speed and brevity of information as well as by the high cost of production.<sup>461</sup>

#### **4.3.5. An electronic offer as an international phenomenon**

An electronic offer is in principle borderless. However, some electronic offers are confined to a specific geographical area. For example, an offer might be restricted to a Francophone market because of the nature of the service, the language in which it is mediated, its cost, tax implications or acceptable currency of payment.<sup>462</sup> In other kinds of geographic restriction, the roles might be reversed. An offeror wishing to sell alcoholic products into Saudi Arabia is restricted by the putative offeree who is subject to the religious and cultural laws of the state. Another reason for geographic restriction might be political, as for example when the USA embargoes a country like Cuba or

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<sup>460</sup> David Bainbridge, *Introduction to Computer Law*, op cit, p.303

<sup>461</sup> Ibid

<sup>462</sup> A. Brooke Overby, "Will Cyber law Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce", (2000), *Tul. J. Int'l & Comp. L.* 7, 219, at 234.

North Korea. In these cases an offeror is not obliged to extend his offer beyond the areas he chooses to specify.<sup>463</sup>

#### **4.4. The status of the electronic offer**

Questions can arise about the responsibility for any mistake or distortion pertaining to the information in an offer as, for example, where there is ambiguity. If a tradesman lists a special offer in a way that is unclear or imprecise, it may appear to the offeree that the reduction in price includes all the products in his range; thus, the consumer mistakenly believes that the reduction applies to the product he wants, and sends an acceptance to the tradesman on a false premise. In cases where the electronic service-provider is itself the offeror, there will be no problem, for the provider is responsible for any mistake or distortion in the advertising of the product. However, it may be problematic for the offeree if the offeror is entirely independent of the service-provider.<sup>464</sup> To avoid such difficulties, the European Directive 1997/66 regarding consumer protection prescribes the precise steps to be followed for completing an electronic contract successfully. These include the way that the 'accept' button should be used to signify unambiguously, and non-accidentally, acceptance of the offer (which is by a double-click). It also specifies how to

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<sup>463</sup> Ibid

<sup>464</sup> Michael Chissick and A, Kelman , *E-Commerce\_ a guide to the law of electronic business*, London, Sweet & Maxwell , 2000, p.178

read the conditions of the contract, register the credit-card number used for payment, as well as other steps.<sup>465</sup> It follows that if the acceptor does not choose to undertake these cautionary procedures, the obligations on the part of the offeror may be lessened or eliminated.

Stipulations of the above-mentioned the EU/1997/EC Directive in Articles (10, 11) are given below.

### **Article 10**

Restrictions on the use of certain means of distance communication are:

“(i), use by a supplier of the following means requires the prior consent of the consumer:

- automated calling system without human intervention (automatic calling machine),
- facsimile machine (fax);

(ii), Member States shall ensure that means of distance communication, other than those referred to in paragraph 1, which allow individual communications may be used only where there is no clear objection from the consumer.”<sup>466</sup>

### **Article 11**

On judicial or administrative redress, states that:

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<sup>465</sup> Christopher T. Poggi, ‘Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation’, op cit.

<sup>466</sup>European Directive 97/7/EC , Article 10

“(i), Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers;

(ii), the means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of the Directive are applied:

(a) public bodies or their representatives;

(b) consumer organizations having a legitimate interest in protecting consumers;

(c) professional organizations having a legitimate interest in acting;

(iii), (a) Member States may stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier;

(iii), (b) Member States shall take the measures needed to ensure that suppliers and operators of the means of communication, where they are able to do so, cease practices which do not comply with measures adopted pursuant to this Directive;

(iv), Member States may provide for voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such



bodies for the settlement of disputes to be added to the means which Member States must provide to ensure compliance with the provisions of this Directive.<sup>467</sup>

#### **4.5. Distinction between an electronic invitation to negotiate and an electronic offer.**

Many ways of expressing volition may result in contracting which can be either an invitation to negotiate or an offer. Thus, both an invitation to negotiate and an offer are considered expressions of volition. The importance of the distinction between the offer and the invitation to negotiate is that the latter still lacks precise knowledge of the consideration. An invitation to negotiate merely implies that an approach has been made without determination of its contents or conditions. The two parties have not reached the point of offer, still less of acceptance, and there is therefore no inherent presumption that they will proceed further. An offer, however, indicates that a process of negotiation has been completed. Hence, an offer is the expression of final will on the part of the offeror and should encompass all the components of a contract from his point of view.<sup>468</sup> Thus, in a traditional form of contract, the distinction between the invitation and the offer is clear.

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<sup>467</sup> European Directive 97/7/EC , Article 11

<sup>468</sup> J.R. Murdoch & Will Hughes, *Construction Contracts: Law and Management*, London, Spon Press; 3<sup>rd</sup> ed, 2000, p.110

On the internet, however, it may be difficult to decide whether a given advertisement is meant to be an offer or an invitation to negotiate. This is important because if the offer is followed by an acceptance, a contract can be made, but if it is only considered an invitation to negotiate, no offer to purchase has been made. Some scholars believe that the distinction between an offer and an invitation to negotiate is a functional one. The function of the latter encompasses a declaration by the owner to show the will to enter into a contract with a view to discovering a prospective customer, while the function of an offer is to pave the way to a draft of the project that has the capacity to become a completed contract. If the expression of volition is in one direction only, that is, from one party to the other without reciprocation, it is only an invitation to negotiate and does not have the components of an offer. A response to the invitation will not be considered acceptance of an offer, and no contract can be concluded on this basis.<sup>469</sup>

Others think that the difference lies in the manifestation of external volition. In other words, an offer shall be considered an invitation to negotiate unless this offer is accompanied by acceptance, meaning that the offer expresses an external volition to enter into a contract. For an invitation to be an offer the invitation stage must end and the offer stage begin. According to this,

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<sup>469</sup> J. Niemann, “Cyber contract – a comparative view on the actual time of formation”, (2000), *Communication Law*, 5(2): 48, p 53

an offer indicates a decisive intention to enter into a contract, whereas an invitation to negotiate merely indicates the initial will to negotiate a contract. The judge in a disputed case can infer volition from statements of offer and the circumstances of the negotiation.<sup>470</sup>

Most scholars believe that the stage of negotiation ends when an offer is issued; that is to say, when negotiations end both parties will move to conclude a contract if one party issues an offer to the other and, if it is accompanied by an acceptance, a contract can result. Others, however, make the further distinction between an invitation to negotiate and an invitation to treat. These terms are not taken as synonymous<sup>471</sup> since each contains an independent concept or objective. In an invitation to negotiate, the will of the parties could be said to be moving towards initiating discussion of the conditions of a contract. An invitation to treat, however, applies properly to a non-negotiable contract. It is an open invitation to anyone willing to enter into a contract for the stipulated offer without negotiation. An obvious example of an invitation to treat is therefore an advertisement for fixed-price goods or services, such as a telecommunications company offering subscription to an international call-

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<sup>470</sup> Joseph Savirimuthu, "Online Contract Formation: Taking Technological Infrastructure Seriously", (2005), *University of Ottawa Law & Technology Journal*, 2, p105.

<sup>471</sup> Hussein Hassan, "Contracts in Islamic Law: The Principles of Commutative Justice and Liberality", (2002), *Journal of Islamic Studies*, 13: pp. 257-297

service. This would be considered an invitation to treat precisely because the offer precludes any discussion of its terms and conditions.<sup>472</sup>

English law distinguishes between an offer and an invitation to negotiate by criteria used to determine the formation of their style and the expressions used. Statements may not have legal effect if they fail to show a moral commitment between the parties. However, such statements might constitute an offer provided they contain sufficient detail to imply a seriousness of intent.<sup>473</sup> Under U.S. law, the criterion for distinguishing between offer and invitation to treat is determinateness of purpose. If the offer does not have this feature, it ought not to be considered an offer but an invitation to treat. In cases that do not show whether the offer is final or not, recourse is made to the details mentioned in the offer.<sup>474</sup> This principle can be found in Article 1/204 of the Uniform Commercial Code which states “except as otherwise provided in Articles 3, 4, [and] 5, [and 6], a person gives value for rights if the person acquires them: (1) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; (2) as

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<sup>472</sup> *ibid*

<sup>473</sup> M. Lubitz, “Jurisdiction and Choice of Law for Electronic Contracts: an English Perspective”, (2001), *Computer und Recht International*, pp. 39- 41

<sup>474</sup> Roberto Rosas, “Comparative study of the formation of electronic contract in American law with references to international law”, (2007), *Computer and Telecommunications Law Review*, C.T.L.R. 13(1), pp.4-26 ,

security for, or in total or partial satisfaction of, a pre-existing claim; (3) by accepting delivery under a pre-existing contract for purchase; or (4) in return for any consideration sufficient to support a simple contract.”<sup>475</sup>

On the basis of what has been discussed so far, if all the essential components of the contract are made known, an expression of volition that includes them is considered an offer. Conversely, any expression of will to sell an item via the internet without determining these components (price and item), can never be considered an offer of sale.

#### **4.6. Open electronic offers made via the internet.**

An open offer here means one where the party to which an offer is available is not nominated by the offeror, as for example where a product or service advertised on a website or on the television is open to any person with the capacity to enter into a contract. This is distinguished from a closed or nominated offer in which a specific individual or group is the potential contracting party.<sup>476</sup>

An offer from one person to another shall not be considered an offer unless it is final and decisive. A proposal may or may not be an offer. In itself it merely constitutes an invitation to negotiate. If it is accompanied by the consent

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<sup>475</sup> Uniform Commercial Code: Article 1/204

<sup>476</sup> S. Jones, “Trading on the internet: contracting in cyberspace”, (1997), *Practical Law for Companies*, 8(3): 41, p 43.

of the other party, this proposal would be considered as an acceptance to initiate the negotiation with a view to an offer being made.<sup>477</sup>

A question arises in this context of an individual browsing websites which contain the advertisement of products and services that may be illegal. Can such proposals be considered as offers? In some legal systems they are regarded as advertising only and therefore do not constitute offers. Others view them as invitations to treat or to negotiate. This last applies to English, French, Italian and Belgian law. The German Civil Code (BGB), however, states that courts shall deal with each case on its merits without referring to a fixed body of rules.

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Article (14/2) of the United Nations Convention On Contracts For The International Sale Of Goods, 1980 (CISG) 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.”<sup>479</sup> In other words, an offer must be addressed to a specific person or group of persons. This article also indicates that if the offer is

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<sup>477</sup> J. Harris, “Contractual freedom in the conflict of laws”, (2000), *Oxford Journal of Legal Studies* 20 (2); p 247

<sup>478</sup> Raymond T. Nimmer, "Electronic Contracting: Legal Issues", (1996), *Marshall J. Computer & Info* 14 J, L. 211 at p.212

<sup>479</sup> United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 14/2, available at : <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>

not addressed to a specific person or persons it is considered an invitation to negotiate unless the will of the individual(s) concerned indicates otherwise, in which case a definite intention to make a contract is established. Thus, advertising may be considered an offer if it contains the commitment of the offeror.<sup>480</sup>

It is also held that a proposal is not an offer, but merely an invitation to negotiate, if it does not contain some of the basic components of a contract as, for example, where goods in the shop window of a commercial store fail to show prices. Had prices been specified, they would have constituted an offer. However, an open and unnominated proposal is considered an offer as long as its content are determinate and sufficient to make a contract.<sup>481</sup>

A proposal made to the public as an offer shall include a clear and obvious determination of the product, alongside the price and the basic components for a contract. Otherwise, it will be considered only as an invitation to treat. In other words, the offer shall have a definite and final expression of volition to initiate the contracting process. Therefore, the volition of the offeror shall be

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<sup>480</sup> Muhsin Shafiq , *United Nations Convention On Contracts For The International Sale Of Goods*, a survey of the field of International Commercial Law, Egypt, Dar al-Nahda, 1988, p.91

<sup>481</sup> Oliver Hanse & Susan Dionne , *The New Virtual Money –Law and Practice* , New York, Kluwer Law International Press, 1999, p.103

directed towards entering into a contract if the offer is accompanied by an acceptance. The offer must contain no ambiguity.<sup>482</sup>

It is possible to liken offers via websites, containing price determination and basic conditions, to those of an Automated Vending Machine. The product is displayed and the client makes his commitment to purchase by simply inserting money into a specific location. The process of sale is carried out entirely at the seller's dictation of terms and conditions, and the role of the offeree is just one of acceptance. In these respects, the conduct of the contract is closely analogous to that of a purchase made via the internet.<sup>483</sup>

Where there is a price determination an offer is constituted, and without that determination there is simply an offer to treat. Yet the formulation of the advertisement itself may be considered as the criterion of an offer. The merits of any such case, however, would be for a judge to determine in any dispute over whether the basic components of a contract have been satisfied with respect to the offeror's will to carry out a contract.<sup>484</sup> To avoid this problem of determinateness, the offeror usually adds some reservation or qualification to escape from entering into an enforceable contract such as "until the item is out of stock" or "subject to availability;" or he may reserve his right to change his

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<sup>482</sup> P. Stone. "Internet Consumer Contracts and European Private International Law", (2000) *Information & Communications Technology Law*, 5 (6), p 8.

<sup>483</sup> Ibid.

<sup>484</sup> Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, UK, Routledge Cavendish, 2006, p.164



prices in accordance with fluctuations in the market beyond his control. The offer to which a reservation is attached may, of course, prevent the fulfilment of a contract.<sup>485</sup> This is especially pertinent to electronic offers made via the internet. Are such proposals to be regarded as offers or as invitations to treat?<sup>486</sup>

It is also held that the decisive feature of an offer excludes the possibility of any explicit or implicit reservation, because reservation stands in sharp contrast to an offer. Accordingly, for as long as this kind of ‘offer’ is accompanied by a reservation,<sup>487</sup> it is no more than an invitation to negotiate or a proposal without obligation. Others dispute that such reservations deprive the offer of its features, so long as it is binding on the offeror for a specified period. Accordingly, an offer with restrictions, and establishing the condition of fixed price to avoid negotiation, is a ‘dangling’ offer. This offer cannot come into effect unless the offeror’s stipulated conditions are observed.<sup>488</sup>

Accordingly, an offer of any product or service via internet websites accompanied by a reservation would not deprive the offer of its distinctive feature because any acceptance would lead to a conclusion of the contract

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<sup>485</sup>The condition is defined as “anything that may not be achieved in which, if achieved, there shall be an obligation.”

<sup>486</sup> Reservation means a restriction laid down by the offeror by which he restricts his will in contracting. Reservation also takes one of two forms. It may restrict the decision of contracting itself, like proposing a specific contract with the right to refuse to enter into a contract with a person the offeror does not like, or the decision may restrict the conditions of the contract established by the offeror, like selling a specific product with the right to change it later.

<sup>487</sup> Michael Erdle, Deeth Williams Wall LLP, “On-line Contracts: Electronic Creation of Effective Contracts”, 1997, [http://www.dww.com/?page\\_id=1078](http://www.dww.com/?page_id=1078), 06-06-07

<sup>488</sup> Ibid

unless the product is out of stock, which would relieve the offeror of his obligation. In such cases, priority is given to the first acceptances to reach the offeror, implying that an acceptance received after the product is out of stock is no longer valid.<sup>489</sup>

In the nature of electronic contracts, open and unominated proposals are not offers but only invitations to negotiate. The producer may receive hundreds or thousands of letters expressing a willingness to buy the product without having sufficient quantity; or he may have the products available but at a different price from the one displayed at the time of advertising as a result of having to buy in more supplies to meet an unexpected demand for his product. Therefore, considering a proposal on the internet as an invitation to negotiate enables the offeror to refuse any orders exceeding his capacities. Failing this, fluctuations in price might result in loss on both sides, be it through an offeror's obligation to compensate, or the offeree's purchase of goods at unreasonable prices.<sup>490</sup> The distinctiveness of electronic transaction here is clearly in the scale of possible consumption or up-take of services; in the electronic environment, the offeror has no means of assessing potential demand. This factor has

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<sup>489</sup> R. Brownsword, & Geraint Howells, "When surfers start to shop: internet commerce and contract law", (1996), *legal studies*, 19(3), p298

<sup>490</sup> Christina Hultmark Ramberg, "The E-Commerce Directive and formation of contract in a comparative perspective," (2001), *E.L.Rev.*, 26, 429 at 431.

significant implications for the legal restrictions that the offeror is obliged to place on the offer.

Cases where roles are effectively reversed make the position somewhat clearer. The offeree may become the offeror in terms of negotiation if he contacts him with a proposal to reduce the costs to himself in the terms and conditions of a contract of purchase. It is then for the seller to indicate his willingness to conclude a contract with the purchaser. In this scenario, it is the consumer who assumes effective control, or has the upper hand, in the negotiation of a contract.<sup>491</sup>

#### **4.7. Electronic acceptance**

Acceptance is the second expression of volition in a contract. It must contain a final and decisive statement to enter into a contract without any conditions or restrictions. Since electronic contracts are mostly contracts of consumption, electronic acceptance would not be final and it does not impose an obligation on the part of the consumer. This leads to the issue of the right to withdraw an electronic acceptance.<sup>492</sup>

An acceptance must comply with the offer and conform to it in every detail. However, there are different forms of electronic offer and acceptance, a

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<sup>491</sup> Graham J.H. Smith, *Internet Law and Regulation*, London: Sweet & Maxwell, 4th ed , 2007, p.809

<sup>492</sup> S Pitiyasak, “Electronic Contracts: Contract Law of Thailand, UK and UNICTRAL Compared” , (2003), *CTLR* 9, p.16-30

theme that will be divided here as follows: (1) features and methods of expressing electronic acceptance; (2) the right to withdraw an electronic acceptance, and different forms of electronic offers and acceptance (the 'Battle of Forms').<sup>493</sup>

#### **4.7.1. Features of electronic acceptance**

Acceptance is defined as "the expression of volition on the part of the offeree to inform the offeror that he accepts his offer."<sup>494</sup> In other words, it is an acceptance towards the offeror in conformity with the offer, leading to a conclusion of the contract. Electronic acceptance does not conflict with this definition. The difference lies solely in the fact that it is carried out via electronic media on the internet or other media because it is a distance acceptance. Thus, it is subject to all the rules and regulations governing traditional acceptance, even though its enactment carries with it certain intrinsic complications, both because it is electronic and because of its remote feature.

Acceptance has certain general conditions governing the expression of volition. It must be final and unrestricted; it must also be made when the offer is still effective. Electronic acceptance shall not be restricted to a specific condition or in a hybrid form that is unacceptable to the offeror. If a medium of

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<sup>493</sup> Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

<sup>494</sup> Joseph Savirimuthu, "Online Contract Formation: Taking Technological Infrastructure Seriously", (2005), *University of Ottawa Law & Technology Journal*, 2(2), p 105

invitation to treat is electronic and the medium of reply specified by the offeror are the same, acceptance must concur with the form specified.<sup>495</sup> An offer on an internet website responded to by mail, telephone or fax, and thus employing an incorrect form of acceptance in relation to that specified by the offeror, does not satisfy the requirement to form a contract.<sup>496</sup> An example of legislation providing such conditions is given by the Uniform Commercial Code in Article ( 206/2) which stipulates under Offer and Acceptance in Formation of Contract that “unless otherwise unambiguously indicated by the language or circumstances, (a), an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; (b), an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but the shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer; (c), if the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance; (d), a definite and

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<sup>495</sup> Lilian Edwards & Charlotte Waelde, *Law and the Internet: A Framework for Electronic Commer*, op cit, p.207

<sup>496</sup> Christopher T. Poggi, 'Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation', op cit.

seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.”<sup>497</sup>

According to UNCITRAL, where the offeror does not determine the medium by which offers and acceptance are to be sent, the electronic data message including acceptance should be sent to the information system of the offeror, which is usually his e-mail box.<sup>498</sup>

#### **4.8. Methods of expressing electronic acceptance**

Electronic acceptance can be expressed in different ways some of which can be written, as, for example, in the use of electronic signatures via e-mail, declaring acceptance in a chat-room, or downloading software via the internet.<sup>499</sup>

Other ways of expressing electronic acceptance are a single click on the icon in response to the prompt “I Agree” or “OK”. However, the offeror may specify that acceptance should be conveyed by a double click on the special icon provided for this purpose on the screen. In this case, a single click would not definitively imply an acceptance. The offeror uses this distinction as a way to make sure that the acceptor really wishes to accept the offer and has the

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<sup>497</sup> Uniform Commercial Code in Article ( 206/2)

<sup>498</sup> UNCITRAL , 1/ March/2002 A/cn.9/WG.95.

<sup>499</sup> Allen, T. & Robin Widdison, “Can Computers make contracts?” (2000), *Harvard Journal of law & Security Report*, 9:25.

intention to conclude a contract. Thus, it is designed to eliminate the possibility that a mistake has been made.<sup>500</sup>

The offeror may use some procedures after the issuance of acceptance like asking the offeree questions about his place of residence, or requiring that certain confidential data, like the details of his credit card, are entered in his application on-line. The purpose of this is to assert and give effect to the acceptance; it also gives the acceptor an opportunity to consider carefully his final will in expressing acceptance. Such requests may, however, be regarded by the offeree as excessively intrusive or imprudent to accept. In many countries, these difficulties have given rise to data protection legislation.<sup>501</sup>

Electronic acceptance may be implicit as well as explicit under certain recognised circumstances. It can be regarded as implicit, for example, where the offeree uses on-line payment, and gives the offeror details of his credit card, thus concluding the contract without ever openly declaring his volition. The general proposition that an expression of volition can only be made explicitly, and that the will of a contracting party cannot be inferred, is therefore subject to limitation in the electronic setting.<sup>502</sup> Because of the summary nature of

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<sup>500</sup> Dale Clapperton, and Stephen Coronos, "Unfair terms in "click wrap" and other electronic contracts" ,(2007), *Australian Business Law Review*, 35(3); p. 152

<sup>501</sup> Ibrahim al-Dosuqi , *Legal Aspects of Electronic transactions*, Beirut, Dar al-Fikr al-Arabi, 2001, p 94.

<sup>502</sup> Bainbridge, *Introduction to Computer Law*, UK, Longman; 5<sup>th</sup> ed, 2004, p303.

electronic transactions, the expression should exclude any doubt as to its interpretation.

#### **4.9. The validity of silence in expressing acceptance**

Although an electronic transaction is made in silence between the contracting partners, silence itself cannot be used to signify acceptance. This raises a more general consideration of the interpretation of a party's volition where silence is a feature of a contract. Silence can never be used as a way of expressing volition because a person's will is an active element whereas silence is passive.<sup>503</sup> In addition, silence cannot be an implicit expression of will because implicit expressions can be inferred from the circumstances that surround them. Islamic jurisprudence (*Fiqh*) asserts that "no statement can be attributed to a silent person". Article 18.1 of the Vienna Convention (1980) also endorses this view: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance".<sup>504</sup>

Exceptionally, however, silence might be an expression of will on the basis of a specific legal text, or as the result of an acceptance between the contracting

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<sup>503</sup> Ian Lloyd, *Information Technology Law*, Oxford, Oxford University Press: 4<sup>th</sup> ed, 2004, p 114

<sup>504</sup> United Nations Convention on Contracts for the International Sale of Goods (CISG) Vienna Convention (1980), Article 18.1, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>



parties that in the agreement formed there were sufficient circumstances to indicate acceptance.<sup>505</sup>

Silence can be an explicit acceptance during negotiations where the silence of the offeree denotes acceptance in particular circumstances as, for example, when there is an agreement between the contracting parties that unless the offeror has heard to the contrary within a week, the contract will be binding. This is an area in which traditional conduct may be of limited value in offering a model for electronic contract-formation, which, in its potential to generate new types of transaction, remains fluid, and open to further change. Nevertheless, the ambiguity of silence as a means of electronic acceptance makes it impractical as a normal way to make agreements between contracting parties.<sup>506</sup> Whether or not silence can be considered as an electronic acceptance or refusal depends on circumstances, taking into account the nature of the transaction or the commercial norm,<sup>507</sup> previous dealings between the parties and their explicit agreements. Yet, we have not found in any legislation, whether Arabic or foreign, related to commercial transactions, any text that considers silence as a means of expressing acceptance in a contract.

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<sup>505</sup> J. Harris, "Contractual freedom in the conflict of Laws", (2000), Oxford Journal of Legal Studies 20 (2): p 247.

<sup>506</sup> Brian A. Blum, *Contracts: Examples & Explanations*, New York, Aspen Publishers; 4<sup>th</sup> edition, 2007, p.75

<sup>507</sup> The court of cassation endorsed that "commercial norm and traditions are issues of what realities, approval or interpretation are left to the judge in charge ( objection No. 7868 of the year 63 q, session 26/2/2001) , Abo Elheja Mohammed, *Contracting via Internet*, Egypt, Dar Alalmyeh lansher, 2002, p25.

#### **4.10. The right to withdraw an electronic acceptance and the principle of binding force**

The principles of electronic acceptance are a mirror-image of the principles of electronic offer. However, it is inevitable in the nature of the relationship between the offeror and the offeree that the circumstances in which these actions or decisions take place are different. In the first place, the offeror has sufficient, if not complete, knowledge of his product or service before the offeree may be aware of its existence. Since, therefore, the offeree lags behind the offeror in perception, it follows that he requires longer to come to his decision. There may also be implications to his decision that require him to consult others, such as his company or his civil partner, and this factor too has a time implication.<sup>508</sup> Furthermore, notionally at least, the offeror is already in possession of the goods or services which he wishes to dispose of, whereas the offeree needs time to scrutinise, evaluate and, very possibly, compare them with others in the market-place. All of these factors make it important that the offeree as a consumer is given sufficient time to satisfy himself of the wisdom of making an acceptance, as well as the additional protection of a time-delay made available to him through the existing legislation of the country in which he lives. In many Western countries, such as the UK and the USA, consumer

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<sup>508</sup> Joseph Savirimuthu, "Online Contract Formation: Taking Technological Infrastructure Seriously", *op cit*, p 105

protection rights for the return of goods without fault, and taken as an absolute right, allow two weeks from the time of purchase.<sup>509</sup>

Neither party can withdraw as long as the contract offer is accompanied by acceptance in a legal and agreed form; the contract is concluded and becomes binding. Yet, since the consumer in an electronic contract does not have the ability to examine the products or know more about the features of the service, he has the right to repent. Additionally, the contract may be suspended if the client is placed under pressure to agree to a contract the terms of which he may not have had either the time or specialised knowledge to understand fully. In such instances, his repentance, which is to say his right to withdraw from the contract, is in function of his right to protection from the unreasonable behaviour of the offeror.<sup>510</sup>

When, as a result of exceptional or unpredictable events, the performance of an obligation, without being impossible, becomes excessively onerous as, for example, if it threatens the offeree with exorbitant loss, a judge may according to the circumstances, and after taking into consideration the interests of both

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<sup>509</sup> The theme is a comparatively new one in comparative law. For instance, the English Act endorsed this right in accordance with the Act issued in 1974 The Consumer-Credit Act; The USA endorsed this Act in accordance with the Act issued in 1965, The Quebec Law Consumer Protection Act in 1978.

<sup>510</sup> P. Stone, "Internet Consumer Contracts and European Private International Law", op cit, p7

parties, reduce to reasonable limits the obligation. Agreements that stray from this principle may be void.<sup>511</sup>

#### **4.10.1. The legal nature of the right of withdrawal**

Many jurists have looked at the right of withdrawal as a species of consumer protection as, for example, in selling by testing or tasting a product before sale. It is thought that the right of withdrawal gives the consumer the right to repudiate a contract which he has accepted as the result of being hurried or harrassed, factors that would violate his Autonomy of Will. Others believe that this right is limited to the consumer who can present evidence of being put under undue pressure. On the other hand, it is also thought that the electronic contract, including the right of withdrawal, is in any case effective, but that it inserts the additional protection of the right of withdrawal for the consumer's protection in conformity with the principle that a contract is not binding on one of the parties if that party's interests have been unfairly affected.<sup>512</sup>

#### **4.11. Different forms of electronic offer and acceptance**

As has been said, in order to conclude a contract, the acceptance should be in conformity with the offer. The distinction between basic and secondary

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<sup>511</sup> Debussere, F., "International Jurisdiction over E-consumer Contracts in the European Union", (2002), *Quid Novi Sub Sole?*, IJL&IT 10 (344), p 4.2.2.

<sup>512</sup> Oren, J., "International Jurisdiction over Consumer Contracts in E-Europe", (2003), *ICLQ*, 52.(3), p65.

issues plays an important role in the conclusion of the contract because the essential issues are considered as the components for the contract to be concluded. Therefore, the lack of any of them will not lead to the contract's origination, will fail to create any legal effects, and the parties will find themselves within the framework of an incomplete legal relationship that cannot be considered a legal contract.<sup>513</sup>

According to the Court of Cassation, the contract's essential issues are the pillars and conditions that shall be agreed upon between the contracting parties, otherwise the contract cannot be concluded.<sup>514</sup> The three essential components that should be available for the contract to be concluded are consensus, place and reason. Thus, any offer via the internet from one person to another is not considered an acceptance unless it conforms with these three basic components. If an electronic offer does not include the determination of the contract's nature, the basic conditions and these three pillars, it will be considered as an invitation to negotiate.

The distinction between basic and secondary issues mainly depends on two criteria: one objective and the other subjective. The objective criterion is the necessity for the agreement to contain the three essential components. This is

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<sup>513</sup> S Jones, "Forming Electronic Contracts in the United Kingdom", op cit.

<sup>514</sup> Objection of cassation of the year 49 Qaf, Session 27/2/1980, Rules of Cassation- Civil Section. Richard Price, and Essam Al Tamimi, *United Arab Emirates Court of Cassation Judgements (Arab and Islamic Laws Series, 17)*, US, Brill Academic Publishers, 1998, p142

made explicit in Article 14.1 of the Vienna Convention (1980): “A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price”.<sup>515</sup>

On the other hand, the subjective criterion makes a distinction between basic and secondary issues. It has regard to the mutual will of the contracting parties that can be discovered in the surrounding circumstances. Thus, the presentation of the contract’s basic components without the clarification of detailed issues may be considered an offer even if it does not meet all the conditions of a contract. In some secondary issues, the rules and regulations established by international organizations on contract are resorted to. This applies to both nominated contracts, and, with reference to the general theory of obligations, to unnominated contracts.<sup>516</sup>

The determination of the essential components of the contract varies in accordance with whether the contract is nominated or unnominated. For

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<sup>515</sup> United Nations Convention on Contracts for the International Sale of Goods, Vienna Convention Article (14/1), (CISG), available at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>, 20-04-08.

<sup>516</sup> Christina Hultmark Ramberg, "The E-Commerce Directive and formation of contract in a comparative perspective", (2001) *E.L.Rev.* 26 429 at 431.

nominated contracts, the essential components can be inferred from general rules, legislative regulation of the contract, and the surrounding circumstances.

Concerning un-nominated contracts, the determination of essential components is left to the judge's evaluation, in a dispute, as to whether he believes there was an agreement between the parties. While determining the essential components of a contract, the judge also investigates the unanimous will between the contracting parties to ascertain their interest in the contract. Thus, his determination relies on "letters of intention", the principles of non-obligatory draft laws, and the nature of the transaction, commercial norms, and other forms of indirect evidence.<sup>517</sup>

In reality, the participation of a judge is based on the fact that the contract was already concluded since, if that was not the case,<sup>518</sup> there would be no need for a judge, and the contracting parties would still be in process of negotiation. Consequently, the responsibility for the detailed issues of the contract is left to the parties.<sup>519</sup>

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<sup>517</sup> Yasser al-Sayrafī, *Role of the judiciary in the formation of a contract*, Egypt, Dar al-Nahda, 2000, p 15.

<sup>518</sup> The judge was empowered with this authority as a result of Article (148/2) of Civil Code . In fact jurists did not think that the judge here exercised this power to establish the contract because he does this later based on the conclusion of the contract especially at the stage of determining the legal effects of the contract. Thus, when the judge concludes the contract, he will be concerned with its legal effects not with its establishment

<sup>519</sup> N. Mohammed, 'Principles of Islamic Contract Law', (1988), *Journal of Law and Religion* 6, p115–16.

#### **4.12. The battle of forms in international electronic offers and acceptance**

Since the contract is not conducted via websites only, but can also be conducted via e-mail, there may be a problem of non-conformity between offer and acceptance, in other words a 'battle of forms'. A case might involve a tradesman who sends a message via e-mail that there are additional terms to his offer, with an attachment that he instructs the offeree to read. In reply, the offeree states that these additional terms include points with which he is not happy, and in response to which he would like to suggest his own changes. At this point, the contract is in flux and no conclusion has been reached.<sup>520</sup>

Such issues arise in cases of previously-prepared and established contracts on websites, especially in situations where it is difficult for an offer to be amended. Thus, it is found that many establishments require acceptance in accordance with their own conditions included in the attachments. An establishment may specify a condition which dictates reference to typical standard contracts regarding the terms of the contract. For example, in the case of exporting equipment and machinery, the offering party may specify a condition that this should be performed with reference to the standard contract issued by the United Nations Economic Commission for Europe in 1957. The second party may accept this condition but lay down a further condition that the

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<sup>520</sup> Andrew Simpson , Stephan Kinsella , *Online Contract Formation*, New York, Oceana Publications, 2006, P390



offeror refer to the Council of Mutual Economic Assistance (COMECON), 1968. However, the first party might then demand that the contract is interpreted in accordance with the international rules of INTERCOMS, issued by the International Chamber of Commerce in Paris (1953). And, finally, the second party gives as a further requirement that the International Institute for the Unification of Private Law UNIDROT is referred to in its interpretation of the basic principles of contract law. It is not difficult to see that scenarios of this kind might generate very protracted negotiation, and perhaps deadlock. Can the electronic contract be concluded between the parties here, or should the acceptance, that includes contradictory conditions, be considered a counter offer? This question can occasion real difficulties when parties do not pay attention to the attachments of a message from the contracting party, or when one party disputes the reliability of the contents of the message. In order to come to a resolution of the issue, the offeror is quite likely to tell the offeree that he must accept or reject the conditions as stated on a take-it-or-leave-it basis, though this, of course, will depend on the relative negotiating strengths of the parties concerned.<sup>521</sup> The jurisprudents who drew up UNCITRAL noted

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<sup>521</sup> A. Mitrani, "Regulating E-commerce, E-contract and the controversy of Multiple Jurisdiction", (2001), *International Trade Law & Regulation*, 7 (2): 50, p50

this problem, appending Article 5 which provides for the legal recognition of information in attachments to a message.<sup>522</sup>

What is important is the nature of the conditions in the attachment. If the conditions are secondary, like the place of delivery or means of payment, then the contract is likely to be concluded unless the parties really insist on their fulfilment, in which case they become essential ones.<sup>523</sup> It is worth mentioning that if the contracting parties agree on all essential issues, without regard to secondary ones included in the attachments, the contract can be concluded in accordance with general principles.

#### **4.13. Conclusion**

This chapter has reviewed some distinctions in the principles of contract. It has looked at the expression of volition and consideration in determining the threshold between an invitation to negotiate or to treat and the making of an offer. It has noted that definiteness or determinacy is the essential feature of an offer. It has looked at how the acceptance mirrors the offer.

The principal theme, however, has been how the electronic contract differs from the traditional contract in modalities, not essentials. Some of these

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<sup>522</sup> Article (5) of UNCITRAL Model Law issued in 1996 and adopted in 1998 stipulates that "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message".

<sup>523</sup> For more assertion, a verdict was pronounced concerning smoked fish that the buyer should send the seller a message via telex to emphasize the way of payment as an important component to conclude the contract. -Com16 avril1991/JCP1992/E/278/not M.O.Gain-J-CL. Notarial-Rep. Vo Vente. Fas.cB-par Y.Desdevisesj-CL.Cont.Dest/250/par B.Gross.

modalities we may dismiss as superficial features, indicating no essential difference. Others have implications for the legal underpinning. The summary nature of electronic acceptance (the click) appears weightless as an instrument compared to the conventional signature on a document and, in a case of repentance or withdrawal, may throw up evidentiary problems. Nevertheless, there is a fundamental conformity between the electronic and traditional contract, attested by a corresponding level of consensus. There is frequent reference in this chapter to supranational conventions and agreements, and almost none to national particularism. In recent times, international commerce has been paramount, shaping the rules and modes of contract to its own functional requirements.

By this account, therefore, the electronic contract is not *sui generis*, heterodox or legally problematic. Yet it inhabits an environment that may produce uncertainty and give legislators legitimate cause for concern. This environment is characterised by certain features, only some of which are benign. Firstly, there is no single methodology or medium but an expanding variety of technological means to convey the electronic contract. This is seen as presenting an essentially technocratic problem of framing regulations that, on the one hand, are sufficiently defined and robust to obviate dishonest use, and yet, at the same time, allow for continuing electronic innovation. Secondly,

time limitations, and other appropriate restrictions, tend to produce contracts which are closely defined and explicitly formulated. But therein lies a third, more troubling, characteristic: anonymity. Although the offeror should make himself known and (as far as possible) accessible to the offeree, he will probably have almost no information about the party with whom he is treating. The privacy of the electronic transaction also denotes the anonymity of the consumer. Without checks – through elicited details that may be offensive or inhibiting to the offeree – it is open to the consumer in an electronic contract to misrepresent himself and/or his motivation. The offeror too may behave disingenuously or dishonestly. Thus, fraud is a possibility on either side, and the opportunity for deception provided by the cloak of electronic anonymity is always present. Furthermore, without watertight international regulations and national policing, these hazards are amplified by the calculus of criminal impunity.

What, then, can prevent fraud occurring on a scale to deter or reverse the growth of electronic transaction? The answer to this is provided in the character of international regulatory documents such as EU Directive No.1977/66 quoted here *in extenso*. The key concept is that of mutual consent. It is implicit that the offeror is satisfied with the framing of the offer and “if there is no objection on the part of the consumer,” there is a mutual shouldering of the burden of risk.

Thus, the risk involved in electronic transaction is implicitly outweighed by the actual or perceived benefit to the parties concerned. This also implies that the costs attaching to that risk are shared between the parties.

A simple illustration of this principle can be found in the operation of ATM banking and credit card use. In the transaction, both parties have a perception of risk regarding identity fraud. The offeror is obliged by the terms of his licence to limit the customer's risk of financial loss. The company annualises the cost of this insurance, and its overall loss, and passes these costs on to the consumer in the form of charges. Despite, probably, an imprecise knowledge of this on the part of the consumer, consent to the process is the essential feature. On this basis, participation in electronic contracting continues to grow exponentially.

Exposure to new forms of risk has played a significant part in the analysis in this chapter, and as with any new enterprise (as, for example, in an engineering revolution in bridge construction),<sup>524</sup> it is not merely dishonest but foolish to fail to acknowledge potential hazards. Yet it is of equal importance to recognise that, jeopardy notwithstanding, the pressure of commerce has made the electronic contract a global reality, and that the legal effort required is to facilitate this traffic and to minimise risk. In the thesis, this leads naturally to a

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<sup>524</sup> In the early construction of the suspension bridge, the hazard of resonance was not properly understood and there were spectacular collapses. Objective analysis, however, brought objective solutions and, in consequence, the citizens of Hull can now cross safely and expeditiously to visit their compatriots in Lincolnshire.

further narrowing of focus, namely that of examining closely the first of two troublesome areas of definition specific to the electronic contract.

## **Chapter 5: The Completion of the Electronic Contract under international legal systems: Time, Place and Settlement**

### **5.1. Introduction**

In the nature of agreements that may lead to repentance or dispute, the legal precision required of ascertaining in a contract whether the terms of completion have been satisfied or not is clearly of the highest importance. Some of the distinctions formulated in this aspect of contract may be esoteric, yet the crucial importance of finding agreed definitions for the dimensions of time and place in the unfamiliar environment of cyberspace go to the heart of the propositional challenge within this thesis, namely that this should prove to be an environment that can be successfully navigated and mastered, to the enrichment of every society.

Moving from the principles of contract formation to the detailed application within the electronic environment, we arrive at the last segment of the process, which is the conclusion or fulfilment of the contract, involving detailed exposition of methodologies both proposed and applied. This is, in part, a contentious field and there is acknowledged difficulties which impact on the successful assimilation of electronic transaction into bodies of national law. The discussion chiefly involves the conditions or notions of time and place,

followed by an account of the current applications to settlement of contract through electronic payment.

The general rule is that the determination of the place of a contract is the same as the determination of the time of the contract. The case is different with electronic contracting because the place of the contract is distinguished from its time. For example, a UK company offering to sell computers at a specific price, sends an offer to a Saudi company via the internet, stating as a condition that the offer is valid for one week from the time of receiving the message. The Saudi company, in response, accepts the offer by sending an electronic message. Once this message reaches the UK company, the question may be raised as to when precisely the contract was made. Was it concluded at the time of expressing the acceptance by the Saudi company? Or was it made at the time of the UK company's awareness of the acceptance? To resolve this question, we must turn first to a number of opinions given on the issue.<sup>525</sup>

## **5.2 Time of concluding the electronic contract**

Having discussed aspects of separation in both time and physical distance, and recognising some of the implications of finding a gap between an offeree's acceptance and the knowledge of the offeror of that acceptance, it is important

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<sup>525</sup> Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, op cit, p.284



to consider the specific difficulty of determining, firstly, the legal definition of time in the sending and receiving of electronic data messages. As has already been noted, this may be different from the viewpoint of the offeror and the offeree. As an obvious, if abstruse, example, a contract concluded on 7<sup>th</sup> January in Japan may have taken place on the 6<sup>th</sup> January in Los Angeles, and, this question is currently a lively issue raised over electronic contracting via communication networks.<sup>526</sup> Neither the UNCITRAL Model Law On Electronic Commerce nor the European Directive on Electronic Commerce (2000) addresses it substantively. The UNCITRAL Convention 2005 provides a very similar, if more coherent, definition and anticipates greater international compliance.<sup>527</sup> Nevertheless, as discussed elsewhere in this thesis, because of the degree of flexibility built into this document, it remains open to individual states to interpret the matter for themselves.

#### **A- UNCITRAL Model Law 1996**

The Model Law determines the time of sending the data message as follows: “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

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<sup>526</sup> Christopher Reed, “Legally Binding Electronic Contracts Digital Signatures and Authentication” , (2001), *International Lawyer*, 35, p.89

<sup>527</sup> The UNCITRAL Convention 2005, Article 9

behalf of the originator. Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) when 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 that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) when the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.”<sup>528</sup>

What is to be understood here are formulas intended to assist the contracting parties and not procedures that are mandatory; agreement may be made otherwise. The Model Law specifies that the criterion for considering the data message received is the moment that it enters the information system. This information system is under the control of neither the originator of the data message nor the one who sent it on his behalf.<sup>529</sup> The UNCITRAL Model Law defines an information system as “a system for generating, sending, receiving, storing or otherwise processing data messages”.<sup>530</sup> The information system for all contracts referred to here is a website on the internet. In this respect, it is

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<sup>528</sup> UNCITRAL Model Law, 1996, op. cit., Article 15.

<sup>529</sup>The text of this article was taken from Singapore’s Electronic Transactions Law Article (13) ; Uniform Transactions Law Article 15, Dubai Electronic Transactions and Commerce Law Article (17) ; Jordan’s E-Transactions Law Article 17; Bahrain’s Article 14.

<sup>530</sup> UNCITRAL Model Law on Electronic Commerce 1996, Article 2 .

worth noting that although the data message was sent to the information system of the recipient, there is no assumption that it has been, because his system might be out of order or work badly. Thus, sending the message is not considered to have taken place according to the UNCITRAL Model Law.

For the purpose of determining whether the data message was received or not, in accordance with this protocol, we have to take into account whether or not the recipient has designated an information system to receive this message. The following scenarios can be identified:

**First case:** When the recipient has designated an information system to receive this message, the contract is concluded as soon as this message enters into the designated system or when the recipient finds out the message in it was sent to his information system or to someone else on his behalf. Accordingly, if both parties have agreed to consider e-mail as the information system to which the addressee should send his acceptance, the contract is concluded from the moment that the acceptance enters into the in-box of the offeror. The criterion here is the message's being noted in the in-box of the offeror, and not just being received without being taken account of, which informs the offeror of the offeree's acceptance.<sup>531</sup> As a result, the component of taking note of the

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<sup>531</sup> B. Wright, & J. Winn, *The Law of Electronic Commerce*, New York, Aspen Publishers Inc., 3ed, 2000, p 202

information is of great importance, especially in the case of a restricted offer period; a period that starts when the offeror declares it.

On the other hand, if the offeree sends a message of acceptance to the offeror but to an information system other than the designated one, under the control of the offeror, as in sending it through an intermediary which passes it to the offeror, the contract is concluded as soon as the message enters into the offeror's information system, in other words, the time of finding the message on the part of the offeror and his taking note of it.

**Second case.** Where there is no designated information system to receive e-mails, according to the Model Law, the contract is concluded after the acceptance message enters into the offeror's information system. In this case the receipt of the acceptance is unconditional.

## **B- UNCITRAL Convention 2005**

The UNCITRAL Convention, following the terms stipulated in the Model Law, produced a more succinct and unequivocal definition of time of despatch and receipt: "Dispatch ... is 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 of the party who sent it on behalf of the originator,

the time when the electronic communication is received.”<sup>532</sup> “Receipt ... is the time when it becomes capable of being received by the addressee at an electronic address designated by the addressee... and the addressee becomes aware that the electronic communication has been sent to that address.”<sup>533</sup>

### **5.2.3. Residual difficulties of time determination**

Notwithstanding the increasingly solid points of reference offered by the process of legal harmonisation, the question may still be asked whether the electronic contract is concluded when the message including acceptance reaches the offeror’s PC or when the offeror receives this message for interpretation and processing, for this is not only a legal but also a technical problem. The difficulty in the determination of the exact time of the electronic contract’s conclusion lies in the problem of determining the time and place of offer and acceptance being received by the other party. This is because when conveying an expression of will in signalling acceptance by pressing the ‘OK’ box, such an expression is converted into an electronic form, i.e. into codified electrical vibrations which pass to the PC of the recipient. This conversion, or transmutation, makes it legally difficult to establish the time at which a message is received. However, in principle (and hopeful axiom), any problem caused by technology can be resolved by technology. To determine the time at which a

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<sup>532</sup> UNCITRAL Convention, 2005, op. cit. p.6

<sup>533</sup> *ibid*

reliable expression of will is given by both parties, new approaches are required to define new media.<sup>534</sup>

Determining the time and place of the contract's conclusion has important legal effects, for it entails the time at which the consumer can exercise the right of withdrawal as well as the time of transferring goods and services. It applies also to contracts made by a bankrupt vendor. The fate of such contracts may depend on an exact comparison of the time a contract was concluded and the time the individual or company declared its inability to meet its obligations.<sup>535</sup>

### **5.3. The place of concluding the electronic contract**

The cause of difficulty in determining the place of concluding the contract is that the conveyance of message takes place in a nebulous region called 'cyberspace'. The question then naturally arises as to whether the contract can be said to have been concluded at the residence of the consumer, that is the place where the offeror received the acceptance, or at the place of the registered website.<sup>536</sup>

The protocols and agreements of Electronic Data Interchange and Information Systems are keen to record the moment at which the data message

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<sup>534</sup> Q, Archer, "The E-Commerce series: Electronic Contracts" ,(2000), *Practical Law for Company*, 11 (7):17.

<sup>535</sup> Greg L Berenstein, Christopher E Campbell, "Electronic contracting: The current state of the law and best practices", (2002), *Intellectual Property & Technology Law Journal*,. 14, (9), p.1

<sup>536</sup> S. Gallagher, "E-commerce contracts: contracting in cyberspace- A minefield for the unwary", (2000), *Computer Law & Security Report*, 16, 20, p101.

is delivered or read, from one system to another, by the recipient. However, these systems do not determine the geographical place in which the data message was sent by way of communication networks. In reality, this is a hindrance to the development of international commerce.<sup>537</sup> Therefore, the UNCITRAL Model Law on e-Commerce sought to clarify the place of sending the data message (Article 15.4) thus: “Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph: (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business; (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence”<sup>538</sup>. Article 10 of the UNCITRAL Convention merely replicates these definitions, if somewhat less opaquely.<sup>539</sup>

Accordingly, the electronic contract is deemed to be concluded at the place where the recipient’s business is, unless the contracting parties have agreed

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<sup>537</sup> R. Casamiquela, “Contractual assent and enforceability in cyberspace”, (2002), *Berkeley Technology Law Journal*, 17: 475

<sup>538</sup> UNCITRAL Model Law on e-Commerce, Article 15.4

<sup>539</sup> Article 10 of the UNCITRAL 2005 Convention  
[www.uncitral.org/pdf/english/texts/electcom/06-57452\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf)

otherwise. In that event, they can determine by agreement another location to be the place of the receipt or the place of the dispatch.<sup>540</sup>

A question might then arise as to whether the originator or the addressee has more than one place of business. In this case, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business. In addition, the principle of the UNCITRAL Model Law deals with the issue that if there was no place of business for both the originator and the addressee, reference shall be made to the habitual place of residence (15M/B).

It is mentioned in the UNCITRAL Model Law, concerning e-Contracts, that the place where the supporting technology and machines of the information system are located is the place of the internet service-provider.<sup>541</sup> However, this place shall not be considered the place of business. For example, the internet service-provider can conclude the contract on behalf of the seller because the seller himself places his advertisement on the internet service's website provider.

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<sup>540</sup> Information Systems are of two types: the hardware, which includes the tangible parts of the computer., and the software, which is defined as the logistic software in accordance with the French brochure on 22<sup>nd</sup> Nov. 1981 that is “ *the set of software , rules, and principles for the operation of the CPU as well as for jurisdiction*” In other words, the logistic software encompasses all tangible materials needed for the operation of the tangible part including programs , description of programs and documents attached to it .

<sup>541</sup> A/cn.9/509-2002.



The UNCITRAL Model Law also showed that the offeror's use of a domain name, e-mail, or registration at a specific website in a specific country, does not necessarily mean that his place of business is in that country. For instance, domain names referring to specific countries like KSA for Saudi Arabia, UK for the United Kingdom, and US for the United States, do not necessarily correspond to the place of business of one of the contracting parties in, for example, e-mail addresses or domain names. We find that multinational companies offer some products and services via regional websites on the network with domain names related to a country that is not a well-known or noted place of business. A product might be offered on a website for the purpose of distributing this product within a region, without having any connection to the country of the domain name itself.

However, some commentators take the place of concluding the contract to be the location of the offeror, and are content to assume that the consumer's residence can be considered the place of concluding the e-Contract unless otherwise shown.<sup>542</sup>

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<sup>542</sup> Cf. R.T. Nimmer *Principles of Contract Law in Electronic Commerce* in I. Fletcher et al (eds) *Foundations and Perspectives of International Trade Law*, London, Sweet & Maxwell, 2001, p165

## **5.4. International laws and treaties governing the conclusion of the electronic contract**

### **(i). European treaties**

The European Model EDI Agreement specifies that “a contract affected by the use of EDI shall be concluded at the time and place where the EDI message constituting acceptance of an offer reaches the computer system of the offeror.”<sup>543</sup> Article 4.3 of The Commercial Use of Interchange Agreements for Electronic Data stipulates that “a contract concluded through the use of electronic data interchange under this agreement shall be deemed to be formed when the message sent as acceptance of an offer has been received in accordance with Section 3.1.”<sup>544</sup>

The Trade Electronic Data Interchange Systems (TEDIS) has endorsed the theory of ‘acceptance reception’ concerning the conclusion of the contract. Article 3.3 of TEDIS specifies that “the moment and place of concluding the contract via electronic data interchange are the time and place of receiving the electronic letter including acceptance of the offer to the information system of the offeror,”<sup>545</sup> which means for the determination of the time and place of concluding the contract, the principle of acceptance shall be applied.<sup>546</sup>

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<sup>543</sup> The European Model EDI, Electronic Data Interchange Agreement, Article 3.3

<sup>544</sup> The European Model EDI, Electronic Data Interchange Article 4.3, available at [http://www.unece.org/cefact/recommendations/rec26/rec26\\_1995\\_r1133rev1.pdf](http://www.unece.org/cefact/recommendations/rec26/rec26_1995_r1133rev1.pdf)

<sup>545</sup> Trade Electronic Data Interchange, Article 3.3

<sup>546</sup> P. Stone, “Internet Consumer Contracts and European Private International Law”, op cit, p13.

**(ii). International treaties**

The same endorsement is made by the United Nations Convention for the International Sale of Goods. According to the Electronic Data Interchange Council of Canada (EDICC), 1990,<sup>547</sup> what is meant by the real reception is when the electronic letter reaches the PC of the recipient. Current attitudes expressed by international treaties have complied with the theory of ‘acceptance reception’ in case of contracting between two absentees as do the Vienna Convention for International Sales Article 18.2 (1986) and UNIDROIT, Article 6.2, (1994).

According to Resolution No. 6/3/54 of the Islamic *fiqh* academy, “If the contract is concluded between two parties who are not present in one place, and neither can see the other physically, nor hear his voice, and they are communicating to each other through writing or a messenger, which includes telegraph, telex, fax and the screen of the computer, then the contract shall be deemed to be completed when the offer is communicated to the offeree and the acceptance is communicated to the offeror.”<sup>548</sup>

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<sup>547</sup> UNCTAD/SDTE/BFB/1-15 May 1998, A/CN.9/350-15<sup>th</sup> May 1991.

<sup>548</sup> Islamic *Fiqh* Academy governed by Organization of Islamic Conference , The Execution of Contracts through Modern Means of Communication, Sixth Session, Vol2/1267.

**(iii). The laws of Western countries**

Positions differ concerning the determination of the moment of concluding a contract. Thus, we find that English law adopts the attitude of absentees contracting and the principle of ‘acceptance expedition’, according to which a contract is concluded at the moment acceptance is issued by the offeree to the mailbox of the offeror. This is called the ‘mail box rule’ or ‘postal rule’.<sup>549</sup> The U.S. Uniform Electronic Transaction Act stipulates that “unless otherwise agreed between the sender and the recipient, an electronic record is sent when it: (a) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; (b) is in a form capable of being processed by that system; and (c) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.”<sup>550</sup>

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<sup>549</sup> Kathryn O’shea, and Kylie Skeahan, “Acceptance of offers by E-mail how far should the postal Acceptance rule extend?”, (1997), *Queensland University of Technology journal* volume 13, p1-22

<sup>550</sup> Uniform Electronic Transaction Act, Art. 114 (e)

Thus, the moment of conclusion is the moment of the confirmation of the expedition of acceptance because acceptance is no longer enough to conclude the contract but must be confirmed by way of the sales order and its expedition to the offeror. Furthermore, an acceptance must be followed by a communication from the offeror confirming the transaction. Here we are dealing with a protocol to determine the time of concluding the contract, which is the principle of ‘acceptance conformation expedition’.<sup>551</sup>

Under Article 10, EU Directive 2000/31/EC, Information To Be Provided, guidelines are laid down for the conclusion of the electronic contract. “Member states shall ensure ....that at least the following information is given by the service provider ... (a) the different technical steps to follow to conclude the contract; (b), whether or not the concluded contract will be filed by the service provider and whether it will be accessible; (c), the technical means for identifying and correcting input errors prior to the placing of the order; (d), the languages offered for the conclusion of the contract.”<sup>552</sup>

The Uniform Commercial Code adopted this attitude in compliance with Article 201/1,2 by which there is an obligation imposed on the seller that he shall send a confirmation to the buyer to inform him of the conclusion of the

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<sup>551</sup> Andrew C. L., *A Guide to e-commerce law in Singapore*, Singapore, Drew & Napier, 2000, p.76

<sup>552</sup> EU Directive 2000/31/EC, Article 10

contract within ten days from the time that the acceptor sent his acceptance.<sup>553</sup> Acceptance does not include confirmation which shall be sent to the offeror, which might otherwise be invalid. So the confirmation procedure, too, is time-limited. The addition of a confirmation procedure is clearly a fail-safe device adopted, like the double (not single) click on an ‘Accept’ button, to provide a reassurance to the contracting parties. It addresses a hazard or difficulty intrinsic to electronic transaction.<sup>554</sup>

#### **(iv). Implications**

This section constitutes no more than a superficial review of just some of the major variants to be found. It does, however, provide a useful perspective on the nature of the challenge faced in this project of international harmonisation, and a clear indication of why UNCITRAL initiatives are couched in terms of process, and of gradually winning consent, rather than peremptorily, as though believing that compliance with an instrument of direct effect can be achieved. The progress made between the UNCITRAL Model Law 1996 and the UNCITRAL Convention 2005, particularly in the uptake by individual signatory states of protocols recommended by the Model Law, gives cause for optimism. Viewed pragmatically, and from the perspective of existing current practice, of course, formal harmonisation is simply catching

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<sup>553</sup> Graham J. H. Smith, *Internet Law and Regulation*, op cit, p.511

<sup>554</sup> *ibid*

up with reality. In all aspects of electronic commerce, the driving force is what the marketplace is already doing, and not the top-down design of what a social élite thinks ought to be done.

### **5.5. Opinions on concluding the electronic contract**

(i). A declaration of acceptance

In this, the contract is concluded as soon as acceptance is declared because it expresses agreement between two expressions of will. This agreement becomes effective as soon as an offer is accompanied by an acceptance without the need for any other information from the offeror. According to this view, acceptance is an intentional expression that does not necessitate contact and it is sufficient that it is declared by the seller. Islamic law (*fiqh*) has implemented this theory in the case of contracts between absent parties. It is predicated on the requirements of modern commercial life that require speed in transactions. Consequently, once the offeree has declared acceptance, he can be sure that the council (*majlis*) is concluded. The electronic contract is concluded once the offeree has written an electronic letter to inform the offeror of his acceptance, even before it has been sent.<sup>555</sup>

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<sup>555</sup> Christoph Glatt, “Comparative issues in the formation of electronic contracts”, ( 1998), *International Journal of Law and Informational Technology* ,6: pp.34 - 68

Two things stand against these notions. The first is that in many cases they do not conform to reality since there is no need to have two declarations of will in an acceptance. Acceptance can be issued by the offeree without the participation of the offeror. Furthermore, it is also open to the offeree to deny his acceptance. An offeror cannot prove it unless the offeree's acceptance was received by him. The second point is that acceptance is a will whose effects do not take place at the time of its issuance but at the time that the information is noted by the offeror.<sup>556</sup>

The offeree declares an electronic acceptance by pressing the 'OK'/'Accept' icon and his refusal by pressing 'Stop'. The issuance is a final and irrevocable declaration of acceptance to the offeror; it is an act to make his volition known publicly. Thus, the contract is concluded as soon as the electronic letter containing an acceptance comes under the control of the electronic intermediary, i.e. the internet service-provider. It is not necessary that the letter shall have reached the in-box of the offeror.<sup>557</sup>

(ii). The reception of acceptance

It is stipulated that the contract is concluded once the letter including acceptance has reached the offeror, that is, when the offeror exercises control

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<sup>556</sup> Abdulhay Hijazi, *al-Nazaryya al-'ama Li al-Iltizam*, Beirut: Muasasat Aresalah, 1996, p.664

<sup>557</sup> Mohammad, Abu al-Hayja, *Applicable law in the Electronic Contract*, a PhD dissertation, University of Cairo, 2004, p.56



over the letter including acceptance from the offeree. Once acceptance is received, acceptance becomes final and irrevocable. Thus, a contract is made whether the offeror had the opportunity to note the offeree's acceptance or not. Proponents of this view believe that it constitutes a sharing of risks on both parties equally. The offeree as well as the offeror must accept a risk and accept the consequences for non-completion of a contract as a result of a delay. Hence mistakes of this kind may more usefully be looked at as knowingly-incurred risks.<sup>558</sup>

It is generally held that the conclusion of a contract is not the moment when the letter including acceptance comes under the control of the internet service-provider, but when the letter reaches the offeror. However, what if the letter including acceptance reaches the internet service-provider but does not reach the offeror on time? Supposing that the offeror has determined a specific period of time for the offeree to declare acceptance, which is at 1 pm, and the offeree sent his acceptance before this hour but, because of a technical problem on the communication network, the internet service provider has sent the acceptance too late. Is there a contract? Or must we say that the offeror is not obliged to conclude a contract since acceptance was received after the time specified? Some would wish to argue that the offeror in this case is obliged to

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<sup>558</sup> Chris Reed, and John Angel, *Computer Law: The Law and Regulation of Information Technology*, Oxford University Press, 2007, p.133

conclude a contract made honestly and that if this is against his interests he has recourse to claims against the internet service-provider in accordance with the rules of responsibility.<sup>559</sup>

(iii) Information of acceptance

According to this, the contract is concluded immediately the offeror takes note of the time and place of the offeree's acceptance by way of looking at the electronic letter including acceptance and by becoming aware of its contents. This is because acceptance is an expression of will, and this expression cannot be effective unless the offeror is informed about it. Since the offer is not effective unless the offeror knows about it, the same applies to acceptance. This means that that the offeror has to take note of it, and since the real circumstances may be difficult to prove, the delivery of the acceptance to the offeror is considered as a context to prove the opposite. Therefore, the offeror can assert that he does not know anything about the acceptance, despite the fact that the acceptance has reached him.

It is worth noting that this principle is based on the notion that the contract is concluded as soon as the offeror takes note of the acceptance of the offeree. Therefore, some commentators believe that the electronic contract is concluded at the moment and at the place where acceptance reaches the offeror from the

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<sup>559</sup> Donnie L. Kidd and William H. Daughtrey, 'Adapting Contract Law to Electronic Contracts: Overview and Suggestions', (2000) 26 *Rutgers Computer & Tech. L.J.* 215

offeree. The offeror takes note of the acceptance upon reading the letter and the contract is concluded.<sup>560</sup>

On the other hand, both jurisdiction and comparative studies agree that the conclusion of the contract depends mainly on the real information on the part of the offeror as in Article (2/1) of the Association of American Advocates. The English legislature follows the same approach, as do jurists in Germany and Switzerland.<sup>561</sup>

Theory favouring a single solution to the problem of time and place in an acceptance is referred to as unilateral. Others asserting that there is no determinate relationship between the time and place of concluding the contract are called bilateral.<sup>562</sup> There are also mixed theories that view acceptance from the angle of both the offeror and the offeree and which try to strike a balance between the rules governing expedition and those governing reception. According to these, the contract is concluded when acceptance is sent to the offeror provided that it is delivered to the offeror.

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<sup>560</sup> N Bockanic, and Marc P Lynn, "Electronic contracts - Law and technology", (1995), *Journal of Systems Management*: Vol. 46, Iss. 4; p.64

<sup>561</sup> Christopher T. Poggi, 'Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation', (2000) ,41 *Va. J. Int'l L.* 224, at 227.

<sup>562</sup> Some of the proponents of modern theories are Malory and Chevalier. The latter says there are no definite obligations at the same place. His main idea rests on the separation between the time of concluding the contract and the place. Mr. Chevalier, however, says in respect of the time of concluding the contract, that it is the time at which the offeror cannot withdraw his offer in compliance with the rules of acceptance. Regarding the place of the contract, it is the place where an offer was sent, i.e. the acceptor's place.

## **5.6. Summary and recommendations concerning the determination of concluding the electronic contract**

The determination of the time of concluding the contract mainly depends on when or whether the offer is accompanied by immediate acceptance.<sup>563</sup> Therefore, it is necessary to distinguish between contracting via e-mails and contracting via websites on the internet.

In the case of contracting via e-mail, the determination as to when the contract is concluded depends on the methodology agreed by the parties. According to the generally-accepted principles of the declaration of acceptance, it can be seen that the contract is concluded at the moment of pressing the button for sending, i.e. the moment when the acceptor writes the electronic letter of acceptance (his e-mail). However, there is a difficulty in applying the general principles of contract to electronic contract, because of the question of evidence. It may be impossible for the offeror to prove whether the offeree has written an electronic letter declaring his acceptance without sending it, because this confirmed acceptance exists only on the PC of the acceptor.<sup>564</sup>

If we apply the principle of ‘acceptance expedition,’ the contract is concluded immediately upon the sending of the letter, a procedure that also comprehends an acceptance made by pressing a button of acceptance. Thus, the

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<sup>563</sup> Raymond T. Nimmer, "Electronic Contracting: Legal Issues", (1996), *Marshall J. Computer & Info.* 14 J, p 211-212

<sup>564</sup> Deveral Capps, "Electronic mail and postal rules", (2004), *International Company and Commercial Law Review*, op cit.

letter is at once out of the sender's control and he is not entitled to withdraw his acceptance after this moment. As a result, it does not matter whether the letter has reached the offeror, or was lost on the way to the offeror.<sup>565</sup>

However, this prescription is not universally applicable since an electronic letter can be sent from many different places, i.e. the sender's home, his place of work or some other address, or, as in the case of mobile laptop use, have no fixed location at all (as, for example, on a train somewhere between Preston and Hull). Accordingly, it may not be possible to determine the place of sending the letter, in addition to which the letter is passed via a third party that has nothing to do with the contract, i.e. the internet service-provider.<sup>566</sup> Nevertheless, no great time separation is normally involved between the expedition of acceptance and its delivery in electronic contracting, since expedition and delivery should take less than a second on the internet.

If the contracting parties do not agree on the method of sending acceptance, some think that the best way to send acceptance is to employ the same means by which the offer was sent, whether by e-mail, chat-room or 'I Seek You' software. Concerning reassurance in electronic contracting, it is surely sensible to accept the principle of 'acceptance reception.' This protects the consumer in

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<sup>565</sup> J.R. Murdoch, *Construction Contracts: Law and Management*, New York, Spon Press; 3<sup>rd</sup>, 2000, p 110

<sup>566</sup> Yamaguchi, Mikio, "The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law", (2004), *Cornell International Law Journal*, 37, p 357

terms of evidence, and the seller in terms of definite intention on the part of the consumer.<sup>567</sup>

It is certainly advisable to know the time of concluding the electronic contract because the reception of the letter indicates the information about it to be effective.<sup>568</sup> According to the theory of ‘acceptance information’, the contract is concluded when the offeror takes note by reading the letter in his in-box. It may be thought that the offeror cannot escape or deny that he opened his in-box and read the letter because his e-mail is available on the internet for the acceptor to contact him. The unlikely scenario of an offeror not checking his incoming mail would suggest poor business practice on his part.

In sum, contracting via a website on the internet, via direct chat or by audio-visual means is not inherently problematic because a contract is made when the acceptor presses the acceptance button or writes a statement indicating acceptance.<sup>569</sup>

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<sup>567</sup> Andrew D. Murray, ‘Entering into Contracts Electronically: The Real W.W.W.’, in: Lillian Edwards and Charlotte Waelde, eds., *Law and the Internet: A Framework for Electronic Commerce*, Portland, Ore.: Hart Publishing, 2000, at 19-20, p.15

<sup>568</sup> The Bahraini Legislator in Article 14/2/1 of E-Transactions Law; Jordanian Legislator in Article 17/B of E-Transactions Law, Dubai E-Transactions Law in Article 15 has followed this theory on the basis of the UNCITRAL Model Law.

<sup>569</sup> Andrew D. Murray, ‘Entering into Contracts Electronically: The Real W.W.W.’, in: Lillian Edwards and Charlotte Waelde, eds., *Law and the Internet: A Framework for Electronic Commerce*, op cit, p.15

## **5.7 Electronic Payment**

Payment is a specialised field of commercial transaction whose significance to the performance of the electronic contract would certainly justify a separate and lengthy treatment of its own. Nevertheless, this thesis can scarcely avoid offering some rudimentary account of it.<sup>570</sup>

The object of a payment system is to transfer value as effectively as possible and thus promote trade. This is achieved by imposing the minimum of additional costs, risks and time-delays on the transacting parties. An electronic payment system (EPS) has been defined as “the whole of the secured transmission modes of financial obligation via open network”.<sup>571</sup>

### **5.7.1 Money**

Money is a medium of exchange whose value in a contract is determined independently of the parties and whose use is agreed to by them for the purposes of exchange. There are two aspects to this. Because of the general acceptance that money is a secure store of value, at least within the short time-frame of a typical contract, transactions are greatly simplified. Secondly, a stable rate of monetary exchange offers a standard of comparability without

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<sup>570</sup> Maxwell J. Fry, *Payment Systems in Global Perspective*, Routledge International Studies in Money and Banking, 5, NY, Routledge, 1999, P25

<sup>571</sup> Jane Kaufman Winn, “Cash of the titans: regulating the competition between established and emerging electronic payment systems”, (1999), *Berkeley Technology Law Journal*, p.678

which traders would easily lose their bearings in estimating and recording real value.<sup>572</sup>

For money to function as a secure store of value it must be durable. However, money as a physical currency can be lost, stolen or destroyed and, except under special terms of insurance, is not replaceable. A second precondition is that it must be difficult to counterfeit: trust in its legitimacy is essential. Wide acceptance is the hallmark of international utility. At the present time, the US dollar is pre-eminent among 'hard' currencies because it is the most traded and because it is used, almost universally, as a reserve.<sup>573</sup> Exceptions are where US dollar bills are commonly counterfeited, or tainted by association with the product of organised crime (as in Colombia with respect to the illegal trade in cocaine); and where the local currency has little value even within the community for which it is produced (as with the Cambodian riel).<sup>574</sup>

As a freely exchangeable commodity, money is also anonymous. Cash offers this privacy because it does not contain information that can identify the parties using it or give any trace of the transactions for which it has been used.<sup>575</sup>

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<sup>572</sup> E. Solomon, *Virtual Money: Understanding the Power and Risks of Money's High-Speed Journey into Electronic Space*, New York: Oxford University Press, 1997, p104

<sup>573</sup> Cristian Radu, *Artech Implementing Electronic Card Payment Systems*, Artech House , Boston House Publishers, 2002, p75.

<sup>574</sup> Ibid

<sup>575</sup> The historical background of money is discussed at [www.woodrow.mpls.frb.us/econed/curric/history.himl](http://www.woodrow.mpls.frb.us/econed/curric/history.himl), 05-11-07



Nevertheless, currency is, like gold or silver by weight, merely a representation of value. Its worth is not intrinsic but contrived and customary. Consumers and merchants trust other instruments, such as traveller's cheques (a more secure instrument because automatically insured) if the name of the guarantor inspires confidence. Thus the whole structure of traditional money is built upon faith. It is surely reasonable, therefore, to assume that by the same logic and historical process, electronic money will, over time, be treated as its equivalent.<sup>576</sup>

### **5.7.2 Payment systems**

At its simplest, a payment system is an agreed way to transfer value between parties such as a buyer and seller in transaction. When coupled with rules and procedures, the payment system provides an infrastructure for transferring money from one entity in the economy to another.<sup>577</sup>

Transactions that represent direct, real-time payments between buyers and sellers also satisfy the legal obligation for payment to be discharged rapidly (unless specifically agreed otherwise by the parties) once the payment process has begun. In this respect, the process of payment and settlement by traditional currency sets a standard of efficiency against which other payment mechanisms

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<sup>576</sup> B. Good, *The Changing Face of Money: Will Electronic Money be Adopted in the United States?* New York and London: Garland Publishing, Inc, 2000, P86

<sup>577</sup> Thomas P. Vartanian, *The Emerging Law of Cyber banking: Dealing Effectively with the New World of Electronic Banking & Bank Card Innovations*, available at <http://www.ffhsj.com/bancmail/tpvcon.htm>

may be compared. An efficient payment system is one that allows instant confirmation of a transaction, without need of a third party, within a secure environment.<sup>578</sup>

By comparison, most other payment mechanisms involve the transfer of deposit money or claims. These mechanisms involve using paper or electronic payment orders that set in motion a chain of transfers involving two or more banks or other entities acting as intermediaries, transportation and data communication links, and a computerised accounting system for updating the accounting records of the financial institutions.<sup>579</sup> Despite the obvious technical variations between different paper-based and electronic payments systems for transferring deposit money, the goal of all these systems is essentially the same. The monetary claim of the person making a payment is reduced or eliminated and the claim of the person receiving the payment is satisfied.

Historically, payment system transactions were exclusively provided by banks and, in some countries, by post offices. However, the dominance of small payment systems by the banking industry is being challenged by an infant industry reacting to consumer demands. Today many non-bank entities provide financial services. In fact, the competition for the provision of payment system

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<sup>578</sup> M. Brindle & R. Cox, *Law of Bank Payments*, Sweet & Maxwell. London: Second Edition, 1999, p 22

<sup>579</sup> Donal O'Mahony, Michael Peirce, and Hitesh Tewari, *Electronic Payment System for e-commerce*, US, Artech House, 2<sup>nd</sup> ed, 2001, p107

mechanisms “has turned monetary value transfer into a commodity.”<sup>580</sup> The banking industry has lagged behind other industries in developing and offering electronic money payment systems for low-value transactions. For example, telephone companies have offered stored-value card technology for nearly a decade.

### **5.7.2.1 Requirements of a payment system**

Any new payment system technology must not only offer innovative features but continue to meet its basic requirements in terms of liquidity, finality, transaction risk and systemic risk.

Liquidity is commonly defined as “the ease with which an asset can be bought or sold for money.”<sup>581</sup> Electronic payment systems are not themselves money, but represent a private substitute for money that is acceptable to the transaction. A private payment system substitute for legal tender has liquidity if other types of assets can be converted into and out of it without causing significant distortions in the market value of the asset. This type of liquidity can be achieved when there are sufficient transactors in the market and transactions

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<sup>580</sup> L. Edgar, “To Regulate or Not? Managing the risk of e-money and its potential application in money laundering schemes”, (1998), *Harvard Journal of Law & Technology*, 11:833

<sup>581</sup> K. Macintosh, “Electronic Cash—More questions than answers”, (2001), *Boston University Journal of Science and Technology Law*, 7:213.

can be settled without making major modifications in other terms of the transaction.<sup>582</sup>

Payment systems differ widely in the degree of finality associated with their use. Final payment is the moment when the payment may no longer be revoked. The rules governing finality of a particular payment device must be clear and universally applied in order to minimise the transaction costs associated with the choice of the payment device. Certainty about the degree of finality, whether great or small, is an essential element of established payment systems. Although the importance of finality of payment is obvious when payment transactions are viewed in aggregate as payment systems, rules governing finality may be difficult to enforce in practice because of competing concerns at the level of individual transactions. A payer will normally prefer less finality because he can profit from the float while the payment is processed, and cancel or suspend payment in the event of a dispute with the payer. Merchants obviously prefer a system with more finality; they benefit from the 'float,' and the risk that settlement will be revoked is reduced. In addition, the party providing the payment service may wish to make exceptions to finality rules for

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<sup>582</sup> Ibid

established clients. Thus, unless supported by clear legal rules, finality of payment will be difficult to enforce consistently and fairly.<sup>583</sup>

When a payment is not in the form of a proffer of legal tender, there is an element of credit risk for the party accepting the payment. Even with a payment of legal tender, there is a risk of error in processing the transaction, or of fraud such as forgery. Transacting parties make choices about which forms of payment are acceptable in part based on these transaction risks.<sup>584</sup>

What is recognized as money in modern economies is rarely legal tender. Rather, it is a web of claims on private organizations that circulate with almost the same degree of acceptance as legal tender. Given the large number of payments that rely on the creditworthiness of private parties, the safety and soundness of participants in the payment system is a paramount concern of regulation, with profound implications for the health of the economy as a whole. Regulators must evaluate not only the degree to which participants in the system observe the rules but also the risk of a participant failing to meet obligations to another. They must also estimate whether the system could withstand the failure of major participants.<sup>585</sup>

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<sup>583</sup> S. Maduegbuna, “ The effects of electronic banking techniques on use of paper based payment mechanisms in international trade”, ( 1994 ) , *The Journal of Business Law*, 338

<sup>584</sup> A.N Berger, D. Hancock, and J.C .Marquardt , “A framework for analyzing efficiency, risks, costs, and innovations in the payments system”, (1996), *Journal of Money, Credit and Banking* 28, Part II, 696–732

<sup>585</sup> S. Newman, , & Gavin Sutter, “ Electronic payments- the smart card: smart cards, E-payment& law”, (2002), *Computer Law& Security Report*, 18(5):307

For new electronic payment instruments and systems to be attractive to consumers as well as businesses, they must be competitive vis-à-vis the current system; if consumers can make savings, they are much more likely to adopt new electronic products. Products should be easy to use and offer economies in space and resources. Yet the fact they are quicker does not necessarily make them viable; they must fit naturally into the current structures of financial services, and appear the logical outgrowth of current market needs.<sup>586</sup>

The instantaneous movement of money is a phenomenon that will change many conventions. New payment systems may challenge and disenfranchise the sponsors and owners of the current system, including the banking industry and governmental entities.<sup>587</sup>

Because the trust factor forms the backbone of money and the payment system, governments have a critical role in making them work. Businesses and consumers should know that the form of value they are using is universally accepted and that as far as possible the system operates without delays, disruptions or challenges.<sup>588</sup> Nevertheless, high ideals and pronouncements are sometimes far from the reality. Many banking institutions, as in the U.K., persist in requiring the same accounting period for transactions as in pre-

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<sup>586</sup> B. Jones , “ The risk of paying over the net”, (1997), *Utah Bar Journal* , 12:8

<sup>587</sup> P., Tomas, Vartanian, ” The future of electronic payments: roadblocks and emerging practices”, available at <http://www.ffhsj.com/bancmail/bmarts/roadblck.htm>

<sup>588</sup> IR. Schudelaro, , “Electronic payment and consumer protection: should recommendation 97/489/EC be replaced with a directive?”, (2001), *Computer Law & Security Report* 17, (2), 15

electronic days, despite the fact that in countries such as Canada real-time transfers have operated since the mid-1980s. Even in a highly competitive and globalised sector of the economy, a protected cartel may prefer its well-disguised profit to the attractions of greater efficiency.<sup>589</sup>

### **5.7.3 Electronic payment and legal issues**

A number of payment systems have been developed and piloted around the world. Some use only established instruments such as debit and credit cards; others have embraced electronic cash and ‘smart’ cards.<sup>590</sup> Internet payment systems allow for several methodologies, old and new. Of these, ‘cybercash@’ is used as an electronic cheque as well as a cash service, and ‘monnet@suit’ provides credit, debit, smart card, and mobile internet options.<sup>591</sup>

Electronic payment systems offer the undisputed benefit of lower costs. It is already well established in countries such as the U.K. that significant retail sectors offer discounts for on-line transaction. In some (airlines, for example), companies may refuse payment by any other means. Depending upon the accessibility of electronic media and credit systems in any particular society, electronic payment also represents savings and convenience to the customer. The evidence for this can be seen in the exponential growth of such business in

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<sup>589</sup> Ibid

<sup>590</sup> Olivier Hance and Suzan D. Balz, *The new virtual money: law and practice*, Kluwer Law International, 1999, p.3

<sup>591</sup> Ibid, p8

the more developed countries. The only apparent hazard in mundane transactions of this kind has become the overload on service providers, i.e. of the increasing frequency with which systems temporarily ‘crash’.

Security of electronic payments is a subject of much greater concern, however, and one that is unlikely to be resolved in the foreseeable future. Electronic networks, in all spheres of activity, must protect themselves from a number of threats: notably, organised financial crime; dishonest trade; malevolent corruption (viruses); amateur hackers; and the sometimes devastating consequences of human carelessness (data loss).<sup>592</sup> The transfer of money has always stimulated criminal ingenuity, and ‘heists’ of gold or coin have been the subject of spectacular theft, from Wells Fargo to Matts Brink and the Great Train Robbery. Electronic transfer provides a new theatre of criminal possibility. At the same time, however, it should be recognised that theft and fraud probably represent no greater a statistical risk in electronic than in conventional forms of transaction. Other than for cases brought before the courts which, in instances of cyber crime is uncommon, this is essentially non-quantifiable, and judged only by anecdotal evidence. At the same time,

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<sup>592</sup> F. Bao, R. Deng, J. Zhou, “Electronic Payment Systems with Fair On-line Verification”, WCC2000, *Proceedings of 16th IFIP World Computer Congress on Information Security*, Kluwer Academic Publishers, 2000, pp. 451-460



however, electronic payment gives rise to new questions of jurisdiction and regulation.<sup>593</sup>

#### **5.7.4 Jurisdictional problems**

Money and payment systems are multi-jurisdictional. Whose laws apply? Problems occur when contracting parties are subject to different legislations. The precision of the contract, or the juridical form required for the contract to be fully effective, differs from one jurisdiction to another. These problems are significant enough in a traditional contract; in the global activity generated through the internet, the challenge is even greater. One operator may deal with an unlimited number of people and encounter over 200 separate jurisdictions.<sup>594</sup>

The United Nations, aware of the problem derived from different regulations, and with the intention of facilitating the development of electronic commerce, proposed through the United Nations Commission for International Mercantile Law (UNCITRAL-CNUDMI) that legal effects should be conferred on all information in the form of electronic messages used within the context of commercial activities.<sup>595</sup>

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<sup>593</sup> R. Bhala, "The Inverted Pyramid of Wire Transfer Law", (1994), *Kentucky Law Journal*, p359.

<sup>594</sup> Heinrich, "Funds transfers, payments and payment systems", (1994), *The International Lawyer*, p788.

<sup>595</sup> Batalla, Enrique J, "electronic commerce: online payments", (2000), *Computer and Telecommunications Law review*, vol 7, p 80

### 5.7.6 Monetary policy

With the use of electronic payment systems and the introduction of electronic money into global commerce, governments confront new problems of regulation.<sup>596</sup> E-Payment systems raise the spectre of privately-issued e-Currencies in parallel with government currencies, with obvious implications for money supply and macro-economic policy. Virtual currency already exists in certain spheres, without the underwriting of hard currency, having a value separate from currencies issued by a central bank. This E-Money can circulate for lengthy periods without being redeemed or deposited, and does not appear in any government audit.<sup>597</sup>

If smart cards and e-Money replace traditional currency, the benefit of seigniorage<sup>598</sup> will be lost to government and accrue to the electronic issuer. The issuer will receive an interest-free loan of the e-Money in circulation at any one time, and an absolute gain on money destroyed and not redeemed.

From a monetary perspective it is obviously desirable that electronic money should be redeemable at par value. The EU central bank takes the view

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<sup>596</sup> Bhala, "The Inverted Pyramid of Wire Transfer Law" (1994) 82 Kentucky Law Journal 347 at 393; Dole, "Receiving bank liability for errors in wholesale wire transfers" (1995) 69 Tulane Law Review 877 at 885-886.

<sup>597</sup>Shahriar Tavakol, "Digital value units, electronic commerce and international trade: an obituary for state sovereignty over national markets", (1999), *The John Marshall Journal of Computer & Information Law*, p 1206-1209

<sup>598</sup> Seigniorage is "a government revenue that is the difference between the face value of coins and the costs of their mintage" (Webster's New World Dictionary, 3<sup>rd</sup> ed., 1996, NY: Macmillan). The value arises because a note or coin represents a liability of the Central Bank issuer but no interest is paid on that liability.

that a requirement to redeem is necessary in order to maintain the unit-of-account function of money. This guards against the instability that would be provoked by the unregulated issue of electronic money, and it preserves both the central bank's liquidity and short-term interest rates.<sup>599</sup>

### **5.7.7 Electronic payment risk**

Commercial law must respond to actual risks to create the framework within which appropriate private arrangements can be made to allocate risk. Electronic payment systems involve two kinds of risk: dishonour, and forgery or repudiation.<sup>600</sup>

Payment systems function because trading partners are willing to trust the promise of the issuer of some token. Credit card systems work because merchant banks believe that the issuer will pay money to liquidate the debt represented in the credit-card record. Cheque systems are viable because merchants and presenting banks believe that the drawee will pay the cheque when it is presented. Historically, currency systems have only worked when everyone believes that the issuer, private bank or central government will redeem banknotes. A problem with the early banknote systems of currency was that traders were remote from the issuing bank, which found it difficult to

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<sup>599</sup> Micheal H. Samos, "Electronic Payment Systems (20–763)" April 2007, Official Course Web, available electronically at <http://euro.ecom.cmu.edu/program/courses/tcr763/2002pgh/cards7.ppt>.

<sup>600</sup> Markus Jakobsson, David MRaihi, Yiannis Tsiounis and Moti Yung, "Electronic payments: where do we go from here?" (1999), *Proceeding of Secure Networking — CQRE*, pp. 43–63.

assess the risk of dishonour. When a question of possible dishonour arose, the efficacy of currency was reinforced by making it legal tender. Thus, participants in the trading system were forced to accept it from one another.<sup>601</sup>

A high risk of dishonour would lead to merchants refusing to accept electronic payment. If the issuers of cards or electronic tokens cannot be relied on, the payment system will be unworkable or, at best, be forced to offer discounts at every stage. From a functional standpoint, e-money can work only if participants are satisfied with the available legal recourse in the event of dishonour. They must also be assured that funds exist to cover claims against an issuer in the event of his insolvency or disappearance.<sup>602</sup> The essential legal response is firstly to make sure that the issuer has a legally enforceable obligation to pay, and secondly, to make sure that issuers are not judgement-proof. Legal infrastructure must deal with the possibility that an entity not presently doing business as a bank will issue e-money. Addressing this requires consideration of a number of interrelated issues such as: whether issuance of e-money by a new enterprise would violate existing banking law. If that is the case, what does the existing law prescribe; if not, what new statutory,

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<sup>601</sup> Borio, C.E.V., Van den Bergh, P, “The nature and management of payment system risks: an international perspective” , (1993), *BIS Economic Papers no. 36, Bank for International Settlements*, Basle, Switzerland, p. 86

<sup>602</sup> Berger, A.N., Hancock, D., Marquardt, J.C, “A framework for analyzing efficiency, risks, costs, and innovations in the payments system”, (1996), *Journal of Money, Credit and Banking* 28, Part II, 696–732

regulatory, or common law requirements would be appropriate to protect against the risk of dishonour?<sup>603</sup>

Most evaluations of e-payment systems identify the risk of forgery by the purchaser of goods and services as a major risk to be addressed before they can become a fully-fledged reality. Forgery can defeat both contract and redemption expectations. The risk of forgery is indistinguishable from the risk of repudiation because repudiation is likely to involve an allegation even where no forgery has actually occurred. Unless the merchant who accepts e-payment can reduce the risk of actual or falsely-alleged forgery, he is not assured of payment.<sup>604</sup>

Privacy measures frequently involve network security, and seek to prevent unauthorized persons from using networked facilities, like routers and routing messages, to obtain access. Frequently, unauthorized use takes advantage of flaws in network security to obtain one or more credit card numbers. Most concerns regarding electronic payment systems on the internet relate to privacy. Privacy of credit card numbers communicated on the internet is of a lower order than the privacy of the credit card numbers communicated orally on the card number, in which the exchange is monitored. Screening and retrieval of credit

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<sup>603</sup> Henry, “ the legal and technological infrastructures for electronic payment systems”, (1996), *Rutgers Computer and Technology Law Journal*, vol 22, p 31-33

<sup>604</sup> S. Freeman, “The payments system, liquidity, and rediscounting.”, (1996), *American Economic Review* 86 , pp. 1126–1138

card numbers transmitted on the internet, however, can be ‘skimmed’, i.e. copied and recorded.<sup>605</sup>

It seems probable that in e-Payment instruments and systems we are only at the beginning of a radical revolution. Thus, it is obvious that government has a critical role to play in the process. This is necessarily as regulator not innovator: change and expansion are driven by the private sector.<sup>606</sup> Its needs, however, are frequently misunderstood or unregarded by government. Government agencies and international organizations should facilitate the private sector to develop efficient electronic instruments, yet it cannot be claimed that government is motivated in quite the same way as the private sector to look first at cost-effective methods that have little impact on their own balances. Nevertheless, the juridical role is clear. Government and supranational regulators must clarify the law and create a greater predictability in respect of new financial products. They should also agree upon the manner in which a common jurisprudence can be reached.

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<sup>605</sup> MacKie-Mason, and K. White “Evaluating and selecting digital payment mechanisms, interconnection and the Internet”. (1997), In: *Selected Papers from the 1996 Telecommunications Policy Research Conference, Mahwah, NJ*, p. 113–134.

<sup>606</sup> Batalla, Enrique J, “electronic commerce: online payments”, (2000), *Computer and Telecommunications Law* review, vol 7 , p 80

## **5.8 Conclusion**

The main focus of this chapter has been the instrumental aspect of electronic contract fulfilment, and yet, as has been seen, principles are still in flux. Rather more questions have been raised here, perhaps, than answered. Definitions of time and place in the fulfilment of the e-contract are by no means as straightforward as at first sight. Likewise, e-payment remains rudimentary in design and, of all areas in electronic contracting, most subject to rapid change and innovation. Nevertheless, what we see is a clear progression from what has existed in the past. The effects of new technology may indeed be revolutionary in the volumes of business they generate and the turbulence they are able to cause (the economic history of this phenomenon is already full of booms built and bubbles burst). Nevertheless, in the excitement over novelty and growth, it is easy to lose sight of the fact that many of the problems of international contracting are pre-existing ones, and that though these may be of a lower order in terms of their impact on the global economy, they are still mundane issues for lawyers to resolve. The question of the International Date Line, for example, is no different viewed from an electronic or a non-electronic perspective.

Furthermore, not only are some of the difficulties suggested over defining the fulfilment of e-contracts also attributable to traditional forms of contract, but they are culturally specific. Almost nothing discussed in this chapter

pertains to problems faced by a particular society, legal system or body of national law. These problems, real though some of them are, are universal in character and therefore not merely susceptible to solution through international agreement but cannot be seriously addressed in any other way. Somewhat buffeted, this consideration of one problematic area in the electronic contract carries us naturally to the other, that of verification and authority.



## **Chapter 6: Verification and Authority of Electronic Signature under International Legal Systems and the initial responses to Islamic jurisprudence**

### **6.1. Introduction**

Contracts are bound by the symbol of authority attached to them, an overarching consideration which, though the last act to be performed by two contracting parties, contains a resolution of the question uppermost in their minds throughout: whether to sign or not to sign. It follows that this authority must be conveyed in an unambiguous, recognisable and permanent form. Hence, the signature is as crucial to the performance of a contract in the novel and innovative electronic environment as adoption of robust legal norms and definitions for establishing its time and place.

This chapter seeks to determine and identify the e-Signature in order to pinpoint its authority in the Electronic Transactions Draft Law of the Kingdom of Saudi Arabia<sup>607</sup> by looking at all the necessary legal conditions. The claimed significance of the e-Signature is for the following reasons:

1. The e-Signature plays a crucial role in evidence regarding various electronic transactions for the purpose of documentation and identification of signatories by which they have expressed consent to the contents.

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<sup>607</sup> Promulgated in 2005 and not expected to be enacted before 2009/2010

2. The tendency towards the endorsement of electronic government in the Kingdom which will have a great impact on using the facilities of modern technology, among this is the e-Signature in formal transactions.

This chapter will be divided into four parts: (i), analysis of the electronic signature, giving detailed definitions made within several jurisdictions and at different levels; (ii), examination of widely-used applications, commercial papers such as electronic cheques, electronic freight, and current communication media; (iii), examination of the effectiveness of the e-Signature; (iv), an examination in detail of the electronic signature from an Islamic perspective.

The internet has the advantage of allowing instantaneous contracting. Nevertheless, contracts have to be proved. The signature is the lynch-pin of contract. It authenticates the contractors (one or both, depending on the nature of the contract) and the expression of their volition; it authorises movement and exchange in the fulfilment of the contract; it leaves a reliable, evidentiary record that the contract was made.<sup>608</sup>

A problem of using an open network such as the internet is the absence of traces, that is to say, of written record. The general rule is that a contract does not need to be in written form. Nevertheless, in current perception a written document has broader credibility than any other form. Some commentators

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<sup>608</sup> Paul Todd, *E-Commerce Law*, UK, Routledge Cavendish, 2005, p105

have assumed that the underlying problem here may be that an electronic contract is neither oral nor written. Yet there is little that is substantive to this concern. Although the discussion of the electronic signature is an aspect of a wider debate concerning the electronic contract, it can be shown that electronic signatures ought to offer reliability because of their intrinsic similarity to traditional signatures. Their function is to provide authentication and integrity to the transaction as well as proof of sender-identity. Therefore it can be said that, within legal reasoning, there is no *a priori* claim that a signature cannot be made electronically. Yet signatures are hybrid, each type having its own historical evolution and register of use as well as of legal acceptance. Electronic forms of signature cannot automatically be taken to be the same as traditional ones. Evidently, new technologies require new concepts, and this is a case, not unlike others since the first industrial revolution, where a sufficient platform has to be carved into the legal mould to accommodate a change in reality.<sup>609</sup>

The actuality in many countries, and in many areas of commerce, is that electronic signatures are already well accommodated within the legal framework and do provide security and reliability in electronic transaction. In contexts where this process has been less easy, the profound significance of the new technology has sparked initiative, and legislators have laboured to produce

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<sup>609</sup> John Dickie, *Internet and Electronic Commerce Law in the European Union*, Oxford, Hart Publishing, 1999, p35

a regulatory scheme that makes e-signature the equivalent as a legal instrument to traditional, accepted forms.<sup>610</sup>

Forms of electronic signature have become established within particular domains of transaction. These range from the most straightforward type of application, such as using a personal identification number (PIN), to costly systems that may require mass screening to install (biometric signatory identification in, for example, a national database). Yet it is almost certainly the case that the majority of people who use one of these forms to signal acceptance in contract are unaware that they are using electronic signatures, and still fewer will understand that certain forms of electronic signature may be unacceptable in certain jurisdictions.<sup>611</sup>

Rapid advances in both technical features and facility, as well as a constant downward pressure in relative costs to the consumer, have made electronic trading a global reality. At the time of writing, and despite the fear of economic recession affecting Western economies, the extraordinary supply made possible by the internet and by satellite technology, and evident as much in poorer as in richer countries, makes it hard to imagine that anything short of global catastrophe will arrest the spread of communication networks. In this context,

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<sup>610</sup> Adrian McCullagh, Peter Little and William Caelli, "Electronic signatures: understand the past to develop the future" (1998), *21/2 U.N.S.W.L.J.* 452 ,; also available at <http://www.austlii.edu.au>, 19-12-07

<sup>611</sup> S. Mason, "The International Implication of using Electronic Signatures", (2005), *Computer and Telecommunications Law Review*, 2(1) , p31.

more and more government agencies, as well as trading companies, are demanding the use of electronic transaction, and therefore of e-signature, by their clients. Thus, pressure is growing on legislators to think clearly and to find workable formulas to resolve the doubts and difficulties that remain. Yet societies have long passed the point of being able to ruminate on what will happen. It is now a matter of what has happened, and of not reverting to that most foolish of procedures, namely burying our head in the sand. As in many areas of law, transformational change has thrust itself upon the hapless legislator to demand equitable, uniform regulation.

This chapter is concerned with pinning down the challenges as well as the particular modes of the electronic signature, and the response to it in a number of settings. Yet before entering more detailed discussion, it is necessary to examine the signature itself, both in its various physical guises and in its social meanings.

## **6.2 The Signature**

Signature has long been of the highest significance in both public and private law, since it is the instrument to signal and record an act of individual volition. In essence, it represents a search for unique identity in the authentication and confirmation of an act recognised in law.<sup>612</sup>

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<sup>612</sup> A. W Scoville, "Clear Signature, Obscure Signs", (1999), *Cardozo Arts & Ent*, 17 (3), p61

The form of the signature has undergone several stages of mutation, variation and evolution. For several thousand years (as far back at least as early Mesopotamian civilisation), signature was carried out by stamps and seals pressed into a soft material that could solidify, such as wet clay or hot wax. Babylonian kings and Egyptian pharaohs were keen to record their deeds in varying forms of signature, both to glorify their reign and as a matter of state record.<sup>613</sup> The iron ring of the Prophet exists to this day, which was used to signify his will in written communications to Muslim and non-Muslim rulers.<sup>614</sup> In European society, from Roman times, the signet ring bore a unique heraldic device to indicate the authority or status of the wearer, or on conveyed documents to authenticate the bearer. This was accepted and even venerated up to the modern age. In the case of the Pope and other high dignitaries of the Church, in token of obedience or favour, this symbol of identity is still kissed. The English legal profession and offices of state in Britain continue to occupy themselves with the peculiar dignity of stamps and sealing wax. These are all forms of signature. Where they contain the expression of collective rather than of individual will, or where they indicate an exalted position, their symbols are made to reflect status, as in the size and complexity of a royal seal or the gold

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<sup>613</sup> This begins a tradition still followed in the time of Saddam Hussein whose reconstruction of sites at Babylon has a record of who their patron was stamped into every brick.

<sup>614</sup> It is held in the Topkapi Museum (the former palace of the Ottoman) in Istanbul.

and precious stones of a signet ring, although such accessories are not acceptable in the adornment of men in Islamic custom.

Of equal longevity, perhaps, for the non-literate, is the practice of customary signature in the form of a distinctive mark, made by a cross or thumbprint, which continues to be regarded as proof of identified commitment in some contexts today. Where the intent of a large number of people is required to be shown in a short period of time, as at an election or referendum, indication of will by the single stroke of a pen or pencil may still perhaps be preferred to more sophisticated methods such as using an electronic device.<sup>615</sup> Only in comparatively recent times has the type of signing composed of an idiosyncratic way of writing one's name – which today is regarded as synonymous with signature - become effectively universal. Yet this is not unproblematic. The verification of a name signature, even one made by a handwriting expert, is not wholly scientific, and is liable to forgery. Hence, the search for new forms of authenticated identity by signature, as for new forms of printed currency, is a widely-felt social need. This was perceived and speculated on before the advent of electronic communication.<sup>616</sup> It can be said, regarding the notorious skill of the predators in society to keep ahead of their

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<sup>615</sup>In this respect, the unhappy fate of the 2000 presidential election in the United States which was mired in a dispute over the use of electronic balloting in Florida might be compared to the simple indication of a cross or tick placed made on paper.

<sup>616</sup> Science fiction writing of the early twentieth century provides some vivid examples of these imagined realities. Cf. Aldous Huxley's *Brave New World*

prey, that there has always been a need to find new ways to protect property; the global sphere of electronic communication and transaction is itself an expression of an increasingly diverse and turbulent global society.

But what more precisely is this search about? What are the characteristics of electronic transaction demanded by mass society, for which the law must provide a robust and coherent framework? Is it for optimistic features of efficiency, practicality and speed that we require new ways to express intention and identity? Or is there also a reactive aspect here which, in the new-found chaos of cyberspace, looks for greater security, reliability and probity? Of course, these are not necessarily mutually exclusive and the two categories may run in parallel as effectively equal requirements. To shed more light on this we need to look further at the social meanings of the signature.

From several perspectives, it might be said that commerce is a sign of health in society. This goes beyond material productivity and the feeding of mouths. A society that is trading according to its own settled norms is not a society at war. Countries in conflict, whether with a neighbour or internally, produce distortions to ordinary commerce particularly in respect of lawfulness. Thus, peaceability and lawfulness might be called the spiritual benefits of a well-regulated commerce. Another benefit is the self-knowledge or self-affirmation that comes from a record of commercial activity. Like justice itself,



commerce has not only to be conducted for the health of society but must be seen to be conducted. Intransparency or obscurity of transaction generally denotes an unfairness that excludes the interests and participation of the citizen, or a corruption practised. In all of these considerations, social meanings of the signature are to be found. It is unsurprising, therefore, that the necessity to adapt new signifiers of authenticated consent has been a feature of recorded social history, and that the current legal anxieties over new forms of signature are seen as urgent. In themselves, they attest the importance of the signature, and yet, in historical terms, merely represent one of many challenges and adaptations.

### **6.3 The definition and forms of the Electronic Signature**

Many organizations have provided definitions of e-signature through laws of e-commerce or via laws established especially for this purpose. However, the discussion can be confined to two international organizations, which are the United Nations Commission on International Trade Law (UNCITRAL) and the European Union as a regional organization. Several other organisations have been influenced by the definition of UNCITRAL.

**A-** Guidelines to the definition of the e-Signature in accordance with ‘UNCITRAL Uniform Rules’ are characterised as follows:

1. The indetermination of the way by which e-Signature is used with a view to finding out any suitable way endorsed by the state, like the use of encoding, cryptography or any other means.<sup>617</sup>

2. This definition focuses on the fact that any signature should achieve its objectives, namely identifying the signatory's identity and expressing his consent to the contents of the data, which is the main objective of any signature.<sup>618</sup>

**B-** EU directive 1993/93/EC of the European Parliament and Council (13th December, 1999) on a Community framework document for electronic signatures, divides e-signature into the following categories:

The electronic signature means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.<sup>619</sup>

The advanced electronic signature means an electronic signature which meets the following requirements:

- (a) it is uniquely linked to the signatory;
- (b) it is capable of identifying the signatory;
- (c) it is created using means that the signatory can maintain under his sole

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<sup>617</sup> UNCITRAL, *The Model Law on Electronic Signature with Guide to Enactment 2001*, (United Nations Publication: New York, 2002, p.1, available at: <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf> (last visited on 16 Jun. 07).

<sup>618</sup> Ibid

<sup>619</sup> EU directive 1993/93/EC

control; and

(d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is deductible”.<sup>620</sup>

This Directive is binding on member states of the European Union. Thus, there is a dual system of e-signature, both simple and advanced. The advanced electronic one enjoys all the features of the traditional signature; while the simpler version has fewer features in terms of authority in evidence.<sup>621</sup>

The European definition of the simple electronic signature is similar to that made by UNCITRAL. The definition of the advanced electronic signature will be discussed at a later stage.

### **6.3.1 Definition of e-Signature in Fiqh**

Different definitions have been provided by *fiqh*. One of which is that “ e-signature is based on certain procedures, and can be used through symbols, numbers and the access to electronic data message which all have a special encoded feature to electronically distinguish the sender of the message transferred by way of using public and private key cryptography”<sup>622</sup>

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<sup>620</sup> EU directive 1993/93/EC on (13th December, 1999), Article 2.

<sup>621</sup> Andrew Barofsky, “The European Commission’s Directive on Electronic Signatures: Technological “Favoritism” Towards Digital Signatures”, (2000–2001), *B. C. Int’l & Comp. L. Rev.*, 24, p 145

<sup>622</sup> Ahmad Hasan al-Shareef, *al-Tawqi al-Electrony, Qawaid al-Ethbat wa Muqtqdayat al-Aman Fi al-Tijara al-Electronyah*, a srvey presented to the Conference of International Trade , Arab League , Cairo, Nov. 2000, p 3.

Some comments on this definition are:

1. This definition has focused on the way the signature is established in symbols and letters.
2. This definition shows the final outcome which is the emergence of a message, including a special sign (e-signature) of the signatory in the electronic conveyance.
3. This definition focuses on the digital signature that is one of the forms of e-signatures, based on private and public key cryptography.

There is also another definition of *Fiqh* which describes an e-signature as “a set of technical procedures allowing determination of the identity of the person who follows these procedures and gives his consent to the reason for which the signature is given”.<sup>623</sup>

In relation to this, the following points can be noted:

1. This definition does not determine the forms of e-signature. It merely says that it is a set of technical procedures. This is helpful from an adaptational point of view, and logical because there is no need to specify the forms of e-signature; it is enough to refer to the purpose of recognizing any procedure that has authority in evidence and able to achieve the signature’s functions, and does not hinder further technological development.

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<sup>623</sup> Hasan Abdulbasit Jumai, *Ethbat al-Tasarufat al-Qanunyah*, Beirut: Aldar Aljama’aih, 1997, p 35

2. This definition highlights the functions of e-signature that all recognised technical procedures should pursue, like the determination of the signatory's identity, and his consent to the contents of the document.

This definition is satisfactorily comprehensive; it satisfies all the objectives of e-signature. It leaves the issues of the forms of e-signature open, as well as the determination of the signatory's identity, to individual executive decisions made by the competent, relevant bodies.

### **6.3.2 Forms and types of e-Signature**

The discussion regarding e-signature does not mean that it is to be found in a single form. Like the traditional signature, it takes different forms. These forms are based on the use of electronic media that can transfer some features set by the signatory, such as letters and numbers, to data that can distinguish a signatory for the purpose of signing documents and e-Contracts.

#### **6.3.2.1 Physical characteristics in biometric devices**

Signing can take place by way of any of several physical characteristics, for example by retina scan, finger print, thumb print, lip recognition as well as voice recognition, which can all be stored as compressed digital samples to take the least space on the computer. There is now a potential for the use of this method when inserting an ATM card (as is already the case with some banking

in the United States) to compare these characteristics with what is stored in the computer.<sup>624</sup>

### **6.3.2.2 The trustworthiness of the biometric e-Signature**

The available technology has led to a great interest in the study of physical characteristics that distinguish one person from another, for the purpose of comparing signatures. Science has been able to develop reliable means to distinguish one person from another, leading to such applications as the ATM and internet use.<sup>625</sup>

These media may, however, be subject to forgery by, for example, ways of reproducing the voice, and coating lips or fingers with a special material to simulate the original. In addition, lenses can be devised and constructed to resemble the original retina. All of this may lead to the conclusion that forgery goes side by side with scientific development. Yet methods of signature must always be employed and although specialist criminals will find means of forgery, the same thing has always happened with traditional signatures. Thus, if reliable methods of e-Signature are employed, there is no problem over their use in legal evidence.<sup>626</sup>

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<sup>624</sup> Lorna Brazell, *Electronic Signature Law and Regulation*, London, Sweet & Maxwell: London, 2004, p76

<sup>625</sup> Stephen Mason, 'Electronic Signatures in Practice', (2006), *Journal of High Technology Law*, VI (2) p 148

<sup>626</sup> Ibid

### **6.3.2.3 The dynamic signature via a dynamic bank**

A dynamic bank is a banking facility by which the client can carry out his banking transactions directly from a house or place of work by giving payment orders via a computer screen and getting a bank statement whenever he wants. How does a signature take place in this context?

It has been described in the following way: “ The client signs through using a small machine not bigger than the bank card. This machine is like a calculator that includes something called a Microprocessor having a logarithm which generates a secret code almost every minute in line with the matrix of the bank. This makes it impossible to steal this code because it constantly changes. Therefore, if the client wants to issue orders, he has to enter this code on the small screen. This machine is sealed, and any attempt to subject it to harmful actions would destroy it immediately.”<sup>627</sup>

For the client to be able to make use of this service, he enters into a contract with the bank by which the client recognises the e-Signature.<sup>628</sup>

### **6.3.2.4 Manual electronic signature**

This device is based on adding a extra keyboard to the original (in Windows /Mac software). Each assigns special values to the letters. A client's handwritten signature should be protected by a secret code whenever required.

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<sup>627</sup> J .Angel, “Why use Digital Signatures for Electronic Commerce?” ,(1999), *The Journal of Information Law and Technology (JILT)* , 3(2), p14

<sup>628</sup> Ibid

This type is advantageous for the identification of users of electronic records, used interchangeably on an Intranet or Extranet, because they are safer than via the internet, and the dealers know each other. The handwritten signature can be scanned to be transferred to the file requested.<sup>629</sup>

#### **6.3.2.5 Signature by the use of an electronic pen**

This method is based on a very sensitive electronic instrument that can write on the computer screen through a special programme that controls the process. The signature is carried out as follows:

1. The programme senses or catches the signature by the user through the use of a digital screen and pen to store the data.
2. The programme stores the digital signature and the related data using numerical values for encryption to be appended as a data message.
3. The stored signature can be retrieved whenever the user needs it by way of merging the encrypted data of the digital signature to create a series of symbols for the purpose of uncovering any attempt at forgery or changes to it.
4. The accuracy of the signature can be determined by a program comparing the existing signature with the stored one. This comparison is based on biometric characteristics (direction of the pen, data regarding the place of the pen on the screen, acceleration of writing the signature, the degree of the pen's pressure on the screen, the percentage of time differences, directions of writing

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<sup>629</sup> A. W. Scoville, "Clear Signature, Obscure Signs", (1999) , *Cardozo Arts & Ent.* , 17 p 361



depending on positive and negative values, together with other values regarding the required accuracy of the signature (1-100%). Use will depend on the importance of the document and transaction.<sup>630</sup>

5. Whenever the digitally-signed document is opened through the help of the programme that checks the safety of both the signature and the document when there are any changes regarding the contents, a warning message will appear to confirm this.<sup>631</sup>

Such a signature performs the following functions:

(a) The service of sensing and receiving the signature when signing via the electronic pen.

(b) The ability to check the signature by comparing it with the stored one alongside the existing signature through biometric characteristics.<sup>632</sup>

The Adapt Software Solutions Company reports that it has devised a signature, called My e-Sign, a software which has all the desired applications previously mentioned. This software requires the signature to be entered six different times at the first time of use. The software employs certain logarithms to create the potentialities of the signature. In entering the six signatures, the

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<sup>630</sup> Lorna Brazell, *Electronic Signature Law and Regulation*, po cit, p135.

<sup>631</sup> Ibid, p139.

<sup>632</sup> Ibid

writing speed is monitored to verify authenticity. It refuses all signatures that do not match the biometric characteristics of the original signature.<sup>633</sup>

#### **6.3.2.6 Signature by password on magnetic cards**

Magnetic cards have been in common use for withdrawal of cash sums (at ATMs) for twenty years, and more recently for paying for goods by inserting or swiping the card at a specified place or by using cards on the internet.<sup>634</sup>

The accuracy of this system lies in the fact that it has a secret number or password, which means that if this card is found, it cannot be used unless the number or password is known. If the card is lost because of carelessness, the holder can put a stop on his account. This instructs the bank to prevent any further transactions in the account. Without this separation of a secret code, the magnetic card would only function in the same way as the signature, though better than a stamp or fingerprint.<sup>635</sup>

### **6.4 The Digital Signature**

The digital signature, previously referred to in the EU Directive's terminology as the Advanced Electronic Signature, is considered as one of two forms of e-signature; it can also be said that it is the better of them, for it enjoys a very high degree of authority in evidence. This promotes the view in many

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<sup>633</sup> Ibid, p 149.

<sup>634</sup> Ehab Maher Elsonbaty, "The electronic signature law: between creating the future and the future of creation", (2005), *E-Signature Law Journal*, , E.S.L.J. 2(1), 60-64

<sup>635</sup> Graham Smith , *Internet Law and Regulation*, op.cit, p828

countries that the laws of electronic signatures should now be called the laws of digital signatures. Therefore, a detailed examination of its definition is required with respect to how it works and its degree of reliability.<sup>636</sup>

#### **6.4.1 Definition of the digital signature**

The digital signature is basically a secret number or symbol created by its owner (signatory) by the use of a software (cryptosystem or asymmetric cryptosystem) to be encoded by two different but mathematically-related “keys.”<sup>637</sup> These are large numbers produced using a series of mathematical formulae applied to prime numbers. In order to clarify the concept of the digital signature, the mechanism requires some explanation.

#### **6.4.2 Difference between traditional and digital signatures**

The special conditions pertaining to the digital signature are several. They are not instantly readable; the signature, the medium of transfer and the signed object are not physically related to each other, and do not exist in the same locked and durable form; electronic manipulation of data may leave no trace as the manipulation of data in a traditional environment would normally do; portions of the signed object may be split up and stored in different locations. In

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<sup>636</sup> J. Angel, “Why use Digital Signatures for Electronic Commerce?” (1999), *The Journal of Information, Law and Technology* (JILT) (2): [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999\\_2/angel/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_2/angel/) , 28 January 2006.

<sup>637</sup> Jalil Fegghi, and Peter Williams, *Digital signature applied to internet security*, US, Addison-Wesley , 1998, p73

the electronic environment, the physical realisation of the traditional signature is replaced by technological verification of the signed-information object, stored in a computer-readable format. As the digital attribute that makes the signature unique to an individual is assigned, and not an inherent characteristic, the signature process may be performed by anyone who has access to its secret and to the procedures. Hence, the digital signature employs "public key cryptography" to ensure that the party to a contract has a verifiable identity. The basis of a person's digital signature is a mathematical formula ("a private key") representing an encrypted message unique to the individual. Attached to a document, the digital signature simulates the appearance of a person's having physically signed the document.<sup>638</sup>

The hand-written signature furnishes information with a physically unique sign of authenticity, and whether for the signatory himself or as proxy (where there is a power of attorney) and conveys his authority and rights. In contradistinction, the unique aspect of a digitally-signed object relates to a pattern of data that may easily be copied, and a duplicate will convey the same assurance as the 'template'. Consequently, the existence of viable electronic

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<sup>638</sup> Stephen Paine & Mohan Atreya, *RSA Security's Official Guide to Digital Signatures*, US, Osborne/McGraw-Hill, 2002, p109

material depends upon the ability to store and transmit original contents and, in some applications such as shipping, documents that require to be registered.<sup>639</sup>

Digital signatures can be processed to replace traditionally-signed instruments. Through the application of security techniques, authenticity of information can be maintained. The need for careful protection of traditional instruments is standard practice. Electronic commerce, in the handling by administrative agencies and the routines employed, requires similar scrupulous attention to security. It is unnecessary to create a completely new legal framework, but rather that existing procedures should be incorporated as far as they are compatible with the new technology.<sup>640</sup>

### **6.4.3 How the digital signature works**

Cryptography in the digital signature is based on:

1. Cryptosystem: the notion of a secret key (number) between the two parties. Such a key is performed in a separate environment such as that of magnetic cards because the secret number is mutually known by the card holder and the machine.<sup>641</sup>

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<sup>639</sup> J. Murray, 'Public Key Infrastructure Digital Signatures and Systematic Risk, 2003 (1) *The Journal of Information, Law and Technology (JILT)*, <<http://elj.warwick.ac.uk/jilt/03-1/murray.html>>.

<sup>640</sup> Barry Fisher & Ben Hughes, "Electronic Signatures", (2002), *International Journal of Electronic Commerce Law and Practice*, 2 E Commerce 2, 25.

<sup>641</sup> Dennis Campbell, *E-Commerce and the Law of Digital Signatures*, New York, Oceana Publications, 2005, p75

2. Asymmetric cryptosystems: this type of encryption has two keys (public and private). The former is freely accessible; while the latter is kept by its holder in secret, as previously mentioned, by which the holder can encode or encrypt his message. Therefore, the holder is unable to refuse anything included in his message. This means that each key has the opposite function to the other, i.e. what the first encodes, the second decodes.<sup>642</sup> In order to clarify this, let's take an example. Suppose that (A) wants to send a message to (B), A should write his public key, so that (B) can read the message. (A) should keep his private key. Having written the message, (B) should encrypt the message by using (A)'s public key. This message can be decoded only by (A) who holds the private key. In addition, suppose that (A) wants to send a message to (B) that confirms (A) is the sender of this message, (A) should write the message to which he includes his digital signature by the use of his private key. In fact, the digital signature is a very short unit of data attached to the message through which the recipient of the message, after decoding it (B), can make sure that (A) is the sender.<sup>643</sup>

It is worth noting that the digital signature is accomplished by numerical values using logarithms through which the handwritten signature is turned into

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<sup>642</sup> Ibid

<sup>643</sup> Ibid, p 99.

a numerical equation that can be re-translated into its normal form by the person who has the public and private keys.<sup>644</sup>

#### **6.4.4 The reliability of the digital signature**

The degree of reliability of the digital signature can be verified by several different means. The verification process of this signature is as follows:

1. The recipient of the message can encode a part of it by using the public key that he has. If the result is the same, it means that the message was sent by the owner (the holder of the private key), it can mean that this signature is a fake, or it can mean that the message was corrupted.<sup>645</sup>
2. Certification Authorities: such authorities can grant digital certificates to its members that include information to identify the member on the internet, and authorise him to use the digital signature to protect every message he writes. Such certificates and authorities comply with a special system in terms of information, time, the scope of use and other things.<sup>646</sup>

This certificate is stored on the internet, on-line, which can be accessed by anyone. The Verification Authority can protect this certificate from forgery, and

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<sup>644</sup> Kailash N. Gupta , Kamlesh N. Agarwala , and Prateek A. Agarwala, *Digital Signature: Network Security Practices*, Prentice-Hall of India Pvt.Ltd, 2005, p 132

<sup>645</sup> Gail Grant, *Understanding Digital Signature: Establishing Trust Over the Internet and Other Networks*, US, McGraw-Hill Inc., 1998, p211

<sup>646</sup> Ibid

any person can make sure that this certificate is the original by making use of the public key of the certificate.<sup>647</sup>

#### **6.4.5 Functions achieved by digital signature**

On the basis of what has been previously mentioned, the digital signature achieves the following functions:

1. Determination of the Signatory's Identity: both the public and private keys guarantee to identify the identity of the signatory successfully, for nobody can forge the signature if it is used by another person unless such a key was lost and used by someone else. If the holder loses his control over the private key as by giving it to another person or losing the card or the password, the program itself will detect whether or not the message has been altered and that the sender is the real owner of the digital signature.<sup>648</sup>

2. Verification of the Message: the digital signature based on the private and public keys guarantees the safety of the message because any change taking place on the digital signature leads to a doubt that the message has been altered. Therefore, the digital signature is able to uncover any forgery by the use and application of the hash function processing the results. The hash function can

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<sup>647</sup> Warwick Ford, and Michael S. Baum, *Secure Electronic Commerce: Building the Infrastructure for Digital Signatures and Encryption*, Prentice Hall PTR; 2nd ed, 2000, p 210

<sup>648</sup> J. Murray, "Public Key Infrastructure Digital Signatures and Systematic Risk", op.cit.



perform its work at the moment of signing and at the moment of verification to find out whether the message is the same as at the moment of signing.<sup>649</sup>

3. Efficiency: The process of verifying the digital signature has a high level of reliability to make sure that the digital signature is really related to its signatory. This process also has a high degree of accuracy and confidentiality. On the other hand, the possibility of facing any deficiency or any security problems like forgery, alteration or the use of any less secure types of e-signature is small.

## **6.5 Applications of the E-Signature**

After discussion of the definition and forms of e-Signature, we should turn to its applications. In other words, in which fields an e-Signature can be used at the level of legal transactions among individuals and with establishments. This comprises three topics. The first will deal with magnetic cards, the second with Electronic Cheques and Bills of Lading, and finally comment on the use of e-Signature in modern communication tools like the internet.<sup>650</sup>

### **6.5.1. Types of magnetic card**

The process of withdrawing money used to be carried out manually so that the client had to come to the bank and sign a Money Withdrawal Form. This

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<sup>649</sup> Ibid.

<sup>650</sup> Dennis Campbell, and Susan Woodley, *E-Commerce: Law and Jurisdiction*, New York, Kluwer Law International, 2003, p 313

was for the bank to have evidence of the withdrawal. However, during the last two decades, and because of great innovation in methods of transaction, banks began to make use of ATM cards. These cards are of different types, namely:

- **Credit Cards**

These are cards granted by the issuer to the holder through which he can buy and pay later. If the holder is unable to pay at once for what he has bought, he can utilise the credit card as a method of deferred payment, relying on the credit card company (bank) to make the immediate payment. These cards can also be used to pay via the internet, the most famous of which are Master card and Visa.<sup>651</sup>

- **Charge Cards**

Such cards enable the consumer to buy and pay later because such cards do not have a time-allowance on the credit advanced. This means that the holder of such a card has to pay the entire amount when the issuer sends an invoice to him. The advantage to the consumer, however, is that he does not have to pay interest on his account.<sup>652</sup>

- **Debit Cards**

This card requires the holder to pay for what he has bought by withdrawing money immediately from his current account. In other words, the client

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<sup>651</sup> Stephen Mason, *Electronic Signatures in Law*, UK, Tottel Publishing; 2nd edition, 2007,p113

<sup>652</sup> David Kosiur, *Understanding Electronic Commerce*, USA, Microsoft Press, 1997, p 42.

transfers money from his account directly when performing a transaction with the seller. If the card is on-line, this means the money will be transferred directly, while if it is off-line, the money will be transferred within a few days.<sup>653</sup>

- **A.T.M. Cards**

This card allows the client to use its own automated teller machines, or its connected networks with other banks, to carry out a number of different banking transactions such as money transfer, deposits, balance checks, statements, withdrawals or bill payments. These were the first such electronic bank cards and are in common use throughout the world.<sup>654</sup>

- **Secure Credit Cards**

This card is a secured “saving deposit with interest” card used in order to secure the credit limit. This card is used by customers who do not qualify for a credit card because of personal status.<sup>655</sup>

- **Smart Cards**

This is currently one of the leading magnetic cards available. It is a plastic card containing a Microprocessor PUCE, which is a small computer used to perform

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<sup>653</sup> Reed C, “What is a Signature?” (2000), *The Journal of Information, Law and Technology (JILT)* (3) <<http://elj.warwick.ac.uk/jilt/00-3/reed.html/>>.

<sup>654</sup> Darren L. Spohn , David McDysan, *ATM: Theory and Application (Signature Editions)*, U.S, Osborne/McGraw-Hill, 2<sup>nd</sup> ed, 1998, p89

<sup>655</sup> Donal O'Mahony , Michael Peirce, and Hitesh Tewari, *Electronic Payment Systems for E-commerce*, op cit, p195

certain limited functions. The programming of the smart card is carried out by companies that insert the name of the card-holder, his employer's name and other information into the card.<sup>656</sup> A hash function or a logarithm is programmed to generate the password. Whenever the client inserts this card into a card reader, together with the password, if details match, a transaction can be performed, thus by-passing the barriers of personal identification and signature. If the password and the card are not identical, however, the holder of the card is given two more trial attempts. If the holder has made a mistake, the microprocessor will issue an order to destroy itself, so that the card becomes inoperative. This card is used as a secure payment tool. The Cartes Bancaires company has claimed that the percentage of forgery decreased (by 50%) since this card was introduced in France. This card is also used as a key to inter-information networks like Citibank, which uses this card to enable its clients to use their Home Bank on-line facility.<sup>657</sup>

### **6.5.2. The e-Signature in magnetic cards**

What all magnetic cards share in common is that they depend on the password when using them to perform any transaction in accordance with the card's function. This is carried out as follows:

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<sup>656</sup> Uwe Hansmann , M.S. Nicklous , T. Schack , and F. Seliger, *Smart Card Application Development Using Java* , New York, Springer-Verlag 1999, p174

<sup>657</sup> Mike Hendry, *Multi-application Smart Cards: Technology and Applications*, Cambridge University Press, 2007, p 69

1. By inserting the card that includes the entire client's data into the correct machine.
2. Writing the password of the client.
3. Giving the order to perform the required transaction by pressing the key designed for this job, which means complete consent on the part of the client.<sup>658</sup>

The secret number or the password is used to carry out the transaction and sign on the computer screen without printing it. Then the transaction will be recorded on electronic files processed by the competent accounting authorities. Thus, the bank will get an exact budget that shows payments and incomings. In addition, the bank tellers make use of the smart card with the secret code to issue international payment orders via one of the largest networks in the world (SWIFT) to transfer orders and connect more than 90% of the World's banks.<sup>659</sup>

Any card should work by using a secret code or password, known only by the client. This secret code replaces the handwritten signature. Many EU Directives have been established to facilitate the payment process via cards.<sup>660</sup>

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<sup>658</sup> John S. Stolz & John D. Cromie, "Electronic Signatures in Global and National Commerce Act", available at: <http://www.cfg-lawfirm.com/articles/oneclick.html>. (last visited on 26,12,2007).

<sup>659</sup> Ibid

<sup>660</sup> M. Ballard, "E-Sign: A Nudge, Not a Revolution: Oct.1 is big day for E-signature implementation, but states, business have work to do", 2000. *The National Law Journal*: <http://www.law.com/jsp/article.jsp?id=900005520189>, 06,07,2007.

The use of the e-signature via a password has been subjected to criticism because there is a possibility of theft or loss via the internet and information hijacking, or by accidental discovery, especially when used in open networks.

It might be said that the e-Signature, which is physically separated from its owner, allows the use of the card by any other person able to get hold of it. In addition, the secret code might be known if his owner were obliged by force to reveal it to someone or by the use of recording machines in public places.<sup>661</sup>

The answer to these claims is that if a card is lost, and the secret code known to others, the client must inform the bank directly to invalidate its use. Furthermore, e-signature is subject to forgery but this applies also to the handwritten signature. According to Interpol, the forgery of the traditional signature reached such an extent that experts were sometimes unable to distinguish the fake from the original signature.

### **6.5.3. Electronic cheques**

Cheques are considered the most important tools used in payment that can substitute for money. Cheques are also a part of commercial instruments known as *“a legally signed and due instrument which can be used, and which guarantees its holder or the payee’s rights. This instrument includes an amount of money paid by the person obligated in a short period of time or when the*

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<sup>661</sup> Ibid,

*client is informed*'.<sup>662</sup> The cheque is the most important of these commercial instruments.

Cheques can also be issued and signed electronically. For a cheque to be payable, some obligatory data should be available, the most important of which is the signature of the drawer, his stamp, or fingerprint, providing that there are two witnesses in the case of signing by stamp or fingerprint. These witnesses are meant to be able to testify that the signatory acknowledges and knows the contents of the cheque. As an important instrument of payment, the use of the traditional cheque continues to increase in many societies. Yet on examination, the traditional cheque can be considered a hindrance to carrying out transactions in everyday activities. As a result of this, banks in some countries have begun to issue electronic cheques and to encourage or incentivise the use of on-line banking. This began in France, and later the US Administration issued electronic cheques to assist the treasury with the issue of more than 400 million units of coinage to pay its expenses.<sup>663</sup> Electronic cheques have the following characteristics:

1. Replacement of paper cheque-books by an electronic one given to the client by the bank via the internet safely and quickly. This virtual book does not

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<sup>662</sup> Aryya Gangopadhyay , *Managing Business with Electronic Commerce: Issues and Trends*, Hershey, USA , IGI Publishing, 2001, p153

<sup>663</sup> Stephen Mason, *Electronic Signatures in Law*, op cit, p 187.

differ from its paper equivalent, other than in form, because both have the same functions.

2. Electronic cheques are used for payments in all electronic transactions be they administrative or commercial ones. An electronic message will follow the transaction via e-mail or on the internet.

3. Electronic cheques follow the same legal procedures that are used in paper cheques. What might be of concern with electronic cheques, however, is the signature. How exactly are they signed and authenticated?<sup>664</sup>

Electronic cheques are signed by electronic signatures based on public keys and the use of passwords, and smart cards ensuring and storing the public keys and electronic certificates. The client can use his electronic signature (secret code) to sign electronic cheques; the client can also sign this cheque in the same way as he would a paper one.<sup>665</sup>

Electronic signatures (secret codes) on electronic cheque-books are examined and authenticated by means of electronic and mechanical comparison. Therefore, electronic cheques undergo the same examination procedures used in paper cheques except for the corporeal part. A specialist employee has responsibility for examining the cheque by inserting it into a special machine that decodes symbols. It is worth noting that the time the

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<sup>664</sup> Jonathon E. Stem, "Business Law. The Electronic Signatures in Global and National Commerce Act", (2001), *Berkeley Tech*, L. J. 16 p 391.

<sup>665</sup> *Ibid*, p395.



machine consumes is less than that needed to examine a traditional cheque. Electronic signature on electronic cheques used on the internet can be examined by the Certification Authorities.<sup>666</sup>

Electronic cheques are used to reduce the expense of, for example, typing and paper distribution, by using payment machines, and to solve certain problems regarding forgery or other forms of theft, as well as currency fluctuations.

Despite all these features, electronic cheques will not replace paper ones in the immediate future. The individual small customer of a bank may find electronic banking more complicated than established methods such as credit-card use which perform the same function. There is also the question of trust in the virtual world to set against the known physical presence of the high street bank and its physical instruments of exchange. The striking contrast here is between the take-up in the corporate world compared to the adoption of electronic banking in the world of individual small customers. Companies constantly analyse their costs and efficiency, and once a consensus is formed in the corporate sphere, all commercial concerns will be under competitive and trading pressure to adopt the same systems.<sup>667</sup>

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<sup>666</sup> Andrea Schulz, *Legal Aspects of an E-commerce Transaction: International Conference in the Hague*, Munich, European law publisher, 2004, p 205

<sup>667</sup> Margaret Tan, *E-Payment: The Digital Exchange*, Singapore University Press, 2004, p76

It can be seen that electronic cheques are first used at a national level and in multinational dealings, in both state and corporate entities; then between the clients of smaller enterprises and those able to use laptops. The US Administration issued the first electronic cheque for \$22 million USD via the internet to a company in 2000.<sup>668</sup> This was as the direct result of research into making the electronic cheque something tangible, realistic and safe. This method works by using the digital signature of an authenticated party.

## **6.6 The effectiveness and authority of the E-Signature**

An e-signature is legally recognized and defined as “a *set of lines that take a specific shape which have no relation to normal writing but which have a special geometrical pattern*”.<sup>669</sup> The signature should identify the signatory that is the person whom the signature was issued or signed by the signatory with a pen of whatever type. The signature is usually placed at the bottom of the document, by which the signatory expresses his consent to the contents, though the signature can be at any other place.<sup>670</sup> So does an e-signature achieve the function of the hand-written signature?

An e-signature is a part of electronic data in a different form, making use of symbols and letters. It cannot be considered as the same as a hand-written

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<sup>668</sup> Yutaka Kurihara , Sadayoshi Takaya , and Nobuyoshi Yamori, *Global Information Technology and Competitive Financial Alliances* , Information Science Publishing, 2005, p222

<sup>669</sup> Minyan Wang, *The impact of information technology development on the legal concept.a particular examination on the legal concept of 'signature*, Oxford University Press, 2006, p216

<sup>670</sup> Ibid

signature unless performed by an electronic pen. This method will gain recognition if it comes into common use along with the availability of protective features that can be relied on by users. In this case, signing with the electronic pen will be considered as functionally the same as using a traditional one if the signature is properly used and correctly conveys consent to the business of the document.

#### **6.6.1 The feasibility of considering E-Signature as a fingerprint**

The fingerprint leaves a tangible effect that can identify the holder of the document, which is the effect of the skin in the form of curved lines unique to each individual. On the other hand, the e-Signature cannot be considered as a fingerprint because this signature is based on the encryption of symbols and letters which are not a part of the human body. Encryption is a technology for which a person must be trained to use. In addition, it does not leave any effect like a fingerprint, unless considered as a biometric signature, which is used in the field of ATM machines. A person who wants to use an ATM is asked to put his finger on the screen to be compared with what has been saved on the ATM's memory. Thus, this type of signature replicates the role played by the

fingerprint, though we should notice also that these machines may ask the user to enter a password.<sup>671</sup>

### **6.6.2 The feasibility of considering the e-Signature as a stamp, seal or signet ring**

The stamp, seal or signet ring (more usually today and hereafter referred to as a stamp) is one of the oldest mediums used in signature. The stamp can be made of wood, and contain the holder's name, address and occupation, without any legislated specification regarding its shape, because the shape is at the discretion of its holder. The use of the stamp has raised much criticism because it can be easily forged or stolen, which places its holder in difficulty.<sup>672</sup>

Can we consider the e-signature as a stamp? Some people have argued that the e-signature, based on a password implanted in a plastic card, is like a stamp. Their contention is that this type of signature is not carried out in written form, or in a form of words.<sup>673</sup> In fact, we cannot generalise all cases. The signature by the use of a stamp is like a drawing that leaves a tangible effect, after absorbing ink, on paper. This is quite unlike an e-signature based on a password because the impression left by the password on the screen (which is no more

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<sup>671</sup> Heiko Rossnagel.& Jan Zibuschka, "Integrating qualified Electronic signature with password legacy systems", (2007) , *Digital Evidence Journal*, D.E.J., 4, 5-11.

<sup>672</sup> Judith Y Gliniecki and Ceda G Ogada, "The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce", (1992), *13 Journal of International Law & Business*, p117.

<sup>673</sup> Nuri Hamad Khatir, *Wazaif al-Tawqi*, Beirut:Muasasat Aresalah, 2001 p 70.

than a vacant space in a box) is different from the effect left by a stamp. The difference is also that the password is known only to its owner.<sup>674</sup>

Therefore, the e-signature may be considered a new form of signing that has emerged as a result of the new communication media to perform transactions via PCs. This has led to the spread of such instruments to replace the traditional forms of signature. In addition, the issue of regulating these forms is left to the competent legislative authority in each country.<sup>675</sup>

### **6.6.3 The effectiveness of e-signatures in relation to the functions of the traditional signature**

For any signature to achieve its functions, it should be either a diacritical or biometric distinctive mark of the signatory to convey his identity. The reason why legislators accepted the stamp or the fingerprint was because of illiteracy. Legislators have recognised that both the stamp and fingerprint are distinctive and reliable marks of the signatory.<sup>676</sup>

It can be said that the forms of the e-signature are distinctive. The biometric signature, which is based on physical characteristics, the use of a password, the electronic pen, together with the digital signature, convey the

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<sup>674</sup> M. H. M. Schellekens, *Electronic Signatures: Volume 5: Authentication Technology from a Legal Perspective: Authentication Technology from a Legal Perspective v. 5* (Information Technology and Law), Asser Press, 2000, p 70.

<sup>675</sup> Ibid, p78.

<sup>676</sup> Minyan Wang, "Do the regulations on electronic signature facilitate international electronic commerce? A critical review", (2007), *Computer Law & Security Report*, 23(1), 32-41

distinctive features of the signatory. Each of these has its own applications and particularities, which can be looked at as follows:

1. The password is the simplest method of conveying secure identity electronically. Its applications can now be found, even in economically-deprived parts of the world, as a universal and essential requirement of modern transaction. This is particularly apparent in retail banking, as in the use of ATMs. It offers the facility of unique identity to the signatory through the PIN system, but suffers from being relatively insecure as to penetration by fraud because of criminal techniques of ‘hacking’, ‘skimming’ and the like.<sup>677</sup>

2. The electronic pen enjoys the ‘unique selling point’ of providing a completely objective method of ascertaining identity of signature by the electronic match of a signing to a specimen stored within the system. It enjoys a high degree of protection because it is intrinsically superior to traditional methodology which, however expertly performed, retains an element of subjectivity and unreliability. Its current applications can be found in retail business such as restaurants and banks, secure document handling as provided by DHL and FedEX, and it is likely in future to find widespread use through linkage to mobile telephones.<sup>678</sup>

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<sup>677</sup> Ibid

<sup>678</sup> Ibid

3. The particular advantage of the digital signature is that it sets up a channel of secure authentication under which business can be approved and transacted, and is thus at present the instrument of choice for company dealings. The registering of secure keys and the issuing of PKI certificates has a cost implication that may deter the consumer from taking advantage of this facility. This signature is based on two keys, one is private and the other public. The private key is only known by the signatory himself. The person who receives the signature can authenticate it by reference to the certification and verification authorities.<sup>679</sup>

4. The biometric signature is the most secure method of all to convey identity. It can utilise a number of separate features of the human body and is an expanding science of enquiry. Its drawback is the cost of system installation, and at present is only an available option to government and big business. National databases established, for example, by the police, or for the purposes of immigration and passports, biometric identification is now used. It can also be found in corporations that operate with a high need for security, such as in computer technology companies like Microsoft.<sup>680</sup>

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<sup>679</sup> Ibid.

<sup>680</sup> Ibid

#### **6.6.4 The signature shall be ‘clear and lasting’**

Electronic signatures are machine-read but with an equivalent durability to traditional forms of written signature. E-signatures achieve these conditions since they process many different data through the PC, which is equipped with software to read the binary computer language (rendered as digits 1, 0) to translate human language.<sup>681</sup>

There is some doubt regarding the stability of the signature because of the structure of the chemical magnetic chips, or the ‘floppies’ used in PCs. These are characterised by their sensitivity and are subject to damage through the speed of the electrical current. However, this problem has been overcome by the use of more advanced machines able to save and keep data for a long time. It is also longer, in some settings, than the life of paper documents which can be damaged as a result of humidity or by insects.<sup>682</sup>

For the signature to achieve the function that the signatory has approved, it needs to be linked directly to what is written. This raises the question of competence concerning electronic technologies used in protecting data. They must ensure and give confidence that the connection with the electronic instrument cannot be separated from the signature. The most effective technology in this regard is the digital signature. This system (PKI) transfers the

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<sup>681</sup> Sean Doherty, “The e-signature act makes online transactions legally binding”, (2001), *Network Computing*, 12(25), p 83

<sup>682</sup>Ibid.



signature to a mathematical equation which can only be read and understood via the private key through a process known as '*hachage irreversible*'. Accordingly, nobody can amend this document but the signatory himself.<sup>683</sup>

## **6.7 E-Signatures in different jurisdictions**

### **A- The European Union**

Following the European Initiative in e-commerce<sup>684</sup> and as a result of the Bonn Conference and the hearing in Copenhagen in 1998, the Commission realised the need for a uniform legal framework for e-signatures at a European level, in order to avoid any inconsistencies in the internal market and to keep pace with international action that had already been made. The directive on e-signatures has laid the foundation for a secure environment in the online market, as its main objectives are to facilitate the use of the e-Signature by contributing to its legal recognition, creating harmony among Member States, and providing a flexible scheme compatible with other international initiatives.<sup>685</sup>

The directive provides the legal framework for e-Signatures and CSPs and defines two levels of security that organisations may apply depending on the

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<sup>683</sup> Nigel Millar, "Electronic Signatures—Much Ado?", *Computers and Law*, C and L, 2002, p36.

<sup>684</sup> <http://www.cordis.lu/esprit/src/ecomcom.htm>. 21-11-2007

<sup>685</sup> Model Law on Electronic Signatures, 2001: <<http://www.uncitral.org>>. 21-11-2007.

sensitivity of the transaction.<sup>686</sup> The basic e-Signature is used as authority at the minor level of transaction, and the advanced e-Signature provides for a higher level of security, complying with requirements laid down in Article 2(2b) of the directive.<sup>687</sup> Although this directive is not technologically orientated,<sup>688</sup> there is a strong suggestion of the digital signature technology under the provisions of Article 2(2b).<sup>689</sup>

As far as legal recognition is concerned, the directive provides a non-discriminatory approach towards e-signatures but it ensures that advanced versions will fulfil national requirements, this being linked to requirements for certificates, CSPs, and signature-creation devices.<sup>690</sup> It is obvious that Article 5(1) refers to digital signatures and for the time being the directive considers only digital signatures to be equivalent to handwritten ones whilst under Article 5(2) it is stated that e-signatures will not be denied enforceability and admissibility as evidence in legal proceedings simply on the grounds that they are in electronic form.<sup>691</sup> However, this legal recognition is limited as all contractual or other non-contractual obligations, where specific requirements of

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<sup>686</sup> Frank D (2000), 'Europe Takes Lead on E-signatures',  
<<http://www.fcw.com/fcw/Articles/2000/1016/tec-esigns-10-16-00.asp>>.,

<sup>687</sup> EU Directive 1999/93/EC, Article 2.2.B

<sup>688</sup> 'Whereas rapid technological development and the global character of the Internet necessitate an approach which is open to various technologies and services capable of authenticating data electronically': See note 13

<sup>689</sup> EU Directive 1999/93/EC, Article 2.2.B

<sup>690</sup> Joint Keidanren-ILPF Workshop on Electronic Signatures and Authentication (1999):  
<http://www.ilpf.org/events/keidanren/summary.htm>, 21-11-07

<sup>691</sup> EU Directive 1999/93/EC, Article, 5(1), (2)

conclusion or validation under national or EU law have to be met, are excluded from the directive's scope.<sup>692</sup>

In terms of market access, Member States cannot subject the provision of e-signature services to mandatory licensing<sup>693</sup> but it is left to their discretion to introduce voluntary accreditation schemes, which must be objective, transparent, non-discriminatory, and proportionate. In addition, based on party autonomy and contractual freedom, schemes governed by private law agreements, such as corporate Intranets or banking systems, where a relation of trust already exists and there is no need for regulation, are permitted.<sup>694</sup>

The two-tier approach that the directive adopts seems to be the best legal instrument in order to set the minimum requirements of secure e-transactions and converge different trends and policies among the Member States. Nonetheless, it is more focused on e-signatures and the requirements of CSPs than on the legal recognition and force of digitally-signed contracts. The narrow scope (Article 1) of the directive proves the strict regulatory character of the EU on e-Commerce and appears to be a regressive factor in the development of a competitive EU e-market.<sup>695</sup> Therefore, it is not surprising that businesses

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<sup>692</sup> Christopher William Pappas, "Comparative US & EU Approaches to E-Commerce Regulation: Jurisdiction, Electronic Contracts, Electronic Signatures and Taxation", (2002), *Denver Journal of International Law & Policy*, 31, p325, 341

<sup>693</sup> Commission welcomes new legal framework to guarantee security of electronic signatures: [http://europa.eu.int/comm/internal\\_market/en/media/sign/99-915.htm](http://europa.eu.int/comm/internal_market/en/media/sign/99-915.htm), 21-11-07

<sup>694</sup> *Idem*

<sup>695</sup> EU Directive 1999/93/EC, Article 1.

remain confused and are still waiting for a more liberal and less restricted regulation on e-signatures.

### **B- The United States**

On a Federal level, the United States has enacted the Electronic Signatures in Global and National Commerce Act (2000) (the 'e-Sign Act'), which adopts a minimalist approach to the regulation of electronic signatures.

The e-Sign Act contains the following very general definition of an electronic signature. “The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”<sup>696</sup> Almost any type of electronic signature would be capable of fulfilling this definition provided the requisite element of intent is present. The e-Sign Act contains a number of provisions specifically relating to consumer transactions, but the general position on the validity and effect of electronic signatures is reflected in section 101(a). Generally speaking, it is intended that electronic signatures, and contracts that utilise them, will not be invalidated purely because the signature or contract is in an electronic form. Section 101(a) of the E-Sign Act is replicated below:

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<sup>696</sup> E-Sign Act, section 106(5), available at :  
<http://www.fca.gov/Download/Public%20Law%20106-229%20E-Sign.pdf>

“Notwithstanding any statute, regulation or other rule of law...with respect to any transaction in or affecting interstate or foreign commerce ... (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.”<sup>697</sup>

At a state level, in 1999 the National Conference of Commissioners of Uniform State Laws approved and recommended that all states enact the Uniform Electronic Transactions Act (the 'UETA'). The UETA defines an 'electronic signature' in similar terms to the e-Sign Act and comments on the UETA specifically emphasize that electronic signatures may be created by any form of technology, and that the key lies in establishing the relevant intention to sign a record.<sup>698</sup> Under section 5(b) of the UETA, the legislation will only apply to a transaction where the parties have agreed that the transaction will be conducted by electronic means.<sup>699</sup> This prerequisite element of consent is

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<sup>697</sup> E-Sign Act, section 101, available at :

<http://www.fca.gov/Download/Public%20Law%20106-229%20E-Sign.pdf>

<sup>698</sup> National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (1999)

<sup>699</sup> UETA, section 5(b)

determined by looking at the context and the surrounding circumstances, including the parties' conduct.<sup>700</sup>

Electronic signatures are generally recognised by section 7 of the UETA. It provides that: “a record or signature may not be denied legal effect or enforceability solely because it is in electronic form....if a law requires a signature, an electronic signature satisfies the law.”<sup>701</sup>

The fact that a signature is in electronic form does not provide a basis for excluding the signature as evidence (s 13 UETA). However, the attribution of an electronic signature to a person and the effect of the signature are governed by section 9 of the UETA. Section 9 states: “an electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable....The effect of an electronic record or electronic signature attributed to a person under sub-section (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.”<sup>702</sup>

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<sup>700</sup> Jonathon E. Stem, “Business Law. The Electronic Signatures in Global and National Commerce Act”, (2001), *Berkeley Tech. L. J.* 16 ,391

<sup>701</sup> UETA section 7.

<sup>702</sup> UETA. Section 9

It has been noted that UETA (s 9) ensures that an electronic signature is ascribed to a person rather than to a machine. These comments also provide a range of examples where an electronic record or signature would be attributed to a person, including where the person types their name as part of an email purchase order.<sup>703</sup>

### **C- United Kingdom**

The UK enacted the Electronic Communications Act 2000 (UK) ( 'ECA (UK)') which is intended to be consistent with the European Union Directive 1999/93/EC of 13 December 1999 on a community framework for electronic signatures (the 'Directive on Electronic Signatures') and UNCITRAL's Model Law on Electronic Commerce 1996.<sup>704</sup> The ECA (UK) adopts a minimalist regulatory approach and among other things, enables a relevant Minister to make orders modifying legislation to authorise or facilitate the use of electronic communications for a range of purposes. One of these purposes relates to requirements for a person's signature or seal, and requirements for a deed or witnessing.<sup>705</sup>

Section 7(2) of the ECA (UK) contains the following definition of an 'electronic signature': “an electronic signature is anything in electronic form as (a) is

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<sup>703</sup> Robert A. Wittie & Jane K. Winn, “Electronic Records and Signature under the Federal E-Sign Legislation and the UETA”, (2000), *56 Business Law*. 295

<sup>704</sup> Explanatory Notes to the Electronic Communications Act 2000 (UK) clause 19

<sup>705</sup> Electronic Communications Act 2000 (UK) s 8

incorporated into or otherwise logically associated with any electronic communication or electronic data; and (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.”<sup>706</sup>

In contrast with the provisions of the ETA, this definition endeavours to connect an electronic signature with the authenticity and/or integrity of an electronic communication.<sup>707</sup> Under the ETA, there is no requirement for an electronic signature method to serve the function of verifying the integrity of data that has been communicated. Section 15(2) of the ECA (UK) clarifies the UK Parliament's intention when referring to the authenticity and integrity of communications or data: “In this Act, (a), references to the authenticity of any communication or data are references to any one or more of the following, (i), whether the communication or data comes from a particular person or other source; (ii), whether it is accurately timed and dated; (iii), whether it is intended to have legal effect; and, (b), references to the integrity of any communication or data are references to whether there has been any tampering with or other modification of the communication or data.”<sup>708</sup>

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<sup>706</sup> Electronic Communications Act, section 7(2)

<sup>707</sup> Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland*, UK, Routledge Cavendish, 2006, p 245

<sup>708</sup> Electronic Communications Act . Section 15(2)



Section 7(1) of the ECA (UK) provides for the admissibility of electronic signatures to establish the authenticity and integrity of an electronic communication or data. The materials that are admissible are the electronic signature itself (which is incorporated into, or logically associated with the communication or data), as well as a certification of the electronic signature.<sup>709</sup> The ECA (UK) does not distinguish between different forms of signing technology, although on March 8, 2002 the Electronic Signatures Regulations 2002 (UK) came into force, particularising the potential liability of certification service providers.<sup>710</sup>

#### **D- United Nations Commission on International Trade Law**

At the supranational level, in 1996, the policy of the UNCITRAL Model Law was to remove legal obstacles to the use of electronic and digital signatures. It expressly provided that where the law requires the signature of a person, “that requirement is met in relation to a data message if: (a), a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and (b), that method was reliable as was appropriate for the purpose for which the data message was generated or

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<sup>709</sup> Electronic Communications Act . Section 7 (1).

<sup>710</sup> Anda Lincoln, “Electronic Signature Laws and the Need for Uniformity in the Global Market”,( 2004), *The Journal of Small & Emerging Business Law*, 8 , 71.

communicated, in the light of all the circumstances, including any relevant agreement.”<sup>711</sup>

In 2001, UNCITRAL adopted the UNCITRAL Model Law on Electronic Signatures (UNCITRAL Model Law on e-Sign).<sup>712</sup> One of its purposes is to provide equal treatment to the use of various electronic signature techniques currently being used or still under development with the use of hand-written signatures and other kinds of authentication mechanisms used in paper-based transactions (e.g. seals or stamps).<sup>713</sup> Article 2 of the UNCITRAL Model Law on E-sign defines "electronic signature" as "data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message."<sup>714</sup>

Under the UNCITRAL Model Law on e-Sign, electronic signatures cover both electronic signatures based on the use of a private and public key pair or "digital signature"<sup>715</sup> and electronic signatures based on techniques other than

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<sup>711</sup> UNCITRAL Model Law (1996), article 7.

<sup>712</sup> UNCITRAL, UNCITRAL Model Law on electronic signature Resolution 56/80 adopted by the 85th plenary meeting of the General Assembly (December 12, 2001) (UNCITRAL Model Law on E-Sign), [www.uncitral.org/en-index.htm](http://www.uncitral.org/en-index.htm), 21-11-07

<sup>713</sup> UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on electronic signature para.31

<sup>714</sup> UNCITRAL Model Law on E-Sign, Art.2.

<sup>715</sup> Digital signatures involve the use of a private and public key pair that are issued by a Certification Authority ("CA"), a third party who verifies the identity of the person requesting the key pair. The private key is distributed only to the key owner whereas the public key can be found by accessing a CA's public database. The public and private key pairs are mathematically

the use of a private and public key pair,<sup>716</sup> for example, the use of a special pen to sign manually on either a computer screen or a digital pad, the use of a personal identification number, and the click on an "I accept" or similar icon on the computer screen.<sup>717</sup>

The UNCITRAL Convention, 2005, builds on the foregoing Model Laws without substantively superseding any of their provisions.<sup>718</sup> Article 9.2 (Form requirements) adds the safeguard that an electronic communication is subject to the requirement that “the information contained therein is accessible so as to be usable for subsequent reference.”<sup>719</sup> Article 9.4 covers a situation where a communication may not be available in its original form, which has validity if “there exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form ... and that information is capable of being displayed to the person to whom it is to be made available.”<sup>720</sup>

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related such that a message encrypted with a private key can only be decrypted with a public key. Therefore, if a sender signs a document with his/her private key, the recipient can use the sender's public key to confirm the authenticity of the document.

<sup>716</sup> UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Electronic Signature above n.94, para.33.

<sup>717</sup> *ibid.*

<sup>718</sup> UNCITRAL Convention 2005, *op. cit.*, Article 9. Much of the drafting in this Article reproduces the corresponding provisions in the Model Law 1996, although there is some broadening of approach as, for example, in replacing a ‘person’s approval’ (Article 7) by a ‘party’s intention’.

<sup>719</sup> *ibid.*

<sup>720</sup> *ibid.*

## **E- Islamic legal system (Sharia): Islamic Fiqh's approach towards E-Signature**

Although the signature occupies a very significant position in the recognition of both legal and unofficial documents, historically Islamic law does not provide any definition of the nature of the signature. This has led scholars and specialists of law to make their own efforts to establish a definition.

Some scholars give a very narrow definition which is confined to a specific number of signature patterns, and this approach is still followed at the present time. One definition holds that a signature is a sign, mark, or fingerprint, written on a document to express consent to the contents of that document. Another is that a signature is a diacritical mark used by a specific person by which to express his consent. The restriction in such definitions lies in the connotations of the words that confine the concept of the signature to specified forms and patterns.<sup>721</sup>

Other scholars have offered much wider definitions of signature, focusing on its functions and purposes without nominating the form in which it is carried out as, for example: “*any medium used to determine the identity of the signatory by which he shall comply with the contents of the written document.*”<sup>722</sup> This definition achieves the required comprehensiveness for the interpretation of legal texts. Definitions, taken together from legal texts, should

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<sup>721</sup> Abbas al-Abudi, *al-Ithbat al-electroni*, Beirut: Aldar Aljama'aih, 2000, p 133.

<sup>722</sup> Husam Lutfi, *al-Itar al-Qanuni Lilmu'amalat al-Electronya*, Jordan; dar aldhia, 2003, p 33.

identify the current and common patterns of signature at the moment of being given legal effect and should not restrict the concept of the signature to the three forms of sign, mark and fingerprint.

*Sharia* is interested in the issue of regulations concerning e-signatures because it gives importance and full authority to the documentation of transactions. Allah, The Exalted, says in the Holy *Qur'an*, “*O you who believe! When you contract a debt for a fixed period, write it down.*” Allah also says “*And get two witnesses out of your own men and if there are not two men (available) , then a man and two women , such as you agree for witnesses , so if one of them (two women) errs, the other can remember.*” Also “*you should not become weary to write it ( your contract ), whether it be small or big for its fixed term, that is more just with Allah; more solid for evidence, and more convenient to prevent doubts among yourselves.*” <sup>723</sup>

Regarding signature on written documents, much evidence and many proofs about signatures are used as an evidence in *Sharia* towards the signatory. The Prophet (peace be upon him) wrote letters to Muslim governors and princes; many letters have his stamp on them. The same thing applies to the letters by the Prophet to kings and leaders of other countries with his stamp on

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<sup>723</sup> The Holy Book: Quran: Al-Baqarah:2: 282.

them, asking those kings and leaders to embrace Islam.<sup>724</sup> After the death of the Prophet, the Orthodox Caliphs (al-Khulafa' al-Rashidin) sent to their governors letters of general and special provision with their stamp on them. Such letters were sent through couriers who did not know the contents, only the Caliph's stamp.<sup>725</sup>

In Islamic *Sharia*, most scholars and jurists make the distinction between official and 'unofficial' documents (by 'unofficial' is meant personal and private in character). Therefore, they take more precaution with legal documents than with unofficial ones.

On formal documents there are different opinions. Bin Al-Qayyem says “ *if the judge's document includes a verdict, in the interest of the party concerned the judge shall ask him to sign in acknowledgement of the verdict. There are three cases given by the scholar Ahmad. In the first, if a person recognises the handwriting, he will follow what it says without question. In the second, he will do nothing until he is sure of the handwriting. In the third, if he owns and remembers the document, he will fulfil his obligations, otherwise he will not do*

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<sup>724</sup> Look at what was examined by Bukhari in Book of Al-Ilm ( Knowledge) under what comes under Chapter of Handing over ( al-Munawalah ), Tradition No (64-65) ; the book of al-Jihad ( Fighting for the cause of Allah) under chapter Inviting jews and Christians to embrace Islam, Tradition No. 2780; the book of Dress ( al-Libas ) Chapter : the use of stamp to stamp something or to write for the People of the Book ( the People of the Scripture ) , Tradition No 5537; the Book of Judgments ( Ahkaam ) , chapter : the leader to his governors , tradition No. 6769; look at what was examined by Muslim in the Book of Dress , chapter ; The Prophet's stamp, Tradition No. 2092.

<http://cwis.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/025.sat.html>, 07,08,2008

<sup>725</sup> Al-Mughni al-Akbar by Bin Qudama 8/472, Beirut, Dar al-Fikr al-Arabi, 1994, 2:323

*anything.*” Bin Qu’dama says that if Ahmad has a plaintiff and a defendant, and one of them says that his case can be found at the justice office, the judge shall see if his stamp is on the document first, and if it is, only then will he give his verdict on the case, but if the judge does not find the stamp or does not remember the case, he will give no verdict or sentence. This has been given by Ahmad in testimony, and it is also confirmed by others as well, for example, Abi Hanifa, al-Shafey, and Mohammad Bin al-Hasan. Ahmad also follows Ben Abi Layla in saying that if there is a verdict or a sentence by a second judge, and the first does not recognize him, the second cannot implement the verdict without further evidence. This is because forgery of the stamp or of the handwriting is possible.<sup>726</sup> This deterrent procedure is followed by many jurists with respect to written documents, although recognition of the handwriting and of the stamp would be enough.

The unofficial document is considered as evidence in a case documented by a testimony, a stamp, a recognition of the handwriting, or any other means of verification that links the document to the signatory. Therefore some jurists have decided that “ *if anyone dies and his Will is found in writing next to his head, nobody has witnessed the writing of his Will; yet, if his handwriting is*

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<sup>726</sup> *Al-Mughni*, 14/57, *Kashaf al-Qina’* by al-Bahuti 6/28., also, Abd al-Jabbār, al-Qādī Abū ’l-Hasan. *Al-Mughnī*, 20 vols. Cairo: Mat.ba’at ‘Isā al-Bābī al- H.alabī, 1385/1965.

*recognized, it shall be accepted. If his stamp is on this Will, it shall also be accepted.”*<sup>727</sup>

Another evidence is that if a son finds in his deceased father’s notebook a debt owing to someone, the son must accept responsibility for this debt.<sup>728</sup> The same thing applies to an heir who finds any debt on the legator in his handwriting. The heir must pay this debt on behalf of the legator<sup>729</sup>.

Regarding money or goods held in trust, “ *if an heir finds in the handwriting of the legator saying that there is a trust for someone left in my charge, the heir shall pay this or return this trust mandatorily*<sup>730</sup>” .

Some jurists and scholars have considered that similarity in handwriting was evidence to ascribe a written document to a presumed issuer and signatory. In *Tabsirat Al-Hukkam*, “*if a man( plaintiff) claimed that a person (defendant) had taken his money and the same plaintiff has a document containing the handwriting of the defendant. Yet the defendant denies what the plaintiff claims against him because there is no solid evidence against him. If the plaintiff demanded that the defendant should write before the judge, the defendant will be obliged to perform that for the purpose of comparison*”<sup>731</sup>

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<sup>727</sup> al-Mughni 8/ 470, Kashaf al-Qina’ 4/288.

<sup>728</sup> Al-Mughni 14/57, Kashaf al-Qina; 4/155.

<sup>729</sup> Kashaf al-Qina’ 4/155.

<sup>730</sup> Kashaf al-Qina’ 4/155.

<sup>731</sup> *Tabsirat al-Hukkam* by Iben Farhun 1/308. , Egypt: Dār al-Ma‘ārif, 1956.



Abu Al-Hasan Al-Lakhmi endorsed the fairness of this action provided that the defendant write extensively, so that the style of his handwriting becomes transparent, and competent witnesses can compare what the plaintiff brought as evidence with the defendant's handwriting to testify whether or not this is the same. Most jurists agree with the opinion that Al-Lakhmi has given.

Other scholars have also claimed that the recognition of handwriting should be considered as evidence to ascribe a written document to the person who wrote it. In *Tabsirat AL-Hukkam* “*if a person wrote something on Sahifa (a piece of leather or paper written on by hand), or a piece of cloth, he should acknowledge that this is his handwriting.*”<sup>732</sup>

The majority of jurists considered that the written document can be ascribed to its owner as an evidence for or against him. Ibn Al-Qayyim said “*the purpose of this is to ascribe the handwriting to its writer; if it is surely known, the same applies to speech because handwriting implies speech, and speech refers to volition.*”<sup>733</sup>

Thus, jurists have not restricted methods of documentation to one method only,. They have expanded the concept and taken into consideration the setting of the transaction. Some of them have been keen to see that formal documents

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<sup>732</sup> *Tabsirat AL- Hukkam* by Iben Farhun 2/57

<sup>733</sup> *AL-Turuq al-Hakimah*. Ghazālī, Abū H.āmid al. *Al-Mustas.fā min 'Ilm al- Us.ūl*. Vol. 1. Cairo: al-Maktabah al-Tijārīyah al-Kubrā, 1937 , p 175

have an appropriately official appearance of being recorded, as in a letter sent from one judge to another. On the other hand, concerning the unofficial document, jurists have considered any method to be valid if it can be clearly ascribed to its writer. This shows that Islamic *fiqh* does make use of a very wide and broad sense of signature. In addition, it also means that Islamic *fiqh* is, by precedent, free to accept any new method regardless of appearance or specific realisation as long as it conforms to established principles.

## **6.8. Conclusion**

The electronic signature has been defined as a number of technical procedures that allow for the identification of personality, issued by these actions, and which accept the contents of a transaction to be carried under the signing occasion.<sup>734</sup>

This definition does not specify the signature type, which may be electronic, but merely states that it is a group or collection of technical electronic procedures. This is logical, because it is not necessary to determine the form of an electronic signature, just as it is not necessary to determine the nature of a written signature or symbol. It is sufficient that a series of technical procedures allows recognition of any procedures if they are efficient and able to achieve the functions of a signature or symbol. They must convey both

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<sup>734</sup> Rahman, Fazlul, *Islamic Methodology in History*. Karachi: Ripon Printing, 1965, p 33

authority of evidence and security without specifying a hand-written mark. As such these requirements must include the use of the electronic signature.

This chapter has reviewed the status of the argument concerning the electronic signature within the electronic contract. It has looked fairly extensively at the major concerns, beginning with the concept of the signature itself, and working through its applications, effectiveness and authority. There is evidence of consensus and harmonised regulations throughout. At the point of examining separate jurisdictions, however, it has been found that in certain places the role of the electronic signature has not been given sufficient consideration. Whereas in the definitions and regulations of the UN (UNCITRAL), the European Union, as well as in independent evaluations in the US and UK, a whole section of recommendations and directives is devoted to addressing the question of e-signatures, in the draft law on electronic transactions currently under review in the councils of the Kingdom of Saudi Arabia, there is no specific mention. This is disappointing, because it is quite obvious from the review undertaken in this chapter, that the issue cannot be merely subsumed within a broader discussion of electronic contracting. If it is not to give rise to difficulties for companies, individuals and the courts in future, this lack of serious analysis and legal construction needs to be rectified. The merits of this question will be argued more extensively in the

recommendations made in the conclusion of the thesis. The general findings of the chapter are that the case for an unfettered legal approach to the electronic signature is made both through the evolving history of the conventional signature and the latitude of existing practice in the performance of the e-Signature. There is little here to inhibit a corresponding and complementary implementation in the KSA. This leads us, finally, to a comparative examination of perspectives on the electronic contract, in which the attitudes currently exhibited in Saudi Arabia and a number of other Arab states are set alongside those of Western countries where implementation of the leading international protocols is already well advance.

## **Chapter 7: The Electronic Contract and its features viewed from Islamic Perspective**

### **7.1. Introduction**

At this point, it is appropriate to make a general estimate of the current state of receptivity and acceptance towards the electronic contract among the trading nations, as well as in trans-national initiatives, most referred to in this thesis. Convergence upon a universally-accepted and harmonised model is, of course, the desired objective of all states since, as in graver questions of international relations, discord serves the interests of no society that seeks the well-being and prosperity of its citizens. Nevertheless, as we have seen, since laws of contract go to the very heart and origin of organised society it is inevitable that nations will manifest rooted patterns and ideals of how contract is legally performed; that these may continue to have both appeal and merit; and that therefore some flexibility, as well as cultural sensitivity, are required in the creation of new regulations that will have, over time, the effect of displacing old ones. In Islamic law, the most striking illustration of this point, is the tradition of the *Majlis*. There is the further caveat to universal legal prescription (as has been noted here more than once) that the formulation of protocols should not reflect existing practice so precisely, at the technical level, that they preclude legal application within future electronic environments.

Having completed an extensive review of the methodologies currently applied in the conduct of e-commerce and having discussed the major difficulties and unresolved questions that they present, it is important to draw together the strands of opinion currently voiced on the issue. This chapter will assess opinions expressed both in Islamic society and by international bodies with respect to the assimilation of electronic modes of transaction to the traditional regulation of contract. It will look in particular at the transformation of the relationship between contracting parties in the electronic environment.

The function of the *majlis* (council of contract) and the traditions of *fiqh* (informal body of jurists providing legal opinion) are examined in relation to electronic contracting in Islamic society.<sup>735</sup> In the situation in which we find ourselves today, and particularly in the KSA, it is appropriate and necessary to find facilitating compromises.

## **7.2. Variability and similarity in national codes of law**

To clarify the grounds of the discussion, an overall perspective is required on the nature of the laws and regulations involved. To a believer (a defender of Islam), that there should be a strong relationship between religion and the laws of society is prescribed, and even where it is abrogated in a particular state, remains an article of faith. Yet all societies maintain, if not as reality then as

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<sup>735</sup> Harold J. Berman, "The religious sources of general contract law: historical perspective", (2000), , *Law & Religion*, 4J p 103-124

myth, that their important legislation is brought forward in conformity with cherished values. Even where there has been a transparent change of attitude in society,<sup>736</sup> values that have long been in tension with others they now supplant - as in the libertarian rights of the individual versus entrenched, normative behaviour - the leaders of society must still lower their buckets into the well of tradition.

At the same time, however, within any state, there are conflicts of behaviour which pertain ultimately to the personality of the individual. In matters of religion, there are people who fix naturally and at once on differences, just as there are individuals who as quickly perceive points of convergence and agreement. In relation to the beliefs of others, an ecumenical viewpoint finds there is much more that unites the precepts of 'world' religions than there are objective differences that divide them. In relation to jurisprudence, the lawyer operates within a tense framework. His function is as much to point out difference as to reconcile it. An advocate's livelihood may depend on finding a critical edge in the details of a law, or of an account given, and yet his value to society is to smooth the affairs of men, and to draw

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<sup>736</sup> Social opinion in Western nations has manifested extraordinarily rapid change. In many countries, less than a century separates public executions from the total abolition of capital punishment.

individuals back from the violence incipient in a dispute.<sup>737</sup> For those whose business is to frame law, a similar dualism can be seen. Some will immediately perceive that the only way a global marketplace can be operated, using electronic technology, is within a legal framework common to all participants, and that to raise national particularisms, in relation to customs and traditions, in the context of agreements that must be applied internationally, can only serve to undermine, or exclude oneself from, the project. Others, however, will keep their main focus on particularisms, and contest each point of divergence. This characterises the nature of the perceptions, and the discussion of electronic vis-à-vis traditional commerce, at present in Saudi Arabia.<sup>738</sup>

Yet the impasse this suggests is not insuperable. To arrive at a more favourable standpoint, we have only to think of the peculiar disposition and orientation of the established laws of contract. Firstly, this branch of law can readily be distinguished from the criminal code by the absence of mutability. As has been said, society may rapidly change those behaviours it chooses to prohibit, and vary its punishments at will. Contract, by contrast, varies mainly in the superficialities of application. The essential paradigm does not change. Insofar as a particular society has evolved a way to regulate the normal (not

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<sup>737</sup> Men will put their own and others' lives at risk for what they see as a breach of trust or obligation even in what (to others) may seem inconsequential, such as inappropriate behaviour at a traffic light or establishing the exact position of a fence.

<sup>738</sup> Ibrahim al-Dosuqi, *al-Aqd Wa al-Irada al-Munfarida*, Dar al-Nahda al-Arabyyah, 2004, p.104



aberrant) behaviour of its citizens, within a framework that is not partial to the strong, but stands to benefit all citizens, the direction of law-making is clear and unassailable.

Furthermore, commerce is an aspect of social behaviour where there is a readily-agreed need for regulations as to fair dealing and security. If it can be said that jurisprudence arises from moral considerations rooted in systems of belief, it has to be asked whether there is any evolved belief-system, elaborated at the level of precise state laws, which suggests that a contract can or should be performed on any other basis than fair dealing and security.<sup>739</sup>

Moreover, commerce has always implied distance in the relationship between contracting parties. This distance may be looked at both on a human and social scale, and on the geographic separation that necessitates the coming together of persons wishing to trade in the common place of a market.<sup>740</sup> Its regulations are essentially predicated on the assumption that a commercial transaction takes place between parties who are not related or known to each other, may have different customary backgrounds, may not share the same language or dialect, or even the same religion, yet are brought together for their

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<sup>739</sup> James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, USA, Oxford University Press, 1991, p77.

<sup>740</sup> It is worth noting that the meanings of market in early Mediterranean civilisation ('agora', 'forum', etc.) are as much social as mercantile.

mutual benefit under the aegis of the same laws, regulations and powers of enforcement.<sup>741</sup>

If it is accepted, therefore, that contract as a body of law has extraordinary features that set it generically apart from some other branches of law, the principal question to be addressed here is whether Islamic legal and customary practice and that of Western countries really have generically different approaches to contract, or whether such differences as exist pertain to superficial aspects or to other factors.

More specifically, do these differences arise from tradition, and the distinctive outlook that tradition creates, or from differences in the nature and scale of the commerce in question? Is there a fundamental commonality in the international norms of contract, binding apparently divergent systems, in states where laws of contract have been elaborated and observed, and where individual citizens are presumed to behave equitably and reasonably?

To illustrate these alternatives by analogy, it can be said that the prescriptive teaching of the *Qur'an* has given rise to a duty-bound attitude to the personal expression of charity towards beggars, which contrasts with the practice of charity in Western society where it has been transmuted into

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<sup>741</sup> In the current climate of Western opinion in attitudes struck towards the Arab world, it is easy to overlook the fact that most Middle Eastern and North African states have lived peaceably and in trading harmony with minority Christian and Jewish communities since their foundation.

organisational and state-run systems of support, and where direct donation to individuals is often looked on as undesirable or unnecessary.<sup>742</sup>

Is there a similar order of difference between Islamic and Western society in matters of contract, or are the differences that exist ones of form only? If the norms of law-abiding individuals, adjudged to be acting reasonably, are much the same, this surely provides us with a strong indication that the nature of the problem confronting Islamic society in electronic contracting is less significant than has sometimes been supposed.

### **7.3. The Majlis**

Central to the practice of contract in Islamic law is the *majlis* (council of contract). This does not equate to the negotiation simply but to the space allowed for the whole process of contract formation. The purpose of a *majlis* is for the contracting parties to be given sufficient time for thought and consideration, within a context favourable to serious negotiation. An essential objective, therefore, is to create the ambience or setting of a *majlis*, and although this is likely to take place at the premises of the offeror, the prescribed behaviour of the *majlis* serves to protect both parties in a contract.<sup>743</sup>

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<sup>742</sup> Schacht, Joseph. *An Introduction to Islamic Law*, USA, Oxford University Press, 1983, p 174

<sup>743</sup> Mohammad Hussien , “*al-Masulyyah al-Electronyyah*”, Cairo, Dar al-Nahda al-Arabyyah, 2002, p.67

The *majlis* starts from the moment of meeting and ends with the moment of dissolution. Neither offer nor acceptance is binding or obligatory if the meeting has not been concluded. The offeror can still withdraw his offer, and the offeree can still accept or refuse for as long as the council has not been dissolved and is still in session. This is referred to as the ‘option of the council.’<sup>744</sup>

The importance of the *majlis* lies in the fact that it defines the time and place of contracting which a competent court of hearing can thereafter determine in any dispute, and in conformity with the applicable law.<sup>745</sup> The council may be real or virtual. A real council means “a council of contract in which both parties are together at the same place in direct contact ..... each of them can hear the speech of the other directly. The council starts with the offer, proceeding step by step.”<sup>746</sup> In the virtual *majlis*, however, only one of the contracting parties is present, as in the case of the electronic contract initiated by the offeror only.

Al-Samanhuri, as a contemporary Islamic scholar, thinks that the principle of *majlis*, or ‘sitting together’ in negotiation, has not been treated appropriately

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<sup>744</sup> Hussein Hassan, “Contracts in Islamic Law: The Principles of Commutative Justice and Liberty”, (2002), *Journal of Islamic Studies*, ; 13: pp.257-297

<sup>745</sup> *ibid*

<sup>746</sup> N. Mohammed, ‘Principles of Islamic Contract Law’, *Journal of Law and Religion* 6 ,1988, p.115–16

in the predominantly French laws adopted by many Muslim countries.<sup>747</sup> The Islamic *fiqh*, as an informal body of legal opinion, applies the principle of conduct in *majlis* in a strict way. According to *fiqh*, it is not demanded of the contracting party (the offeree) that he reply at once, but for fear of leaving the offeror dangling, the offeree should not be given excessive time to come to a decision. The time factor (as has been seen) is one of the cruxes of contract formation, and is no less central to electronic than it is to traditional transactions.<sup>748</sup>

Again, in attempting to resolve the question of whether electronic contracting takes place between absent or present people, we might first note that the concept of the *majlis* appears to be originally an Islamic idea.<sup>749</sup> Certainly, many attempts have been made to describe it as such in secular studies.<sup>750</sup> The *majlis* really describes a process or procedure, beginning with the invitation to negotiate, proceeding through discussion to the point of offer, and ending with acceptance or rejection of the proposal. The time-frame is not

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<sup>747</sup> T. Dare, "Kronman on Contract: A Study in the Relationship between Substance and Procedure in Normative and Legal Theory", (1994), *Canadian Journal of Law and Jurisprudence* 7, p.331

<sup>748</sup> Al-Shahy, Jaber, *Council Contract in Islamic Fiqh and the International Law*, PhD dissertation, Alexandria University, 2001, p.128

<sup>749</sup> A claim made by Mustafa Mohammad al-Jammal, *al-Qanun al-Madani Fi Thawbihi al-Islami, Masader al-Eltizam*, unpublished 1996, p.107. It can certainly be argued, however, that the general sense of this practice is paradigmatic of what has, in legal-historical culture, taken place in innumerable settings around the world.

<sup>750</sup> Al-Shahy, Jaber, *Council contract in Islamic Fiqh and the international law*, op cit, p.128 It has been defined as "the place and time of contracting that starts with drawing up the form of the contract and ends with its completion."

prescribed but (unless otherwise agreed) limited to the uninterrupted period that the parties spend together. An agreement can be made, for example, to hold an offer open for twenty-four hours and within that period the parties can break company. However, where no such agreement has been reached, even if one party absents himself for just a few moments, the offer currently standing between them is void. The place of the *majlis* is indeterminate and although the term *majlis* refers literally to a sitting down together, the parties in an Islamic council could be standing, walking or flying to Japan.

### **7.3.1. The meaning and function of the electronic majlis**

The description given of the *majlis* applies equally to a council in electronic contracting. The place (being immaterial) we may call ‘cyberspace’. The time-principle is that the contact should be live and uninterrupted. In a chat-room, for example, closing communication by quitting ‘the room’ cancels the offer. Conversely, for as long as the line is held open, the offer is valid.

The *majlis* rests on two foundations: a tangible one of place, and the incorporeal one of time.<sup>751</sup> Whilst the distinctions between real and virtual councils are the factors of both time and place, the factor of time is the major criterion. Most jurists think that the basis for the distinction between absent persons and present ones is the time factor, that is to say in the gap

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<sup>751</sup> A. T. Kronman, ‘Contract Law and Distributive Justice’, (1980), *Yale Law Journal*, 89, p 472

between the issuance of an offer and the response of the acceptor. In the case of contracting between two present persons, of course, the time factor becomes redundant as a consideration, with the offeror being directly informed upon the issuance of an acceptance or refusal.<sup>752</sup> When these principles are applied to the electronic contract, we find that the place is also virtual, since negotiation is carried out in cyberspace. Hence, UNCITRAL, mindful of the legal precept that an action must be located, drew up its draft law on electronic contract determining that the place of the electronic contract should be the location of the acceptance.<sup>753</sup>

Concerning time, the duration varies according to the manner of contracting, whether by e-mail, website, or some form of simultaneous communication. Of the conditions for establishing the electronic contract, the first is the virtual presence of the contracting parties, and the second is involvement in drawing up the form.

Concerning the option of the council, in an electronic contract of sale each party is entitled to withdraw as long as he is in direct contact by computer on the internet. If he leaves his PC or turns it off voluntarily, or moves on to another website, the option is not effective because in the first instance the

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<sup>752</sup> M. E. Hamid, "Islamic Law of Contract or Contracts", (1969), *Journal of Islamic and Comparative Law* 3, pp. 1-11

<sup>753</sup> John D Gregory, "The Proposed UNCITRAL Convention on Electronic Contracts", (2003), *The Business Lawyer*, 59(1); p. 313

party broke away, while in the second, the party is deemed to have resigned the question.<sup>754</sup>

### **7.3.2. Determination of the duration of the electronic majlis**

The duration of the electronic *majlis* is determined on the basis of the method of contracting as follows:

- 1.** If contracting is via e-mail and is carried out straightforwardly in writing and solely between two parties, the communication is characteristically brief. The council starts as soon as the negotiations take place and leads to the issuance of an offer. This situation subsists until one or both of the parties complete their electronic contact. If, however, the communication is direct, as in a chat-room, it may be discursive and its timespan indeterminate. In this case, the council begins as soon as the offeree sees the offer, and may last until the parties refer to the norms for such a discussion.<sup>755</sup> However, since electronic contracting is quite recent, there are no well-established commercial norms in this context.

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<sup>754</sup> Abdullah Alwi Haji Hassan, *Contracts in Islamic Law*, UK, I.B. Tauris & Co Ltd , 2008, p

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<sup>755</sup> Abdulwadud Yahya , *al-Mujaz Fi al-Nazaryya al-ama Li al-Eltizamat Masader al-Eltizam*, Cario, Dar al-Nahda al-Arabyya , 1994, p.247



2. In contracting via a website, whether by pressing the OK-box or downloading software, the *majlis* starts at the moment the offeree enters the website, and lasts until he leaves it.<sup>756</sup>

3. In the case of contracting via audiovisual means, the *majlis* starts when the offer is issued and lasts until the end of the conversation.<sup>757</sup>

### **7.3.3. Attitudes to the determination of the electronic Majlis**

Although electronic contracting via network communication is like contracting between two parties not present in the same place,<sup>758</sup> this does not necessarily mean that they are absent in terms of the time of the *majlis*. Telephone contracting is considered as contracting between present people although they are separated in terms of place. As long as the expression of will is present and active, the parties are notionally together at one place. Accordingly, the rules that pertain to present people are applied.<sup>759</sup>

However, in the situation of a contract taking place between people who are present but where there is a time separation between the offer and issuance of acceptance, the rules governing absent contracting parties are not applied. This would cover a case where the offeror has determined a final date for

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<sup>756</sup> Ibid

<sup>757</sup> ibid, p.248

<sup>758</sup> Ibrahim al-Dosuqi , *al-Jawanib al-Qanunyya Li al-Taamulat al-Electronyy*, Cario, Dar al-Nahda al-Arabyya , 1999, p 67

<sup>759</sup> N. Stephan & Andrew Simpson, *Online Contract Formation*, Oxford University Press, USA, 2004, p83

acceptance after the two parties have broken away and the offeree later sends his acceptance via one of the communication media. In the KSA, the court of last resort has confirmed that this should not be considered as contracting between absent parties since the exchange of message shows effectively the same evidence of contract as one concluded conventionally.<sup>760</sup>

However, the attitudes of *fiqh* have varied as to whether a contract via the internet is between absent or present people. Five distinct standpoints, as well as other chains of thought, are summarised here.

**1.** In what might be called the absenteeist view, the electronic contract is regarded as a contract between absentees in terms of place and time, because it is similar to contracting via mailing or telephone.<sup>761</sup> The sole difference is the medium through which it is carried out.<sup>762</sup> It is also held that electronic contracting takes place between absentees because offer and acceptance were not issued at the same place, and there is a time separation between the information available to the offeree and the acceptance,<sup>763</sup> as well as a

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<sup>760</sup> Ahmad Hidayat Buang, *Studies in the Islamic law of contracts: The Prohibition of Gharar*, Kuala Lumpur, Sole distributor, Golden Books Centre, 2000, p 151

<sup>761</sup> "Some believe that contracting via telephone is a contracting between absentees in terms of place for far distances, and between present people in terms of time because each of which can hear one another at the same time except in the case of video telephone where the telephone will be provided with a camera for the transmission of the picture, so it is a contracting between present people in terms of place and time." , Abbas al-Abbudi, op cit, 148.

<sup>762</sup> Fayez Abdullah al-Kandari, *Contracting via -Internet*, Cairo, Dar al-Nahda al-Arabyyah,, p 609.

<sup>763</sup> Osama Ahmad Bader, *Himayyat al-Mustahlik Fi al-Taaqud al-Electroni*, Beirut, Dar al-Fikr al-Arabi, 1977, p225.

difference of place for the contracting parties. In other words, a *majlis* of electronic contracting is virtual and has its own proper rules. The internet, in this framework, is seen as a messenger.<sup>764</sup> It is worth noting, however, that this stance overlooks an important fact, which is that electronic contracting can be contemporaneous in offer and acceptance where the contracting parties are in direct contact audio-visually or in writing, as with the use of a combined camera and microphone. The time-factor vanishes since the delivery of the message will last for less than a second. In this type of situation it is difficult to consider electronic contracting as contracting between absent persons.<sup>765</sup>

2. There is an opposed standpoint to the effect that electronic contracting takes place between people who are present since the contracting parties are in direct contact. Even if the contracting parties are physically absent, there is no impediment in time (between the issuance and the information of acceptance) to justify designating the electronic *majlis* as virtual and not real.<sup>766</sup> Proponents of this view believe that electronic contracting does not take place between absentees, since the contracting parties have direct contact on the internet by way of writing, as with the software “Free Tell”, via live speech as on “Fox-Wire”, or audio-visually and in writing if the PC is provided with a webcam as

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<sup>764</sup> Ibid, p 235.

<sup>765</sup> al-Qanun “al-Wajib al-Tatbiq ala al-Mu‘amalat al-Electronyyah,” a paper presented to the Conference on *Electronic Banking Transaction between Sharia and Law.*, Vol.4, 2001, p.1669,

<sup>766</sup> Christopher Reed, ‘Legally Binding Electronic Contracts Digital Signatures and Authentication’ , (2001), *International Lawyer* (35), p.89

in “Multi Media” software. These would satisfy the criteria of presence in the electronic *majlis*; hence these forms of contract are between parties who are present.<sup>767</sup>

3. A third view is that electronic contracting takes place between people present in terms of time but absent in terms of place.<sup>768</sup> This is based on the assumption that contact may be carried out audio-visually<sup>769</sup> on the internet, as in the case of the use of the Integrated Services Digital Network<sup>770</sup> leading to an interaction of the parties in a virtual council. Therefore, the electronic contract should be considered here one that takes place between two people present in terms of time. Yet because the contracting parties are in different geographic states, the same laws that govern, for example, electronic banking should apply

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<sup>767</sup> Greg L Berenstein, and Christopher E Campbell, “Electronic contracting: The current state of the law and best practices”, (2002), *Intellectual Property & Technology Law Journal*,. Vol. 14, Iss. 9; p.1

<sup>768</sup> Abdulrazzaq al-Sanhuri, “*Nazaryyat al-Aqid*”, Beirut, Dar al-Fikr al-Arabi, 1997, pp.19-20

<sup>769</sup> Article (2/2) FREEDOM OF COMMUNICATION ACT N° 86-1087 OF 30 SEPTEMBER 1986 stipulates that “ *Telecommunication is understood as any transmission, emission or reception of signs, signals, documents, pictures, sound or information of any kind by wire, optics, radio electric or other electromagnetic systems. Audio-visual communication is understood as any act of putting at the disposal of the public or parts of the public, by means of a telecommunication process, signs, signals, writing, pictures, sound or any kind of messages which do not have the nature of private correspondence*” .

<sup>770</sup>This network allows its users to hold distance conferences via Video Conference by which people can contact and see one another without being physically present in the same place, leading to the expression of will at the time of its issuance , but this does not deny the fact that the contracting parties are separated in terms of place .

to electronic contracts where parties are considered as absent in terms of place.<sup>771</sup>

Some add that electronic contracting is like contracting via the telephone in terms of directness of information or, more particularly, in directness of hearing, and thus must be considered as between people who are present in time.<sup>772</sup> Electronic contracts are carried out in places not designed to receive customers, yet although unquestionably they are a form of distance contract, the legal meaning of “distance” is equivocal in this context. It signifies an indisputable barrier in terms of location but does not imply a barrier in time.<sup>773</sup>

There are also those who reject the notion that electronic contracting can be between people present in time but absent in place. They base this on the understanding that a *majlis* cannot be divided in such a way since it requires a unity of time and place. Yet this point of view starts to become confused in the implications for distinguishing between a real and virtual council. Is it possible to have a hybrid (i.e. both real and virtual) council at the same time? Such a fuzzy concept is surely at odds with time-honoured legal foundations, that is to say the pillars of time and place. And might this not lead to a heterodox

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<sup>771</sup> L. J. Kutten, *Electronic contracting law: EDI and business transactions*, Clark Boardman Callaghan, 1993-94, p.132

<sup>772</sup> Christoph Glatt, “Comparative Issues in the Formation of Electronic Contracts in United Kingdom”, (1998), *Int'l J.L. & Info. Tech.* 34, 6:1 at p.57

<sup>773</sup> Louis F. Del Duca, and Patrick Del Duca, “Electronic contract formation - “Click-wrap” contract formation - Manifestation of assent”, (2003), *Uniform Commercial Code Law Journal*, 35(4); p.103

association of reality with time, and of virtual reality with place? Such objections may be over-symbolic, and exaggerated in their misgivings, but they are not difficult to understand.<sup>774</sup>

4. A fourth position is that electronic contracting cannot be considered as a contract between people present because the contracting parties do not exchange offer and acceptance via tangible means, such as hard copy or documents. Correspondence is carried out electronically via the internet by which the parties achieve direct contact. As a result, although the tangible presence of contracting parties does not take place, a virtual presence does. In addition, electronic contracting is not considered as contracting between absentees because that would imply an inconsistency of time and place, whereas electronically such inconsistency of time does not occur because the parties are in simultaneous contact. This view concludes that electronic contract is contracting between absentees but that absence here is of a special nature.<sup>775</sup>

Clearly, this argument is advanced as an attempt to escape the establishment of a legal adjustment in favour of electronic contracting.

5. A fifth view asserts that once acceptance on the PC of the sender is sent to the PC of the recipient via the internet, the idea of time barriers, established in

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<sup>774</sup> Mohamma. Rushdi, *al-Taaqud Bi wasael al-Ittisal al-Haditha*, Cairo, Dar al-Nahda al-arabyya, 2000, p.29

<sup>775</sup> Jamal al-Nakas, “*Nazaryyat al-aqd Wa Mula’matuha Li Tanzeem al-Ta’aqud*”, a research paper presented to the conference of educational and legal aspects held in Kuwait from 3-5 Nov. 2001.

the contracting process as between absent parties, no longer has meaning in the electronic contract. This does not imply that the recipient has necessarily been made immediately aware of the message. His PC may have been shut down, or the message received by the server and passed on to him later. In either case there would have been a time separation between sending and receiving.<sup>776</sup> Accordingly, we would be dealing in this context with split contracting, that is to say a contract effected between one present and one absent party. In reality, electronic contracting cannot be either between people present or between absentees in all circumstances. This is because the determination of the time of the contract's conclusion is largely based on the criterion of the offer immediately accompanied by acceptance. Yet is this criterion based on the delivery of the acceptance to the offeror, as to his e-mail, or is the real criterion the content of the message?

This approach concludes that the nature of electronic contracting should be dealt with from the perspective of the laws applicable to contract.<sup>777</sup> Thus, the determination of time and place in a contract must be subject to normal law, since this does not only deal with the effects of a contract, but also defines the conditions determining the moment at which all parties are in direct contact. In

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<sup>776</sup> Chris Reed, and John Angel, *Computer Law: The Law and Regulation of Information Technology*, Oxford University Press, 2007, p.133

<sup>777</sup> J. Savirimuthu, "Taking Online Contract Formation Seriously", (2004), *University of Ottawa Law and Technology Journal*, , 2(1), pp. 105-143

this respect, it is worth adding that although some of the discussion of these questions might seem abstruse, if contracts do not include a determination of the laws to be applied to them, a court called to settle disputes is left without a framework of rules and principles to which it can apply.<sup>778</sup>

#### **7.3.4. Summary concerning the determination of an electronic majlis**

There is a basic difference between an e-mail acceptance and pressing the 'I Agree' button in an internet discussion. Contact between the parties in the case of pressing a button in a chat-room is contemporaneous, whereas acceptance by e-mail is not if, for example, the offeror's PC happens to be shut down, or there is a deficit within the network hindering delivery. Contracting via e-mail can thus be divided into two types. The first is contemporaneous contact where no time-separation exists between the issuance of the acceptance and the offer. The second takes place between parties absent from each other in place and time and cannot therefore be in any sense contemporaneous. Where acceptance is carried out by pressing a button, as on the 'OK' box at a website, contracting is between people present in time but absent in place. Thus, a contract concluded

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<sup>778</sup> J. Coulson, *Commercial Law in the Gulf States: the Islamic Legal Tradition*, London, Graham & Trotman, 1984, pp. 17, 27–31



in any of these ways is a contract between people present in time and is consistent in having a corresponding mode of offer and acceptance.<sup>779</sup>

In sum, except for cases of non-contemporaneous contracting, which takes place between absentees in time and place, electronic contracting takes place between people present in time but absent in place.

#### **7.4. Electronic contract as local or international**

Parties to a contract may be within the same country. In this case, the mandatory and applicable law is the local one in conformity with the concept of territorial integrity and sovereignty.<sup>780</sup> The state is entitled on a territorial basis to practise all functions related to its existence as a state inside its own territory. Within this territory, the state is responsible for its laws and its judiciary because disputes between its citizens are its responsibility, and considered a part of sovereignty. Hence, any agreement that ignores national laws is invalid.<sup>781</sup>

Nevertheless, some see the contract of e-commerce as essentially international in character both because a criterion of universality is applied in

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<sup>779</sup> Greg L Berenstein, and Christopher E Campbell, "Electronic contracting: The current state of the law and best practices", (2002). *Intellectual Property & Technology Law Journal*, 14(9);

p.1

<sup>780</sup> Sovereignty means the authorities of the state on its territories including everything like individuals and money. See Ali Abu Haif, *al-Qanun al-Dawli al-'am*, op cit, p.100

<sup>781</sup> Ahmad Abdulkareem Salam says: Since a long time ago, there is a rule used in Private International Law which says that the contracting parties themselves determine the law that governs the contract, Khalde Abd al-Fattah, *Qanun al-Aqd al-Dawli*, Cairo, Dar al-Nahda al-arabyya, 2000, p153-166

the way that such contracts are formed, and because its mode is an international network operating under internationally-agreed rules.

Special provisions are required in international contract and it is necessary to make a distinction between the principal types of contract, which is to say in business-to-business (B2B) and business-to-consumer (B2C).<sup>782</sup>

### **1. B2B**

With respect to the determination of the applicable law in B2B, the rules of international law are agreed; they make mandatory and enforce the ‘law of volition,’ which distinguishes between explicit and implicit determination thus:

(a) Explicit determination. The contracting parties can choose the law explicitly by way of including a clause that determines the law applicable to the contract, whether at the time of concluding the contract or at the time that any dispute emerges.<sup>783</sup>

(b) Implicit determination. This is an implied volition and obvious inclination to use a specific law. Implied volition can be inferred from the current circumstances of a situation, or the conditions of the contractual process itself as follows: (i) determination of the competent courts to settle disputes. The applicable law is that used by a particular court that has competence to hear the case, so choosing to go before a particular judge implies choosing the law used

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<sup>782</sup> Simon P. Haigh, *Contract Law in an E-commerce Age*, Ireland, Round Hall, 2001, p167

<sup>783</sup> *ibid*

by that judge; (ii) the contract shall include rules and principles based on a law of a specific state to regulate all of the contract's aspects providing that the contracting parties have the volition to adopt the applicable law from which all rules and principles are taken; (iii) the contract shall be drawn up in line with an international model law or a law of a specific state providing that the contracting parties have the inclination to enact the law of that state; (iv) the contract shall be written in a way that proves the contracting parties have the implied volition to enforce the law of the state according to which the contract was drawn up; (v) the type of the currency to be used to satisfy liabilities proving the implied volition to enact the law of the state whose currency will be used in the contract.<sup>784</sup>

Although the implicit determination of the applicable law is acceptable, many specialists in this field emphasize the importance of explicit determination of the applicable law in contracts of e-commerce.<sup>785</sup>

In the absence of any agreement between the contracting parties on the applicable law, the resort must be to jurisdiction. The judge may use his own

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<sup>784</sup> Ibid.

<sup>785</sup> Ahmad Salamh says: it is very dangerous for the lawmaker not to determine the applicable law he is going to use in the contract because he may himself be involved in ambiguity, so why not include a clause of two lines by which the contracting parties determine the applicable law. This is because the contracting parties are the makers of their own desperate adventures. *al-Internet Wa al-Qanun al-Dawli al-Khas Firaq Wa Talaq*, op cit, p.37-38

judgment to determine the applicable law which is usually the domestic state law of the judge looking into the lawsuit.<sup>786</sup>

**2. B2C** (where one of the contracting parties is a consumer)

Consumer means here any natural or virtual person who enters into a contract with any business to obtain goods or services for the purpose of satisfying his own, family or household needs providing that the contract has no professional or commercial connection with the consumer. In this case: (a) The contracting parties shall agree on the applicable law. The decision is taken by the contracting parties to determine the applicable law in terms of obligations, contracts and enforcement. This is because consumption contracts are not subject to general rules, in terms of competence in jurisdiction, whether explicitly or implicitly. However, the rule of enforcement in accordance with the ‘law of will’ is not unfettered because there is an exception in this rule for the interest and protection of the consumer. In fact, many treaties and systems of private international law<sup>787</sup> (which is the common trend in terms of jurisprudence and systems) stipulate that the contracting parties’ selection of

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<sup>786</sup> In the Rome Convention, 1980, it was mentioned that “To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.”

<sup>787</sup> *Lahai Conference on Private International Law* which endorsed the Applicable Law Convention in 1980, Rome Convention in 1980 on Applicable Law Article 5/2, The Swiss Private International Law in 1987 Article 120/1, and The Austrian Private International Law in 1987.

the applicable law shall be followed by the protection of the consumer by way of the governing and mandatory provisions of the state. This exception in the 'law of will' has its justifications and reasons. As for the 'law of will' that gives contracting parties the freedom in the selection of the law which governs their contract, it is one of the fundamental principles stipulated both by many laws and by international conventions. Yet this freedom among parties is available only among opponents having the same power. The economic and social inconsistency among contracting parties necessitates putting some restraints on the freedom of the more powerful party in contractual issues to protect the other. Such procedures are designed to minimize the degree of inconsistency. With respect to exceptions, it is recognised that while consumption contracts are subject to the 'law of will', exceptions to the law are necessary for the protection of the consumer;<sup>788</sup> these are objective in character and can be applied without setting aside the provisions of the law altogether.<sup>789</sup>

## **7.5. Protection via international conventions on e-Commerce**

### **A-Provisions of Islamic Law (*Sharia*):**

The rules and principles of *Sharia* dominate the daily activities of Muslims.

Therefore, any agreement must comply with *Sharia* in two things: (a) that all

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<sup>788</sup> Rome Convention in 1980/2, Khalde Abd al-Fattah, *al-Internet Wa al-Qanun al-Dawli al-Khas*, op cit, p.42

<sup>789</sup> Pamela Samuelson, "Licensing Information in the Global Information Market: Freedom of Contract Meets Public Policy", (1999), *European Intellectual Property Review*, 21(8), 386-397.

agreements comply with *Sharia* rules and principles asking for the protection of necessities such as money; (b) that any term or clause that is inconsistent with *Sharia*, such as trade in alcohol or other forbidden materials, is invalid.<sup>790</sup>

**B-Recommendations at conferences of Arab states:**<sup>791</sup>

There have been several conferences on e-banking and *Sharia* law in which important recommendations were made to facilitate e-banking among Arab and Islamic states.<sup>792</sup> The Third International Conference on New Approaches in e-Commerce recommended the creation of a Uniform Arab Agreement on the issue of electronic transactions as follows: (a) that there be a set of legal and contractual rules laid down by competent bodies and companies. Compliance with these rules and principles would necessitate the consent of parties to enforce such rules. (b) That these rules are applicable to international contracts,<sup>793</sup> since the enforcement of uniform rules leads to their being made the conditions of international contract.<sup>794</sup>

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<sup>790</sup> Ahmad Abdulkareem Salamah , *al-Internet Wa al-Qanun al-Dawli al-Khas Firaq Wa Talaq*, Cairo, Dar al-Nahda al-Arabyya, 2002, p1957,

<sup>791</sup> Khled Abdal-Fattah, *Himayyat al-Mustahlik Fi al-Qanun al-Dawli al-Khas*, Cairo, Dar al-Nahda al-Arabyya, 2000 , p.35

<sup>792</sup> Organized by the College of Sharia and Law of Arab Emirates University from 9 to 11 Rabi Awal 1424 H.

<sup>793</sup> Organized by Cairo's Regional Centre For Commercial International Arbitration from 11<sup>th</sup> to 17<sup>th</sup> January, 2004.

<sup>794</sup> Ahmad al-Hawwari , *Qanu al-'Aqd al-Dawli*, Cairo, Dar al-Nahda al-Arabyya,2000, p.1654-1655

### **C- International Recommendations:**

The most important international recommendations in the field of e-commerce are: (a) Recommendation No. 4, signed in Canada on 25/4/1975, asserting the necessity of amending the Warsaw Agreement on air transportation in accordance with the recognition of tools, and electronic means in the process of transportation and cargo;<sup>795</sup> (b) the recommendations of UNCITRAL to resolve all difficulties in relation to information data. These recommendations were as follows: that the validity of commercial documents issued by media other than writing to be considered official ; that UNCITRAL include within its agenda special legal problems related to electronic treatment of international trade data; that the domestic legal rules considered as obstacles to the use of information systems in commercial deals be reconsidered, for example, the permission to register information considered as the documents of the deal, along with the permission to use such information with a view to helping information systems via electronic messages.<sup>796</sup>

The most salient, putative rule in the field of e-Commerce is the model contract on e-Commerce issued by the French Chamber of Commerce and Industry in October, 1998, which contains a set of contractual rules aimed at formulating a model contract of e-Commerce between a businessman who has a

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<sup>795</sup> This agreement was signed on October 12<sup>th</sup>, 1929.

<sup>796</sup> Cf. [www.uncitral.org](http://www.uncitral.org)

commercial register in France and a consumer elsewhere. Such principles are considered a sound introduction to formulate international rules for all aspects of electronic transaction.<sup>797</sup>

## **7.6. Conclusion**

Semantic difficulties have dominated much of the discussion in this review of current attitudes. In relation to the *Majlis* and questions raised of time and place in the absence or presence of parties in an electronic contract, it has been seen that a multitude of viewpoints reflects a multiplicity of scenarios, and that these features of the e-Contract are genuinely novel or hybrid. Yet it can be argued that not only will the search for a single unifying theory or description always be likely to prove delusive, but that the search itself is hardly necessary. That proper regulation and clarity in the law have been, throughout, axioms of this enquiry does not mean that we need, or can expect to find a singularity of solution. Solutions in the form of sensible, working definitions, as has been seen elsewhere in the thesis, exist already. They are the products of pragmatism and proven experience. Electronic commerce will continue to throw up situations not covered by definitions made in the laws of contract. Yet offshoots, exceptions and anomalies are the business of the law to comprehend

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<sup>797</sup> Osam Abu al-Hassan, *Contracting via I-Internet*, Cairo, Dar al-Nahda al-Arabyya, 2000, p.139



and make provision for, and the electronic environment may be a stranger place than the law has previously visited. Terra-forming in this sphere is scarcely different from supplying writ to the lawless colonies of the past

## **Chapter 8: Recommendations and Conclusion**

### **Recommendations to law and policy makers in Saudi Arabia:**

There are two types of discussion inside this thesis and two half-submerged pieces of advocacy. The discussions are contrastive, revealing the need for judicious compromise; there is a balance to be struck.

On the one side, it is clear that trans-national agreement is essential to electronic commerce in a global environment, and that international law is the arena in which this must be found. The forces involved are several: (a), there exist already the findings of business after years of experience; (b), international organisations such as the United Nations have already spent years in deliberation on producing acceptable formulas, and a significant degree of convergence has already been achieved between many of the states where the need for uniformity is most pressing.

On the other side, however, there is ‘subsidiarity’ in the application of electronic law to individual states. Commerce is not a new field of law but one whose evolution goes back to the foundation of every state; since electronic commerce is essentially not more than adjustment to a different methodology, jurists are not presented with a *tabula rasa* on which laws of contract can be set down afresh. Both the United Nations and the European Union explicitly recognise that contract law inside member states is far from being uniform in all

particularities, and do not set out to overturn codes or customs long established. Saudi Arabia is not exceptional in preferring to maintain some of its own arrangements with regard to internally-conducted business inside the kingdom. The e-Contract is still an on-going 'conversation' in which the KSA can participate, offering its own perspectives.

Thus, several issues are in play. Adaptation to a new methodology is at once a technical question and one of jurisprudence. Lawyers cannot be expected to make a good job of designing a durable framework without first understanding the minutiae of technical functions and the writer makes no apology for entering into considerable detail in this regard. Just as importantly, the precise character of the society that is the subject of the case study is looked at in depth and from a number of perspectives. The reader will not have formed a very clear view of the purpose of this thesis without first grasping the centrality of Islamic law and the interplay of historical and political forces in Saudi Arabia.

Yet in all this it is essential not to lose sight of the phenomenon that has provoked the need for this project. Although we may view electronic commerce prosaically as the conduct of commerce by other means, the radical difference lies in the depth and scale of trans-national commerce made possible by new

technology in a global environment in which that technology is itself a principal actor and facilitator.

Inside the KSA there is a tension between relatively strict definitions that seek to follow historically-derived precepts to the letter, and those which recognise that new situations require new remedies. It has been argued here that to search for improved solutions is not contrary to *Sharia* and Islamic teaching, neither in spirit nor written precept, but rather the contrary. The teachings of our Prophet enjoin believers to utilise their faculty of mind for ways to benefit humanity, and more specifically they teach us that that which is not forbidden by the Qur'an and *Haddith* is permitted. Our belief in Islam is not served by a desire to hide away or shun the modern world but by confronting it positively with the persuasive and loving powers of a true believer.

Article 1 of the KSA Constitution states: “The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s book, the Holy Qur’an, and the *Sunnah* of his Prophet, God’s prayers and peace be upon him, are its constitution; Arabic is its language; and Riyadh is its capital”<sup>798</sup>

Because electronic commerce is of very recent origin it has attracted widespread attention, and the legal system of the KSA needs to consider e-commerce regulation on the basis of the rules and principles of Islamic belief.

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<sup>798</sup> Article 1 of the Statutes of Saudi Arabia, adapted in accordance with the Royal Directive No. A/90, dated 24<sup>th</sup> August, 1412. Higri.

Allah has provided the principles by which to judge any newly-occurring social, economic, political or juridical issues facing Moslems, giving latitude to our decisions provided they are in harmony with His rules and principles and do not conflict with the evidence of Islamic law. Regarding e-commerce, we can see that here, as elsewhere, Islamic law should be applied to provide benefit to and answer the needs of the citizen.

### **Suggested Guidelines and Rationale**

The Saudi legal system should profit from the international experience of developed countries and also from its own experience of international commerce conducted by traditional means. Sufficient time has elapsed for the pattern and outline of electronic commerce to be seen fairly clearly, at least for the immediate future. Variations exist in current applications, and the UNCITRAL project, frequently cited here, has the force of a proposal and not, as in the case of EU directives, of a legal treaty. Yet certain countries, including the Gulf States of Arabia, whose systems are in part based on observance of Islamic law, have proceeded to introduce legislation of their own. These exemplars should furnish an insight into the implications for the KSA were the Draft Law or its replacement to be enacted. At the same time, the KSA should be encouraged by its established commercial treaty agreements with other countries. As the largest trader in the world's most valued commodity (oil),

Saudi Arabia is not an ingénue dipping its toe for the first time into the turbid waters of international commerce. It is a seasoned, first rank player - in this field at least - and ought to be able to respond to the challenge of electronic commerce with fitting robustness. The following points might then be adduced.

**1.** The Saudi legal system should maintain a balance between the experience of other countries and the principles of its own traditions. Accommodation ought not to mean simply the copying of policy initiatives such as UNCITRAL. Deliberative bodies within the KSA cannot afford to be uncritical in their appraisals since this is likely to result in inappropriate legal adoptions that lock in problems for the future. An example of such inattention is the failure to recognise the importance of e-Signature as a discrete and vital component in the composition of electronic contracting. An absence of detailed analysis and constructive criticism implies a lack of seriousness in dealing with an issue, and despite the misgivings and uncertainty in the minds of legislators, it is simply unacceptable to adopt the stance of disengagement from an argument of such far-reaching significance.

**2.** The Saudi legal system needs to review any experience and evidence before it adopts a law of electronic contracting. It does not follow from the previous remarks that the kingdom must rush headlong into enacting policies worked out in other contexts, in other states, or in other institutions. Without

legal guidance in e-Commerce, Saudi citizens are at a disadvantage in international dealings, being effectively unprotected by law. The lack of apparent progress in producing further work following the Draft Law is not encouraging. It may be that some Saudi legislators take the view that it is better to wait to see how these new developments settle down in countries such as the Gulf States, before proposing definitive legislation for the kingdom. Nevertheless, the Saudi position is prejudicial to its own citizens, whose real needs would not be met by ill-considered legislation but who yet cannot afford to stand still while the rest of the world moves forward.

3. The Saudi legal system should try to effect compliance with existing agreements and treaties to avoid incompatibilities within the international system. As has been said, coming into dialogue with existing international agreements and recommendations is not the same as uncritically copying them. In particular, the policy initiatives brought forward under the aegis of the United Nations are, effectively, a work in progress. This leaves open the possibility both of tailoring legal policy to established conditions and of influencing and improving upon the suggested regulations. Yet nothing is possible without engaging in discussion. It would be surprising for a nation with such a strong sense of its own legal identity and ethical standards not to seek to influence the composition of policy documents which, whether desired

or not, will significantly impact upon the lives and opportunities of its own citizens. At the same time, a failure to engage produces a sense of isolation and exclusion damaging to the standing of the kingdom in the eyes of the world. The freezing of the country's position on electronic commerce stands in marked contrast to the national response to legislation on the International Sale of Goods Treaty (1992). In this the government worked very hard, and moved quickly to produce acceptable modifications to the proposed treaty to bring in order to bring it into accommodation with the Saudi legal system. Even more recently, the issue of Saudi membership of the World Trade Organisation, long bedevilled by extraneous political matters such as the relationship with Israel-Palestine, as well as by the question of embargoed goods (particularly the trade in alcohol) prohibited under Islamic law, was brought to a successful conclusion as a result of lengthy and difficult discussions. The issue became a focal topic in the kingdom at every level of society and in the media, and news of its resolution was seen as a great achievement and provoked open expressions of gratitude towards the government. It appeared to symbolise a new-found ability to reconcile the old with the new, and of the Kingdom's progress in the world. That these two projects were achieved through active and serious engagement with difficult problems, and through the arduous task of negotiating with people who start from a quite different position to its own,



should inspire the Saudi government to believe that it can make a similar breakthrough in the questions hanging over the accommodation of electronic commerce. It should not be underestimated that the sense of lagging behind the rest of the world is both irksome and disabling, especially to younger members of Saudi society.

4. The attitude adopted by the KSA should be that there is little to be feared and much to be gained by engaging in electronic commerce. Clear legal guidelines on electronic contract would improve prospects for the individual, for business and the national economy, but it would also bring a new sense of contact, new information and an understanding of the outside world to millions of people. Yet the present failure to engage with new technology in electronic contract does not imply the kind of censorship seen in some other developing countries. Such societies as China and Vietnam, while being liberal in the electronic access given to facilitate trade, are nevertheless burly gatekeepers at the portals of social opinion. Their governments routinely block access to aspects of the outside world that are seen to threaten or diminish the authority of their governments and police. The KSA is governed on the basis of access to and respect for the law. It is not negatively defensive in a broad socio-political sense, rather, the attitudes struck are of a country confident in its religious beliefs, ethical values, traditions and customs. The culture of the electronic

world that is upon us is no threat to an Islamic society or its values, but will improve the economy, health, education and world knowledge of its people.

## **Conclusions**

This thesis has taken a segmentary approach to the analysis of electronic contract. After setting the background to the situation of Islamic law, and specifically of the current dispositions in the legal and historical framework of the Kingdom of Saudi Arabia, a detailed review has been attempted of the stages and components of electronic contract formation with reference to traditional methods. The focus has then returned to the nature of the opinions held, both in the KSA and abroad. The iterative question throughout the thesis has been whether the differences between the conditions of the electronic contract are essentially differences in substance or in form, and consequently whether the problems faced by Islamic law are real or merely supposed. The answers given at each turn have necessarily been qualified, and yet, by the standpoint asserted here, solutions can and need to be found.

Since advocacy and recommendation (not to mention frustration at the slowness of progress in this matter in the KSA) have never been far from the surface in this thesis, there has been a difficult balance to strike. Evaluation is impure, and ultimately not useful, if skewed too far in one direction from the outset of an enquiry. On the other hand, the motive-power of a thesis is almost

always preceded by some particular idea, and a notion that a particular phenomenon is not at present properly or thoroughly understood. The object of influencing others to gain a new or clearer insight into a major social question is not in itself an ignoble one.

The Islamic perspective on electronic contracting centres on the need to reproduce, replicate by other means, or in some way satisfy the fulfilment of a *majlis*. Probity and due diligence are requisites of all successful contracts, but where a revolution occurs that transforms all previous possibilities in the scale and reach of contract formation, it is obvious and essential that these aspects are examined carefully. What, then, is the value of the *majlis*?

The impression may have been created in the mind of the reader that this established proceeding, prescribed under Islamic law, represents some kind of hindrance to modernity. If so, that is unfortunate since it is a view not shared by this writer. So far from implying some kind of out-moded ritual, trip-wire or obstacle to negotiation, the concept of the *majlis* has great relevance and utility. Yet it is the concept, and not an idealised image of the way people should conduct business, that we must hold onto. Of course, few in the Arab world would dispute that the most agreeable way to negotiate a contract is to sit down in a leisurely fashion and discuss terms and conditions over a glass of tea. Equally, most will recognise that whereas this type of council is still possible in

some types of dealing, there are many where it is not. In practice, this has always been true. It is not possible to negotiate the purchase of livestock in a crowded market, full of animals and of people shouting, in the same way as the purchase of a carpet in the refined atmosphere of the vendor's own shop. The *majlis*, then, has never functioned in the same way in all circumstances. Yet the legal concept persists in its core values. These are that there are acceptable ways to invite, negotiate, offer and complete a contract, and there are types of unacceptable behaviour, which void the transaction and release the participants from obligation.

Is the *majlis* capable of adaptation to an electronic environment? The question is best answered, perhaps, in relation to radical transformations elsewhere. Up to 1980, the London Stock Exchange operated on an open trading floor, according to well-established and cherished principles of doing business. Its proud maxim had always been '*dictum meum pactum*' ('my word is my bond' – an exact equivalent to the expression of business ethics in Islamic society). With the apparent casualness of asking for a drink at a tea-stand,<sup>799</sup> trades made by members of the London Stock Exchange (the offerors being then the 'jobbers' and the offerees, acting for outside clients, the 'brokers') might equate to the annual GDP of a small African state. This manner of doing business, originating to the seventeenth century, was utterly and in a short space

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<sup>799</sup> Actually very close to the origins of the trading floor, first enacted in London coffee houses.

of time transformed by the substitution of the face-to-face trading with on-line virtual trading. The floor and, indeed, the building itself, were swept away, and future trading done almost exclusively by distance communication, i.e. by electronic means. Yet the London Stock Exchange did not, as some feared, lose or abandon its values, nor did its standing in the world decline as a result of the change in 1986,<sup>800</sup> although there was initially some resistance from older members who, fearing change, continued to trade on the floor until the LSE finally ordered its physical closure.

The deliberative councils of the KSA, it seems, strive to fit the concept of the *majlis* to their perception of the electronic contract because this council is essential to contract formation under Islamic law. Yet in this they are, perhaps, making more of the question of absent or present persons, or of time and place, than is objectively justified. Many permutations, as we have seen, exist in the environment of electronic commerce, both in the scenarios of trade and in the arguments advanced to locate these possibilities in legal definition. Nevertheless, it has been argued here that though these questions are not necessarily simple to disentangle, solutions are forthcoming, and, moreover, tested and proved in their legal effectiveness on a daily basis in countless instances of international trade.

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<sup>800</sup> The New York and several other important stock exchanges in the U.S. did not follow the same path as London and have maintained traditional trading floors. London's importance in global finance has not been diminished but increased over the last twenty years.

Aspects of difference, as has been claimed, may be of several orders and types. A superficial aspect might be, for example, the exact species of token used as currency or in signature. Here, some understanding of how the nature of money (from beads to banknotes) or the nature of the signature (from elaborately-crafted seals to idiosyncratic ways of writing), has changed over time should be of help to individuals whose naturally conservative outlook makes them suspicious of innovation. There is, however, rather more to be said of difference arising from the nature or scale of a business transaction.

To those who insist that transaction is defined by the face-to-face contact between buyer and seller, it can be pointed out that buying sweets at a shop is not normally distinguished in our minds from buying sweets from a vending machine. Any contact is of the most perfunctory nature and involves none of the elaborated stages in contract formation between first encounter and settlement. The buyer incurs the risk, of course, that the product will not be as he expects it to be, and his redress must, in most instances, be with the seller or at the immediate point of sale, rather than with the original supplier. There is the additional risk with a vending machine that it is not functioning properly, in which case the consumer has the inconvenience of having to complain to a remote party that may or may not accept the complaint and satisfy his claim to be compensated for any monies lost. The same would not be true, however, if

the buyer of sweets wanted to place a wholesale order for 10,000 examples of the same product. Provenance, reliability and security of contract would all be at issue. Thus, scale interposes its own demands in contract formation.

The same can be said of value. Buying a bracelet for five pounds in a street market does not involve the same scrutiny as buying a ten thousand pound bracelet at a luxury jewellers shop. The name and standing of the vendor is of no account on a market stall, and both parties to the trade would implicitly assume that the purchaser would not feel able to return the item on the objection that the stones were poorly set or the glue used defective.

Again, these factors apply equally to service. The difference in the seriousness of the undertaking and commitment between contracting with a builder to unblock an outhouse drain and asking him to put a roof on one's house is obvious and incontestable. What we should notice, however, about such examples, is that differences are generic to the type of contract entered into and not to the jurisdiction or legislation governing the contract. The same modulations and modifications of attitude to contract would be found in a *souk* or in an English Sunday market, in Bond Street or in the night markets of Dubai.

The KSA as an Islamic law state is a legal system that derives its primary sources and principles from *Sharia*. At the same time, however, it has been seen

that in the tangle of affairs in the KSA there is an incoherence and congestion of overlapping powers whose deliberative functions make it difficult for the state to resolve certain issues that touch upon possible conflict between religion and changing environments, which appear constantly in the world. An example of this involves Islamic banking and the recent issuance of *soq'uq* (or 'Arab bonds'). At the heart of this lies the legal-religious question of the prohibition of interest payment. Some Islamic states effectively ignore the injunction, in order to accommodate themselves to a world system of finance in which interest payment plays an integral and dynamic role. Others seek to circumvent by repaying the principal on loans at a rate that subsumes (i.e. it does not acknowledge) interest accumulation. Others still, out of individual conscience as believers, choose to forgo entirely all interest that may be 'owed' to them, and prefer that others should gratuitously profit from their investments than that they should defy what has been expressly forbidden by God.

With reference to the current Saudi Draft Law on electronic contracting, there is a strong impression that it is not sufficiently analytical and detailed to satisfy the needs of the KSA. In any case, it is largely a copy of the UNCITRAL Model Law. What, then, is deficient in the UNCITRAL document? There are areas left undefined, an issue that must be looked at in contrasting ways.



Firstly, a lack of definition in the formation and completion of the electronic contract leads to the dissatisfaction of business and of individuals in not knowing precisely where they stand. In the event of dispute, they must have a clear route to interpretation. Where an offeree has been misled by the offeror over the terms and conditions of his contract with him, clarity of law is necessarily the prerequisite to a claim for compensation or other form of redress. If, however, the offeree cannot be certain that the offeror has not complied with the legal requirements, his situation is not simply damaged in a material sense, but he is left unsheltered by the law. The unfortunate consequences that may flow from this may be that a prosecution is attempted unsuccessfully against the offeror, bringing the law and the judiciary into disrepute; that the offeree withdraws from further participation in the market, negating further commerce and all the potential benefits of this; or that the offeree takes the matter of redress into his own hands, provoking an outbreak of lawless behaviour. People will naturally contrast this unsatisfactory state of affairs with the known quantity and orderliness of traditional forms of contract. Since trade is increasingly likely to involve trans-national commerce, negative experience of electronic contracting will soon create the impression that dealing with the outside world is something to be entered into, if at all, only with the greatest caution. This attitude would be a highly damaging, as well as an

unjustified, situation for the Saudi society to find itself in. While the rest of the world is trading without inhibition, protected, as in Europe, by clear directives and treaties, the Kingdom of Saudi Arabia will lag behind, fearful of its commercial contacts with the outside world. Though this prognostication may seem gloomy or exaggerated, it should be maintained that, as this thesis has found, those who do not embrace the new way of commerce brought about by electronic means might find themselves isolated and as a result face the fundamental dilemma of adapting to the new environment or exit the commercial markets where they operate.

Secondly, it has been found that there is a clear need not to define too precisely the means of electronic transactions. This is to avoid prejudicing or second-guessing future technical developments that may - as in most things related to electronics and informatics - arrive swiftly and without warning.

As a final concluding comment, it is hoped that this research thesis has proved its research hypothesis; that the alignment of the Saudi Arabian legal regime with international rules on electronic commerce is not prevented due to the principles of Islamic law (Sharia). On the contrary, Islamic law presents Saudi legislators and policy makers with a wide-range of flexibility and discretion to adapt domestic legal system to international norms.

The thesis has showed that the criticism of the time-consuming procedures in the Saudi legislature process can be attributed to an overlap of authority, which confuses matters and delays the process of legal and policy reform. The paradox is that the inherent flexibility of Islamic law in adapting to international legal norms and obligations arising out of international treaties should have clarified any doubts on the part of Saudi legislators. The interface between legislative and executive authorities in Saudi Arabia when enacting domestic e-commerce rules and regulations has pointed towards the conceptual limitations of Saudi legislators as one of the main obstacles to the alignment of the KSA legal regime with the international rules of e-commerce.

The principles and sources of contract under Islamic law position the Saudi legal system as a receptive platform of innovation in changing the perceptions and legal obligations of a traditional society to embrace and affect the modernisation envisaged in electronic contracting and electronic commerce functions.

Flexibly, as a theme, has emerged across this research thesis. The international legal systems have responded positively to a “benchmark” norm of e-commerce, reflected upon and encapsulated in the UNCITRAL model and principles of e-contract, but applied their discretion and often a significant

margin of appreciation, in adapting and aligning their own legal requirements to the above norm.

The flexibility is interrupted when a greater need for uniformity emerges, in particular in cases of electronic commerce that pose significant threats to society and also to the integrity of the entire system. There is a compelling argument for uniformity and convergence in matters relating to electronic payments and the role and function of electronic signatures.

The response of Islamic law and of Islamic jurisprudence (*Ulama* and *fiqh*) to the advent of e-commerce has showed a fundamental correspondence between the old and new methods of contracting, as well as between the functions and modalities of the concept of contract itself.

This thesis has demonstrated that the concept of Majlis is the connecting ground of the international rules of e-contract and the Saudi legal system and that the application of traditional Islamic principles provides the freedom to the national legislator in Saudi Arabia to adopt the international rules of electronic commerce and in particular the function of electronic contract. The Kingdom of Saudi Arabia has nothing to fear in relation to discretion and individual concerns of contract law under the Islamic legal system when adopting international rules of electronic commerce.

It is hoped that this research will lead to further research relevant to regulatory aspects of e-contracts and to consumer protection issues which are intrinsically linked with the concept of electronic commerce.

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