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An evaluation of e-commerce legislation in GCC states:

Lessons and principles from the international best practices

(EU, UK, UNCITRAL)

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LLB – Islamic law - Imam Muhammad ibn Saud Islamic University

LLM – International Business Law- University of Hull

(May 2016)

Submitted for the degree of Doctor of Philosophy

Declaration

I confirm that the thesis is my own work; that it has not been submitted in substantially the same form for the award of a higher degree elsewhere; and that all questions have been distinguished and the sources of identification specifically acknowledge.

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Abstract

E-commerce has witnessed massive growth every year, since it has become the backbone of many economic and financial transactions and the preferred choice for most consumers and merchants alike and to offer access not only to national electronic stores but also cross-border markets.

This thesis is intended to explore the concept of e-commerce contracts by analysing the extent of consistency and harmonisation between the e-commerce rules by comparing some of the international best practices (namely the UN, EU and UK) and between the Gulf States. In addition, this research aimed to cover the three dimensions of e-commerce in a legal context as follows: First and foremost, it examined contractual issues, in order to discover to what extent the legislation could boost certainty and enhance confidence in concluding contracts electronically. The second issue it considered was online security and identity issues, by focusing on the nature and function of the electronic signature, which serves as the main proof

of identity in the virtual environment. Thirdly, it explored the concept of online dispute resolution (ODR) and recent EU initiatives which provide best practice in the area of ODR regulation. It also analysed the regulatory context of alternative dispute resolution in the UK and reviewed some successful examples of online arbitration services.

The object of all these point of study is to analyse these various legislations in order to highlight its strengths and weaknesses, and to draw comparative lessons from international best practice that might help to be adopted in Gulf States.

Acknowledgments

First of all, I have to thank "Allah" who helped me to finish and submit this thesis. Then, I would like to express my deepest appreciation for my supervisor, Mr Angus Macculloch for his ongoing support and guidance. He provided me with great advice through the long journey of my PhD study and without his valuable assistance, this thesis would not have been possible. Also, I am also most grateful to my supervisor Dr Richard Austen-Baker for his valuable guidance that he offered me.

Words cannot express how grateful I am to my family. A special thanks to my mother, father, as their prayers for me were what sustained me thus far, and I would like express my deepest appreciation to my wife for all of the sacrifices and support that provides me to strive towards my goal.

I would also like to thank all of my friends and colleagues who supported me

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Chapter 1: Introduction

1.1 Preface

The world is witnessing a huge and rapid development in the sphere of information and communications technology. At the forefront of that revolution is the Internet, which has become indispensable for providing information and communication amongst people throughout the world. It has removed geographical boundaries and even temporal differences, transforming the world into a small village as one of the main features of the era of globalisation.

One of the most important aspects of these technological developments and the revolution in information and communications technology is the emergence of electronic contracts, sales and purchases over the Internet, either business-to-consumer (B2C) or business-to-business (B2B). The phenomenon is known as electronic commerce or more simply e-commerce.

E-commerce has witnessed tremendous double-digit growth every year, with companies and stores going online to make the most of this phenomenal opportunity. It has become the backbone of many economic and financial transactions and the preferred choice for most consumers and merchants alike.

In this new digital world, consumers have gained many advantages, saving time and the cost of a trip to the shops. They also have the opportunity to easily compare products and services, and more significantly, e-commerce means they can access not only many stores nationally but also cross-border markets; all that is needed is an Internet connection.

What is more, e-commerce brings huge benefits to businesses and corporations, which can save the cost of renting expensive high street stores and of marketing, with low-cost online

advertisements now an option. More importantly, with regards to accessibility, online stores are available 24/7 for the convenience of customers.

The European Commission released a staff working paper (2012) on 'Online services, including e-commerce, in the Single Market', which states that in the USA, 66% of Internet users made purchases online, while 94% did so in South Korea. This compares with 57% in the EU. However, the growth rate of e-commerce is now higher in the EU than in the US, with the UK, France and Germany accounting for some 70% of European e-commerce.[1]

E-commerce sales expected further growth and have climbed remarkably, as more than half of the sales for a wide number of industries from online buyers, giant companies such as Amazon and eBay which offer a broad range of product and the visitors from all around the globe was with its net sales revenue more than doubling in the past three years [2]

Economic prosperity in the Gulf States and the rapid increase in the number of Internet users there have formed an excellent foundation for a large e-commerce market. For example, a report by PayFort predicted that by 2020 the volume of e-commerce in Saudi Arabia and United Arab Emirates would exceed more than USD 10 billion.[3] However, despite all this positive news, it could be argued that e-commerce in the Gulf is still lagging behind its expected potential, due to a series of obstacles such as technical issues (including building the infrastructure of websites); data security challenges, and logistical problems which may include storage and delivery of products.

[1] European Commission, Online services, including e-commerce, in the Single market (Commission staff Working documents, 11.1.2012) <http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf> accessed 19 November 2015
[2] Statistics Portal 'Statistics and Market Data on Key Figures of E-Commerce' <http://www.statista.com/markets/413/topic/544/key-figures-of-e-commerce/ > accessed 25 November 2015
[3] Payfort, 'state of e-payments in the Middle East 2015' <http://marketing.payfort.com/mailshots/url/sop15/SOP15_Final_Ar.pdf > accessed 26 November 2015

For the purposes of this research, it is the range of legal issues associated with e-commerce which constitute the principle focus of interest, since some areas in legislation concerning online transactions may lead to a lack of consumer confidence or may discourage businesses from making the most of this new sales medium. In addition, the pace of technological developments has caused legislation to lag behind, meaning there is a pressing need for well-drafted legislation to deal with more recent innovations.

The United Nations Commission on International Trade Law (UNCITRAL), one of the most prominent legislative commissions in the world, was quick to recognise the importance of e-commerce in the growth of international trade. Therefore, since the early 1990s, it has assigned a working group to the issue of e-commerce as well as developing some model laws and international conventions that are intended to work towards unifying and harmonising national laws and regulations in this field.

1.2 Research aims and objectives

This research aims to explore international best practice in e-commerce law, with a specific focus on EU directives and UNCITRAL model laws and conventions, comparing this with the e-commerce legislation of the Gulf States, in order to analyse the extent to which consistency and harmonisation exists with respect to e-commerce law in these different legal systems. More specifically, this research will focus on three distinct areas of e-commerce in the legal context, namely, contractual issues in e-commerce; online security and identity issues; and online dispute resolution. The underlying purpose of this examination is to provide effective lessons for the Gulf legislators in order to further enhance the e-commerce rules in the Gulf area.

1.3 Research questions

With regards to the first of these, electronic contracts form the foundation of e-commerce transactions, whether these are B2B or B2C, and concerns about grey areas in legislation or

fears about the trustworthiness of online contracts impact negatively on e-commerce. It is of vital importance, therefore, that all the parties involved are confident about all aspects of such contracts. Application of the concepts of offer and acceptance in relation to electronic contracts can be a particularly complex and contentious issue in the virtual environment of e-commerce. Clarity is needed regarding such areas as determining the time of the conclusion of electronic contracts, the location of the parties as well as the time and place for receipt and dispatch. Further difficulties are raised by the issue of the identity of contracting parties as well as their legal capacity in electronic contracts due to the use of electronic agents and automated message system. The following questions are addressed with regards to contractual issues raised by e-commerce:

- Are existing rules of offer and acceptance sufficient for their application in e-commerce?
- What is the importance of determining the identity of the contracting parties?
- To what extent is the availability of contract terms clear?
- How is it possible to resolve errors in electronic communication committed during the formation stage of the contract?

The second area of e-commerce legislation to be considered entails online security and identity, which raises further concerns in relation to user confidence. Of particular importance in this context is the nature, function and legal status of the electronic signature (e-signature), which fulfils a number of key functions including identity authentication in online transactions; ensuring the integrity of documents, and strengthening the confidentiality of communication. This crucial role has significant implications for data protection and privacy.

Aspects which merit examination in this area include possible legislative differences regarding the validity and equivalency of e-signatures together with the evidential value of an e-signature in a court of law. Finally, misuse and burden of proof issues need to be discussed.

The relationship between e-signatures and electronic authentication also entails examination of the nature and function of trusted third parties (certification authority providers) and their legal liability, as well as the recognition of domestic and foreign certificates with reference to the international regulatory standards of certification.

The third and final area to be covered is online dispute resolution (ODR). Recent EU initiatives concerning regulation of ODR are reviewed as examples of best practice, in addition to analysis of the regulatory context of alternative dispute resolution in the UK. An example of successful online arbitration, the Uniform Domain-Name Dispute-Resolution Policy (**UDRP**) will be reviewed.

In order to enhance efficiency and urgency in resolving disputes relating to e-commerce, it is important to analyse the legislation of the Gulf States with respect to alternative solutions to resolving conflicts in e-commerce, such as arbitration, mediation and conciliation, drawing on lessons which can be learnt from international best practice.

1.4 Importance of this Topic

E-commerce is still a new phenomenon that is attracting increasing attention from many countries, which is likely to continue growing as numbers of those with access to the Internet rise. As e-commerce becomes increasingly internationalised, the need to produce new well-drafted legislation governing online transactions becomes an issue of global significance.

Constant advances in information and communications technology will continue to provoke international debate and discussion regarding the rules and principles that should govern the

virtual world of e-commerce, challenging many aspects of existing legislation in areas such as contractual law. The emerging field of e-commerce law will need to receive increasing attention in order to maintain consumer confidence and minimise the existence of legal loopholes.

Moreover, the significance of this research also lies in its focus on comparative analysis and observations of e-commerce legislation in four important jurisdictions. At the international cross-border level, it examines UNCITRAL model laws and conventions. In addition, the EU system is considered to be one of the best examples of unification and harmonisation of laws, and this thesis also considers how its directives are implemented in one of the Member States, namely, the UK. Finally, it also comparatively assesses developments in GCC legislation in the light of best practice available elsewhere.

The main contribution of this thesis will be the best practice lessons and legal principles that will emerge from conducting this analysis. The thesis will not only identify key strengths in best practice from these jurisdictions but will also serve to highlight those elements that could prove to be potential areas of inconsistency or grey areas in existing legislation. The adoption of best practice will help to support the spread of e-commerce and at the same time eliminate those weaknesses that could be regarded as an impediment to the growth of online business. Lessons learnt from this analysis can also be used to inform future proposals for the harmonisation of legal frameworks for e-commerce contracts in the Gulf States.

One of the main objectives of the Gulf Cooperation Council (GCC) is to achieve consistency and harmonisation in the legislative frameworks of the Gulf States, especially in the area of e-commerce, which covers cross-border sale of goods and services via electronic means. This makes it a particularly interesting legal case study for investigating the extent to which

developing legislation of electronic contract law and e-commerce can be said to contribute to the level of prosperity and growth of e-commerce within a region.

1.5 Methodology and approach

This study will use a doctrinal method to examine to what extent the consistency and harmonisation of e-commerce legislations in the Gulf States, both between the various GCC members, and with international best practise, more specifically those of three jurisdictions: the UN, the EU and the UK. However, it should be clear that this research will not conducting a traditional comparative method that aims to show the similarities and differences between these legal systems as well as the differences of the constitutive elements and how they differ. Instead, this thesis use a doctrinal approach to evaluate the current level of consistency and harmonisation of e-commerce legislations of the selected jurisdictions in order to learn lessons and principles that can be used to propose a law reform and to enhance future proposals for the harmonisation of legal frameworks for e-commerce contracts in the Gulf States, which is one of the main objectives of the GCC. Thus the purpose of the methodology in this context is to provide the GCC legislators with lessons and principles from the international best practise, since the law should be assessed from a wide perspective, and the experience of other jurisdictions should be taken into account in order to develop the current law.

On the one hand, this leads to consider legal transplantation theory which is one of the most significant sources of legal development and as Alan Watson[4] argues, the law is a compilation of rules that can be transferred because there is no necessary association or close relationship between the law and the context of the society in which it is intended to implement it. Moreover, all schools of law are usually borrowed from elsewhere, which means they were

[4] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (1st ed, Scottish Academic press 1974)

initially developed in a different context. On the other hand, Legrand[5] argues that it is impossible to import or borrow or transplant complete rules, or it is insufficient to do so. In general, it can be argued that the legal transplant of that is based on the mere importing or borrowing of foreign legal rules or the blind copying and pasting of either partial or complete adoption without prior assessment or analysis of local socio- economic context could lead to complex problems in the applications of such rules. Therefore, the thesis supports the median approach, which involves an attempt at synchronisation or harmonisation with best practices, along with taking into account the local context. This approach is justified by affirming that the comparison with international best practices is one of the main sources of improving and developing the legal system; however, it is necessary to consider the limitations of legal transplantation theory, and such harmonisation with best practices should be aimed at alongside analysing the local problems in order for countries to discover their own solutions; this will mitigate the negative consequences brought about by adopting unsuitable rules.

This research will depend entirely on a doctrinal methodology and will not carry out an empirical study. Thus, wherever relevant, reference will be made to primary sources relevant to the selected issues, including laws, cases, statutes, regulations and other sources of binding legal authority of the selected compare jurisdictions. In addition, a range of secondary sources will be employed to elucidate these primary sources. This literature will include text books, journal articles and learned opinions related to the topic under discussion.

It should be borne in mind that the thesis will not conduct an article-by-article dissection of these laws and their implementing regulation; instead, it will follow a thematic approach which will focus on those issues which are perceived to be of major significant in the field of

[5] Legrand, Pierre, What Legal Transplants? In David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) p 55-70.

electronic commerce law. Each of these issues will generally be discussed in three stages as follows:

Stage One: A review of the theoretical concept, presenting the key debates on the issues and an analysis of this issue has been dealt with via EU directives and implemented in UK legislation and the reason behind choosing this jurisdiction that the EU system is considered to be one of the best examples of unification and harmonisation of laws, which would be vital to enrich the experience of the harmonisation of law between GCC countries, also this thesis will considers how the directives are implemented in one of the Member States, namely, the UK.

Stage Two: An analysis of how UN model laws and conventions deal with the same selected issues, since UNCITRAL would consider the most respected international models that sought to enhance the convergence and harmonisation of laws throughout the world, another reason for choosing UNCITRAL is the early accession of Gulf states to UNCITRAL models and conventions in this regard.

Stage Three: A discussion of existing Gulf States' legislations in regard to the selected issues with particular reference to Saudi Arabia which is the home country of the researcher. This will also examine in detail any specific points of interest in relevant articles as well as highlighting any gaps and or grey areas in the legislations.

1.6 Scope and Limitations of the Research

The principal focus of this thesis is electronic contracts. Although the term 'contract' may refer to all civil contracts in general, including marriage contracts and agency contracts, this thesis is limited to contracts of sale, including both B2B and B2C types. Moreover, it will not cover all contracts conducted by electronic means but will concentrate for the most part on Internet applications and will not concern itself directly with legislation which relates to electronic contracts and mobile phone, fax, or TV.

In terms of its geographical scope, this thesis will cover the Gulf States: Dubai, Qatar, Bahrain, Saudi Arabia, Oman and Kuwait. Together they form the entity formally known as the Cooperation Council for the Arab States of the Gulf, normally referred to as the GCC which has been in operation since 1981. Attempts at coordination in all fields, including legislation, developed into a proposal in January 2012 to establish a so-called Gulf Union. In addition to their geographic proximity, these nations share a common religion and language, and practise similar customs and traditions. They also have many similarities in terms of their standard of living which means that e-commerce is developing rapidly in this region.

However, this thesis will not address any of their neighbouring countries in the Middle East. Although the GCC countries have cultural, linguistic and religious affinities with other states in the region, there are also significant differences, including wide disparities in the legal systems and in standards of living, which significantly affect the size of electronic trading.

All of the Gulf States have already introduced legislation covering electronic transaction, namely, Dubai (2001), Bahrain (2002), UAE (2006), Saudi Arabia (2007), Oman (2008), Qatar (2010), Kuwait (2014) and most recently a Saudi Draft of e-commerce law 2015. It is essential to emphasise that when examining this legislation, the thesis will focus on those articles which are of direct significance to the field of electronic contract law, rather than discussing every article in these laws.

1.7 structure of the Research

After the introduction in the first chapter, the second chapter will address the context of the Gulf Cooperation Council (GCC) concerning the unification of laws, by looking at the key functions of the GCC as well as the legal background of the GCC Member States; moreover, it will examine the similarities and differences between the EU and GCC, and the relationship

between UNCITRAL and the GCC, and finally, it will review e-commerce legislation in the GCC.

The third chapter will analyse electronic contracts in the European Directives and UK implementation, starting with explaining the different forms of electronic contracts, including email contracts, browse-wrap contracts and click-wrap contracts. Also, the time of the conclusion of contract and the application of offer and acceptance, as well as the requirement to acknowledge receipt of an order, will be analysed. Moreover, the chapter will address electronic identity issues, which will include: common law recognition of electronic signatures, directives on electronic signatures, as well as the legal effects of two-tier systems.

The fourth chapter will analyse online dispute resolution in the European Directives and UK cases by starting with the advantages of using ODR; challenges limiting the potential of ODR; addressing the regulatory context of mediation in the EU Directives as well as the EU initiative for ODR 2013, and then reviewing ADR in the context of cases in England and Wales. Finally, it will set out successful examples of ODR providers including SquareTrade and Smartsettle.

Chapter Five will analyse UNCITRAL model laws on e-commerce by reviewing the basic principles of electronic communication conventions and addressing the following topics: formation and the time of dispatch and time of receipt; location of the parties; the availability of the contract; incorporation by reference; use of automated systems for contract formation, and errors in electronic communications. Finally, this chapter will analyse the Model Law on electronic signatures.

The sixth chapter will examine e-commerce legislation in the GCC Member States by adressing the following topics: legal recognition and requirement of electronic transactions; electronic contracts; offer and invitation to treat; theoretical frameworks of the time of contract formation; legislation of electronic offer and acceptance; automated message systems; and time and place

of dispatch of electronic record. Furthermore, this chapter will analyse electronic signatures; legal recognition of electronic signatures; conduct of the signatory; conduct of the party relying on the electronic signatory; protection of the electronic signature; conduct of the certification service provider, and the recognition of foreign certificates. Moreover, the regulatory approach will be addressed according to the following topics: prior information requirements; commercial communication; consumer data protection; right of withdrawal; regulatory competence, and sanctions. Last but not least, the chapter will address ODR and legislation in the GCC Member States.

The concluding chapter will set out the main findings of the research question, as well as the findings under the following dimensions: contractual dimension, security dimension, regulatory approach and consumer protection, ODR trends, harmonisation and best practices, and finally, recommendations stemming from best practice.

Chapter 2: The context of the Gulf Cooperation Council in the unification of laws

2.1 Introduction

Before delving into the depths and details of electronic commerce provisions, it is necessary to review the main functions of the Gulf Cooperation Council (GCC) and to address the legal background of the GCC States. It is also important to analyse the similarities and differences between the EU and the GCC and to address the relationship between UNCITRAL and the GCC Member States.

The GCC regional organisation was founded on May 25 1981 at a meeting held in Abu Dhabi, and was intended to coordinate regional stances on political and security issues, as well as working towards legal cooperation and harmonisation of laws in general and those covering economic issues, in particular.

Although there are more than 13 uniform laws, it is unclear as to why legislation covering electronic commerce is not yet included in these, so this research seeks to fill this gap, by analysing the most obvious similarities and differences in the legislation of the Gulf States, as well as comparing these to other examples concerning the subject of electronic commerce. It will take into account the legal and the commercial environment of the region, whilst at the same time taking advantage of the experience of the European Union in the unification of laws in general, and the EU Electronic Commerce Directive 2000/31/EC in particular, as well as comparing existing GCC legislation with the UNCITRAL Model Law on Electronic Commerce.

This research emphasises the importance of e-commerce in various areas of convergence amongst the Gulf countries, most notably the fact that the majority population consist of a

younger generation; the level of income which ranges from medium to high, and the boom in the consumption of technical products and modern communication devices in the region.

This chapter attempts to review the experience of the GCC in the unification of its laws. It begins by outlining the most important functions of the Gulf Cooperation Council, particularly with regard to the unification of laws and economic coordination, as well as examining the controversial primary motivation for its establishment. The following section provides an overview of the legal environment of each of the six Member States of the GCC, and their main sources of legislation, and their legal and judicial history. This is followed by a review of new arrivals' jurisdiction and methods of alternative dispute resolution, an important topic due to the increasing number of economic disputes. The focus then shifts to a comparative analysis of the similarities and differences between the EU and the GCC examining two key themes: legal harmonisation between the EU and the GCC, and economic integration. A discussion of the relationship between UNCITRAL and the GCC is followed by a review of the legislation relating to electronic commerce in the GCC. The chapter concludes by addressing the significance of the unification of laws for electronic commerce amongst the Member States of the GCC.

2.2 The key functions of the GCC

The Arabian Gulf States are linked not only by their geographical proximity as they are all located in the Arabian Peninsula, overlooking the Arabian Gulf but also by shared cultural factors such as their religion, language, customs and traditions. In addition, their economic similarities remain a further important factor encouraging convergence, since all six Gulf States

are energy-exporting developing countries. According to Sturm et al.:"40% of global proven oil reserves are controlled by the GCC countries, as well as 23% of global gas reserves".[6]

The following sections examine three key areas of cooperation and joint work amongst the GCC Member States, namely cooperation on political and security issues, economic cooperation and joint economic action, and legal and judicial cooperation.

2.2.1 Political coordination and security cooperation

Over the course of three decades, the GCC has sought to coordinate policies and strategies amongst Member States and to cooperate in the field of foreign policy, in order to enhance the security, stability and prosperity of their people. In 1984, the Gulf countries established a common defence force known as the "Peninsula Shield"; in addition, the Gulf States signed the Joint Defence Agreement of the Council of Cooperation in Manama in December 2000. Although many commentators have attributed the creation of the GCC to the fear of its founding members of the spread of the Iraq-Iran War, or to common security concerns,[7] this is an unwarranted assumption because the Charter of the Gulf Cooperation Council stipulates cooperation in all fields:

> Article Four (Objectives): The basic objectives of the Cooperation Council are: 1- To effect coordination, integration and inter-connection between Member States in all fields in order to achieve unity between them.[8]

Although it cannot be denied that the aforementioned conflict and common security concerns acted as a catalyst, they were not the only cause, and in practice, as mentioned above, the

[6] Michael Sturm, Jan Strasky, Petra Adolf and Peschel, *The Gulf Cooperation Council countries, economic structures, recent developments and role in the global economy* (European Central Bank 2008) 63
[7] Rouhollah K Ramazani and Joseph A Kechichian, *The Gulf Cooperation Council: Record and Analysis* (University of Virginia Press 1988)
[8] *The Gulf Cooperation Council Charter* (GCC Publications 1983)

coordination and integration includes political and security cooperation as well as the unification of laws and harmonisation of economic policies, which is the axis of this research.

2.2.2 Economic cooperation and joint economic action

Economic cooperation began with the Unified Economic Convention in 1981 which aimed to achieve economic citizenship for the GCC, along with achieving economic integration among the GCC Member States on the basis of gradual steps, starting with the establishment of a Free Trade Zone in 1983. Then, in early 2003, it achieved Customs Union. Some five years later, in January 2008, it established a Gulf common market, marking a major step towards a Monetary Union Agreement and common currency in December 2008. However, this is still pending after the withdrawal of two of the six GCC Member States (the UAE and Oman). Harmonisation of regulations, policies and strategies in the areas of the economy and in the financial and commercial sectors is still a major focus.

2.2.3 Legal and judicial cooperation

According to Article IV of the Charter of the Gulf Cooperation Council, which states the objectives of the GCC, this is one of the most important functions of the GCC. This applies to similar laws and regulations in various fields and has involved the GCC Member States focusing on two key areas. The first involves the convergence of regulations and laws in various fields through the preparation of uniform laws. Some thirteen unified common laws already exist, and some are being transformed mandatorily. The second entails enhancing coordination between the various judicial authorities and the judiciary, with the intention of unifying the various types and levels of litigation and trial proceedings.[9]

[9] Information Centre, *The GCC process and achievement* (GCC Publications 2009)

Since its inception three decades ago, the GCC has been seeking to achieve coordination and integration in all fields. The three joint action pathways have been reviewed, starting with political coordination and security cooperation, in addition to economic cooperation, and legal and judicial cooperation, and finally, cooperation on Human Resources and Education. This sheds light on the overall nature of this cooperation, which is far from being limited to military and security cooperation.

This research focuses on two of these joint action pathways: legal cooperation, which seeks to propose a unified law, and economic and trade cooperation, since this law lies at the heart of business; therefore, the research will address both economic convergence and unification laws.

This has been confirmed by the recommendations from the "Unified Laws and Regulations in the Member States of the Gulf Cooperation Council" conference, which was held on 29 March 2011 in Riyadh under the patronage of King Abdullah bin Abdulaziz Al Saud. This meeting recommended the harmonisation of legislation on some areas such as intellectual property rights and e-commerce across the GCC Member States.[10]

To conclude, since it was established three decades ago, the GCC has been seeking to achieve coordination and integration in all fields in order to achieve the Union phase. One of the most important principles that the Council sought was the harmonisation of laws through the formulation of uniform laws; however, before reviewing these proposals for uniform laws, it is important to analyse the legal background of each Member State of the GCC, which will be examined in the next section.

[10] 'Unified Regulations in the Gulf Cooperation Council conference' organised by Imam University, Riyadh, March 2011

2.3 The legal background of the GCC Member States

In order to fully understand the importance of creating legal harmonisation in the business laws and regulations of the GCC Member States, it is necessary to review the legal background of each of these countries in turn.

Despite their geographic proximity, their cultural and linguistic similarities, and their economic convergence, each GCC Member States has a somewhat different legal background, although they share common sources of legislation and their style of drafting. Therefore, before focusing on analysis of the GCC's laws on e-commerce, it is necessary to review the legal and judicial systems of the six Gulf Member States and the most prominent commercial laws which are currently in place there.

2.3.1 Saudi Arabia

The history of commercial law in Saudi Arabia dates back to commercial court law in 1930, and contains 633 articles, with four main chapters, which are: firstly, main land trade; secondly, maritime trade; thirdly, Trade Council, and finally, commercial tariffs.

Since the commercial court system did not address commercial papers, except for briefly addressing bills of exchange, this led to the need for a detailed system for commercial papers, which was then issued in 1963. It is mainly derived from the Geneva Convention 1930, which provides a uniform law for bills of exchange and promissory notes[11]. Moreover, with the rise of the economy and the growth of companies, the need for a detailed and comprehensive system for companies emerged, and so in 1965, [12] a law was issued which was applicable until the new Companies Law was issued in 2015.

[11] Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) The League of Nations Document, C. 360. M. 151. 1930. II.
[12] Khaled Ahmed Osman, *Jurisdiction of Commercial Courts* (Saudi Research & Publishing 2012)

Aljaber[13] believes that the style of Saudi's commercial drafting of laws is derived from Ottoman commercial law, which was itself originally derived from a mixture of Islamic rules and the French commercial code (code de commerce) adopted in 1807. Also, he argues that since Saudi commercial court law was written over 80 years ago, in 1930, it contains many articles that are now outdated and it fails to address a number of modern issues. However, a remarkable shift occurred in the late 1990s, when Saudi Arabia announced plans to join the World Trade Organization (WTO), a decision which has had an impact on its national laws and regulations. According to Zahid[14] negotiations began in 1999, ending with the announcement of its official accession and approval as a WTO member in December 2005. This led to the reform of a large range of existing legislation and also the enacting of new legislation, including: Law of Commercial Data 2003; Law of Trade Names 2000; Foreign Investment Law 2001; Capital Markets Law 2003; Securities Business Regulations 2005; Investment Funds Regulations 2006; Electronic Transactions Law 2013, Arbitration Law 2013, and Companies Law 2015.[15]

2.3.2 United Arab Emirates (UAE)

The union between the seven emirates began when the UAE Federal Constitution was signed in 1972. The judicial system in the UAE bilateral framework is unlike any other judicial system in the Arab world and in under the jurisdiction of both the local and the federal judiciary. It is regulated by the rules of the constitutional Articles 94 to 109. Federal laws are issued under the provisions of the Constitution of the United Arab Emirates. As the UAE follows the codified system for civil law, it issued the Civil Transactions Law No. 5 of 1985 ("the Civil

[13] Mohammed Al Jaber, *Saudi Commercial Law* (King Saud University publications 1997)
[14] Tariq Zahid, *the effects of the Kingdom's accession to the World Trade Organization* (Al Yamamah Press 2006)
[15] Abdulrahman Ahmed al-Afandi, *Saudi Commercial Law* (Al-Baha University 2009)

Code")[16], and according to Alazohaily,[17] it is mainly derived from Jordanian civil law which was issued in 1976. The UAE Civil Code consists of 500 articles, and Chapter One (articles 125-275) discusses contracts and addresses in detail the foundations of the contract, its validity and effectiveness, and options for termination. [18]

2.3.3 Qatar

Since the beginning of the new millennium, Qatar has been the fastest growing country in the Middle East, with the highest rates of income per capita.[19] An overview of Qatar reveals it to be a more contemporary legislative Gulf State, for instance, Civil Law No. 22, introduced in 2004, is totally different to the 1971 law which it replaced. It includes 1168 articles covering the civil aspects of transactions including contracts, which are discussed in 143 articles. Two other pieces of Qatar legislation are of relevance in this context: The Companies Act 2002 and E-Commerce Law 2010.

2.3.4 Bahrain

Bahrain's Civil Law is the cornerstone of Bahraini legislation, and includes 1054 articles covering all branches of civil transactions. The Bahraini legal system has an integrated system of legislation that covers most economic aspects, for example:

- Code of Civil Procedure and Commerce (Legislative Decree No. 12 of 1971)
- Law establishing and organising the Bahrain Stock Exchange (Legislative Decree No. 4 of 1987
- Trade Law (Legislative Decree No. 7 of 1987)
- Commercial Companies Law (Legislative Decree No. 21 of 2001)

[16] Yasser Saggaf, *Legal history of the United Arab Emirates* (Saqqaf Consulting Group and Information Technology 2008)
[17] W Zuhili, *Contracts in the UAE Civil Transactions Law* (Alfiker 2011)
[18] Ahmed Khedr and Bassam Alnuaimi, *A Guide to United Arab Emirates Legal System* (New York University School of Law, 2010)
[19] Beth Greenfield, 'The World's Richest Countries' *Forbes* (22 February 2012)

- Electronic Transactions Law (Legislative Decree No. 28 of 2002)
- International Commercial Arbitration Law, and
- Bankruptcy Law.

Bahraini legislation also ensures the protection of intellectual property, by means of the Law of Protection for Copyright and Related Rights, Patent Law and Trademark Law.[20]

Bahrain has economic relations with many countries and has entered into more than 130 bilateral agreements in the areas of investment, promotion of economic cooperation and trade. At the forefront of these agreements is its Free Trade Agreement with the United States of America.

2.3.5 Oman

Laws governing the various aspects of business in the Sultanate include the Omani Trade Act No. 55/99 in addition to other laws relating to aspects of trade, including the Commercial Companies Law; the Banking Law, the Law on Commercial Registering and Maritime Law. These laws guarantee the rights of all parties related to a business. It is worth mentioning that Omani Trade Law, issued on 11 July 1990 by Royal Decree No. 55/90, established many of the rules and regulations which currently govern business.[21]

The Arbitration Law issued by Royal Decree 47/97, on 28 June 1997, details the appeal procedures and disqualification provisions for domestic or international arbitration, names the competent court. In 1999, the adoption of several\ laws and various pieces of legislation concerning the judicial system in the Sultanate was rolled out in order to restructure and organise the judicial institutions into something resembling a modern system. This included

[20] *Rules of the Bahrain Trade Act (7/1987)* (GCC Legal Information Network 2011)
[21] Ahmed Mansour, *Concerning development of the Omani judicial system* (Square Law Research 2009)

the Code of Civil Procedure and Commerce enacted on 6 March 2002 by Royal Decree No. 29/2002. [22]

Although Oman depends on codified law, and influenced by French civil law, some including Masood and others[23] have argued the case for implementing English common law in Omani trade law. Almktomih argues that the articles and provisions of Omani law do not meet current requirements and have not kept pace with developments in various fields, including the trade openness for attracting foreign investment.[24]

2.3.6 Kuwait

Following Kuwait's independence in 1961, on 26 August of the same year, Amiri Decree No. 12 called for a general election for members of the Constituent Assembly, including Sheikh Abdullah Salem, the Emir of Kuwait. A regulatory body and a higher council were established in addition to a constituent assembly, with a decree for a temporary constitution. On 17 March 1962, the Constitutional Committee held its first session preparing for a Permanent Constitution. Kuwait constitution was finally completed on 15 January 1963 and consists of 183 articles.

Moreover, Code of Civil Procedure (Legislative Decree 38 of 1980) codified in the *Official Gazette* on 4 June 1980, Commercial Law (Legislative Decree 68 of 1980) codified in the *Official Gazette* on 19 January 1982 [25]

After all, whilst most of the legislation adopted in Gulf states influenced by Islamic legislations as its primary source, it has also been influenced by the Egyptian system of civil law,

[22] Adel Ali Mikdadi, *Commercial law in accordance with the provisions of the Trade Act of Oman* (House of Culture, Publishing and Distribution 2007) 367
[23] Kelly Miller, 'The Omani Conundrum' <http://tyglobalist.org/in-the-mag/politics-and-economy/the-omani-conundrum/> accessed 19 November 2011
[24] Madrin Almktomih, 'New Commercial Law expected to address legislative shortcomings' *Vision* (2012)
[25] Abdul Razak Abdulla, *The legal system in the State of Kuwait* (ARALF Kuwait 2006)

established in the late 19th and 20th century. This, in turn, has its roots in the French legal code. This influence is most clearly demonstrated by the adoption of civil law by most countries in the region, rather than the common law system as in the UK.

2.4 New arrival jurisdictions

Since some Gulf States aspire to occupy a position among the major world economies, they have tried to establish alternative dispute resolution centres that have the authority and autonomy to establish new jurisdictions and 'legal islands' which have been given full independence to adopt both English common law and the use of English language, and these attract experienced judges from the Commonwealth.

This section will address these experiences, particularly in Dubai, Qatar and Bahrain, which could change the face of investment and the legal environment within the region, by establishing financial Free Zones and providing special exemptions as part of a separate legal system that can be described as legally independent islands within the state. This is in addition to a fully exempt tax system which allows companies which are 100% foreign-owned to be based there. These issues are presented in more detail in the following sections.

2.4.1 UAE

Alternative dispute resolution in the UAE began with the Abu Dhabi Commercial Conciliation and Arbitration Centre which was established in 1993, followed by the Dubai Arbitration and Conciliation Commercial Centre in 1994; however, the biggest step forward occurred in 2004 when the Ruler of Dubai issued Decree 10 which facilitated the establishment the Dubai International Arbitration Centre. Its Board of Trustees consists of 21 members and it used its extensive experience in arbitration to develop the rules of the centre and take into account best practice. Its rules are based on those of the UNCITRAL Model Law; the London Court of International Arbitration; the International Chamber of Commerce (ICC); the World

Intellectual Property Organization (WIPO) and the Stockholm Arbitration Rules. Also, article 14 refers to appointing an arbitrator from Europe and North America.

There was a significant shift with the establishment of the Dubai International Financial Centre (DIFC) in September 2004 as a result of a federal decree establishing a Financial Free Zone, with its own internal authority and jurisdiction. Surprisingly, after establishing an independent judicial authority, the court chose to rely on common law, and the sole language of the court is English. Since its establishment in 2004, the court has had exclusive jurisdiction over any disputes relating to contracts fulfilled in whole or in part in the DIFC; however, in October 2011, the Ruler of Dubai signed a law which allowed any company to resort to the DIFC courts if they wished to do so. Enforcement remains the main obstacle for this court and remains a matter of concern for this and other arbitration centres in the rest of the UAE outside Dubai or other Gulf States or countries.

2.4.2 Qatar

Since the enactment of Law No. 7 establishing the Qatar Financial Centre (QFC) in March 2005, multiple bodies necessary for the work of the QFC have been created, including the independent body known as the QFC Civil and Commercial Court which deals with matters arising under QFC law. Issues are considered by high-level judges with legal and international prestige, for example President Lord Woolf of Barnes who was Lord Chief Justice in England and Wales and was appointed as President of the Civil and Commercial Court of QFC until October 2012. He was followed in role by Lord Phillips who was also Chief Justice of England and Wales.[26]

[26] 'The appointment of Lord Phillips as the new head of the International Court of Qatar and the Dispute Settlement Center' *AME Info Qatar* (10 October 2012)

Mubarak Al-Hajri[27] and others consider the QFC Court to be unconstitutional, especially as it differs from the DIFC Court in that it allows the staging of parties outside the centre of the court, which violates the sovereignty of the judiciary country. This may create local conflicts and detract from the role of national courts. On the other hand, Hassan[28] sees the QFC Court as being consistent with the general principles of the Constitution, which provides for all courts established by law.

In 2009, QFC Civil and Commercial Court was incorporated into the International Court of Qatar under the terms of Qatar Law.[29]

2.4.3 Bahrain

In August 2009, Bahrain launched an ambitious initiative when it signed a cooperation agreement with the American Arbitration Association (AAA) which is regarded as the world's largest dispute resolution service, thus ensuring cooperation between the Assembly and the Bahrain Chamber of Dispute Resolution, from which the BCDR-AAA originated. [30] The new Chamber provides international, regional, and domestic commercial and governmental users contracting in the Gulf and beyond, with a purpose-built solution for the rapid, effective and certain resolution of commercial disputes.

2.4.4 Conclusion

Therefore, the emergence of a common law system can be seen within the region, in the form of the Dubai International Financial Centre Court (DIFC); the Bahrain Chamber for Dispute Resolution (BCDR-AAA), and the QFC Civil and Commercial Court. Furthermore, a large proportion of companies in the Gulf prefer to deal with such courts, causing Sheikha Haya Al

[27] Saad Alkhadhar, 'Constitutional Court of Qatar' *Al Arab* (2 February 2011)
[28] Hassan El Sid, *International Court of Qatar* Gulf (Centre for Development Policy 2011)
[29] QFCA, 'About the QFC' <http://www.qfc.qa/about-qfc/Pages/about-qfc.aspx> accessed 23/11/2012
[30] The Information Affairs Authority 'The Minister of Justice and Islamic Affairs signs a cooperation agreement with the American Arbitration Association' *Albayan* (Manama, 17 August 2009)

Khalifa[31] to conclude that the emergence of such centres emphasises the need to meet the demands of international clients who wish to deal with common law rather than civil law. Thus, it is necessary for all Gulf States to develop a uniform commercial code in order to cope with the growth in the region.

In conclusion, it can be said that the establishment of such Free Zones gives the Gulf States the power to create independent legal Islands. These centres also settle disputes at the highest level to create an investment climate that is in step with the world's leading economies. However, drawbacks have arisen around enforcement, and there have been serious attempts to introduce reforms in this regard. Hajri[32] and others argue that these violate judicial sovereignty, and lead to poor attention being paid to legislative reform.

2.5 EU and GCC: Similarities and Differences

This section will identify the key similarities and differences between the GCC, which is a regional organisation with six members, and the European Union (EU) which is a politico-economic union of 28 Member States. The aim of establishing the GCC is to enhance coordination and integration amongst its members in vital fields such as security and economic and legal harmonisation, while the EU's main objective is to seek to ensure the free movement of persons, goods, services and capital within the Union (the famous "four freedoms"), and to enact a binding legislation, as well as to adopt a monetary union.The next section will focus on the two main objectives of the EU and the GCC: legal harmonisation and economic convergence.

[31] Haya Rashed Al Khalifa, 'Settlement of disputes in the law' *alayam* (August 2012)
[32] Saad Alkhadhar, 'Constitutional Court of Qatar' *Al Arab Doha* (2 February 2011)

2.5.1 Legal Harmonisation in the EU and GCC

With respect to the EU, Article 115 of the Treaty on the functioning of the EU (ex Article 94 TEC)[33], provides for the harmonisation of laws, regulations or administrative provisions of the Member States that directly affect the establishment or functioning of the internal market. Since the establishment of the EU, the European Commission has sought to reach an ever closer degree of harmonisation and approximation of national laws, sometimes leading to the unification of laws, which includes the process of creating similar legal rules in fields considered crucial for the functioning of the internal market. This occurs through Council directives, regulations, and decisions; however, it is not an easy process because the legislation across the different European Member States varies greatly.

The process of EU law-making starts with the formation of a proposal by the European Commission, or sometimes as a response to a Member State. This proposal will then be debated by the European Parliament and the European Council, and will be amended before its adoption. However, the long process of negotiations between 28 different countries, each with different policies, priorities and legal systems, is a far from easy task, but the purpose is to give the representatives of each Member State the chance to ensure that the proposed legislation will work within its own domestic legislation and interests as far as possible, which ultimately results in more harmonised legislation which has a positive impact on its implementation.

In the case of the GCC, however, legal and judicial cooperation takes up a substantial part of its tasks, in the form of coordination amongst the judicial bodies and unification and convergence among their laws and regulations. One of the significant objectives set out in the GCC Charter is “developing similar laws in various fields.”

[33] Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 - 0390

The cooperation process amongst the Gulf State was started in December 1982 by the Ministers of Justice of the GCC States. An expert committee was constituted to prepare draft unified laws. In practice, there have been some remarkable achievements made in this field in recent decades, by working towards unifying laws and creating common legislation in various fields. These can be divided into two areas.

The first of these focuses on attempts to establish common ground in the basic legislation, such as sources of obligations; contract, property and rights, and personal status legislation, as well as legislation in relation to Corporeal Estate Registration, which is as follows:

1. Kuwait Document on the GCC Common Civil Law 1997
2. Muscat Document on the GCC Common Law of Personal Status 1996
3. Kuwait Document on the Common Law for the Management of Minors' Property 2004.
4. Muscat Document on the Common Law of Corporeal Estate Registration 2002.[34]

The second of these areas focuses on attempts to harmonise the competency of laws and criminal law and procedures, in addition to juvenile law and the fight against human trafficking. Most importantly, there is the Agreement on the Execution of Rulings, which is as follows:

1. Doha Document on the GCC Common Penal Law 1997
2. Riyadh Document on the GCC Common Law of Penal Procedures 2000
3. Abu Dhabi Document on the GCC Common Juvenile Law 2001
4. Abu Dhabi Document on the Common Law for Control of Trafficking in Individuals 2006.[35]

[34] *The GCC process and achievement* (GCC Publications 2009)
[35] Akram Abdul Razak al-Mashhadani, 'Legal integration process of the Gulf Cooperation Council (GCC uniform laws and model)' 2011 2 *Quarterly Law Journal*

This gives rise to several issues, the first of which is the most important, namely, the mandatory transposition of legislation in the EU and the GCC. To start with the EU, in Art 288 TFEU[36], the treaty emphasises the binding nature of EU legal acts, which are divided into four types (1) A regulation which shall have general application and shall be binding directly on all Member States; (2) A directive which is also binding, but allows each national authority to choose the form and method this will take; (3) A decision which shall be binding on those to whom it is addressed; and (4) recommendations and opinions which have no binding force.

However, in the case of the GCC, the legal nature of the GCC's resolutions is of key importance as the statute which established the GCC does not allow any resolutions which are made the legislative authority to be superior to local legislative authorities. Its executive organs including the Supreme Council or its Ministers of Justice do not have the jurisdiction to issue decisions to be implemented directly towards Member States. Those rules remain only legal recommendations and only become effective when each of the Member States individually consents to them being integrated into its national legislation.

This is completely different to the case of EU Directives, which are binding on the Member States to whom they are addressed, with most of them being addressed to all Member States. In fact, notwithstanding the legal effect of the above common laws depending on the implementation of all GCC Member States, most of these common laws serve as a legal point of reference only. However, the Supreme Council of the Gulf Cooperation are able to issue legislation which is binding for all Member States, such as the Unified Economic Agreement, the provisions of which take precedence over national legislation. Customs Union was adopted in the GCC in 2003 with monetary union and the proposal of the single currency being established in 2008. The fifteen unified laws undoubtedly served to lay the foundation for the

[36] Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 - 0390

unification of legal issues and these include civil and criminal law and unification of civil procedures; however, despite these great achievements on the path to economic integration, there is an absence of unifying specialised commercial laws such as Company Law, Investment Law, and laws covering electronic commerce (the focus of this research).

Al-Anzi[37] confirms that the existing legal impediments must be worked on and overcome in order to prevent them from contributing to the economic slowdown of the GCC's unification, as some local laws will hamper the process of economic integration. He states that, currently, flexible laws are urgently needed to serve the economies of the GCC Member States rather than legal directives which are not compulsory, as is now the case. Al Anzi notes that there is a need to develop uniform laws for all the GCC Member States in the business field. In addition, there is a need to promote a legal culture among the citizens of the GCC Member States, since their level of familiarity with the culture of legal systems is low.

Morished[38] claims that the draft uniform laws have suffered many delays in becoming mandatory across the Member States, despite approval by the Supreme Council, and the slow progress is holding back plans for cooperation and coordination which are intended to benefit GCC citizens. This is confirmed by Alshehri[39] who states that unified Gulf laws need new mechanisms including a gradual waiver and starting to actually apply those laws which have common features.

More than three decades after the establishment of the Council, some of the decisions taken have still not been fully implemented because the Cooperation Council requires consensus in decision making, which can delay many matters if two or more states are opposed. The proposal made by King Abdullah bin Abdulaziz Al Saud in his opening speech to the thirty-second

[37] l Anzi, *Bureaucracy in the integration process of the Gulf economy* (Arab House 2011)
[38] Saud Morished, *Unified Gulf laws.* Where will it end? (Al Yamamah Press 2011)
[39] Alshehri, 'The true story of a unified Gulf currency' *AlMajelh (*April 2010)

session of the Supreme Council, held in Riyadh on 19 December 2011,[40] concerned the transition from cooperation to full union. He emphasised that the GCC Union should not detract from the sovereignty of its Member States, and one of its objectives will be to maintain their sovereignty.

At the Manama Summit on 24 December 2012, the Bahraini Foreign Minister confirmed that the process leading to the process of GCC union was to be expedited, and that all member States would work towards making the GCC region an integrated economic zone, removing any obstacles that might delay the completion of this stage, which he described as "a priority for the GCC."[41] The six Member States are being asked to move the GCC forward from the cooperation stage to a second phase which calls for closer integration.

2.5.2 Economic integration

The main objective of the EU is economic integration, which was achieved by several initiatives beginning with Customs Union in 1968 and the abolition of internal tariff barriers; in 1992, the Maastricht Treaty affirmed a Free Trade area and enabled free movement of persons, goods, services and capital within the Union bringing the single market into operation. Monetary union is a further significant step toward economic integration and the Eurozone was launched officially in 1999, with the Euro being introduced in 2002 as a single currency in all the Eurozone members. There is also some degree of coordination and integration of fiscal policy. Overall, the EU has achieved a satisfactory level of integration and has enhanced economic and social progress through the incorporation of a common market and a common currency, strengthening the foundations of regional development. Furthermore, it has established European citizenship to ensure basic rights and civil and political rights, in addition

[40] Mohammed Tayeb, 'King's invitation to move to the Union a wise strategy' *Okaz* (15 January 2012)
[41] Mtalhq Anzi, 'Gulf Union recently inevitable' *Gulf Al Yaum* (23 December 2012)

to strengthening Europe's role in the world by improving relations amongst organisations and countries to achieve these common goals.

With regard to the GCC context, the first integrated project began with the Unified Economic Agreement (1981) approved by the Supreme Council at its second session in November 1981. The main purpose was to draw up a joint economic action plan, and to aim for economic integration and cooperation among the GCC Member States. This has been set out in detail, and includes, in particular:

1. Achieving economic citizenship for GCC nationals.
2. Achieving economic integration among the GCC Member States, by a series of gradual steps, starting with the establishment of the Free Trade area, followed by customs union, creation of the GCC common market, and finally, economic and monetary union.
3. Unification of regulations, policies and strategies in the areas of economics and finance and commerce.
4. Interconnection of infrastructure linking the GCC states, particularly in the areas of transportation, electricity and gas, and encouragement of the establishment of joint ventures.

This agreement proceeded at a reasonable, albeit somewhat slow pace in economic integration, until the shift towards the Economic Agreement (2001). This conformed with the developments laid out in the joint action plan during the first two decades of the Council, and was also in response to international challenges in the economic sphere. It was approved by the Supreme Council at its 22nd session in Muscat in December 2001. The Economic Agreement between the GCC Member States marks a new way of working jointly during the coordination phase of the process of integration in accordance with the agreed mechanisms and specific programmes. It also places more emphasis on the following topics:

1. Customs Union of the GCC Member States.
2. International economic relations of the GCC Member States and other economic groups; international and regional organisations, and international and regional aid.
3. The GCC common market which includes identifying areas of economic citizenship.
4. Monetary and Economic Union.
5. Improving the investment environment in GCC Member States.

In addition, the Agreement includes mechanisms for the implementation of economic objectives, and for the follow-up and settlement of disputes. The latter stipulates the formation of a judicial body to consider claims relating to the implementation of the provisions of the Convention and decisions issued pursuant to its provisions.

The most prominent achievements in the sphere of economic integration can be divided into three categories. The first involved the establishment of common institutions, which included the Gulf Investment Corporation (GIC), the Standardization Organization for the GCC Member States, the Commercial Arbitration Centre, the Patent Office, and the Telecommunications Bureau.

The second category involved working towards Customs Union, beginning with the introduction of the new uniform customs tariff on 1 January 2003. As a result, products are considered as originating in a GCC country if the value added to such a product in the said country is more than 40% of the value of the product in question, and if the factory that manufactured the product is at least 51% owned by GCC nationals.[42] In the event of re-export to non-GCC Member States, a customs deposit has to be paid which is refunded when proof of re-export is given to the authorities. In the event of re-export to a GCC Member State, a customs

[42] Abdel Moneim Ali, *GCC monetary union and a common Gulf currency* (Center for Arab Unity Studies 2008)

duty of 5% is levied at the first point of entry. These provisions of the GCC Customs Union have been applied since 1 January 2003.[43]

Although the transition began in 2003, some problematic areas have created difficulties, such as revenue sharing, protecting agents, and tariff protection for goods imposed by some Member States; however, there are concrete steps in place to overcome these problems. The establishment of a supreme body of the Customs Union in April 2012 identified the final phase of the Customs Union in January 2015.[44] Given that the transitional phase has made slow progress for 12 years, according to the IMF,[45] it is now vital to move onto the final phase in order to promote intra-regional trade.

The third category relates to single currency and monetary union. Ambitious economic integration projects, in theory, could encourage monetary union and a new wave of trade and investment in the region. Laabas and Limam**[46]** predicted in 2002 that the formation of the GCC would result in a single currency in the foreseeable future. However, some elements are missing which would bring a comparative advantage in production, and in the GCC, oil is still dominant in the GDP, meaning that some of the necessary pre-conditions for monetary union have not been achieved. There was also a split between GCC Members States concerning the location of the headquarters of the Central Bank, leading to UAE and Oman pulling out in 2009, meaning that only four nations signed up to prepare for this project. In addition, according to

[43] Ibid
[44] *Customs Cooperation Council for the Arab States of the Gulf - the launch of the Customs Union* (Information Center, GCC Secretariat 2012)
[45] Looney, Robert 'The Gulf Co-operation Council's Cautious Approach to Economic Integration' 24.2[2003] Journal of Economic Cooperation 137-160.
[46] Belkacem Laabas and Imed Limam, *Are GCC Countries Ready for Currency Union?* (Arab Planning Institute 2002)

Kotilaine,[47] the endemic problems in the Euro Zone demonstrated that monetary unions are not always positive, which affected attitudes towards GCC monetary union.

Although the official data shows that trade between the GCC Member States jumped to 65.4 billion dollars in 2010 from 19.8 billion in 2003, this is only a small part of the GCC's total trade, which amounted to about $1.3 trillion last year.[48] According to a study by the EU, bilateral trade between the GCC amongst GCC Member States does not exceed 6%.[49]

Working towards a single currency instead of the current range of currencies is a goal worth is still seen as a worthwhile goal because it will contribute towards strengthening the economic efficiency of the GCC Member States, and deepening their economic integration, as well as enhancing the development of economic sectors, including non-oil exports. [50]

Abbas Mejren and others[51] consider that cooperation in the economic field over three decades has been lower than might have been expected, particularly since it involves commitments that are much less than those required for security or political cooperation. However, others argue that gradual economic integration, accompanied by a degree of supranational institutionalisation, is the most effective route to the creation of a long-term system.

2.6 Relationship between UNCITRAL and the GCC

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of December 1966 "to promote the progressive harmonization and unification of international trade law"[52]. Over the

[47] Jarmo Kotilaine, 'Despite the problems of the euro, advancing the unified Gulf currency steadily' (Wharton Arabi Knowledge 2010)
[48] Albany, 'CU enhance economic relations between the Gulf States' *Economy today* (Dubai 2012)
[49] Ibid
[50] Abdel Moneim Ali, *GCC monetary union and a common Gulf currency* (Center for Arab Unity Studies 2008)
[51] Abbas Mejren, *Gulf Cooperation Council: outlook perspective* ("Gulf Studies Center " Kuwait University, May 2012)
[52] *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* (Vienna Resolution No. 51/162 of December 16, 1996)

years since its inception, it has been considered the legal body of the United Nations in the field of international trade law, its main task being to modernise and harmonise the rules on international trade. It makes use of several tools such as:

- Conventions, model laws and rules which are universally accepted legal, legislative and recommendations
- Updated information on case law based on uniform commercial laws
- Technical assistance to reform law projects
- Regional seminars and national standardised systems in the field of commercial law

The Commission carries out its work at annual sessions, which alternate between New York City and Vienna, and has established six working groups to perform the substantive preparatory work on topics within its programme of work. These addressed the following issues: Micro, Small and Medium-sized Enterprises; Arbitration and Conciliation; Online Dispute Resolution; Electronic Commerce; Insolvency Law, and Security Interests.

The GCC Member States, in general, are considered to be some of the earliest countries to have signed up to the various conventions and legislations of UNCITRAL, starting with the most famous Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) commonly referred to as the "New York Convention". The majority of the conventions, model laws and rules have been adopted by GCC Member States and those which are most significant to the purposes of this research are: the UNCITRAL Model Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005). These three have been adopted by most but not all of the GCC Member States.

2.7 Review of e-commerce legislation in the GCC

2.7.1 Saudi Arabia

It is possible to argue that the legislation has not kept pace with the rapid growth in Internet usage since it first made its appearance in Saudi Arabia in 1997, meaning that the country has suffered from a legislative vacuum with respect to electronic commerce and electronic transactions in general. This situation was remedied by Royal Decree No. M/18 on 27 March 2007 which issued rulings on the Electronic Transaction Law.[53] Moreover, the Ministry of Communications and Information Technology issued executive regulations and the Ministerial Resolution for Electronic Transaction Law No. 2 on 18 March 2008.[54]

2.7.2 UAE

The legal provisions for electronic commerce in the UAE are derived from two sources:

First: The Ruler of Dubai issued Law No. 2 of 2002 concerning electronic transactions and commerce, in order to facilitate e-commerce in the emirate of Dubai. As a result, Dubai became the first state in the Middle East to enact laws relating to electronic commerce. This law is mainly derived from the UNCITRAL Model Law of Electronic Commerce which was adopted by the United Nations in 1996[55] together with some local specifications. It may also have benefitted from legal developments in Asian countries such as the Electronic Transaction Act of Singapore 1999.[56]

[53] Electronic Transacting Law, issue by Royal Decree No. M/18 on 27 March 2007, Ministry of Communications and Information Technology

[54] *The executive regulations and the Ministerial Resolution for Electronic Transaction Law* (National Center for Documents and Archives, 18 March 2008)

[55] *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* (Vienna Resolution No. 51/162 of December 16, 1996)

[56] Qudah and Samer 'Legal Insight on the Dubai Electronic Transactions and Commerce Law' (2002) 283 *Arab Law Quarterly*

Second: Federal Law No. 1 for the year 2006 concerning Electronic Transactions and Commerce[57] was introduced by all the UAE, and although this took longer to be enacted than the Dubai law, it served to regulate electronic commerce throughout all areas of the seven emirates, and it can be said to be very similar to the law of Dubai.[58]

2.7.3 Qatar

Coinciding with the rise of Qatar economy, the volume of electronic transactions has grown greatly there in recent years, with most import and export transactions being made by electronic means.[59] Therefore, it can be said that the issuance of the laws governing electronic commerce were delayed until Amiri Decree issued Law No. 16 in 2010 on the Promulgation of the Electronic Commerce and Transactions Law on 19 August 2010.[60] The law of e-commerce in the country has two main goals: firstly, to organise, regulate and protect electronic commerce transactions, and secondly, to resolve any disputes that may arise from them.

2.7.4 Bahrain

Bahrain was one of the first countries in the Middle East, after Dubai, to pass a law dealing with electronic transactions and its Law on Electronic Transactions (Law No. 28 of 2002) is its only law which legislates cyberspace. When this Law was passed, other countries in the region were still in the process of studying the draft legislation for cyberspace, especially that related to transactions and electronic commerce.

[57] Telecommunications Regulatory Authority (TRA), Federal Law No. 1 of 2006 on Electronic Commerce and Transactions, Abu Dhabi, UAE 2006

[58] Y Omar, *'The Scope of the Federal UAE E-Commerce Law: is it self defeating*?' The conference of E-commerce & e-government, UAE University 19-20 May 2009

[59] F A al-Dabi, 'Glimpses of the law of Qatari e-commerce law' *Sudanile* (October 2010)

[60] Qatar Decree Law No. 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law

2.7.5 Oman

In line with its national strategy for a digital society and e-government emanating from the vision for the Omani economy by 2020[61], to be implemented by the Information Technology Authority, a fully developed law is needed. This should cover the organisation of transactions that take place in the virtual world in terms of saving, exchanging and provision of technical protection, ensuring these receive legal recognition. The Sultanate of Oman has witnessed a major shift in the legislative structure of its legal system thanks to the passage of the Electronic Transactions Law under Royal Decree No. 2008/69.[62]

One of the most prominent features of this law is its provisions concerning the writing and signing of electronic transactions, in the domain of civil and administrative transactions, since it accepts these as authentic and providing the same legal standard of proof as writing and signing in the traditional way.[63]

This law is divided into nine chapters split into fifty-four articles. Article II sets out the purposes of the Act, which are as follows:

1. To facilitate electronic transactions through messages or electronic records.
2. To remove any obstacles or challenges to electronic transactions, which result from uncertainties over writing and signature requirements, and promote the development of a legal infrastructure for the application of electronic transactions that are guaranteed.
3. To facilitate the transfer of electronic documents and subsequent amendments.
4. To reduce cases of fraud and subsequent amendments in electronic transactions.

[61] Information Technology Authority (ITA) 'Digital Oman Strategy' (Oman, March 2003) http://www.ita.gov.om/ITAPortal/ITA/strategy.aspx?NID=646&PID=2285&LID=113 last accessed 2 October 2016

[62] H Ghaferi, *Explanation of Electronic Transactions Act of Oman* (Dar al-Nahda Al Arabiah, 2011)

[63] S Al-Jabri, *The General Framework of Electronic Transactions Act In the Sultanate of Oman* (Forum Legal Research 2009)

5. To establish uniform rules and regulations and standards relating to authentication and integrity of electronic records and correspondence.
6. To enhance public confidence in the integrity and validity of transactions, correspondence, and electronic records.
7. To develop electronic transactions at the national level as well as throughout the Arab Gulf, and through the use of an electronic signature.

2.7.6 Kuwait

Two decades after the arrival of the Internet in Kuwait, and after a long delay by the Kuwaiti parliament in approving the proposal of Electronic Transaction 2004 (which was under discussion from then until February 2014 when Kuwaiti Law No. 20 of 2014 concerning electronic transactions (20/2014) was enacted), the executive regulations were implemented in January 2015. The law addresses, in eight chapters, the following topics: definitions, general provisions, document or electronic records, electronic signature, the government's use of documents and electronic signatures, electronic payment, and privacy and data protection.

2.8 The significance of electronic commerce in the Gulf States

The e-commerce phenomenon in the Arab Gulf states is experiencing a dramatic rise, with studies and reports indicating unprecedented numbers, with the focus being on the two biggest economies and most populous states, namely Saudi Arabia and the UAE. According to the report by the Boston Consulting Group 'The World's Next E-Commerce Superpower' the impact of Internet use on the economy of the G-20 reveals that the Internet economy in Saudi Arabia contributed 37 billion Riyals towards the Kingdom's economy in 2010. The report

predicts that this figure would reach 107 billion Riyals by 2016, equivalent to 3.8% of Saudi gross domestic product.[64]

Economic prosperity in the Gulf[65] and the rapid increase in the number of Internet users there makes an excellent base for a large e-commerce market.

Analysis suggests there are three principal reasons for the high growth in electronic commerce in the Gulf region:

1. Financial prosperity and an economic boom in most of the GCC Member States, fuelled by oversubscribed initial public offerings; excessive privatisation; the good business results of some companies despite the recession; encouraging and highly supportive government officials; massive expansion in the private sector; increased government spending on infrastructure projects; huge increases in national revenue, and excess liquidity in local markets, which have helped to boost the rise in national stock market prices of all the GCC Member States.
2. Demographic profile: According to a report by the Kuwait Financial Centre, over 54 percent of the total population of the GCC Member States is under 25 years old; in 2011 this amounted to some 45 million young people in the Arab Gulf States.[66]
3. IT Boom: Due to the younger generation's attraction to consuming technology products, Abdullah Al-Bassam, Vice Chairman of the Commission Communication and Information Technology in the Eastern Chamber in Saudi Arabia, stated that the Saudi market is the primary market in telecommunications and IT in the Middle East, enjoying an annual increase of between 15 and 20 percent. He stressed the statistical

[64] Boston Consulting Group, 'Clicks Grow Like BRICS: G-20 Internet Economy to Expand at 10 Percent a Year Through 2016' (19 March 2012)
[65] Jawad Abbassi, 'The volume of e-commerce for the Internet users in Saudi Arabia' (Arab Advisors Group, 8 January 2008 Dubai)
[66] Kuwait Financial Centre, Gulf residents and public budgets (Markaz 2012)

that indicate on the strength of this sector in the Saudi market and the extent of profitability if properly handled.[67]

2.9 Conclusion

Since the founding of the GCC, which combines the existing geographical and historical links of six Member States with hopes for economic convergence, it has clearly sought to coordinate activities in all fields, starting with the political process and security. Ramazani[68] argues that this was the main motive behind the founding of the Council; however, economic coordination is beginning increasingly important in addition to the areas of education and human resources. Concerns have arisen regarding the search for legal and judicial coordination, either by coordinating judicial authorities, or by proposing uniform laws.

Although convergence has occurred in many areas, within the legal environment development of legislation has historically been rather more uneven. Thus, at one extreme whilst some Saudi Arabia's trade legislation dates back seventy years and has only been updated in part, at the other extreme, most of Qatar's legislation was drafted less than ten years ago, and the rest of the Gulf States fall at different points on this broad spectrum. Undoubtedly, this disparity in content and age of the legislation impacts on the legal environment of the GCC Members States.

What is more, alternative dispute solutions and legal 'island' status make this an interesting topic. On the positive side, the GCC is well-placed to attract foreign investment and provide an excellent legal environment; however, Nabel argues [69] that the slowing pace of growth of e-

[67] Mohammed Alillaa, 'Saudis are most commonly used for information technology equipment and communications' *aleqtisadiah* (July 16 2012, Dammam)
[68] Rouhollah K Ramazani and Joseph A Kechichian, *The Gulf Cooperation Council: Record and Analysis* (University of Virginia Press 1988)
[69] Nebal Edilbi, 'Coordination of cyber legislation to stimulate Knowledge Society in the Arab Region' The United Nations Economic and Social Commission for West Asia (ESCWA), (March 2012 Beirut)

commerce legislation, causing general consumers and small to medium enterprises to lose interest.

Despite these disparities, the GCC seeks to work towards uniform laws, having already achieved some thirteen, with further legislation being investigated and debated as attempt are made to fill the legislative vacuum which exists in several areas. The aim is to create a uniform law for electronic commerce that will confirm the recommendation regarding uniform laws in Riyadh in March 2011, which stressed the need for uniform laws in vital areas such as intellectual property and electronic commerce.

Although the issue of mandatory enforcement has been a matter of concern due to the legal nature of the GCC's resolutions, the statute to establish a cooperation council does not give its resolutions the legislative authority to take precedence over local legislative authorities.

In this respect, the legal position of the GCC is unlike that in the EU is different since the binding status of EU legal acts means its legislative authority takes precedence over legislative authorities in its Member States, as affirmed by Article Art 288 TFEU which state that: "

> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> - A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> - A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods …."[70]

[70] Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 - 0390

With regards to the relationship between the GCC Member States and UNICITRAL, in general they are considered to be amongst the earliest countries to sign up to the various UNCITRAL conventions and enact the associated legislation. Most significantly for the purposes of this research is that the GCC Member States have adopted UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Electronic Signatures (2001) and United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

As a result of the demographic profile of the region, e-commerce remains a major trend, vitally aligned with the Gulf region's 30 million people, most of whom are under 25. This is why this research seeks to analyse the GCC's electronic commerce legislation in comparison to the best practice of the EU in the unification of laws, especially in e-commerce. In addition, it will compare existing legislation with UNCITRAL's model law, since this body is internationally recognised as the leader in the modernisation and harmonisation of rules on international business.

Chapter 3: Analysis of electronic contracts in the European Directives and UK implementation

Part I: Contractual issues

Since the emergence of e-commerce in the nineties, the EU has been looking towards regulating electronic commerce owing to the important potential advantages which it offers, such as promoting the growth of investment and innovation in the Information Society, which would boost the competitiveness of the European market and improve its position in the global economy. Moreover, this would also bring about greater employment opportunities as well as stimulating the free movement of goods within the internal market, which is one of the major goals of the EU.

Due to all of these advantages, the EU has paid significant attention to its Electronic Commerce Directive, which was adopted on June 8 2000; the purpose of which is to provide legal certainty for both businesses and consumers and to enhance their confidence in electronic commerce. This involved creating a legal framework to cover some important aspects of electronic commerce, together with the Directive 1999/93/EC of the European Parliament and the Council of December 13 1999 which provided an EU framework for electronic signatures[71].

This chapter will analyse this legal framework for electronic commerce created by the EU directives and will examine how it was implemented in UK regulations, focusing on two key areas: (1) contractual issues; (2) online security issues; and overall outcomes of the EU experience in drafting legislation in this area.

[71] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.1.2000, p. 12–20

This chapter will begin by examining contractual issues, starting with the various forms which electronic contracts can take, including email contracts and different types of wrap contracts. The contract process will then be considered, starting with prior contractual information requirements and unfair contract terms, before moving on to the most important aspect of this topic, namely, the formation of contracts. Questions relating to the recognition of electronic contracts and their conclusion will be discussed, together with the application of the concepts of offer and acceptance and the requirement to acknowledge the recipient of an order. Also, it will review the mistakes and errors that most frequently occur in the electronic contract process and the liability of intermediary service providers. Finally, it will review electronic signature.

3.1 Forms of electronic contracts

3.1.1 Email contract

An email can be used to make an offer or to communicate an acceptance. In its basic form, it can be similar to posting, as an offeror can send an email from his or her outbox to an Internet service provider (ISP), which then forwards this directly to the offeree's inbox.

In face-to-face dealings, communication is immediate and instantaneous, so there is no distinction between dispatch and receipt, or notification, so an acceptance becomes effective from the time it comes to the attention of, or is communicated to, the offeror. All parties are aware of the precise moment of the contract's conclusion and they do not face problematic issues, such as delay or failure of transmission, which may occur in non-instantaneous communication such as post or email.[72]

In long distance transactions, there is a time difference involved between dispatch and receipt and this delay means that both parties are uncertain about whether a contract has been formed, and if so, when. In addition, it is also possible that an offer may have been revoked before

[72] Paul Fasciano, 'Internet Electronic Mail: A Last Bastion for the Mailbox Rule'(1997) *Hofstra Law Review* 1542

acceptance is received. In the law of England and Wales, the major exception to the general rule concerning acceptance relates to an acceptance sent through the post (the so-called postal rule)[73], and English law has adopted the concept of validity upon posting rather than delivery.[74] The debate concerning the relevance of the postal rule to email will be discussed in depth in section 3.4.2.

3.1.2 Wrap-contracts

Wrap is a term used in Internet law to refer to the three main ways in which commercial contracts can be made electronically: shrink-wrap, browse-wrap and click-wrap. Originally, the terms browse-wrap and click-wrap were coined by analogy to ’shrink-wrap’ which is used 'to sell tangible software in packages.[75] All three contracts are reviewed below.

3.1.2.1 Shrink-wrap contract

The shrink-wrap contract is regarded as the origin of browse-wrap and click-wrap contracts. Shrink-wrap is commonly used to protect packaged software, meaning the terms and conditions are not usually visible until the consumer opens the packaging, breaks the seal or installs the software. Crucially, consumers cannot review any terms and conditions until they have paid for the software, so the fundamental question from the judicial standpoint of view concerns whether this kind of contract is valid and enforceable. This point will be discussed in further detail in section 3.4.3.

3.1.2.2 Browser wrap contract

The second method of online contracting is browser-wrap and refers to an agreement that concerns browsing, using a website or downloading software, where the website owner states

[73]-Eliza Karolina Mik, ‘The Effectiveness of Acceptances Communicated by Electronic Means, or does the Postal Acceptance Rule Apply to Email?’ (2009) JCL 68
[74] Ewan McKendrick, *Contract Law* (Palgrave Macmillan 2009)
[75] Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Routledge 2006) 248

that a particular action such as downloading or using the site will constitute an acceptance of a contract and will be taken as agreement to abide by certain terms and conditions.

Most browse-wrap contracts do not involve buying or selling goods, but instead relate to downloading or using a website. A typical example would involve the user downloading free software which has been linked to spyware by the website owner. There is no visible means of providing assent to terms and conditions; instead, these need to be accessed on another part of the website using a hyperlink.

3.1.2.3 Click-wrap contract

The third type of electronic contract is known as click-wrap agreement, whereby the seller provides a platform on the World Wide Web to display goods or services and all relevant details using an interactive website. Here, customers can browse the website and if they are interested in any item they can click on for further details. After previewing all the information required regarding payment, delivery, and terms of exchange or return, consumers finally place an order by clicking on text which states 'submit', 'I agree to the terms and conditions' or some similar expression. The contract is closed when this final step has been carried out.

From a legal point of view, when the website owner displays this link to the consumer, it clearly amounts to an invitation to make an offer and it is hard for the consumer to deny the existence of a contract after he or she has assented by clicking on the relevant link.[76]

The distinction between the click-wrap and the browser-wrap contracts is that in the former case, buyers indicate their assent to the terms and conditions by clicking on the relevant text box, whilst in the latter case users are assumed to have given their assent by simply using the website or downloading the software.

[76] Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Routledge 2006) 248

3.2 Prior information requirements

Ensuring that pre-contractual information requirements are fulfilled helps to build confidence and enhance legal certainty in electronic commerce, given that an electronic commerce contract is held remotely and the parties involved are not physical present, meaning that the contract cannot be negotiated and it is not possible to clarify any information which seems vague.

The requirement to disclose information is intended to help restore the balance between the contract parties as an online consumer may have insufficient knowledge concerning the product or service contracted, or may lack other contract details such as payment or delivery. Electronic platforms such as commercial websites can be particularly good at employing the latest methods of advertising to entice consumers whilst at the same time failing to provide all the necessary information; hence, establishing a set of objective criteria for these requirements gives consumers greater confidence in their role as contract holders.

Prior information requirements are regarded as the cornerstone for consumer protection, a sphere in which EU Commission is very active, as evidenced in the fact that this principle is included in many Directives in various areas. Furthermore, the directives differentiate between the information requirements needed, depending on particular situations and contracts. At the time of writing, the following EU Directives consider this principle: Directive 2002 concerning life assurance[77]; the third non-life insurance Directive[78]; the distance marketing of consumer

[77] Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345 1-51

[78] Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) [1992] OJ L228 1–23

financial services[79]; Timeshare Directive[80]; the Electronic Commerce directive[81]; distance selling directive[82], and finally, the Directive on Consumer Rights 2011.[83] The last three of these Directives could address prior information requirements for electronic contracts as they fall under the scope of e-commerce contracts.[84]

In the Directive on Electronic Commerce, pre-contractual information duties are more specific in relation to technical information. Article 10, for example, details the technical steps which consumers need to follow to conclude the contract; how service providers must fulfil the contract and make this accessible; the technical means by which input errors are to be identified and corrected, and finally, the language/s to be used for the conclusion of the contract.[85]

In the Directive on Distance Contracts, the requirements regarding prior information duties towards consumers are set out in Article 4 and comprise: (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal (g) the cost of using the means of distance communication

[79] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271 16–24

[80] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280 83–87

[81]Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178 1–16 Hereafter referred to as Directive on Electronic Commerce.

[82] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re Article 6 (1) - Statement by the Commission re Article 3 (1), first indent [1997] OJ L144 19–27 Hereafter referred to as Directive on Distance Contracts.

[83] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (1) [2011] OJ L304 64-88 Hereafter referred to as Directive on Consumer Rights.

[84]Sylvia Mercado Kierkegaard, 'E-Contract Formation: US and EU Perspectives' (2007) 3 Shidler J L Com & Tech 12

[85]Directive on Electronic Commerce [2000] OJ L178 1–16

(h) the period for which the offer or the price remains valid; (i) 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.[86]

The latest directive in this area, the Directive on Consumer Rights, seeks to enhance consumer confidence by modernising consumer law, and in Article 6 it expressly states the information requirements for distance and off-premises contracts, which include electronic contracts. A review of these information requirements shows that they are similar in many respects to previous stipulations, but additional pre-contractual information is specified as follows:

- Reminder of legal guarantee of conformity of goods
- Existence of any after-sales care and of any codes of conduct adhered to
- Duration of contract, and ways to terminate the contract
- Any deposits or financial guarantees to be paid
- Functionality and interoperability of any digital content, and
- Existence of any alternative dispute resolution scheme.[87]

It is clear that consumers need transparent accessible information concerning the details and price of any goods or services they are planning to purchase. Disparity in this pre-contractual information between EU member states could be a significant barrier to cross-border trade, as many problems and disadvantages can arise from insufficient pre-contractual information in electronic consumer; therefore, the EU commission has made considerable efforts to harmonise pre-contractual information, including technical information in the Directive on Electronic Commerce and additional pre-contractual information in the Directive on Distance Contracts.

[86]Directive on Distance Contracts [1997] OJ L144 19–27
[87] Directive on Consumer Rights [2011] OJ L304

Moreover, the Directive on Consumer Rights has extended the information requirements in favour of the weaker party i.e. the consumer.

3.3 Unfair contractual terms

Many electronic contracts which take place between the consumer and the service provider are made immediate with reference to the Terms and Conditions. Many, if not most online consumers, click agree to the terms and conditions without reading these or paying them due attention; often, even if they have read them, they may not be able to understand them or their implications. It is possible to say that unfair content is frequently encountered in consumer contracts across the internet and may take a variety of forms. This makes the need for protection from unfair terms and conditions all the more important.

It is important to take into account that the EU context has no general competence over contracts, and therefore it can only act in relation to contracts in the context of consumer protection or the internal market. This is because the competence of consumer protection was granted under the Treaty on the Functioning of the European Union[88] and it was empowered to ensure a high level of consumer protection.

In fact, unfair terms are explicitly addressed in the Directive on Unfair Terms in Consumer Contracts[89] which aims to reduce or eliminate unscrupulous aspects of consumer contracts. Although this Directive was drafted and enacted before the advent of the Internet and electronic contracts, it is still of the utmost importance with regard to legal instruments in this area, and many of the Articles are still active and applicable in this context, as the following review shows.

[88] Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 - 0390
[89] Council Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95 29–34 Hereafter referred to as the Directive on Unfair Terms in Consumer Contracts.

Article 3 defines unfair terms as a contractual term which has not been individually negotiated, and it is contrary to the requirement of good faith, which causes a significant imbalance in the parties' rights and obligations arising under the contract- to the detriment of the consumer. A term not individually negotiated is one that has been drafted in advance whereby the consumer was not able to influence its substance.

Article 4 indicates that the Directive does not look to assess the unfairness in general terms only, but takes into account the nature of the goods and services; the circumstances, and the rest of the contractual terms. Where there seems to be doubt in the wording of the meaning of a term, Article 5 states that the one which has the most favourable interpretation for the consumer is the one which should prevail.

Regarding the consequences of unfair terms, Article 6(1) provides nullity for the unfair term only, emphasizing the need to continue to work with the remaining terms, if possible without cancellation. As Article 6(2) notes, the consumer will not lose the protection of the EU Directive if applicable law or choice of law specifies a Member State; if the contract involves any contact with the EU, this Article is binding in international law.

Finally, concerning implementation and enforcement, Article 7 requires Member States to ensure that sellers are prevented from continued use of unfair terms, and to establish their own consumer protection bodies with the authority to act before the court or other bodies.

In legal proceedings, it is not possible for consumers to rely on the complexity or length of terms and conditions, often due to their ignorance when reading them; that is when they are even available before online purchase.

After all, The Directive on Unfair Terms in Consumer Contracts can be enforced in the sphere of electronic contracts, but given that use of unfair terms in electronic contracts is widespread

and is likely to expand along with electronic commerce itself, This Directive, which dates back to 1997, to some extent, has not covered all the new types of unfair terms which are likely to be encountered online.

3.4 Contract formation

Formation of contracts via the Internet raises a number of interesting legal issues relating to the validity and enforceability of different forms of electronic contracts and their functional equivalence with traditional paper-based contracts, including the essential matter of the exact moment at which they take effect.

3.4.1 Recognition of electronic contracts

Functional equivalence is considered to be one of the most important principles of electronic commerce law, meaning that electronic contracts are equivalent to paper-based contracts. This principle of non-discrimination is applicable when considering the legal effect of any document in electronic form and is also relevant to its validity or enforceability.

It is noted that Article 9 of the Directive on Electronic Commerce requests that Member States carry out a systematic review of the rules and requirements for the formation of contracts which might prevent or restrict electronic contracts. It highlights the following areas as needing to be revised since rules and requirements of this type might prevent or reduce the use of e-commerce:

1. Provisions requiring a formula for contracting such as contracting using paper, writing, copying, printing, or paper originals.
2. Provisions that make the electronic contract worthless such as the requirement for it to be negotiated in the presence of a person or particular place, or requiring witnesses.
3. Provisions that deny electronic systems their electronic nature, such as electronic agents.

In the same Article, this European Directive also requires Member States:

> to ensure that the legal requirements applicable to the contractual process neither 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.[90]

The Directive therefore is sought to remove all practical impediments in legislation to uncertainty concerning the status of electronic commerce. Having discussed the general principle of the legality of electronic contracts, the different types of electronic contract and the issues related to them are now analysed in detail.

3.4.2 Email

To start with email, where in long distance transactions, the time is made distinct between dispatch and receipt. This delay is the result of the remoteness, which leaves both parties uncertain as they do not know whether or when a contract has been formed. Also, an offer may be revoked before acceptance is received. However, in the law of England and Wales, the major exception to the general rule is acceptance sent through the post (postal rule), and English law has adopted validity upon posting rather than delivery. As noted above, the postal rule constitutes an exception to the general rule of acceptance in English contract law. The leading cases in this area are *Adams v Lindsell*,[91] *Entores Ltd v Miles Far East Corporation*[92] and *Brinkibon v Stahag und Stahlwarenhandelsgesellschaft GmbH*[93].

The first of these proved to be the landmark case involved in establishing the postal mailbox rule. The case started when Lindsell (the offeror) made an offer by post on September 2nd to

[90] Directive on Electronic Commerce') [2000] OJ L178 1–16
[91] *Adams v Lindsell* (1818) 1 B & Ald 681, 106 ER 250
[92] *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 Hereafter *Entores*
[93] *Brinkibon v Stahag und Stahlwarenhandelsgesellschaft GmbH*[1983] 2 AC 34 Hereafter *Brinkibon*

sell Adams (the offeree) some wool, requiring him to reply by post. The offer did not arrive until September 5th. The offeree had sent a letter of acceptance on the same day but it did not arrive until September 9th, and as a result of the delay, the offeror assumed that the offeree had rejected the offer and consequently sold the wool to another person; the offeree then claimed breach of contract. The significance of this case is that the court held that the contract had been formed when the letter was posted. The reason for this was to avoid indefiniteness and uncertainty, since if both parties have to wait for confirmation of the contract, it would become impossible to complete any contract by post. Instead, agreeing that the contract is formed when it is sent, will promote business efficiency.[94]

Entores Ltd v Miles Far East Corporation can be regarded as a starting point for case law in the area of electronic contracts. The case involved offer and acceptance sent by telex and the difficulty lay in determining when the contract had been made: whether to apply the postal rule and consider the contract had been formed when it was sent, or to apply the general rule and consider it formed when it was received.

The judgment in the Court of Appeal was given by Lord Denning LJ:

> When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing [...].
>
> My conclusion is, that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the

[94] *Adams v Lindsell* (1818) 1 B & Ald 681, 106 ER 250

> acceptance is received by the offeror: and the contract is made at the place where the acceptance is received. In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have stated. Indeed, they apply it to contracts by post as well as instantaneous communications.[95]

Moreover, the House of Lords upheld this decision in the later case of *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft GmbH*, where the acceptance had been sent by Telex and the question concerned when and where the contract had been formed. The House of Lords approved the principle of instantaneous communication, which included Telex, arguing that the contract should be considered to have been formed when the acceptance is received, rather than when it is sent, as with the postal rule; however, Lord Wilberforce made an important point: "No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment of where the risks should lie."[96]

Turning now to contracts concluded via the Internet, the question arises as to whether the postal rule exception should also apply to email. In this instance, analysis needs to be based on two significant factors: The first is instantaneousness, which is commonly divided into an instantaneous acceptance applying the original rule of validity upon delivery and receipt, and non-instantaneous acceptance such as acceptance sent through the post, which applies the exceptional rule meaning the offer becomes valid upon posting rather than delivery.[97] The second is control which refers to the ability of the sender to guarantee successful receipt, or to avoid failure of receipt.

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[95] *Entores* [1955] 2 QB 327
[96] *Brinkibon* [1983] 2 AC 34
[97] *Entores* [1955]2 QB 327

With regards to instantaneousness, Fasciano[98] notes that the majority of commentators suggest that email is ‘almost’ or 'more or less' or ‘nearly’ instantaneous with only a minority arguing to the contrary. Technically speaking, however, an email system consists of many processes which may lead to a number of delays, since emails are sent from the mail-sender to the outgoing mail-server, and subsequently to the final mail-server, and are then finally accessed or retrieved by the addressee. Thus, although email is almost instantaneous, delays may occur, meaning it cannot be considered instantaneous and should be viewed in a similar way to face-to-face dealings.

The second factor, as Mik has pointed out, relates to control, since the individual sending letter via post may lose his or her control over the message of acceptance and may not be able to guarantee receipt; based on postal rules, then, he or she would not be not liable for any subsequent events such as any loss or mistake by the employees of the postal company. Whereas the sender of email has control on the message, since many mail-servers or gateways issue a failure notification if an email message cannot be delivered, meaning this is under the control of the sender.[99] However, it could be argued that not all mail-servers provide this feature, or the notification may not be issued to avoid exposing the mailbox to unsolicited messages (spam); in this case, the email once again remains outside the sender’s control.[100]

Difficulties arise, however, when an attempt is made to treat email using interaction via instant messengers and web-applications, when the message which is typed is visible to both parties at the same time. Moreover, status information indicates whether a person is online or offline,

98 Fasciano, ‘Internet Electonic Mail: A Last Bastion for the Mailbox Rule’(1997) *Hofstra Law Review* 1542
[99] Mik. Ak ‘The Effectiveness of Acceptances Communicated by Electronic Means, or does the Postal Acceptance Rule Apply to Email?’ (2009) JCL 68
[100] K Moore, Simple Mail Transfer Protocol (SMTP) for Delivery Status Notifications (DSNs) (2003) RFC 3461

and as a result, in comparison to the post, email could be regarded as instantaneous; however, in comparison to instant messengers it would be difficult to consider it instantaneous.[101]

The key issue, then, about the applicability of the postal rule relates to whether email can be compared to the post. On the one hand, there are similarities, since there are some delays between sending and receiving messages; also, the sender dispatches the message via intermediate distribution which is either the post company or server for email, and then the message must be retrieved by the receiver. When viewed from this angle, it would appear that an analogy may be drawn between the new and the old means of communication. On the other hand, arguments based on the speed of transmission highlight the substantial differences since the delay between dispatch and receipt via post is normally measured in days, whereas delay via email is likely to be mere seconds, making it difficult to equate email with the post. In my opinion, in the case of electronic mail, the general acceptance rule should prevail over the postal rule exception for several reasons.

First, with regards to timing, although Fasciano[102] mentioned that Mary et el argue that email is not completely instantaneous, it is clearly unlike traditional postal mail, because a postal delay could be days or longer, whereas for the most part an email delay can be measured in seconds. Case law does not require the act of communication to be instantaneous, but "virtually instantaneous"[103] and the parties are to all intents and purposes in each other's presence. Moreover, due to the high speed of email contracts, the function of the postal mail to avoid long delays and enhance business efficiency does not exist in email contracts.

Second, with regards to control, once a sender has posted his or her message in the traditional way, it is then completely out of their control, which is not the case for email, since in most

[101] Raymond T Nimmer, Electronic Contracting: Legal Issues' (1996) *Journal of Computer & Information Law* 211, 222
[102] Fasciano, 'Internet Electonic Mail: A Last Bastion for the Mailbox Rule'(1997) *Hofstra Law Review* 1542 p29
[103] *Entores* V *Miles Far East* [1955] 2 QB 327

instances, email users know whether their message has been successfully sent, often receiving some form of notification in the case of failure, for example, input error in the address used. Thus, they would know if they needed to send the email again, for whatever reason.

The most significant finding to emerge from this analysis seems to be that attempts to apply the postal acceptance rule to email are not justifiable; as Hill has concluded:" There is nothing to be gained in trotting it out and applying it to email."[104]

3.4.3 Shrink-wrap contract

As previously explained in section 3.1.2.1, the term shrink-wrap contract stands for the contract where the terms and conditions are not visible until the consumer opens the packaging or installs the software. The main concern regarding this type of contract is that consumers cannot review the terms and conditions until they have paid for the software, so the fundamental question from the judicial standpoint is whether this kind of contract is valid and enforceable.

The US case of *ProCD, Inc. v Zeidenberg*[105] involved a company (Pro-CD) which sold CD-ROM databases, the terms and conditions of which were inside the packaging. The case addressed the fact that the company limited the purchase to non-commercial use only; however, one purchaser (Zeidenberg) did not comply with the terms and sold the information to other companies. Zeidenberg claimed that the terms and conditions were only accessible after purchase. The court treated the shrink-wrap, holding that because the seller gave the buyer the opportunity to return the software and he chose not do so, therefore the contract was deemed valid and enforceable and the buyer was bound to the additional terms.[106]

[104] Simone W B Hill, Flogging a Dead Horse – the postal acceptance rule and email (2001) 17 JCL 151
[105] *ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)
[106] Cristina Coteanu, *Cyber Consumer Protection Law and Unfair Trading Practices* (Ashgate 2005)

Another case, *Klocek v Gateway, Inc., et al.*,[107] involved the sale of a computer and in this case, too, the terms and conditions for the software were inside the packaging. They stated that: if the buyer keeps the computer for more than five days, these terms and conditions will be considered accepted. One of the provisions concerning dispute resolution involved determining the method through final and binding arbitration in Chicago. The court held that the terms received with the software did not become part of the contract until the buyer had expressly agreed these, and therefore the clauses relating to arbitration were not valid or enforceable.[108]

As Wang notes there are no consistent judicial opinions in the UK on shrink-wrap contracts but as the terms and conditions are not available until the conclusion of the contract, enforceability and validity seems less certain.[109]

3.4.4 Browse-wrap contract

A fundamental question concerns the actions of a user who has no personal knowledge of or intention to create a legal relationship when he or she performs a particular act, and whether that act then amounts to an acceptance of the terms and conditions.

In the EU Directive on Electronic Commerce, there is no substantive ruling on browse-wrap contracts, therefore it is of utmost important to clarify that the contract law of England and Wales takes an objective approach to the question of determining when the contract has been made. The leading case in this context is *Gibson v Manchester City Council*[110] where the objective approach is expressed in the words of Lord Denning LJ:

> In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract.

[107] *Klocek v Gateway, Inc., et al,* 104 F. Supp.3d 1332 (D. Kan., 2000)
[108] Michael Rustad, *Global Internet Law* (West Academic 2014)
[109] Faye Fangfei Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China* (Routledge 2010)
[110] *Gibson v Manchester City Council* [1979] UKHL 6, [1979] 1 WLR 294, [1979] 1 All ER 972

> A man cannot get out of a contract by saying 'I did not intend to contract', if by his words, he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.[111]

However, it is important to establish that in most cases, as Macdonald argues, the objective and subjective approach have been coincided, as both parties knew about the possibility of a contract, and the stage of negotiation or inquiry, or the conclusion of contract needed to be determined; however, the use of browse-wrap is different as users are completely unaware of the possibility of contracting, and they may absolutely not have intended to enter into a legal relationship.

In her journal article published in July 2011, Macdonald commented that: "The courts of England and Wales have not yet looked at the issue of contract formation in the browse-wrap context"[112], but there have been several cases in the United States. The leading case in this regard is *Specht v Netscape Communications Corporation.*[113] It adopted the view that online contracts must be clear and the terms and conditions must be brought to the attention of the consumer or both parties. The court held that if the contract was not mentioned to the consumer explicitly, and clicking meant agreeing to the terms and conditions, or terms were not in a prominent location to attract the attention of the consumer, then merely using the website or downloading software should not amount to contractual acceptance and the contract has not been concluded.

Another leading case is *Ticketmaster Corp. v Tickets.com, Inc.*[114]. In this case, there were three claims: Copyright, Trespass to chattels and Contract. With regard to the contract claim, the

[111] Michael Furmston, Jill Poole, G J Tolhurst, *Contract Formation: Law and Practice* (Oxford University Press 2010) 15
[112] Elizabeth Macdonald, 'When is a contract formed by the browse-wrap process' (2011) 19 *International Journal of Law and Information Technology* 285,
[113] *Specht v Netscape Communications Corporation* 306 F.3d 17 (2d Cir. 2002)
[114] Ticketmaster Corp. v Tickets.com, Inc., 2003 WL 21406289 C.D. Cal. Mar. 7, 2003)

terms and conditions were not in a prominent location and were easy to miss; also, website visitors were not required to click the 'I agree' button in order to show their assent. Therefore, the court held that the existence of a notice on the website stating that "Anyone using the web pages has accepted the website's terms", was not sufficient, and because these were not obvious to the other party, they were not legally bound by them. Thus, the browse-wrap contract does not seem to be a binding agreement.

To conclude, although the objective approach towards contract law in England and Wales could be adopted in regard to the browse-wrap contract, in order to facilitate the creation of such a contract, nonetheless, this is problematic approach since if the user is completely unaware of contract, this could create an obstacle to establishing a binding contract. In fact, restricting the creation of browse-wrap contracts will not undermine the spread of e-commerce; instead, requiring the clicking of an 'I agree' button to conclude a contract will enhance certainty and make consumer aware of the existence of the contract.

3.4.5 Click-wrap contracts

The issue of concern is with regards to mutual consent to the terms and conditions of a contract since most click-wrap agreements are non-negotiable and can enable the seller to impose unfair terms on consumers by requiring them to click on a link to show acceptance to long, detailed terms, without any negotiation. A further issue arises, namely, the availability of contractual terms, since terms and conditions may appear on the screen as a record of a data message, but when the consumer clicks on the 'I agree' button these then disappear and are not available to read again, download or reproduce. This practice often occurred in the early stages of the e-commerce phenomenon and is still prevalent in certain contexts.[115]

[115] Steve Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (Routledge 2006) 248

EU legislation aims to enhance legal certainty and predictability in transactions concluded by electronic means, and has responded to this issue by requiring that the terms and conditions be available to download or reproduce in their entirety. Article 3 of the Directive of Electronic Commerce states: "Contract terms and general conditions provided to the recipient must be made available in a way that allows him or her to store and reproduce them".[116] Moreover, Article 10 of the Electronic Commerce (EC Directive) UK Regulations 2002 makes the following stipulations regarding information to be provided to consumers:

1. In addition to other information requirements established by Community law, Member States shall ensure that at least the following information is given by the service provider, clearly, comprehensibly and unambiguously, and prior to the order being placed by the recipient of the service; whether or not the concluded contract will be filed by the service provider and whether or not it will be accessible.[117]

Still, the discussion concerns neither the EU Directive nor the UK Electronic Commerce (EC Directive) Regulations 2002 not providing substantive rules in the case of failure to comply with such requirements. The requirement for terms and conditions to be available will substantially enhance legal certainty in the case of any dispute arising after the contract's conclusion.

3.5 Time of conclusion of contract

The time of conclusion of an electronic contract is a crucial question, as it is useful for building confidence and enhancing legal certainty in this type of contract and, perhaps more importantly, it has a direct impact on the rights and obligations of the parties. Each party has a commitment

[116] Directive on Electronic Commerce [2000] OJ L 178/1–16
[117] The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013

to expect the other to respect the terms of the contract on the basis of English Common Law, and it remains possible for the offeree to withdraw from the offer until the contract is concluded. Moreover, the court can distinguish between pre-contractual obligations and contractual rights.

The European Parliament was anxious to identify the moment at which the electronic contract is concluded, and this is clearly stated in the Committee on Economic and Monetary Affairs and Industrial Policy Report:

> The conclusion of contracts electronically in a transfrontier and networked environment brings about a number of important questions which will have to be addressed in order to facilitate electronic commerce transactions across borders. For instance, the determination of where and when an electronic contract is concluded and which country's law is applicable, could be addressed differently by the Member States. These questions, which go beyond the legal recognition of digital signatures, should be clarified in order to facilitate electronic contracting within the EU.[118]

Contract law in the Member States does vary. English contract law, for instance, includes two steps: following the initial offer, the offeree must accept the contract before it becomes binding. While other countries require three stages. The proposal of an electronic commerce contract will include a fourth step.

[118] Erika Mann, Report on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce (COM (97)0157 - C4-0297/97) Committee on Economic and Monetary Affairs and Industrial Policy < http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1998-0173+0+DOC+XML+V0//EN&language=MT > accessed 25 February 2013

With regards to determining the moment at which the contract is concluded, the proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (1999/C 30/04) clearly specified in Article 11:

> Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, in cases where a recipient, in accepting a service provider's offer, is required to give his consent through technological means, such as clicking on an icon, the following principles apply:

(a) The contract is concluded when the recipient of the service:

- has received from the service provider, electronically, an acknowledgement of receipt of the recipient's acceptance, and
- has confirmed receipt of the acknowledgement of receipt." [119]

It is clear that the provision required from both parties is for additional communication before the contract becomes effective. The reason for this requirement was to provide added protection for the consumer to ensure the contract did not become binding by mistake or error; however, it was argued that it was not clear what the draft wanted to achieve with this extra step which added unnecessary complexity and would be counterproductive.[120] The European Parliament also criticised the Article, describing it as cumbersome and unusual for recipients to restate their desire to conclude the contract.[121]

[119]Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market /* COM/98/0586 final - COD 98/0325 */ OJ C 30, 5.2.1999, p. 4
[120] Andrej Savin, *EU Internet Law* (Edward Elgar Publishing 2013)
[121]Report on the proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM (98)0586 - C4-0020/99 - 98/0325(COD))23 April 1999, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A4-1999-248&language=EN> accessed 25 February 2013

This point, which was intended to define the crucial moment of contract formation, was removed from the final draft and the actual Directive, thus cancelling any attempts to harmonise national laws relating to the conclusion of a contract has been clearly highlighted by the EU Council:

> The Council considered that it was not appropriate to harmonise national law regarding the moment at which a contract is concluded. For this reason, Article 11 has been renamed and now limits itself to certain requirements regarding the placing and receipt of orders on-line. In addition, the Council, whilst fully supporting the principle in Article 9 guaranteeing the legal validity of electronic contracts[122.]

It is important to note that EU legal families vary significantly in their approach to formation of contracts, and it would not be an easy task to attempt to harmonise such rules; although there has been a degree of success in some projects, such as the Principles of European Contract Law.[123] However, the Commission's decision to leave this point to the national law of each Member State and to focus instead on the placing of the order is understandable, and will be discussed in the following section.

3.6 Application of offer and acceptance

In English contract law, it is of utmost importance to recognise offer and acceptance, in order to build confidence and certainty, and consequently its legal effects. The Directive does not include any mention of offer and acceptance, including instead substantive rules on the placing

[122]Common Position (EC) No 22/2000 of 28 February 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) OJ C 128, 8.5.2000, p. 32–50

[123] Rodolfo Sacco, 'Interaction between the Pecl and Italian Law' in Luisa Antoniolli and Anna Veneziano (eds), *Principles of European Contract Law and Italian Law: A Commentary* (Kluwer Law 2005)

of the order, with Article 11 requiring the service provider to acknowledge receipt of the recipient's order without undue delay and by electronic means.[124]

It is important to understand the meaning of "order" in this context and whether it would mean an offer or not, as the interpretation and implementation of this point has been left to Member States when it is enacted in their national laws; therefore, it is useful to consider the UK's implementation of this in its Electronic Commerce (EC Directives) Regulations 2002, which has imported the majority of the terminology wholesale from the Articles that form the Directive. Regulation 12 defines the term "order" in two parts: firstly, with relation to Article 11(2) and 10(1)(C), in which "order" refers to the contractual offer; and secondly, in other contexts the Regulation states that the order "may be but need not be the contractual offer".

However, it has been argued that the imprecise use of language in the term "order" has led to confusion in the Regulation, meaning that it has clearly been left to the courts and to common law; the Interim Guidance by the Department of Trade and Industry states that the regulations do not deal with contract formation itself but that this remains subject to common law and existing statutory provisions. Thus, this involves applying the doctrine of English contract law, which distinguishes between offer and invitation to treat, and the court applies an objective set of rules to assess the intention of the party to be bound in a binding legal agreement.

In applying this rule to interactive sites, where the contents are displayed, whether as an offer or invitation to treat, and where website users browse the business via an electronic platform, it is possible to distinguish three steps: first, when consumers choose certain goods and look at their description and price and other details; second, when they put the goods in the virtual basket and choose between the option to continue shopping or to proceed to the checkout; third,

[124] Directive on Electronic Commerce [2000] OJ L 178/1–16

when they input the quantity, payment and shipping procedures and the delivery address, which will determine the jurisdiction and other specific details.

It is important to note that throughout all three steps, the website proprietor usually uses an automated system in order to interact with the buyer's actions, such as checking the availability of goods or determining the price of the shipping and the confirmation, all of which will be discussed later.

The general approach views website content as an invitation to treat, in the same way as a shop display or advertisement, although it could be argued that it is difficult to apply the default rules and is unwise to claim there is a resemblance between electronic shopping and buying from a local shop. In practice, the major UK service providers such as Amazon.co.uk clearly state in the conditions of the sale:

> Your order is an offer to Amazon to buy the product(s) in your order. When you place an order to purchase a product from Amazon, we will send you an e-mail confirming receipt of your order and containing the details of your order (the "Order Confirmation E-mail"). The Order Confirmation E-mail is acknowledgement that we have received your order, and does not confirm acceptance of your offer to buy the product(s) ordered. We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that we've dispatched the product to you.[125]

However, it is important not to generalise as this may not be the case for all websites and it is necessary for the court to treat each case individually, conducting an objective assessment, so as to preserve the rights of the consumer before those of the business owner.

[125]Amazon.co.uk, 'Conditions of Use & Sale (Last updated on September 5,2012)' <http://www.amazon.co.uk/gp/help/customer/display.html?nodeId=1040616> accessed 19 February 2013

3.7 The requirement to acknowledge receipt of an order

One of the significant elements of the Directive is that it requires the service provider to acknowledge the receipt of an order without undue delay. It is possible to adopt a minimalist approach to this requirement, as the EU Commission has done, with the crucial aim being to protect consumers from uncertainty concerning the status of their contract.

One point which merits consideration is the liability which can result from the failure to acknowledge business, although the Directive fails to mention this. This implies that it is left to Member States' regulations or national laws; however, in the UK case, regarding the liability of the service provider, Article 13 provides that: "The duties imposed by regulations 6, 7, 8, 9(1) and 11(1) (a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty".[126]

In general terms, the Directive has sought to build legal certainty and enhance consumer confidence by removing obstacles to electronic transactions. It is a difficult balancing act to create a regulatory environment for electronic commerce without curtailing the scope of the national contract law of the Member States and its efforts should be applauded as the outcomes are generally positive in the sphere of consumer protection.

3.8 Mistake and error

In the process of forming electronic contracts, there is a bigger possibility of error than for traditional contracts due to their technical nature. A key feature of electronic contracts is automation and consumers express their intentions by clicking button, negotiating and engaging with input data without human intervention. This means that someone may press the wrong button with regard to the goods or service he or she wants, the quantity or specifications

[126] The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013

required. Speed is another feature of this process and consumers can buy something, book a flight or carry out a transaction in just a few minutes, which also possibly increases the risk of problems.[127]

The Directive specifies that one of the requirements of the information to be provided is "(c) the technical means for identifying and correcting input errors prior to the placing of the order." Due to the EU's focus on enhancing consumer protection and the importance of this requirement, Article 11 regarding placing of the order emphasises this point:

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.[128]

It is clear that the Directive focuses on the errors before placing the order and makes no mention of errors committed after this process, which means it is left up to Member States and national laws to deal with this. However, when errors are committed after placing an order it is difficult to distinguish between errors occurring as part of an electronic contract or merely a consumer's change of mind, and Wang suggests that a possible solution would be to deal with this problem in the context of the right of withdrawal.[129] This is because the EU provides more protection than other equivalent systems. Under the Distance Selling Directive, the right of withdrawal gives consumers a period of seven working days to withdraw from the contract without giving any reason, and in practice, most of large online stores extend this period to 21 days or more. Amazon.co.uk, for example, states:

[127] Andrew Phang, 'The Frontiers of Contract Law - Contract Formation and Mistake in Cyberspace - The Singapore Experience' (2005) *Singapore Academy of Law Journal* 17, 361
[128] E-commerce Directive 2000
[129] Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China* (Routledge 2010)

> By law, customers in the European Union also have the right to withdraw from the purchase of an item within seven working days of the day after the date the item is delivered. This applies to all of our products except for digital items (e.g.: e-books) where the item has been downloaded.

They have also extended this period to 30 days, their website stating: "If for any reason you're unhappy with your purchase, you can return it to us in its original condition within 30 days of the date you received the item".[130]

What is more, the Consumer Directive 2011 extends the period of right of withdrawal from a distance contract to 14 days, as stated in Article 9:

> The consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14.[131]

In fact, it is clear that the EU directives are very active in the area of electronic errors. Errors committed prior to placing an order are addressed in the Directive on Electronic Commerce, whilst those which occur after concluding the contract can be solved under the right of withdrawal, and, undoubtedly, such regulations will enhance confidence in online contracts.

3.9 Liability of intermediary service providers

One of the most significant elements of the e-commerce Directive is regulating the liability of intermediary service providers that have sought to enhance the functioning of the internal market, and encourage the development of cross-border services, through the coordination of national provisions concerning liability of ISPs acting as intermediaries. Intermediary service

[130]Amazon.co.uk, Conditions of Use & Sale, URL: <http://www.amazon.co.uk/gp/aw/sp.html?s=A3O3GDQITM5BEC&mp=&oid=&t=returns> accessed 28 February 2013

[131] Directive on Consumer Rights

providers could include Internet access providers; Internet search engines; web hosting providers, including domain name registrars; e-commerce intermediaries; Internet payment systems and social networking platforms. Therefore, in order to improve the framework conditions of online intermediary firms and to ensure the free movement of intermediaries between Member States and encourage companies to engage in cross-border trade across EU markets, the EU commission has attempted to coordinate the national legislation by establishing precisely defined limitations on the liability of intermediary service providers who offer mere conduit, caching and hosting.

There are several possible areas of liabilities that need to be explained that could affect intermediaries, such as mere conduit, caching or hosting Illegal and harmful content, private and defamatory material, copyrighted material and misrepresentation material. The types of liability that could be applicable to intermediaries are: first, strict liability which refers to who can be held responsible and liable regardless of their control and knowledge over the material, so intermediaries indirectly bear the weighty burden of monitoring all the material posted or processed through their facilities. This approach is technically complex and threatens the growth of intermediaries across the EU.

The second approach is based on fault, and intermediaries would be liable if they intentionally violate the rules. However, it does not mean actual knowledge but, instead, constructive knowledge which means the law may determine whether intermediaries should have reasonably presumed that certain material was violating the rules, thereby making such intermediaries liable.

To start with mere conduit, this has been addressed in Article 12 and may include "the transmission in a communication network of information provided by a recipient of the service" as well as "providing Internet access." Article 12 sets out three conditions that when

intermediaries meet these conditions, there is "no liability" and they cannot be held liable for the information transmitted as long as they have no control over the data flowing through their network. These conditions are that, first, the service provider did not initiate the transmission; second, they did not select the receiver of the transmission, and third, they did not select or modify the information contained in the transmission.

Another vital issue is caching services, which is when Internet Service Providers store the high demand data on local servers in order to avoid saturating the Internet with the repetitive demand for certain material. The directive stipulated in Article 13 states that intermediaries cannot be held liable when they perform caching on the condition that:

" b) the service provider -

i. does not modify the information;
ii. complies with conditions on access to the information;
iii. complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
iv. does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
v. acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement."

Web hosting is another significant element of intermediaries, which means that a service provider offers to rent space and incorporate any kind of data on the web. The directive also limits the liability on the condition that the service provider does not have actual knowledge of

unlawful activity or information; or when obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. [132]

In practice, two contradictory cases put to The Court of Justice of the European Union (CJEU) have been found. The first case is a claim by Louis Vuitton Malletier against Google France. Google Inc alleged a number of trademark infringements, since Google offers a paid referencing service called 'AdWords.' The court held that the internet referencing service provider in the case had not played an active role of such a kind as to give it knowledge of, or control over, the data stored. As it had not played such a role, that service provider cannot be held liable for the data which it had stored at the request of an advertiser.

The second case is L'Oréal v eBay which is a claim by L'Oréal against eBay and a number of its users for trademark infringements in the sale of infringing and counterfeit products on eBay's online auction site. The court held that eBay could not benefit from Article 14's defence, which is limited to merely technical and automatic processing of data, where there is no actual knowledge of unlawful activity. In general, the CJEU held that online marketplaces such as eBay could be found liable if they do more than merely host material and play an active role, such as optimising or promoting the offers for sale; or become aware of facts that the online offers are unlawful and they do not act 'expeditiously' to remove such items.[133]

Overall, the liability system imposed by the Directive is based on the fault system, which is, if it intentionally violates the rules or involves "constructive knowledge. "This means that the law must determine whether the intermediaries should have reasonably presumed knowledge that certain material has violated the rules. Hence, intermediary service providers are likely to

[132] Baistrocchi, P. A. *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*. (2002). *Santa Clara Computer & High Tech. LJ*, *19*, 111.
[133] James, Steven. "*L'Oreal and eBay & the Growing Accountability of e-Operators*." E-commerce Law and Policy (2011): 5-7.
file:///C:/Users/Hp/Downloads/growing-accountability-of-e-operators-in-eu.pdf

benefit significantly from the combination of limited liability provisions (article 12-14) through which intermediary service providers can not automatically be held liable for content when acting as mere conduits, caches, or hosts of information.[134]

Part II: Electronic Identity issues

Since the emergence of e-commerce in the nineties, security has become a significant barrier to its growth. Businesses and individuals involved in e-commerce must be able to place their trust and confidence in the identity of the other party, as well as in the integrity of any electronic messages received, to ensure that they have not been altered.

Identification and authentication via an electronic signature provides both parties with assurances concerning identity and the integrity of the message. From a legal perspective, the role of legislation in this context is to offer the necessary guarantees of a secure and trustworthy online transaction. This can be achieved through recognition of electronic signatures and regulating the certification of service providers.

This section will consider the different forms of electronic signatures which exist, and the legislation which deals with their recognition, including the Electronic Signature Directive, the Electronic Communication Act 2000, and the Electronic Signatures Regulations 2002. It will also examine the legal effects of the existence of a two-tier system. It will then identify the types of certification authorities which exist and the conditions governing their establishment. Finally, it will conclude by discussing the duties and contractual liabilities of certification authorities.

[134] European Commission, DG Internal Market and Services Unit E2 (Authors:Claus Kastberg Nielsen, Christian Jervelund, Karin Gros Pedersen, Benita Rytz, Eske Stig Hansena and Jacob Lind Ramskov) Study on The Economic Impact of the Electronic Commerce Directive, 7 Sep 2007 URL: http://ec.europa.eu/internal_market/e-commerce/docs/study/ecd/%20final%20report_070907.pdf [accessed 7 April 2013]

3.10 Forms of electronic signature

Many people use electronic signatures on a daily basis, often without being aware that they are doing so. Passwords, email signatures, 'I accept' buttons, and even the personal identification number (PIN) are all classed as electronic signatures which can take a variety of forms depending on the technology which they employ. Some of the commonest ones are discussed here.

Word document: This is one of the most basic forms of electronic signature, which features in Microsoft Word as users create an alphanumeric password known as a Word document signature.

Image-scanned signature: A handwritten signature is scanned into a device to create an electronic image of someone's signature which is then attached to the file; however, an electronic signature can be very easily forged using this basic method.

Biometric signature: This involves using a pen attached to a digitising pad to create a physical signature. In this case, the data which the device records include not merely the appearance of the signature, but also the speed and the acceleration rates of the pen strokes and the time taken to sign.[135]

Digital signature: This is classed as being one of the most reliable forms generated via cryptographic tools. Two types of cryptography are used to create electronic signatures. The first, symmetric cryptography, requires a key which should be common to both parties, and the function of the software key is to encrypt and decrypt the data in the same key based on a mathematical algorithm. However, since this type of signature requires a shared key, it is impractical as a solution for e-commerce traders and customers. The second types, asymmetric

[135] Chris Reed, 'What is a Signature?'(2000) 3 The Journal of Information, Law and Technology <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed > accessed 10/4/2013

cryptography (also known as public key cryptography) is widely used and requires two keys: one 'private,' the other 'public'. The former, which should remain with the sender, is connected to a signature algorithm for signing the data, whilst the latter is available publicly via an online directory, for example. An algorithm is required to verify the signature. The disadvantage of the second system is that the encryption of the public key is available to everyone, and therefore could be accessed and forged to create a false identity. The ideal solution, therefore, involves the use of certification authorities, as discussed in section 3.11.

3.11 Legal recognition of electronic signatures

Having described the various forms of electronic signatures, consideration should now be given to legal recognition of electronic signatures in common law, and also to the EU Electronic Signature Directive, and its UK implementation via the Electronic Communication Act 2000 and the Electronic Signatures Regulations 2002.

3.11.1 Common law recognition of electronic signatures

The key question to be addressed here concerns the extent to which case law and the courts consider electronic signatures a viable form of identification. Before answering this question, another point needs to be clarified, namely, the general legal position regarding the acceptability of different forms of signature.

One of the earliest English cases to address the issue of the form which a signature could take was *Jenkins v Gaisford*. The case involved a testator, who had become ill and was unable to write or sign his name, so he used a stamp engraved with his signature and a person acting as an agent. The point at issue was whether this complied with Article 9 of the Wills Act 1837 which requires 'a will or codicil to be signed by the testator'. The court held that the codicil was indeed signed and valid, Sir C. Cresswell commenting further:

> It has been decided that a testator sufficiently signs by making his mark, and I think it was rightly contended that the word 'signed' in that section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence or by his direction, [...].. Now, where the mark is made by pen or by some other instrument cannot make any difference, neither can it in reason make a difference that a facsimile of the whole name was impressed on the will instead of a mere mark or x. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator.[136]

Therefore, the court confirmed the validity of wider forms of signatures.

Another leading case in this regard is *Goodman v J. Eban Ltd* which also addressed the form of signature, and the wider use of its application. The case involved the use of a rubber stamp that contained an ordinary signature. The issue was whether it constituted a sufficient signature or not. The court held that a rubber stamp is sufficient to comply with the statutory requirement in the Solicitors Act 1932, and thus a signature made using a rubber stamp is valid.[137] Sir Raymond Evershed MR clearly stated that:

> It follows, I think, that the essential requirement of signing is the affixing, either by writing with a pen or pencil or by otherwise impressing on the document one's name or 'signature' so as personally to authenticate the document.[138]

In another more recent case which may be regarded a cornerstone in this area the court had to address the issue of a proxy form signed and transmitted by fax. It had to decide whether this was sufficient for the requirements of Insolvency Rules 1986 which provide that "a proxy form shall be signed by the principle or by some person authorised by him." The court held that the

[136] *Jenkins v Gaisford* [1863] 3 Sw & T 93
[137] Diane Rowland and Elizabeth J. Macdonald, *Information Technology Law* (Psychology Press 2005)
[138] *Goodman v. J Eban Ltd* [1954] 1 QB 550

form was signed and that the signature not restricted to the narrow concept linkage of hand, pen and paper. Laddie J. stated that:

> It is possible to instruct a printing machine to print a signature by electronic signal sent over a network or via a modem. similarly, it is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporated within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only the hard copy of the document. It seems to me that such a document has been 'signed' by the author.[139]

To conclude, it is clear that the court of England and Wales has chosen the liberal view in response to what satisfies the legislative requirement for a signature; therefore, this broad approach could encompass a broad range of electronic signatures, including the modern technology of electronic signatures.[140]

3.11.2 Directive on Electronic Signatures

Since the emergence of e-commerce in the nineties, one of the main objectives of the EU has been to enhance trust and build confidence in trading electronically, within the internal market. Therefore, Directive 1999/93 of the European Parliament and Council on a Community Framework for Electronic Signatures was adopted on December 13 1999. This plays a vital role in guaranteeing the legal status of electronic signatures and has been adopted to ensure free movement and circulation of e-signature products within the EU.

[139] *re a debtor (No 2021 of 1995)* [1996] 2 All ER 345 (fax)
[140] Graham J.H. Smith, *Internet Law and Regulation* (Sweet & Maxwell, 2007)

The directive addresses a number of key elements. The first of these entails the legal recognition of electronic signatures, as Article 5 of the Directive regarding the legal effects of electronic signatures states:

> 1. Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:
>
> > (a) Satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and (b) are admissible as evidence in legal proceedings.'
>
> 2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
>
> - in electronic form, or
> - not based upon a qualified certificate, or
> - not based upon a qualified certificate issued by an accredited certification-service-provider, or
> - not created by a secure signature-creation device." [141]

Thus, Article 5 seeks to ensure that an electronic signature is not judged inadmissible or denied its legal effectiveness merely because it is in electronic form; however, it is worth mentioning that the Directive clearly distinguishes between basic and advanced electronic signatures by establishing rules and requirements for advanced signature, requiring these to be: (a) uniquely linked to the signatory; (b) capable of identifying the signatory; (c) created using means that

[141] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures. [2000] OJ L13 Hereafter Directive on Electronic Signatures

the signatory can maintain under his or her sole control; and (d) linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.[142]

In the case of an electronic signature which does not meet these requirements, the Directive does not deny admissibility, but requires all the circumstances to be considered. This complex issue will be discussed in detail later in 3.12.

The second point to note is that the Directive adopts a technology-neutral framework. Due to rapid pace of technological innovation, the Directive has been drafted in a broad enough way to remain open to any new technological methods which might emerge to create e-signatures and will thus be able to cover all types of signatures for the foreseeable future.[143]

A third important point relates to the liability of certification authorities. The Directive seeks to establish liability rules for service providers, making them liable for verifying electronic signatures and issuing them with a certificate which will build consumer trust and enhance confidence in relying upon them. This issue is addressed in 3.12

Finally, the Directive has an international dimension as it attempts to promote global market recognition of the EU electronic signature by establishing a mechanism for co-operation with third-party countries. It envisages that this will involve joining international agreements or ensuring the mutual recognition of certificates through the negotiation of bilateral and multilateral agreements.

[142] Electronic Signature Directive
[143] Christina Spyrelli, 'Electronic Signatures: A Transatlantic Bridge? An EU and US Legal Approach Towards Electronic Authentication' (2002) 2 The Journal of Information, Law and Technology <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_2/spyrelli> accessed 13/4/2013

3.11.3 Electronic Communication Act 2000

The Directive on Electronic Signatures was introduced in 1999 and required implementation in Member States by July 2001; since the enactment of the Electronic Communication Act received Royal assent on May 25 2000, the UK was compliant with the terms of the EU directive a year ahead of schedule. The Act fully recognises electronic signatures, the first part mainly discussing this topic and the use of encryption and certification schemes; the second part seeks to facilitate e-commerce by removing requirements for non-electronic writing or signatures, whilst the third part deals with the telecommunications licensing regime.[144]

3.11.4 The Electronic Signatures Regulations 2002

The Electronic Signatures Regulations came into force on March 8 2002 and was implemented using the EU directive, which called for Member States to incorporate its terms into their respective legislation. As mentioned previously, the UK had already met the requirements of the Act and implemented the relevant parts of the directive, such as the recognition of electronic signatures and advanced electronic signatures, as well as certification of service providers. The regulations address other issues such as the supervision and liability of certification services providers and issues regarding data protection.

3.12 The legal effects of two-tier systems

The Directive on Electronic Signatures and UK legislation have adopted a two-tier system which gives the upper level (the advanced electronic signature) more recognition than the lower one. One vital question concerns whether the basic method which is used daily by many people as a signature, such as an email address or name typed on an email, is considered admissible and satisfies the legal requirements for a signature. Several points merit analysis in addressing this question.

[144] Ian J Lloyd, *Information Technology Law* (6th edn, Oxford University Press 2011)

First, the Directive has adopted a two-tier system for signatures and distinguishes between them. An advanced electronic signature need to meet four criteria to qualify and must be (a) uniquely linked to the signatory; (b) capable of identifying the signatory; (c) created using means that the signatory can maintain under his or her sole control; and (d) linked to the data to which it relates in such a manner that any subsequent change to the data is detectable.

On the one hand, the upper level requirements will facilitate the encryption method which uses the certification system stipulated for use throughout the EU, which is a positive point. But on the other, the Directive is not clear on the lower level (such as an email address or written name on an electronic message) and does not specify any criteria for this level of signature. With regards to its legal effectiveness and admissibility, Article 5/2 states:

> Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
>
> - not based upon a qualified certificate, or
> - not based upon a qualified certificate issued by an accredited certification-service-provider, or
> - not created by a secure signature-creation device. [145]

Whilst it is clear that the Article requires Member States not to consider an electronic signature lacking legal status or admissibility merely because it does not meet the criteria for advanced electronic signatures, this does not give a clear opinion on the status of the lower level signature.

Second, the Electronic Communication Act merits further discussion, in particular Section 7 which provides that:

[145] Directive on Electronic Signatures

7.—(1) In any legal proceedings—

a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
b) the certification by any person of such a signature, shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.

(2) For the purposes of this section an electronic signature is so much of anything in electronic form as—

(a) is 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.[146]

It can be seen that Section 7 accepts most forms of electronic signature, and is wider than the directive, as it merely considers an electronic signature admissible in legal proceedings without distinguishing between two tiers.

The Act does not directly address the case of an email address and typed name in an electronic message and when applying the provisions of Section 7, it is not clear whether the sender should try to establish authenticity or provide a return email address, and whether it will consider an email address or typed name admissible in the court.

One positive point worthy of note is that the Act has empowered the Minister to modify these provisions and address specific problems as and when they arise, but according to Jay Forder

[146] Electronic Communications Act 2000 c. 7

ministers have still not clarified what is meant by electronic signature, or if the email address or typed name equals an electronic signature; therefore, so it could be claimed that this issue should be dealt with according to common law principles.[147]

Generally, common law has a flexible approach towards accepting new methods of signature such as engravings, as in the case of *Jenkins v Gaisford and Thring*[148] which was previously discussed. Other cases involving the use of a rubber stamp (*Bennet v Brumfitt*),[149] typewriting (*Newborne v Sensolid (Great Britain) Ltd.*)[150] or telegrams (*Godwin v Francis*)[151] were all recognised as meeting signature requirements in common law.

However, some argue that this flexibility for the decision maker under common law is a weakness, for instance Brazell[152] argued that:

> Uncertainties [were] seen as a potentially significant barrier to the expansion of e-commerce. Although it would certainly have been possible for the courts to produce equivalent guidance through future case law, this would of course have been a slow process with potentially years of commercial uncertainty in the interim.

Finally, the most important case, and the only reported UK judgment dealing with electronic signatures to date, is that of *Mehta v J Pereira Fernandes SA.*[153] This case involved the supplier company (J Pereira Fernandes SA, hereafter JPF) and Mr Mehta, the director of Bedcare (UK) Ltd. JPF presented a winding-up order against Mehta's company. He asked a member of his staff to send an email to JPF's solicitors asking for an adjournment of the hearing and offering a personal guarantee to pay the debt. Mehta's initials did not appear in the email, and the email

[147] Jay Forder, 'The inadequate legislative response to e-signatures' (2010) 26 *Computer Law and Security Review* 418
[148] *Jenkins v Gaisford* [1863] 3 Sw & T 93
[149] *Bennet v Brumfitt* [1867-1868] LR 3 CP 28
[150] *Newborne v Sensolid* [1954] 1 QB 45
[151] *Godwin v Francis* [1870] LR 5 CP 295
[152] Lorna Brazell,*Electronic Signatures and Identities: Law and Regulation* (2nd edn, Sweet & Max well2008) 3
[153] *Mehta v J Pereira Fernandes SA* [2006] EWHC 813

was not signed, but his email address (Nelmetha@Aol.com) was automatically included in the email header. The issue concerned whether or not the automatic insertion of an email address satisfies the requirements of an electronic signature.

The judge ruled that the automatic insertion of an e-mail address did not satisfy the requirements of Section 3.10.2, and therefore did not constitute a sufficient signature; had the party typed his name in the main body of the email, this would have been sufficient. However, from a practical view, the recipient of an email cannot be instructed to rely only on the typed name rather than an email address header since both could easily be altered. Thus, the focus should be on the legal effect of email systems in general, and the level of security required for email signatures.

In conclusion, in the ever-moving online world, new technological methods for simulating the function of a signature are constantly being developed. It is the role of the law to provide legal certainty, and in the existing two-tier system. The top tier receives full recognition, for example digital signatures using encrypted data or certification services, which are certainly the most reliable methods. What remains unclear is the status of the lower-tier signatures, including, for example, the email address in an electronic message.

One possible solution would to specify which method of technology would satisfy particular legislative requirements for signatures, given the incredible speed of the new methods being developed and the wide range of existing legislation requiring a signature. The current solution does not appear to be practical and is sometimes a waste of time.

A useful solution suggested by Forder[154] would be to establish and enhance the rating of signature activity. The function here would be to provide guidelines on which methods are

[154] Forder, 'The inadequate legislative response to e-signatures'(2010) 26 *Computer Law and Security Review* 418

considered valid and admissible for particular legal purposes for a signature. This method could involve market-driven activity and be regulated by the relevant authorities, in order to adapt to the rapid technological advancements in this area. The rating activity would undoubtedly enhance certainty and help with user predictability of the admissibility of electronic signatures.

3.13 Conclusion

Since the emergence of e-commerce in the nineties, the EU has paid significant attention to promoting the growth of investment and innovation in the area of e-commerce. This has resulted in the Electronic Commerce Directive, which was adopted in June 2000, the purpose of which is to provide legal certainty by creating a legal framework for some important aspects of electronic commerce, together with the 1999 EU framework for electronic signatures.

In fact, the formation of contracts via the Internet raises many legal issues relating to the validity and enforceability of different forms of electronic contracts, which have been given full recognition in the EU directives and UK implementation.

To determine the time of the formation of contracts, due to the differences in EU legal systems in their approach to the formation of contracts, it has not been an easy task to attempt to harmonise such rules; therefore, the Commission's decision was to leave this point to the national law of each Member State and to focus instead on the placing of the order.

The Directive does not include any mention of offer and acceptance, including instead substantive rules on the placing of the order, which opens up a about debate whether it would mean an offer or an invitation to treat, as the interpretation and implementation is left to Member States. For instance, UK Electronic Commerce (EC Directive) Regulations 2002 Article 11(2) defines the term "order" as referring to the contractual offer. Also, service providers, such as in the terms and conditions of Amazon UK, define the order as an offer to

Amazon to buy the product(s). This leads to a crucial elements of the Directive that aims to protect consumers from uncertainty concerning the status of their contract, and it is the requirement of the service provider to acknowledge the receipt of an order without undue delay.

Another significant element of the EU e-commerce directive is the pre-contractual information requirements, as online consumers may have insufficient knowledge concerning the product or service contracted, or may lack other contract details such as payment or delivery; therefore, the Directive on Electronic Commerce has listed some pre-contractual information duties which are more specific in relation to technical information. However, the Directive on Consumer Rights lists wide pre-contractual information duties in order to enhance consumer confidence in electronic contracts.

Electronic contracts are rapidly concluded and usually carried out by an automated system, which may increase the risk of electronic errors; the EU directives seek to ensure more confidence in electronic contracts, and they are very active in electronic errors due to requiring the service provider to make effective and accessible technical means available that allow consumers to identify and correct input errors. Such regulations will undoubtedly enhance confidence in online contracts.

Security has become a significant factor in the growth of e-commerce. Since both parties need to have trust and confidence in the identity of the other party, as well as the integrity of the received electronic messages, electronic signatures provide both parties with assurances concerning identity and the integrity of the message. From a legal perspective, the role of legislation in this context is to offer the necessary guarantees of a secure and trustworthy online transaction. This can be achieved through recognition of electronic signatures and regulating the certification of service providers. Therefore, Directive 1999/93 of the European Parliament and Council on a Community Framework for Electronic Signatures plays a vital role in

guaranteeing the legal status of electronic signatures, and has been adopted to ensure free movement and the circulation of e-signature products within the EU. However, the Directive on Electronic Signatures and UK legislation have adopted a two-tier system which gives the upper level (the advanced electronic signature) more recognition than the lower one. Digital signatures using encrypted data or certification services are receiving full recognition as they are certainly the most reliable methods. What remains unclear is the status of the lower-tier signatures, including, for example, the email address in an electronic message.

For common law, it has a flexible approach towards accepting new methods of signature, as in the case of Mehta v J Pereira Fernandes SA[155] in which the judge ruled that the automatic insertion of an e-mail address did not constitute a sufficient signature; but if the party had typed their name in the main body of the email, it would have been sufficient.

Overall, the EU legislation in the context of e-commerce has sought to enhance the internal market by ensuring the free movement of "information society services" across the European Community by adopting a regulatory approach and ensuring full recognition of the electronic contracts. In addition, it enhances transparency through a minimal list of prior information requirements, as well as requiring appropriate means for correcting input errors. The legislation also regulates significant issues such as commercial communications and the liability of intermediaries. All of that is in support of consumer confidence in electronic commerce.

[155] *Mehta v J Pereira Fernandes SA* [2006] EWHC 813

Chapter 4: Analysis of online dispute resolution in the European Directives and UK cases

4.1 Background

It was perhaps to be expected that the rapid growth of e-commerce might lead to a huge number of online disputes, which might reduce confidence in e-commerce. Therefore, an efficient system of online dispute resolution (ODR) would help to build trust and keep online buyers satisfied, as well as preserve business relationships.

According to Colin Rule, who was one of the pioneers of ODR as the director of dispute resolution for eBay and PayPal, there have been two waves of e-commerce: the first created market platforms and made a huge splash, trumpeting their potential, but their shortcomings soon became clear and the need for a dispute resolution system prompted a second wave. This stage focused on the need to sustain buyer and seller involvement and attempted to establish an integrated dispute resolution system so online consumers could obtain redress, enabling the real potential of e-commerce to be achieved.[156]

4.2 Defining ODR

According to Kaufmann-Kohler and Schultz (2004): "ODR is a broad term that encompasses forms of Alternative Dispute Resolution (ADR) and court proceedings which use Internet as a part of the dispute resolution process". In other words, it could be defined as the use of ADR principally assisted by ICT tools. Part of this doctrine incorporates a broader approach,

[156] Colin Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts* (Jossey-Bass 2002)

including online litigation and other sui generis forms of dispute resolution, which are assisted largely by ICT tools that are designed ad hoc.[157]

4.3 Advantages of using ODR

4.3.1 Speedy resolution

One of the most prominent aspects of ODR is that it offers speedy resolution of disputes, meaning that the decision on litigation might be reached within days or months; in fact, ODR can sometimes takes as little as hours or just a few days as the Internet has accelerated the procedure and enables the parties involved to file and respond to a dispute at any time and sometimes 24/7 using asynchronous communication. Therefore, in many cases, especially for e-commerce disputes, the disputant is simply required to visit a website and fill in a form including their personal details and explain the case. They then wait for a response from the service provider or another party. What is more, while official correspondence is normally via post, email is a faster option, and is certainly consistent with the nature of e-commerce where transactions are concluded cross-border throughout the world within minutes or seconds.[158]

4.3.2 Cost saving

Cost is also a paramount advantage of ODR as both parties in e-commerce seek to reach a satisfactory decision at a lower cost. ODR compares well with traditional litigation or alternative dispute resolution such as traditional arbitration, which is often in favour of the wealthier party who can afford travel and accommodation costs and so on, while the lesser party is unable file a dispute.[159] ODR means the parties involved are saved these expenses, an important factor when most e-commerce disputes occur across borders.

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[157] G Kaufmann-Kohler and T Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004)
[158] Aashit Shah, 'Using ADR to Solve Online Disputes' (2004) *RICH JL & TECH* 25
[159] Lan Q. Hang, 'Comment, Online Dispute Resolution Systems: The Future of Cyberspace Law' (2001) 41 *Santa Clara Law Review* 837, 854

4.3.3 Self-representation

It would be impractical to require the buyer or seller involved in e-commerce dispute to file it through a lawyer or legal advisor due to the unpredictable costs of the legal representation while the majority of online transaction are considered low-value cost. In contrast, ODR maximises cost saving by facilitating the procedure and encouraging individuals to represent themselves in legal proceedings, which will promote legal certainty and eliminate risk in e-commerce disputes, as well as supporting the electronic consumer to gain access to justice.

4.3.4 Convenience of procedures

The flexibility and convenience of its procedures are considered to be the cornerstone of ODR due to its harmonisation with the nature of e-commerce. The parties involved in traditional litigation are bound by strict procedures, whereas those in alternative dispute resolution have the flexibility to reach a consensual agreement which sometimes does not need any authority to impose an agreement. The parties could also choose an expert in the area of ODR to resolve any difficulties which may arise, thus eliminating the need for a lawyer or legal advisor, especially with a small claim.

4.3.5 Asynchronous communications

What is more, a unique component of ODR that distinguishes it from more traditional dispute resolution is that by using asynchronous communications, both parties can proceed at any time and review their grounds for dispute in a confidential and reliable environment. The service provider can then send the other party a request to respond at a specific time.[160]

[160] M WAHAB, 'Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement' (2004) 12 *International Journal of Law and Information Technology* 123

4.3.6 Virtual place of the settlement

Moreover, the Internet can connect parties involved in ODR across the globe, whereas the offline system has the benefit of a 'home court advantage' as the arbitration sometimes takes place in the stronger party's place of origin and the other party needs to travel and pay accommodation expenses. These are eliminated when using ODR.[161]

4.3.7 Effective enforcement

Consensual agreement via online alternative dispute resolution increases the chances of effective enforcement of cross-border litigation which traditionally may be subject to challenges, delay and high costs.

4.4 Challenges limiting the potential of ODR

Like any other form of dispute resolution, ODR poses a set of challenges which need to be reviewed and analysed with the aim of overcoming these and finding the best solutions available. Some of the key challenges are considered below.

4.4.1 Enforcement challenge

Although in most cases the parties in ODR find that the enforcement issue goes smoothly, sometimes enforcement may be challenging and complicated since it crosses jurisdictions and involves different types of local legislation. The major challenge emerges from enforcing decisions, since when an award has been given in an involuntary arbitration procedure, this then requires enforcement by a competent court or authority, which requires the identification of parties' location even though the transaction was made online. This in turn raises the choice of law issue which would be likely to reduce the trust in and certainty of online dispute resolution; thus, a creative solution is needed to this legal concern.

[161] Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts* (Jossey-Bass 2002)

4.4.2 Accessibility and sophistication

Although computer usage and Internet accessibility has increased dramatically throughout the world over recent decades, there is still a noticeable disparity in the skill levels of computer users and also problems with Internet accessibility. For instance, even in Europe, despite ambitious initiatives to tackle Internet access, there is still disparity in the speed available and with other technical issues.

4.4.3 Limited types of disputes

Although it could be said that ODR is mainly useful for particular types of disputes that stem from e-commerce or domain names, which are largely of a technical nature, and it tends to be limited to cases involving small amounts of money but is not likely to work for high value disputes which would require support for enforcement from a court or other public authority. However, this hypothesis requires further analysis, given the fact that companies like eBay has resolved over 80 million dispute through ODR.[162] As ODR proves its efficiency and earns consumer confidence, it should rapidly attract high-volumes of disputes due to its wide range of advantages.

4.4.4 Impersonal nature of online communication

The impersonal nature of communication via the Internet, including ODR, could cause miscommunication due to the lack of body language or ability to hear intonation. In addition, simply having to type at the computer could easily result in fraudulent behaviour.

Clark et al[163] argue that video conferencing could offer an alternative form of personal communication, although this still differs from real face-to-face communication. It has also

[162] Jaap van den Herik and Daniel Dimov, 'Towards Crowd-sourced Online Dispute Resolution', (2012) 7 *Journal of International Commercial Law and Technology,* < *http://www.jiclt.com/index.php/jiclt/article/view/150* > accessed 17/3/2013

[163] Clark, Eugene, George Cho, and Arthur Hoyle. "Online dispute resolution: present realities, pressing problems and future prospects" (2003) 17.1 *International Review of Law, Computers & Technology* 7-25.

been noted that when the third party (the arbitrator or mediator) is a real person rather than an automated system, this impacts positively on building confidence and avoiding misunderstandings between the parties. On the other hand, anonymity during communication could be advantageous since face-to-face communication may create prejudices with regard to gender, religion or ethnicity, resulting from appearance, which would therefore be avoided.[164]

4.4.5 Technical challenges

One of the most complicated technical challenges posed by ODR relates to online security, privacy and the confidentiality of information. Litigation or traditional alternative dispute resolution assumes full confidentiality and privacy, whereas ODR is considered to be of concern for many users. They may not feel confident about putting all the details of a claim on the Internet, including evidence which needs to be kept away from any external partner, risking unauthorised external disclosure by the service provider. Despite the major improvements in online security, there are still concerns about virtual space.

The second technical challenge concerns authenticity and the need to verify the identity of the other party, as e-commerce involves online arbitration, which has been described as stranger-to-stranger. Therefore, it could be possible for another third party to misrepresent or challenge claims made by one of the parties relating to errors having occurred.

4.4.6 Language challenge

Language can be considered a barrier when providing certain services, but due to the global dimension of e-commerce, when cross border disputes do arise, most ODR takes place through the medium of English. However, those who cannot operate in English or use it as a second

[164] Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010)

language may experience difficulties in expressing themselves in disputes which could lead to them losing their rights.[165]

Some of these challenges are relevant only to specific circumstances and others need to be more closely investigated to assess their seriousness; however, in general terms, challenges of this nature should not greatly hinder the massive potential of ODR as long as appropriate technical solutions or forms of regulations can be devised to overcome them.

4.5Analysis of the regulatory context of ADR in the EU

4.5.1 Regulating mediation in the EU

Mediation is significant part of alternative dispute resolution (ADR) which has become an increasingly relevant mechanism for the EU in resolving disputes, as it can provide an alternative to lengthy litigation or even arbitration. It helps to ensure lower costs and swift extra-judicial resolution of disputes. Some argue that regulating any field may have a major impact on flexibility; in this case, regulation incorporates strict rules and may bring about some restrictions or limitations in self-regulated mediation. However, the field of mediation needs to be regulated in order to ensure compliance with fundamental procedural principles such as impartiality, fairness and confidentiality. The challenge, then, is how to strike a balance between two significant aspects: procedural flexibility and due process.

In 2008, the European parliament adopted a directive on certain aspects of mediation in civil and commercial matters.[166] It provided that Member States should implement this Directive into their national laws before May 21 2011. The UK has partially implemented the directive

[165] Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010)
[166] Directive on Mediation

by enacting the Cross-Border Mediation EU Directive Regulation[167] 2011, which came into force in May 2011. As the Directive only addresses cross-border disputes, the regulators have made this point clear by inserting the word "cross-border" in the title. However, the Ministry of Justice in England and Wales is considering extending the legislation to cover domestic disputes. In general, the Directive contains provisions which seek to regulate mediation processes and encourage the promotion of a settlement, as well as guaranteeing a proper balance between mediation and judicial proceedings.[168]

4.5.2 Enforcement and cross-border recognition

Mediation relies on voluntary agreement, and in general involved parties will comply with this; however, in one of the parties refuses to comply and does not respect the mediation agreement, this cannot be enforced and the other party needs to start judicial proceedings. In this case, the purpose of the mediation process risks being thwarted. This possibility highlights the importance of enforcement and cross-border recognition. To address this, the Directive states in Article 6 that "the content of such an agreement [resulting from mediation] shall be made enforceable"[169].

Thus, under the terms of this directive, parties must have the opportunity to request that the content of the agreement reached following the success of the mediation process can be made enforceable,[170] But with regard to enforcement mechanisms, the directive does not specify an enforcement procedure, leaving this to the general principles of the Rome Convention on the law applicable to contractual obligations.[171] This leaves each Member State to decide its own

[167] The Cross-Border Mediation (EU Directive) Regulations 2011
[168] Antonio Maria Marzocco and Michele Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105
[169] Directive on Mediation
[170] Marzocco and Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105
[171] Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980/*Consolidated version CF 498Y01269(03) */[1980] OJ L266, 1-19

method for procedural matters. Thus, for effective enforcement, the parties are required to refer to the civil procedural laws of the Member State, which will specify whether a judicial act or an administrative act will be sufficient for the agreement to be enforceable.[172]

It has also been suggested by Anthimos that the enforcement of the mediation agreement should use the Exequatur mechanism established in the Brussels I Regulation. This would give the mediation agreement the same enforceability qualities as those given to arbitral awards.[173]

The Directive provides that mediation settlements will be made enforceable by a new type of order called a 'mediation settlement enforcement order' and Article 6 requires the "explicit consent" of all parties for enforceability to be recognised by the court.[174]

4.5.3 Compulsory mediation and right of access to the judicial system

One of the most important topics in the mediation context in the EU is the relationship between mediation as an extra-judicial instrument for resolving a dispute and judicial proceedings. In other words, if the parties to a dispute should seek recourse to mediation voluntarily or if it is compulsory; for example, making mediation a condition for the admissibility of action before the court, or as a condition for proceeding in the court.

The Directive does not specify a precise means of addressing the relationship between mediation and judicial proceedings but attempts to regulate this relationship by setting a limitation period for the mediation procedure in order to avoid precluding judicial action.

[172] Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010)
[173] A Anthimos, 'Greece' in Giuseppe De Palo and Mary B Trevor (eds), *EU Mediation Law and Practice* (Oxford University Press 20 12)
[174] Rebecca Attree, 'The Impact of the EU Mediation Directive: A United Kingdom Perspective' (Libralex Meeting, Perugia, Italy, 22 October 2011) <http://www.libralex.com/Documents/Internal/38-The_EU_Mediation_Directive_-_A_UK_perspective-1%5b1%5d.pdf> accessed 20 January 2014

Indeed, in general, the Directive has chosen voluntary mediation but leaves the option for any Member State to make mediation compulsory before judicial proceedings, as provided in Article 5/2:

> This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.[175]

In practice, Spain and Italy are implementing mandatory mediation in their national law. Moreover, Member States can choose to limit the compulsory nature of mediation to specific types of disputes only, leaving this optional for other types of disputes. This option has been taken by Italian legislators in the Legislative Decree no. 28 of March 2010 concerning the regulation of mediation[176] which made pre-trial mediation compulsory for a listed category of cases including car accident disputes.

However, the argument which will be addressed here is that whilst the imposition of a compulsory attempt at mediation would facilitate this process and help achieve its objectives, obligatory mediation could create obstacles and restrict free access to judicial proceedings. Moreover, there needs to be a detailed discussion concerning whether mandatory mediation would be contradictory to the general EU principle of effective judicial protection, as enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedom which was signed in Rome in 1950[177], as well as Article 47 of the EU Charter of Fundamental Rights.[178] Both assert the right to a fair trial and that individuals must

[175] Directive on Mediation
[176] M Marinari, 'Italy context' in Giuseppe De Palo and Mary B Trevor (eds), *EU Mediation Law and Practice* (Oxford University Press 2012) 185
[177] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14 Rome [1950]
[178] Charter of Fundamental Rights of the European Union [2000] C 364/01

enjoy effective judicial protection. In fact, it is possible to confirm that this concern is addressed by Article 5/2 which explicitly notes: "such legislation does not prevent the parties from exercising their right of access to the judicial system."[179]

Firstly, with regards to the principle of effective judicial protection, some have argued that this principle may be subject to some restrictions for the purposes of achieving general interests.[180] The preliminary ruling of Case C-28/05 *G J Dokter and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*:

> It should, however, be borne in mind that fundamental rights, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest [...] and that they do not constitute,[...] a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.[181]

Thus, it is clear that the nature of the principle of effective judicial protection is non-absolute, which to some extent would allow for the imposition of compulsory mediation. What is more, there is a significant case from The Court of Justice of the European Union (CJEU) which draws attention to this point. The Alassini judgment[182] dealt with disputes relating to electronic communication services between end-users and providers of those services. The CJEU was asked to rule on the compatibility of Italian legislation with EU law under which compulsory attempts can be made to pursue alternative dispute resolution, which is considered a condition precedent to proceeding in the courts. The judge held that the national rule in question, which involves Italian legislation, was compatible with the specific provision of the Directive on

[179] Directive on Mediation
[180] Marzocco and Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105
[181]C-28/05 G J Dokter and Others v Minister van Landbouw, Natuur en Voedselkwaliteit [2006] ECR I-5431
[182] Alassini -v- Telecom Italia SpA (Environment and Consumers) [2009] EUECJ C-318/08_O

Mediation. Indeed, the CJEU found that neither the principle of equivalence[183] nor the principle of effectiveness[184] preclude national legislation from imposing prior implementation of an out-of-court settlement procedure.[185] According to Marzocco's analysis of the Alassini judgment, provided that certain requirements and conditions are satisfied, these conditions can be divided into general and special requirements.[186]

4.5.3.1 General requirements

First of all, concerning the general requirement aspect of the Alassini judgment, this seeks to assert that the imposition of compulsory out-of-court dispute settlement would fulfil the objective of the Directive on Mediation, and should be examined; moreover, the relationship between the Directive on Mediation and the right to access to justice should be evaluated.

It is important at this stage to recall the objective of Directive on Mediation, which as Article 1/1 states is: "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[187] Recital 5 also emphasises that:

The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.[188]

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[183] The principle of equivalence means a procedural rules governing action cannot be less favourable than those regulating similar domestic actions.
[184] The principle of effectiveness which provides that such rules must not make it in practice impossible or excessively difficult to exercise fundamental rights conferred by EU law such as the right of fair trial.
[185] Koen Lenaerts, 'Effective judicial protection in the EU' <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf > accessed 18 January 2014
[186] Marzocco and Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105
[187] Directive on Mediation
[188] Ibid

It is clear then that the general requirement is satisfied by the Directive on Mediation as well as pursuing the objective of general interest, which would justify restricting the principle of effective judicial protection.

4.5.3.2 Special requirements

It is of utmost importance to analyse the special requirements provided by the Alassini judgment. Alternative dispute resolution must satisfy these, as the Judgment of the Court (Fourth Chamber) stated that none of these principles preclude national legislation on imposing such procedures, provided that that the procedure:

does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.[189]

It is worth dealing with these issues in detail to examine whether the Directive on Mediation does indeed comply with these special requirements. Moreover, national legislation must also satisfy compliance with the EU's general principles.

The first condition requires not reaching a decision that is binding on the parties. To some extent the facilitative type of mediation means that the mediator is attempting to broker a voluntary agreement, instead of proposing a resolution, as in evaluative mediation.[190]

[189] Joined Cases C-317/08 to C-320/08 C-319/08 and C-320/08. *Rosalba Alassini and Others v Telecom Italia SpA and Others*, Judgment of the EU Court of Justice (Fourth Chamber) of 18 March 2010, para 67
[190] H. André-Dumont, 'European Union: The New European Directive on Mediation: Its Impact on Construction Disputes' (2009) 26 *International Construction Law Review* 1

The second condition is that it does not create a substantial delay for the purposes of bringing legal proceedings. In fact, the Directive mandates for the Member State when implementing such rules to fix time limits for the completion of a mediation attempt, although there are no specific criteria so it could vary in its implementation. For instance, the judgment in the Alassini case set 30 days whilst the other Italian legislation set four months, but this could be based on the ECHR criteria which is related to the reasonable length of proceedings. This states that:

> The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute.[191]

The third condition is that it suspends the period for the time-barring of claims. This condition could also be implemented by national legislation by asserting when the mediation suspends the prescription period.

The fourth condition is that it does not give rise to costs or gives rise to very low costs for the parties involved. This question of the cost raises concerns about how to identify "very low" costs. Indeed, the answer is not clear but it has been suggested that objective criteria can be used which take into account the cost incurred by the parties and the amount of the dispute, as well as subjective criteria, which bear in mind the economic and individual situations of the parties.[192]

The fifth condition applies only if electronic means are not the only ones by which the settlement procedure may be accessed, and interim measures are possible in exceptional cases

[191] *Sürmeli v Germany* App no 75529/01 (ECHR, 8 June 2006) para 128
[192] Marzocco and Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105

where the urgency of the situation requires it. However, in Recital 9 it is clearly stated that "This Directive should not in any way prevent the use of modern communication technologies in the mediation process."[193] Even so, this does not mean that modern communication technologies have to be used as an exclusive means of mediation. In addition, interim measures cannot be subject to compulsory mediation.

To conclude, it has been confirmed that Member State regulation imposing compulsory mediation attempts would not violate the principle of effective judicial protection, provided that the prescribed requirements as set out by the CJEU judgment are met. Some of these are already satisfied by the Directive itself, whilst others need to be regulated by national legislation.

4.6 ADR in the context of England and Wales cases

There has been a huge trend within many e-commerce platforms towards providing alternative dispute resolution (ADR) via online means, particularly online mediation methods. Sometimes, some e-commerce platforms force the other party to engage in specific ODR services in order to resolve a dispute, which the parties have agreed upon, in some contractual clauses. Therefore, it is of great importance at this stage to examine some significant cases of mediation which provide evidence of the extent to which the Court of England and Wales would recognise or support alternative dispute resolution.

In the first case, *Cable & Wireless v IBM2001* the Court endorsed ADR as a means of avoiding litigation, by using the court's power to enforce mediation clauses, even though this was against the will of one of the parties. The second case, *Cowl and Others v Plymouth City Council 2001*, confirmed this principle of supporting alternative dispute resolution in disputes arising between

[193] Directive on Mediation

public authorities and individuals. The third case, *Dunnett v Railtrack 2002*, demonstrated the cost implications for refusing to engage in ADR.

The fourth case, *Halsey v Milton Keynes NHS Trust 2004*, has attracted wide debate in support of or against this judgment, and in this case the court only encouraged the use of ADR if it was appropriate according to a list of established factors; however, this judgment was subjected to much criticism and many objections by some highly respected judges, such as Mr Justice Lightman, Sir Anthony Clarke, the then Master of the Rolls, and Lord Phillips, the then Lord Chief Justice (this will be discussed in depth later on). To some extent, this case is reliant on the European Convention on Human Rights as it considers the compelling nature of mediation to be regarded as contrary to Article 6 of this Convention, with the judge referring to a previous case from the European Court of Human Rights, *Deweer v Belgium*, which will be analysed as well.

The last and most recent case, from October 2013, which is regarded as another milestone in this field, is *PGF II SA v OMFS Company 1 Limited*. In this case, the Court of Appeal upheld the principles of Halsey and others with regard to awarding the costs against a party who did not participate in ADR; moreover, the judgment extended the principle to cover the silence and considered it unreasonable to refuse to mediate.

4.6.1 Cable & Wireless v IBM 2001

In order to consider the case in detail, which involves the claimant Cable & Wireless (C&W), a UK-based local service provider, and the defendant IBM, which had signed a global framework agreement (GFA) for a twelve-year period in order to supply C&W and the local parties with information technology services. The dispute arose from a pricing benchmarking clause which obliged IBM to deliver at a price equal or better than that achieved by the top 10% of other organisations providing similar services; however, the parties could not agree on

the price, so they called in a qualified, independent third party to conduct the benchmarking process. This was Compass Management Consulting, which concluded that IBM was charging C&W more than its competitors and that the claimant is entitled to compensation of 31-45 million pounds. However, IBM rejected the result and the compensation figure as well, and C&W issued proceedings on the grounds of the pricing process and the entitlement to compensation; for their part, IBM responded by way of a stay of proceedings and sought to enforce ADR clauses,[194] as established in Clause 41 of the GFA which makes the following provisions:

> The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40. If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.[195]

It was clear that this judgment was regarded as a significant boost to the substance of ADR, as it upheld the enforceability of the clauses on the grounds that the parties have a clear intention to be bound to ADR and to consider litigation as a last resort.

Moreover, the judge, Coleman J, decided that the parties had gone further when drafting the contract clauses than merely attempting to negotiate in good faith, as they prescribed a specific

[194] Karl Mackie, 'The Future for ADR Clauses After Cable & Wireless v. IBM' (2003) 19 *Arbitration International*
[195] *Cable & Wireless v IBM* [2002] CLC 1319, [2002] EWHC 2059 (Comm), [2003] BLR 89, [2002] Masons CLR 58, [2002] 2 All ER (Comm) 1041

procedure of ADR through the Centre for Effective Dispute Resolution[196] (CEDR), which is one of the most experienced dispute resolution providers in UK. It has published several well-known models, for instance the CEDR Model Mediation Agreement; CEDR Model Mediation Procedure; CEDR Code of Conduct for Mediators; CEDR Model Settlement Agreement; and CEDR Model ADR Contract Clauses.[197]

Furthermore, the judge relied upon the provisions of the Civil Procedure Rules in England and Wales which provide that:

> 1.4: Court's duty to manage cases
>
> (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes – […]. (e) Encouraging the parties to use an ADR (GL)[198] procedure if the court considers that appropriate and facilitating the use of such procedure;

Part 26.4 is also significant in this regard:

> Stay to allow for settlement of the case
>
> (1) A party may, when filing the completed directions questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by ADR or other means.

[196] CEDR has over 20 years' experience in dispute resolution as it was launched in 1990 with the support of the Confederation of British Industry and leading law firms, business and public sector with the purpose of bringing mediation into business practice and into the judicial system in England and Wales, and in creating a professional approach in commercial mediation in the UK and internationally see: Centre for Effective Dispute Resolution <http://www.cedr.com/about_us/> accessed 19 December 2013

[197] Centre for Effective Dispute Resolution <http://www.cedr.com/about_us/modeldocs/> accessed 19 December 2013

[198] Civil Procedure Rules - Glossary: "Alternative dispute resolution: Collective description of methods of resolving disputes otherwise than through the normal trial process"

(2) If all parties request a stay the proceedings will be stayed for one month and the court will notify the parties accordingly.

(2A) If the court otherwise considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate.

(3) The court may extend the stay until such date or for such specified period as it considers appropriate.

(4) Where the court stays the proceedings under this rule, the claimant must tell the court if a settlement is reached.

(5) If the claimant does not tell the court by the end of the period of the stay that a settlement has been reached, the court will give such directions as to the management of the case as it considers appropriate.[199]

To summarise the focus of this case, as Karl Mackie[200] describes, this is a seminal case in the history of the courts' attitude towards contractual dispute resolution provisions, and it is an interesting judgment for ADR professionals. In fact, it confirms the international trend and continental EU initiatives for using ADR. This judgment also gives added credence to the trend of recognising ADR with the court acknowledging that ADR may be used to achieve progress in settlements of complex commercial and legal matters, even when the parties are not convinced by or unsure of an outcome.

[199] The Civil Procedure (Amendment No.4) Rules 2013 Statutory Instrument 2013 No. 1412.
[200] Mackie, 'The Future for ADR Clauses After *Cable & Wireless v. IBM'* (2003) 19 *Arbitration International* 3

4.6.2 Cowl and Others v Plymouth City Council 2001

With regard to civil procedure rules (CPR), it is important to consider the Court of Appeal's judgment in *Cowl and Others v Plymouth City Council* (2001) as it addressed the use of CPR powers to promote ADR in a judicial review of a decision by Plymouth City Council about the closure of a residential care home. Lord Woolf dismissed the appeal on the grounds that the residents failed to take up the council's offer to participate in a complaints review panel, and he clearly indicated that "the courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts."[201] What is more, Lord Woolf specified the method of ADR and mediation by stating that an independent mediator should have been recruited to assist as that would have been a far cheaper course to pursue. Today, sufficient information should be known about ADR to mitigate the failure to adopt it, in particular where public money is involved, which he described as "indefensible."[202]

As a final point, Lord Woolf emphasised the lawyers' "heavy obligation to resort to litigation only if it is really unavoidable".[203]

4.6.3 Dunnett v Railtrack 2002

Furthermore, another case, *Dunnett v Railtrack*,[204] addressed the cost implications of ignoring ADR, and mediation in particular. The case involved Susan Dunnett who had kept three horses in an area next to Swansea railway line, but they escaped onto the track and were killed and she lost her claim to compensation. Judge Schiemann LJ strongly encouraged an attempt at ADR but the defendant refused to consider this as they felt had a strong defence, but when the case proceeded to the Court of Appeal and was considered by Lord Justice Brook, who gave

[201] *Cowl & Ors v Plymouth City Council* [2001] EWCA Civ 1935
[202] *Ibid*
[203] Penny Brooker, *Mediation Law: Journey Through Institutionalism to Juridification* (Routledge 2013)
[204] *Dunnett v Railtrack Plc* [2002] EWCA Civ 302

the leading judgment, he upheld the decision of Judge Schiemann LJ, which resulted in her losing her claim. On the other hand, they also refused to award costs to Railtrack and made a significant statement on the nature of mediation and the role of mediators.

Brooke LJ stated that:

> It appears to me that this was a case in which, at any rate before the trial, a real effort should have been made by way of ADR to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial.

He also stated that "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve."[205]

4.6.4 Halsey v Milton Keynes NHS Trust 2004

Another case involved Mrs Lilian Halsey who brought a claim against Milton Keynes General NHS Trust, alleging medical negligence due to the treatment of her husband, which led to his death. The dispute arose because he was being fed through a tube which was incorrectly fitted, thereby directing the liquid food to his left lung instead of his stomach. The inquest was held, and the Coroner heard the evidence, but the results of the inquest were inconclusive as two medical experts disagreed over responsibility. However, the Coroner recorded the medical cause of death as: "1(a) airway obstruction; 1(b) introduction of nasogastric nutrition into airway and lungs; 2 chronic renal failures; old myocardial infarct; chronic obstructive pulmonary disease and fractured ribs".

Halsey had indicated the desire to mediate, but the defendant (NHS trust) refused the request on the grounds that there had not been any negligence, and then at trial the claim was dismissed

[205] Klaus J. Hopt and Felix Steffek, *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press 2012)

and the NHS trust won their case. When the case was taken to the Court of Appeal, the claimant requested the costs on the grounds that the defendant refused to engage in ADR and to accept the invitation to refer to mediation.

The Lord Justice heard the argument and upheld the first judgment and dismissed the appeal by stating that the claimant had come nowhere near showing that the Trust acted unreasonably in refusing to agree to mediation. The LJ confirmed that this was not a case where the court made any order encouraging mediation:

> We accept that the subject-matter of this dispute was not by its nature unsuitable for ADR. But the Trust believed that it had a strong defence, and had reasonable grounds for that belief. Moreover, the judge was justified in saying that the letters written by the claimant's solicitors were 'somewhat tactical'[206]

In fact, the court affirmed the general principle of costs, namely, that the losing party should pay the costs of the winning party (costs follow the event and the winner takes all) and consider that any transition from general rule should be the exception. On the other hand, if the losing party requests the costs on the grounds that the opponent refused to mediate, then he or she must successfully show that the opposing party acted unreasonably in refusing to agree to mediation or to engage in ADR.[207]

The court recognised and accepted the Law Society's proposal of factors that the courts should take into account when deciding whether a party has unreasonably refused ADR, which are as follows. However, these should not be regarded as an exhaustive check-list:

[206] [2004] WLR 3002, [2004] CP Rep 34, [2004] 4 All ER 920, [2004] EWCA Civ 576, (2005) 81 BMLR 108, [2004] 1 WLR 3002, [2004] 3 Costs LR 393
[207] Hopt and Steffek, *Mediation Principles and Regulation in Comparative Perspective* (Oxford University Press 2012)

a) The nature of the dispute. Although most cases are not by their very nature unsuitable for ADR, some cases are not suitable for ADR; where for example it is important to establish a principle which can be applied in similar disputes or cases where injunctive or other relief is essential to protect the position of a party.
b) The merits of the case: if a party reasonably believes that he or she has a strong defence that is relevant to the question of whether he or she has acted reasonably in refusing ADR.
c) The extent to which other settlement methods have been attempted; although the court did observe that mediation often succeeds where previous attempts to settle have failed.
d) The costs of mediation would be disproportionately high. This factor is of high significance, particularly with low-value transactions, due to the comparison with the costs from a small claims court, which is usually much cheaper than the cost of mediation; however, sometimes, mediation institutions are publicly funded in order to make the process affordable. Moreover, another issue concerning costs is that usually the mediator's fees will be borne equally by both parties regardless of the outcome, so it is certainly a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR.
e) Delay: This could happen sometimes if one party suggests mediation just before the trial, and this could result in delaying the hearing. This factor is important in deciding whether the party is unreasonably refusing to engage in mediation.
f) Finally, there is the issue of whether ADR has a reasonable chance or no real prospect of success.

Lord Justice Dyson finally decided in this case that it is wrong to compel unwilling parties to take part in mediation, as such compulsion would create an obstacle to the access to justice and

would be a breach of the right of access to the courts required by the European Convention on Human Rights, which states in Article 6 – Right to a fair trial that:

> In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly […].[208]

However, this decision has been subject to some debate by some highly respected Judges such as Mr Justice Lightman; Sir Anthony Clarke, the then Master of the Rolls; and Lord Phillips, the then Lord Chief Justice. To start with, Lightman J has criticised the judgment on a number of grounds, arguing that:

> The court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial.[209]

Secondly, according to Sir Anthony Clarke (Master of the Rolls and the Head of Civil Justice in England and Wales), in the practice of other jurisdictions, it is prevalent for parties to be compelled to proceed to ADR, or mediation in particular, regardless of whether they wish to or not. In the case of Belgium and Greece, although they are signatories to the Human Rights Convention, they have the option to legislate for compulsory ADR schemes without any violation of Article 6; moreover, Germany's federal states legislation requires litigants to either

[208] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

[209] Mr Justice Lightman, 'Mediation: An Approximation to Justice' At S J Berwins, 28 June 2007 <https://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf> accessed 3 April 2014

engage in court-based or court-approved conciliation prior to formal litigation.[210] Clarke observed that "without prejudicing any future case […] there may well be grounds for suggesting that Halsey was wrong on the Article 6 point."[211]

ADR is part of the civil procedure process, as it is clearly supported by part 3 of the CPR regarding the court's powers on ADR:

> 3.3 (1) If the court considers that ADR is appropriate, the court may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –
>
> (a) to enable the parties to obtain information and advice about ADR; and
>
> (b) where the parties agree, to enable ADR to take place.[212]

Although an arbitration agreement sometimes precludes parties from entering into court proceedings, mediation does not. In fact, in the worst instance, it could just delay the trial if the case is not resolved, but if the mediation is successful, it does obviate the need to continue with court proceedings; it is regarded as a consensual settlement which does not amount to a breach of the right to access the court, or Article 6 of the ECHR.

This view is supported by Lord Phillips, the then Lord Chief Justice, who confirmed that this judgment was controversial amongst the supporters of ADR, who might consider this judgment

[210]Sir Anthony Clarke, 'The Future of Civil Mediation', The second Civil Mediation Council National Conference, Birmingham, 8 May2008, judiciary of England and Wales official website <https://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf> accessed 3 April 2014

[211] Ibid

[212] The Civil Procedure (Amendment No.4) Rules 2013 SI 2013 /1412 PART 3 - NON-COURT DISPUTE RESOLUTION <https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03> accessed 3 April 2014

to be wrong in certain respects, as it can bring about negative effects concerning the willingness of parties to agree to mediation.

Analysing Lord Phillips' comments,[213] he first dealt with Lord Justice Dyson's proposition concerning the court order and the unwillingness of the parties to submit to mediation being in breach of Article 6 of the ECHR, and noted that the waiver of the right to a public trial must be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint". Lord Justice Dyson also referenced the case of *Deweer v Belgium* which had been heard in the European Court of Human Rights.

4.6.5 Deweer v Belgium

In order to identify whether this reference was entirely appropriate, it is necessary to look at this case, which concerned Mr Deweer, a Belgian retail butcher in Louvain. His shop was found to be involved in an infringement of a Ministerial Decree of 9 August 1974: "fixing the selling price to the consumer of beef and pig meat." Mr Deweer faced criminal prosecution and his shop was ordered to undergo provisional closure. The closure was to come to an end either on the conclusion of the criminal proceedings or following the payment of a sum of 10,000 Belgian francs by way of a friendly settlement.

Mr Deweer chose the 'friendly settlement' and the payment of 10,000 BF had already been made; however, he filed a dispute to the European Court of Human Rights in Strasbourg on the grounds that there was constraint to access to a fair trial to which he was entitled. The court finally held that "Mr. Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint. There has accordingly been a breach of Article 6 par. 1 (art. 6-1)." Thus, he was totally deprived of such a trial since, under

[213] Lord Phillips of Worth Matravers, 'Alternative Dispute Resolution: An English Viewpoint', 29 March 2008 http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf accessed 3/4/2014

constraint, he agreed to its waiver. Hence the court "holds unanimously that there has been breach of paragraph 1 of Article 6 (art. 6-1) of the Convention" and it rejected unanimously the Government's plea that domestic remedies had not been exhausted.[214]

It is crucial to turn to LJ Phillips' analysis of whether it is possible to conclude from this judgment that it is contrary to a person's rights which he or she is entitled to under the terms of the European Convention on Human Rights if he or she has a dispute then the court compels him or her to engage first in ADR, particularly mediation.

First of all, it is important to consider the meaning of 'compel', which means to force or oblige (someone) to do something.[215] LJ Phillips placed emphasis on the meaning, which could be used to measure whether it is compelling or not concerning sanctions. For example, if one of the parties simply refuses to attempt mediation when the court orders him or her, if he or she is punished with prison or any other specific penalty for contempt of court, then they could be regarded as having been compelled to go to mediation.

In fact, this is not the case here, but instead the right of access to the court was paused for a period of time by saying that unless mediation is attempted the claimant cannot continue with court action, as mediation is ordered by the court on this basis in some jurisdictions.

In other words, it is could be said that refusing to comply with such an order of mediation will lead consequently to hindering the right to continue with the litigation. LJ Phillips stated that "the European Court of Human Rights at Strasbourg might well say that he had been denied his right to a trial in contravention of Article 6".[216]

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[214] *Deweer v Belgium* - 6903/75 [1980] ECHR 1 [1980] ECC 169, [1980] 2 EHRR 439, (1979-80) 2 EHRR 439, (1980) 2 EHRR 439, 2 EHRR 439, [1980] ECHR 1

[215] *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010)

[216] Lord Phillips of Worth Matravers, 'Alternative Dispute Resolution: An English Viewpoint', India, 29 March 2008 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf> accessed 3 April 2014

A second point supports the proposition that the ordering of compulsory mediation by court is not contrary to Article 6 of the European Convention on Human Rights, namely, that the European Commission has clearly encouraged mediation in Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

Article 5, the most significant Article of this Directive concerning recourse to mediation, provides that:

> 1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.
>
> 2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.[217]

This clearly indicates the European Commission's intention that not to consider compulsory mediation will impede the right of access to the court, as well as the practice of a number of jurisdictions which compel the parties to resort to ADR, particularly mediation, before litigation.

A third point is that those who oppose compulsory mediation might argue that the whole nature of mediation is built on a voluntary basis, since 'You can take a horse to water, but you cannot make it drink'; however, those in favour of compulsory mediation reply to this phrase, 'yes, but if you take a horse to water it usually does drink'. Moreover, in this regard, according to LJ Phillips "the statistics show that settlement rates in relation to parties who have been

[217] Directive on Mediation

compelled to mediate are just about as high as they are in the case of those who resort to mediation of their own volition."[218]

What is more, practice in England and Wales is moving towards this trend of supporting compulsory mediation, for instance in family law disputes, the court may adopt a requirement for the parties to attempt mediation, and the statistics show an 80% success rate.[219] The UK government has also established a National Mediation Helpline. Through this, mediation can be arranged for civil law disputes with fixed fees. There is a 15% year-on-year growth rate planned for this service.[220]

In conclusion, it may be said that compelling parties to engage in mediation does not deprive them of their right of access to the court. Instead, it means parties still have the right to access to the court but on condition that they also attempt ADR.

4.6.6 PGF II SA v OMFS Company 1 Limited

The last and most recent case, which is believed to be another milestone in this field, is *PGF II SA v OMFS Company 1 Limited* (October 2013)[221]. The claimant (PGF II SA) was the landlord of a mixed commercial and office building in London and the defendant (OMFS Company 1 Limited) was a tenant. In October 2010, the landlord issued proceedings, claiming £1.8 million in respect of alleged dilapidations arising from breaches of the repairing covenants of underleases. The defendant denied any liability; however, on 11th April 2011 the defendant sent the claimant an offer of £700,000, inclusive of interest, under Part 36 of the Civil Procedure Rules (CPR).[222]On the same date, via a separate letter, the claimant invited the

[218] Lord Phillips of Worth Matravers, 'Alternative Dispute Resolution: An English Viewpoint', India, 29 March 2008 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf> accessed 3 April 2014
[219] Ibid
[220] Ibid
[221] *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 (23 October 2013)
[222] The Civil Procedure (Amendment No.4) Rules 2013 Statutory Instrument 2013 No. 1412.

defendant to engage in early mediation. However, neither the Part 36 offers nor the claimant's invitation to mediation were accepted or received any response.

On 19th July 2011, the request for mediation was raised again via a letter to the claimant and the defendant, but did not receive any response either. The trial had been set for 11th January 2012, and the day before the trial commenced, 10th January 2012, the defendant gave notice to amend their defence. The claimant's response was to accept the defendant's Part 36 offer of £700,000 by email later the same day.

That acceptance brought the trial to an end, except for the question of costs. Thus, the Court had to determine the cost consequences of the acceptance of a Part 36 offer in accordance with Civil Procedure Rules 36.10 (4) and (5), which set out the normal consequences of a party accepting a Part 36 offer after the expiry of the 'relevant period' which according to Civil Procedure Rules 36.2 (c) is a period of not less than 21 days after the offer is accepted. The rules provide that the claimant is entitled to their costs since the Part 36 offer proposed until the relevant period had expired, on other hand, it provided that "the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance."

Following the offer of 11th April 2011, the expiry of the relevant period of 21 days would have been 2nd May 2011, so the claimant was entitled to the costs in respect of the period 11th April to 2nd May, and in relation to the second period, the defendant would be entitled to the costs. However, the claimant did not agree with that decision and referring to the Halsey case [223]argued that the default order under Part 36 should not be used because of the unreasonable refusal by the tenant to go mediation.

[223] Halsey –v- Milton Keynes General NHS Trust [2004] EWCA 3006 Civ 576

In fact, in the Halsey case, the Court of Appeal addressed the issue of determining the extent to which it was appropriate for the court to use its powers to encourage parties to settle their disputes through ADR. Halsey considered communicated refusals, unlike *PGF II SA v OMFS Company 1 Limited*[224] which relates to a failure to respond to an ADR request, and the court acknowledged that the parties should not be compelled to mediate. Even so, the court stated that, in general, parties should be encouraged to engage in ADR and such encouragement should, for the appropriate cases, allow the court to use its powers to deprive a successful or eligible party of its costs on the grounds of his refusal to enter into ADR. The Court of Appeal went further, specifying guideline factors which could be used to determine the appropriateness of cases for referral to ADR procedures.

In the first instance, the judge considered the defendant's silence as refusal to agree to mediation, and applied the Halsey factors to determine whether it was unreasonable to refuse or not. The judge held that the defendant's silence was unreasonable refusal to participate in mediation.[225]

The Court of Appeal upheld the decision and Briggs LJ considered the silence concerning the invitation to participate in mediation as unreasonable of itself, even if there was acceptable justification for two reasons: first, the delay in replying as a reason for refusal until the costs hearing would make it difficult to investigate whether the "belatedly advanced reasons are genuine"; second, even if a party has a reason for refusal, both parties should be encouraged towards engagement in ADR with an invitation to participate, which will be more likely to lead to a positive outcome and perhaps agreement on a different type of ADR, such as an "early

[224] *PGF II SA v OMFS Company 1 Limited'* [2013] EWCA Civ 1288
[225] Ben Rees "Silence Is Not Golden: The Price of Ignoring ADR Requests." Mondaq Business Briefing <https://www.highbeam.com/doc/1G1-355871872.html> accessed 19 March 2013

settlement at a fraction of the cost [...] or a different form of ADR, or even a different time for it."[226]

The most important aspect of this case is the court's recognition that mediation can play a significant role in resolving disputes. Briggs LJ quoted from statistical research conducted by the Centre for Effective Dispute Resolutionin 2010 and 2012 which asserts that, "when it is undertaken, mediation achieves a remarkable level of success, within a growing market of the order (in 2012) of approximately 8000 cases per annum. The 2012 reported success rates can be summarised as 70% on the day, with 20% more settling shortly thereafter. In 2010 comparable figures were 75%:14%".[227]

Following this case, it is clear that the failure to respond to an ADR proposal will be regarded as unreasonable refusal to mediate, which might be penalised by deprivation of costs. As such, this judgment sends out a clear message concerning the court's recognition and encouragement of mediation as a significant method of dispute resolution; this could be endorsed by using the court's power of recourse to order costs.

4.7 Recent EU initiative for ODR

One of the significant initiative of EU Commission is ODR Regulations (2013) which entered into force on 8 July 2013, and EU Member States are required to implement the Directive into national law by 9 July 2015. The ODR regulations seek to support the digital dimension of the internal market and to achieve a high level of consumer protection for online consumers by requesting the Commission to provide a European platform for ODR which would facilitate the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online. The scope of the regulations would cover any

[226] *PGF II SA v OMFS Company 1 Limited'* [2013] EWCA Civ 1288
[227] *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 (23 October 2013)
URL: http://www.bailii.org/ew/cases/EWCA/Civ/2013/1288.html [2013] WLR(D) 405, [2013] EWCA Civ 1288

dispute regarding contractual obligations stemming from online sales or service contracts between a consumer resident in the EU and an online trader established in the EU.

4.7.1 Establishment of an ODR platform

Article 5 of the ODR regulations requires the Commission to create, operate, maintain and fund a user-friendly platform for resolving online disputes, which should be accessible to and usable by all online buyers, including vulnerable users. This platform will also be responsible for data security as well as user privacy, and should take into account privacy issues from the design stage. The platform is also intended to be available and accessible through the Commission's websites, which provide information to citizens and businesses in the Union, as well as via the 'Your Europe portal'[228]. Finally, it should be free of charge and interactive, with a single point of entry to resolve any online disputes arising between parties.

4.7.2 Functions of the ODR platform

The platform's functions begin when the complainant fills in an electronic complaint form, and it should then inform the respondent party about the complaint. The third step involves the platform identifying the competent ADR entity and passing on the complaint once both parties have agreed about the ADR entity. The Commission should provide translation services for all EU official languages, as well as an electronic case management tool both of which should be free of charge. In addition, a feedback system should be available so that the parties have the chance to evaluate the platform and the ADR entity who addresses the dispute with the aim of improving the service.

Concerning the EU principle of emphasising the disclosure and availability of all necessary information, the regulations request that the platform should provide the following:

[228] European Commission, (your Europe website) <http://europa.eu/youreurope/ > accessed 29 December 2014

- General information on ADR, as a useful alternative means of dispute resolution
- An electronic guide on how to submit a complaint through the platform
- The contact details of the ADR entity
- Statistical data on the outcome of the disputes that the ADR entity has handled via the platform

4.7.3 Submission and processing of complaints

The platform shall provide the party with a user-friendly electronic form to be filled in by the complainant. When the form has been completed, it should be processed by the platform. If the complainant has not completed all sections, the platform will inform him/her that the complaint will not be processed until the missing information is provided.

Once the form has been completed, the platform is required simultaneously to inform the other party (trader), in an easily understandable way and in one of the official languages of the EU, about the complaint, and must also include the following information:

- Information on the parties' right to agree to transmit the complaint to an ADR entity
- Information about the ADR entities which are competent to deal with the complaint.

The Commission is attempting to respect the principle of freedom of the parties, hence, in the case of the respondent party being a trader, the platform will ask him/her within 10 days whether he/she is obliged or committed to use a specific ADR entity, or will agree to use any ADR entity. Once the trader's choice of entity is known, the platform should provide the complainant with a detailed statement containing the following information:

- The name, contact details and website address of the ADR entity;
- The fees for the ADR procedure;
- The language that will be used;

- The average duration of the ADR procedure;
- The nature of the outcomes of the ADR procedure and whether they are binding or non-binding;
- The possibility of the refusal to deal with a given dispute and an explanation of the grounds for that.

Subsequently, the ADR entity shall inform the parties about whether it agrees or refuses to deal with the dispute. If the ADR entity is willing to proceed, it will also inform the parties about its procedural rules; if it refuses to deal with the dispute, it should inform the parties without delay and inform them briefly about other means of redress.[229]

4.7.4 Resolution of the dispute

The ADR entity must conclude the procedure and make the outcome available within the deadline stated in article 8 (E) of the ADR directive, namely a period of 90 calendar days from the date on which the ADR entity received the complete complaint file. There is an exemption for highly complex disputes which may be allowed to extend beyond this period but all parties must be informed.[230]

ADR does not require the physical presence of the parties or their representatives. The regulations also require the ADR entity to transmit the following information to the ODR platform:

- The subject matter of the dispute;
- The date of receipt of the complaint file and the conclusion of the ADR procedure;
- The result of the ADR procedure.

[229] Directive on Consumer ADR, art 9
[230] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR), OJ L165/63 art 8 (E)

4.7.5 Data confidentiality and security

The regulations require the Commission to take the necessary measures to establish and maintain an electronic database in which the processed information can be stored.[231] The Commission is also required to take all necessary measures to ensure the security of processed information, including appropriate data access control, a security plan and security incident management; in addition, ODR contact points shall be subject to rules of professional secrecy or other equivalent duties of confidentiality that are part of the rules and legislation of the Member State concerned.[232]

Access to information, including personal data relating to a dispute, shall be granted only to the ADR entity or to ODR contact points; however, the Commission is allowed to have access to processed information for the purposes of monitoring the use and functioning of the ODR platform.

Rules on the retention period apply to personal data kept in national files by the ADR entity or the ODR contact point, and must be deleted automatically, within six months of the conclusion of the dispute.[233]

4.7.6 Duty to inform the consumer

The regulations request all traders involved in the online contracting of sales or services that are established within the EU to inform consumers about the existence of the ODR platform and the possibility of using the ODR platform for resolving their disputes. Thus, if there is an offer on the website, then the trader is required to provide an electronic link to the ODR platform on their website, or if the offer is by email the trader is requested to provide such

[231] Directive on Consumer ADR, art 11
[232] Directive on Consumer ADR, art 13
[233] Directive on Consumer ADR, art 12

information in that email. The regulations also request Member States to encourage consumer associations and business associations to provide an electronic link to the ODR platform.

Moreover, the platform is required by regulation to publish the list of the ADR entities which have been established by the Commission, which shall include the name, the contact details and the website addresses of the ADR entities, as well as their fees and the languages in which complaints can be submitted; in addition to the types of disputes covered and the sectors and categories of disputes covered, and the nature of the outcome of the procedure whether it is of a binding or non-binding nature, and finally, the grounds for refusing to deal with a given dispute.[234]

4.7.7 Testing of the ODR platform

In order to ensure the effective functioning of the ODR platform and to take the appropriate measures to address potential problems, the regulations request the Commission to evaluate and carry out a test of the ODR platform and of its complaint form, using factors such as user-friendliness, technical functionality and translation service. Such a test should be conducted by a combination of some consumer and trader representatives, as well as some experts in ODR from the Member States.[235]

4.7.8 Network of ODR contact points

The regulations require each Member State to designate one ODR contact point which should employ at least two ODR advisors. The purpose of this contact point is to provide support to the resolution of disputes by facilitating communication between the parties in dispute and the ADR entity. This support may include different means, for instance assisting with the submission and documentation of the complaint; providing information on the functioning of

[234] Directive on Consumer ADR, art 20
[235] Directive on Consumer ADR, art 6

the ODR platform, and providing general information on consumer rights in relation to sales and service contracts that fall under the scope of the ODR platform. Furthermore, it may provide explanations of the procedural rules applied by the specified ADR entity. Also, when a dispute cannot be resolved through the ODR platform, it may inform the complainant party of other means of redress.

Another function of the contact point is to submit an activity report to the Commission and to the Member States which is based on the practical experience gained from the performance of their functions.[236]

4.8 The UDRP: a successful example of online arbitration

4.8.1 Background

Registration agreements concerning domain names with their many clauses have become one of the most significant topics in Internet law. The Uniform Domain-Name Dispute-Resolution Policy (UDRP) provides a good example of how specific types of dispute concerning information and communication technology, which may be unsuitable for resolution by other mechanisms such as litigation or offline alternative dispute resolution, can be successfully dealt with by other means. Since its emergence in the late nineties, UDRP has become one of the most well-known online forms of arbitration, due to its success in regulating domain names. Resolving a dispute by using UDRP has undoubtedly overtaken traditional litigation since it provides an affordable and transparent procedure through a self-enforceable method. Cortés[237] and others consider it very similar to the international adjudication process. This section sheds light on the lessons which can be learned from UDRP and how these can be applied to ODR, especially for online transactions.

[236] Directive on Consumer ADR, art 6

[237] Sen. Rpt. 106-140, at 4 (Aug. 5, 1999) <http://www.gpo.gov/fdsys/pkg/CRPT-106srpt140/html/CRPT-106srpt140.htm> accessed 20 October 2013

In fact, there are two types of domain name:

1. Country code top-level domain (ccTLD) are used to designate mainly local domains for example .uk, .us, .au, or de. These domains are subject to national regulations which are excluded from this discussion.
2. Generic top-level domains (gTLD) are maintained by the Internet Assigned Numbers Authority (IANA) for use in the Domain Name System of the Internet, which is currently a department of the Internet Corporation for Assigned Names and Numbers (ICANN). These domains differ according to their purpose, for instance .com for commercial, .org for non-profit organisations, and so on.

Since the emergence of this system, the right to registration of a domain lies with the prior registrar, which can lead to confusion and chaos in the case of popular names. What is more, it can also lead to so-called "cybersquatting" which refers to buying domain names that are likely to be in demand and then reselling these for high prices.[238] The term is derived from the concept of "squatting", a term which originally referred to occupying an unoccupied space, particularly a property, that the person does not own, or have permission to use. [239]

Cybersquatting can take several forms. One involves exploiting misspelling. Another entails exploitation of the expiry of the domain registration, as some domain owners pay little impotence to their website, and then the cybersquatters rush to reserve the name. They can also use an automated system to register an existing name using another domain, for instance taking a company name using .com and registering the same name using .net.

[238] Law Dictionary <http://thelawdictionary.org/cybersquatting/#ixzz2l9OKxfu2> accessed 20 October 2013
[239] B. A. Garner (ed), *Black's Law Dictionary* (3rd pocket edn, Thomson/West, 2006)

4.8.2 Statutory Basis

To overcome the challenges presented by different forms of cybersquatting, in 1999 the US enacted the Anticybersquatting Consumer Protection Act (ACPA) as an amendment to the Lanham (Trademark) Act 1946. The purpose of the act is to:

> protect consumers and American businesses, to promote the growth of online commerce, and to provide clarity in the law for trademark owners by prohibiting the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks […].

Under the ACPA, the remedies available to the owner of a successful trademark are: (1) injunctive relief, including forfeiture or cancellation of the domain name registration or transfer to the trademark owner; (2) actual damages, profits and costs and, or (3) statutory damages ranging between not less than $1,000 and not more than $100,000 per domain name.[240] However, the most significant disadvantage of litigation under this Act is that it is time-consuming and extremely expensive.[241]

Court systems can also be used to sort out cybersquatting claims, but jurisdiction is often a problem, with courts having variously ruled that the proper location for a trial is that of the plaintiff, the defendant, or the location of the server through which the name is registered. Legislation in countries such as China and Russia does not view cybersquatting in the same way or with the same degree of seriousness as US law does.[242]

[240] Anticybersquatting Consumer Protection Act 15 USC § 1125(d)(1)(C), § 1117(d)
[241] Janet Moreira, 'Making an Informed Choice between Arbitration or Litigation: The Uniform Domain-Name Dispute Resolution Policy vs. The Anti-Cybersquatting Act' (2003) 44 *Idea* 147
[242] Steven Wright, 'Cybersquatting at the intersection of internet Domain Names and Trademark Law' (2012) 14.1 *Communications Surveys & Tutorials, IEEE* 193

4.8.3 Arbitration path (UDRP)

As Edward Brunet points out, the UDRP is the result of a collaborative effort between the World Intellectual Property Organization (WIPO) and ICANN to remedy the chaos involving domain name disputes.[243] The WIPO proposals sought to establish a uniform, mandatory domain name dispute policy for the resolution of cybersquatting disputes and an accompanying arbitration system.[244] The final versions, the Uniform Domain Name Dispute Resolution Policy and the Rules for Uniform Domain Name Dispute Resolution Policy were accepted by ICANN at its annual meeting in November 1999. WIPO was also approved as the first dispute resolution service provider, followed by others including the National Arbitration Forum (NAF), Disputes.org/eResolution consortium (DeC) and the CPR Institute for Dispute Resolution.[245]

4.8.4 The UDRP procedure

The UDRP procedure follows five stages which are detailed below.

4.8.4.1 Preparing and filing a complaint

The first step is to submit the complaint to any accredited UDRP provider, although WIPO, as the first centre accredited by ICANN, is the most specialised in this field. It has vast experience in solving intellectual property disputes and is accepted by any accredited provider. It provides a standard claim form which can be used as a guide for filing a claim; however, it does not restrict the party's autonomy, but this must show the grounds on which the complaint is made including:

[243] Edward Brunet, 'Defending Commerce's Contract Delegation of Power to ICANN' (2002) 6 J *Small & Emerging Bus L* 1, 15-16
[244] Diane Cabell, 'Overview of Domain Name Policy Development' (2013) <http://cyber.law.harvard.edu/udrp/overview.html> accessed 7/10/2013
[245] ICANN, 'Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy' (2013) https://www.icann.org/resources/pages/schedule-2012-02-25-en accessed 7 October 2013

1. The manner in which the domain name is identical, or confusingly similar, to a trademark or service mark in which the complainant has rights;
2. Why the respondent should be considered as having no rights or a legitimate interest in respect of the domain name that is the subject of the complaint; and
3. Why the domain name should be considered as having been registered and is being used in bad faith.[246]

This facilitates the process for non-legal experts but language can be an obstacle since the rule requires the complaint to be submitted in the language of the registration agreement, which may deter some users.

4.8.4.2 Filing a response

The time limit is a significant procedural element of the response, as Rule 5 states that: "Within twenty (20) days of the date of commencement of the administrative proceeding the Respondent shall submit a response to the Provider." [247] Therefore, if the Respondent fails to respond within the time limit, the panel is not obliged to view the response and can take its decision without having considered any response. There is room for discretion as the panellist may grant an extension due to language barriers or any other circumstances. This period may also be extended by written stipulation between the parties, provided this is approved by the provider. The response should be of the following circumstances, in particular but without limitation, to demonstrate the rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

[246] Internet Corporation for Assigned Names and Numbers Board of Directors, Rules for Uniform Domain Name Dispute Resolution Policy (2009) (hereafter UDRP Rules) <http://www.icann.org/en/help/dndr/udrp/rules> accessed 20 October 2013
[247] UDRP Rules

(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.[248]

4.8.4.3 The appointment of the Administrative Panel

Both parties must choose either one or three panellists, and according to Geist[249] who analysed 4000 claims, "eighty-nine percent of the cases were resolved by a single member." If there is to be a single panellist, he or she will be appointed by the dispute resolution provider; if either the complainant or respondent opts for a three-member panel, then each party has to choose one panellist from the list whilst the third party will be chosen by the provider. However, the appointment of the panellist raises an important question about impartiality and independence, which is addressed by Rule 7 which states that:

A Panellist shall be impartial and independent and shall have, before accepting appointment, disclosed to the Provider any circumstances giving rise to justifiable doubt as to the Panellist's impartiality or independence."[250]

[248] ICANN, Uniform Domain Name Dispute Resolution Policy (1999), para 4(a)(ii) (hereafter UDRP) <http://www.icann.org/en/help/dndr/udrp/policy> accessed 20 October 2013
[249] Michael Geist, 'Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP' (2001) 27 *Brooklyn Journal of International Law* 903
[250] UDRP Rules

4.8.4.4 The Administrative Panel's Decision

The panel can decide between three possible decisions: first, the disputed domain name(s) could be transferred; second, the disputed domain name(s) can be cancelled; and third, if the panel finds that the complaint was brought in bad faith, it can rule in favour of the domain name registrant. With regards reaching a decision, paragraph 15(b) of the UDRP Rules provides that "In the absence of exceptional circumstances, the Panel shall forward its decision on the complaint to the Provider within fourteen (14) days of its appointment."[251]

4.8.4.5 The enforcement and the role of the registrar

The Registrar plays a significant role in the administrative proceedings as he or she implements the Administrative Panel's decision, provides the requested information to the WIPO Centre, and prevents the transfer to a third party of a domain name registration; although the UDRP Rules allows both parties to initiate legal action in the court with jurisdictional competence. Moreover, the UDRP Rules also define mutual jurisdiction as a court jurisdiction at the location of either the principal office of the registrar or the domain name registrant's address. In practice, the majority of domain name disputes are resolved by UDRP due to the cost of litigation. In addition, the Rules only allow a 10-day period to challenge the decision in court, which could prevent parties from initiating legal action. Some argue that this aspect of the UDRP Rules needs to be improved by extending this period.

4.8.5 Applying UDRP to e-commerce disputes

The UDRP has proven that it is possible to develop a system for providing an efficient dispute resolution mechanism which would build trust and enhance confidence in online transactions. It is undoubtedly the case that the success of UDRP has enhanced consumer confidence in e-commerce by reducing the possibility of fraudulent domain names, and by developing a

[251] UDRP, para 15 (b)

transparent international system that enables domain holders to overcome cybersquatting efficiently.

What is more, the success of the UDRP in providing an international forum to resolve domain disputes has overcome the obstacle of choice of law and applicable law concerns as under UDRP Rules, a decision can be reached without the need for referral to any national law. Also, since the procedure is conducted without any hearing, relying instead on documentation, the cost of dispute resolution is minimised. This would be a major advantage for those involved in e-commerce disputes due to their cross border nature, and the fact that transactions are sometimes of small value, making it unfeasible to large sums of money on litigation. Moreover, the UDRP Rules have a self-enforcement mechanism, so the winning party does not incur any additional costs in enforcing the decision, but if either of the parties is dissatisfied, they could proceed with litigation.

According to Pablo Cortés,[252] UDRP is the best known online arbitration process. Thus, the UDRP process offers great promise as a model for e-commerce dispute resolution. Its numerous advantages and the similarities between disputes concerning domain names and e-commerce should serve to convince consumers about its effectiveness, as well as online sellers wanting to create a reliable and attractive business environment.

In his study which applied the UDRP model to online consumer transactions, Donahey[253] shows how the Policy and Rules could be modified to produce what he calls an 'Online Consumer Dispute Resolution Policy' which would aim to address the most basic types of consumer complaints. These include: that the goods or services received were not as they were

[252] Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010)
[253] M. Scott Donahey, 'The UDRP model applied to online consumer transactions' (2003) 20 *Journal of International Arbitration*, 5

represented to be; that they were not delivered within a reasonable time; or that although ordered they were never delivered.

In turn, online merchants need to prove that:

1. the goods or services were represented to the online consumer according to their identity, quality, quantity or condition; or
2. that the online consumer wrongfully and without justification, refused to accept delivery; or
3. that the consumer failed or refused to pay.

However, Julia Hornle[254] argues that UDRP processes are unfit for resolving e-commerce disputes because they have been modelled on traditional commercial arbitration. Colin Rule[255] is also sceptical about applying UDRP to e-commerce disputes, arguing that ICANN has been something of a failure, with endless divisions and arguments hamstringing the organisation and preventing it from making decisions or functioning at all.

Perhaps the biggest challenge in applying UDRP to e-commerce is that majority of transactions may be of low value which means it is not worth establishing a claim in ODR using a panellist; however, this issue may be resolved by the use of the sophisticated automated-system which is used by eBay to solve over 60 million disputes per year.[256] This will be discussed in detail shortly in section (4.9.3).

[254] Julia Hornle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press 2009)
[255] Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and other Commercial Conflicts* (Jossey-Bass 2002)
[256] Van den Herik and Dimov, 'Towards Crowd-sourced Online Dispute Resolution', (2012) 7 *Journal of International Commercial Law and Technology*

4.9 Successful example of online mediation

4.9.1 Background

Online mediation is regarded as significant in the field of ODR, which is witnessing a remarkable rise as it is considered to be an alternative to win-lose situations in litigation, and even to some extent to arbitration. This can be seen in the increasing popularity of mediation as a solution based on the satisfaction of the parties and the growth in its use. In his study, Hunt[257] predicted that consumer mediation would soon take the lead, reducing the ratio for arbitration accordingly down to below 20 percent.

The technological revolution has provided easier and faster effective methods of communication, and although communication via electronic tools will not replace face-to-face communication completely, the ability to exchange vast amounts of information quickly is likely to attract increasing numbers of cases to online mediation which relies on the movement of information between parties by a mediator. This information includes issues such as personal identification, determining interests and finding common ground. There are also a number of options which can be considered including generation and transmission of offers, counter offers and agreements. Another vital benefit of online mediation facilitated by technology is analysis and synthesis of information in a matter of seconds, which is important for online mediation.[258]

This section will start by a brief discussion of the development of online mediation within the wider growth of ODR, followed by analysing two significant examples of mediation service providers: Squaretrade (previously eBay affiliation) and the pioneer of complex mediation and negotiation SmartSettle.

[257] Gregory Hunt, 'Consumer ADR in the UK', Consumer ADR in the Spain and the EC, Madrid 11-12 2006; Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010)
[258] David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press 2007)

4.9.2 The development of online mediation

Ethan Katsh and Richard Shell outline the development of online mediation, tracing the history of some of the North American projects which were undertaken during the early experimental phase. These include:

- The online ombudsman project was a virtual magistrate ODR project pilot programme launched in June 1996 at the University of Massachusetts.[259]
- The Maryland family mediation project was established by the National Centre of Automated Information Research. It was intended to bring people together virtually and resolve family disputes. However, this project did not progress due largely to technical difficulties which users experienced during the early period of the Internet era, including poor access to broadband Internet services.[260]
- The cyber tribunal project was initially based at the University of Montreal's School of Law, and then developed into a commercial service providing online mediation as well as resolving disputes concerning domain names.

At the time of these initial experiments and projects, the number of cases resulting from online issues was probably very low and some of these projects did not remain active for long; however, other successful online mediation services have been established and a number of initiatives continue to grow. One of the most important examples to be discussed in detail is Squaretrade, which through its affiliation with eBay, has mediated millions of online disputes. Smartsettle is also a pioneer of both e-negotiation and e-mediation.

[259] Ethan Katsh and Richard Shell, 'The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace' Department of Legal Studies, University of Massachusetts http://www.umass.edu/dispute/ncair/katsh.htm accessed 10 November 2013

[260] Colleen Getz, 'Closing the Distance with Technology: Report on Phase I of the Technology-Assisted Family Mediation Project, British Columbia Mediator Roster Society, Victoria, BC December 2007

4.9.3 SquareTrade

SquareTrade is regarded as one of the leading providers of online mediation and negotiation systems. Its main role is to build trust and enhance confidence in online business transactions by resolving business-to-customer (B2C) disputes.[261] Since its establishment in 1999, SquareTrade has formed a strategic partnership with eBay in order to assist the company's users to resolve their disputes; although the SquareTrade service was not offered exclusively to eBay users, the vast majority of disputants were eBay users.[262] In May 2008 the ODR services provided by SquareTrade were taken over by eBay, PayPal and their ODR system.[263] However, due to the leading role which it has played in this field, it is useful to examine its experience as the dominant eBay ODR system.

In fact, there are two forms of SquareTrade mediation systems. The first has been described as a technological hybrid between negotiation and mediation, as the software is programmed to intervene in the negotiation between the parties, and take the role of mediator, by attempting to formulate the problem and address the interests of both parties. The aim is to find an acceptable solution and help the disputants to move from 'problem mode to a solution stand'.[264]

In terms of the procedures, the first step is for a disputant to initiate the system by filing an online dispute form. The form provides some options describing the most popular types of dispute such as non-delivery of goods or services; improper selling practices; misrepresentation; credit and billing problems; guarantees and warranties; unsatisfactory service, or unfulfilled contracts.[265] Complainants can also complete an open-text box describing their particular problem if it is not found in the menu. In addition, they are required

[261] Spencer and Brogan, *Mediation Law and Practice* (Cambridge University Press 2007) 479
[262] Orna Rabinovich-Einy, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 *Harvard Negotiation Law Review*, 253
[263] Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2010) 260
[264] Rabinovich-Einy, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 *Harvard Negotiation Law Review*, 253
[265] Ibid

to select the solution they are seeking. The system then sends an email to the other party explaining the situation and the basic information about the complaint. The party is required to choose one of the solutions presented or he or she can suggest an alternative.

The majority of online disputes are limited to specific cases, which are discrete contractual transactions that terminate upon the performance obligation;[266] however, SquareTrade also provides tools that can create a long-term relationship, transforming individuals from one-time only users to members of a virtual community.

The second form of SquareTrade services requires human intervention through asynchronous email communication, and is facilitated by over two hundred highly trained mediators employed by SquareTrade. This service not free of charge like the automated process, and to cover their expenses, a nominal sum of money is required to initiate a complaint using this service. There are some similarities in the role of online and offline mediators, as both of them attempt to uncover the underlying interests of the parties, and then try to mediate and lead them towards an acceptable solution. The difference is that whereas offline mediation involves face-to-face meeting the online equivalent relies on written asynchronous communication.

Another service provided by SquareTrade, seal of membership, is provided to eBay sellers. Under this system, the seller commits to a specific set of selling standards which include participating in the SquareTrade ODR system in a good-faith effort to resolve any disputes that may arise. The seal is an icon displayed by the seller, but full control remains with SquareTrade; therefore, if the seller does not meet the requirements, SquareTrade can remove them at any

[266] Ian R. Macneil, Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus' (1981) 75 Nw ULRev 1018, 1027

time. The seal of membership is intended to enhance buyers' trust and confidence in the seller in case of online dispute resolution.[267]

There are, of course, some limitations to this system, as it relies on written communication rather than new techniques such as video conferencing and only a limited range of disputes can be resolved. Even so, the overall experience should be regarded as greatly successful due to the figure of two million disputes resolved from 120 countries in five languages, with a resolution rate of eighty percent of the disputes it has processed.[268] It also established the eBay model which until now has been regarded as one of the best ODR systems.

4.9.4 Smartsettle

Smartsettle is a business-owned company which provides dispute settlement services and an electronic negotiation method that relies on algorithm analytical mechanisms, which can be used to facilitate the ability of involved parties to settle even the most complicated disputes. Smartsettle generally supports online mediation, but also provides software that can support face-to-face mediation.

In theory, Smartsettle acts as mediator and attempts to help both parties to reach a settlement. It first requests information from all parties to determine the issue of the dispute and to establish their priorities, and their preferences regarding the value of the settlement. Next, the software carries out an analysis using an algorithm and suggests a proposal in order to help parties to reach an efficient settlement by using game theory in order to produce satisfactory outcomes.

[267] Rabinovich-Einy, 'Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation' (2006) 11 *Harvard Negotiation Law Review*, 253

[268] Patrick Barta, 'Web Forum Will Weigh Nasty Property Debates' (*Real Estate Journal*, 8 July 2002) <http:// www.realestatejournal.com/buysell/agentsandbrokers/20020708-barta.html> accessed 15 November 2013

In practice, the Smartsettle system takes parties through a series of seven steps which prepare the participants for negotiation, and it attempts to lead them towards fair outcomes in the most efficient manner. These steps are as follows:

4.9.4.1 Preparation

First it is important to explain the process in detail to all participants involved in the negotiations, ensuring that top-level decision makers are engaged so they can interact efficiently and become familiar with the process. They must clearly identify the problem which needs to be solved and determine their priorities, reflecting their objectives, and then all parties must agree to follow Smartsettle's guidance.

4.9.4.2 Formulate an alternative plan

At this stage, both parties are required to review some options and to come up with one or more ideas, considering the negotiation plan more seriously. This process may include brainstorming sessions which should produce a number of options to determine the range of the proposal.

4.9.4.3 Create a framework for agreement

The term 'framework agreement' is used in offline negotiation and this is defined as "a document in the form of an agreement but with blank space for each term to be resolved by negotiation."[269] Smartsettle applies the same principle, so blank spaces are used to represent the issue to be resolved, but more importantly to create goodwill among parties and build a common framework. It is essential to avoid disputes over language used, so wording should be very clear; the importance of this step is to clarify the disputed issue and agree on the issue.

[269] Ernest Thiessen, Paul Miniato and Bruce Hiebert, 'ODR and eNegotiation' <http://www.smartsettle.com/smart2011/wp-content/uploads/2011/03/OnlineDisputeResolution_ErnestThiessen_PaulMiniato_BruceHiebert.pdf> accessed 17 November 2013

4.9.4.4 Quantify interest and satisfaction

The purpose of this step is to build a dynamic system for the evolution package. This is likely to form a significant part of the process, where the demands and values of the involved parties are rated. Some aspects of the negotiation are shared between parties, such as constraints that they are all agreed on. Other aspects are kept private, such as the preferences and objectives of each party. At this stage, Smartsettle uses pre-programmed tools that can analyse and represent preferences; this could involve millions of computer calculations in a matter of seconds or so.

4.9.4.5 Exchange the proposal

Once the package has been created by each party individually, the formal proposal must be exchanged. It starts with the initial optimistic and best conceivable proposal to establish bargaining ranges for all issues, and then in order to narrow bargaining range, parties may continue with a counter proposal. Also, the pre-programmed software can generate suggestions to produce settlem ent options.

4.9.4.6 Reach an initial agreement

Next, each party should consider his or her preference, and a suggestion is generated by the system. If both parties agree with a particular package, they can place a hidden acceptance and then an initial agreement has been reached. In addition, the software is intelligent as agents can keep proposing and generating new improved settlements in order to maximise the benefits for both parties.

4.9.4.7 Implement the agreement

Finally, parties sign the agreement, and the Smartsettle system attempts to ensure that the agreement is well-crafted and can be implemented immediately. Smartsettle can be regarded as a mix of online mediation and assisted software. Smartsettle has great potential due to its use of mathematical solutions for dispute settlement, but the process can prove difficult for

average non-technical users and therefore, it can provide a human facilitator to manage the session. It could be argued that another drawback to the system is that it is complex and time consuming, and better suited to more complicated, high-value disputes then small to medium consumer disputes, meaning that it has reduced applicability.

However, if these challenges can be overcome by simplifying some of the complex processes, it can be anticipated that in the near future most of these types of software will become more user friendly and will be able to deal with all kinds of disputes.

4.10 Conclusion

The rapid growth in e-commerce has undoubtedly led to a huge number of online disputes, which might reduce confidence in e-commerce. Therefore, an efficient system of online dispute resolution (ODR) would help to build trust in online transactions and preserve online business relationships in the long term.

One of the most prominent advantages of ODR is that it offers a speedy resolution to disputes, and it is cost saving, self-independent, and has convenient procedures. On the other hand, there are some challenges that limit the potential of ODR, for instance, enforcement challenges which due to the difficulties in identifying parties' location may raise the choice of law issue, and this could reduce the certainty of online dispute resolutions. Technical challenges may also raise concerns around ODR, such as online security, privacy, and the confidentiality of information and authenticity of the parties, since ODR could be described as stranger-to-stranger; therefore, it is important to resolve the issue of authenticity and identity of the parties.

Mediation has become an increasingly relevant mechanism in the EU for resolving disputes; therefore, in 2008, the European parliament adopted a directive on certain aspects of mediation in civil and commercial matters, to ensure compliance with fundamental procedural principles such as impartiality, fairness and confidentiality. In fact, the Directive has chosen voluntary

mediation but leaves the option for any Member State to make mediation compulsory before judicial proceedings, for instance, Spain and Italy are implementing mandatory mediation in their national law. However, obligatory mediation would restrict free access to the judicial proceedings that are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom, as well as EU Charter of Fundamental Rights. However, on analysing the nature of the principle of effective judicial protection, it has been found that it is non-absolute, which to some extent would allow for the imposition of compulsory mediation. Also, the CJEU held that the Italian legislation is compatible with the specific provision of the Directive, and neither the principle of equivalence nor the principle of effectiveness preclude national legislation from imposing the prior implementation of an out-of-court settlement procedure, but on condition of certain requirements being satisfied, as stated in the ruling. With regard to enforcement mechanisms, the directive does not specify an enforcement procedure, but leaves this to the general principles of the Rome Convention on the law applicable to contractual obligations. This leaves each Member State to decide its own method for procedural matters.

Another milestone occurred in July 2013 when the EU adopted the most vital initiative, which is ODR Regulation (524/2013), which creates a significant regulatory framework of independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online. More importantly, Article 5 of the ODR regulations require the Commission to create, operate, maintain and fund a user-friendly platform for resolving online disputes, which should be accessible to and usable by all online buyers.

The process of the platform shall start with the submission of complaints through a user-friendly electronic format, and then be processed by the platform by informing the other party (trader) of the complaint. Once both parties agree to use any ADR entity, that ADR entity must conclude the procedure and make the outcome available within a period of 90 calendar days

and require to transmit the following information to both parties: the subject matter of the dispute; the date of receipt of the complaint file and the conclusion of the ADR procedure; and the result of the ADR procedure.

Due to the nature of online dispute resolution and the concerns of online security, the regulations require the process to held with the necessary measures to ensure the security of processed information and duties of confidentiality that are part of the EU rules and legislation.

In fact, this chapter has reviewed some significant cases in the context of England and Wales, which provides evidence of the extent to which the Courts of England and Wales would recognise or support online dispute resolution. For example, in *Cable & Wireless v IBM* [270] the Court endorsed ADR by enforcing mediation clauses, even though this was against the will of one of the parties. *Cowl and Others v Plymouth City Council*[271], confirmed this principle of supporting ADR in disputes arising between public authorities and individuals. Also, *Dunnett v RailtrackHalsey v* demonstrated the cost implications for refusing to engage in ADR. [272] *Milton Keynes NHS Trust*[273] attracted a wide debate as the court only encouraged the use of ADR if it was appropriate according to a list of established factors; this case was reliant on the European Convention on Human Rights as it considers the compelling nature of mediation to be regarded as contrary to Article 6 of this Convention, with the judge referring to a previous case from the European Court of Human Rights,

The last and most recent case, *PGF II SA v OMFS Company 1 Limited*, is a milestone in [274] this field. The Court of Appeal upheld the principles of *Halsey and others* with regard to

[270] *Cable & Wireless v IBM* [2002] CLC 1319, [2002] EWHC 2059 (Comm), [2003] BLR 89, [2002] Masons CLR 58, [2002] 2 All ER (Comm) 1041
[271] *Cowl & Ors v Plymouth City Council* [2001] EWCA Civ 1935
[272] *Dunnett v Railtrack Plc* [2002] EWCA Civ 302
[273] *Halsey –v- Milton Keynes General NHS Trust* [2004] EWCA 3006 Civ 576
[274] *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 (23 October 2013)

awarding the costs against a party who did not participate in ADR; moreover, the judgment extended the principle to cover the silence and considered it unreasonable to refuse to mediate.

Another shift in ODR is online mediation, which is regarded as an alternative to win-lose situation in litigation and arbitration, due to the nature of mediation in resolving disputes efficiently by mutual agreement, which like the sustainable relationship between the parties will be preserved. Also, the technological revolution has provided easier and faster effective methods of online mediation.

One of the leading providers of online mediation and negotiation is SquareTrade, which has been taken over by eBay, PayPal, and adopted as the main provider of ADR services, which may include two types: first, a technological hybrid between negotiation and mediation without the involvement of human intervention; second, mediation through asynchronous email communication but with human intervention, but this service is not free of charge like the automated process. However, the drawback of this service could be a lack of using of new technologies such as video conferencing, as it is based only on writing communication, and also it is limited to types of dispute and amounts that can easily be resolved.

Smartsettle also provides dispute settlement and an electronic negotiation method that relies on algorithm analytical mechanisms, in order to facilitate the ability of parties to reach a settlement, even for the most complicated disputes, by establishing their priorities and their preferences regarding the value of the settlement. Next, the software carries out an analysis using an algorithm and suggests a proposal in order to help parties to reach an efficient settlement by using game theory in order to produce satisfactory outcomes.

However, the service suffers from complexity for average users, and so simplifying the complex processes and making it user-friendly would bring great potential to develop such services further.

Chapter 5: Analysis of UNCITRAL convention and model laws on e-commerce

5.1 Historical background

This section will address the historical development of the Model Laws and international convention on e-commerce from their origins in the early 1990s when the United Nations Commission on International Trade Law (UNCITRAL) started to consider the significant role e-commerce might play in future trade. However, at that time, the concept was referred to as "computer records" or "automatic data processing." The (UNCITRAL) began reviewing the rules relating to automatic data processing in order to eliminate obstacles to their use in international trade, as well as reviewing the legal rules affecting the use of computer records as evidence in litigation. Then, in 1985, UNCITRAL adopted the "Recommendations to Governments and international organizations concerning the legal value of computer records"[275]

However, since that time, the Commission has noted that the issues arising from the use of computer records as evidence in litigation have not been as significant as expected. Instead, the requirement that documents should be in written form or signed is regarded as a more serious legal obstacle to the use of computer records. These Recommendations call upon governments to review the legal rules affecting the use of computer records as evidence in litigation, but they have focused on reviewing the legal requirements for documents to be in written form and for the necessity of a handwritten signature or other paper-based method of authentication.[276]

[275] United Nations Commission on International Trade Law (UNCITRAL) Recommendation on the Legal Value of Computer Records (1985) < http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf>accessed 15 November 2014

[276] A/CN.9/265, UNCITRAL, Eighteenth session, Legal Value of Computer Records, Report of the Secretary-General, Vienna, 3-21 June 1985

Those recommendations were endorsed by the General Assembly in Resolution 40/71, paragraph 5(b), of 11 December 1985 as follows:

> The General Assembly, "[...] Calls upon Governments and international organizations to take action, where appropriate, in conformity with the Commission's recommendation so as to ensure legal security in the context of the widest possible use of automated data processing in international trade".[277]

5.2 Basic principles of electronic communication conventions

5.2.1 Functional equivalence

This principle has been debated since the 1990s when the Internet revolution in technology and electronic communication started. Since then it has become common practice to use the Internet for contracts and commercial transactions, ushering in a new form of commerce. UNCITRAL has taken the lead in ensuring the availability of e-commerce and facilitating its use, by addressing those obstacles that threaten to hinder its growth or cause legal uncertainty.

One of the most significant restrictions concerning the use of electronic means in commercial contracts results from requirements in domestic legislation regarding the use of paper-based documents (including signature and retention of originals). Unless an equivalent electronic version is specified, this can cause uncertainty about the legality of the information provided via electronic means.

This lack of regulations or uncertainty in domestic legislation could act as a major obstacle to the spread of e-commerce in international trade. Therefore, the UNCITRAL Commission adopted the Model Law on Electronic Commerce (1996)[278] which is considered as the basis of

[277] Resolution 40/71 was reproduced in UNCITRAL Yearbook, 1985, XVI, Part One, D.
[278] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998 United Nations Publication, New York, 1999

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[279]. In fact, the Model Law is intended to build confidence in the reliability of e-commerce in cross-border transactions as well as clarifying the interpretation of international commercial conventions which may require paper-based certain documents, for example. The Model Law addresses these issues arising from electronic commerce.

In general, the UN is seeking to establish and entrench the principle of functional equivalence between traditional paper-based methods of documentation which involve signing and retention of originals, and their modern electronic counterpart. The Model Law represented a significant break-through at that time, since countries could invoke this to entrench the principle of technological neutrality, referring to the creation of a neutral environment for new technologies meaning that electronic means could be used for commercial contracts.

The main objective of the UNCITRAL Model Law on Electronic Commerce (1996) is to establish core principles to facilitate the use of modern means in writing and communicating commercial contracts. However, it is not intended to be a legal framework which covered all aspects of e-commerce. Thus, it gives countries the freedom to issue their own regulations, which take into account the need for flexibility in accommodating technological developments. It is possible that issues arising may be dealt with in other bodies of domestic law, covering contracts, or in law applicable to administrative, criminal or judicial procedure.[280]

5.2.2 Technological neutrality

The concept of technological neutrality is regarded one of the key principles in electronic communication regulations and legal frameworks, and it has been considered and accepted

[279] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), and Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts United Nations (New York, 2007) hereafter " the Convention"

[280] A H Boss and W Kilian (eds), *The United Nations Convention On The Use Of Electronic Communications In International Contracts* (Kluwer Law International 2008)

across a wide spectrum of regulatory authorities. In the explanatory note to the United Nations Convention on the Use of Electronic Communications in International Contracts (hereafter UN Electronic Communications Convention), the UNCITRAL secretariat notes:

> The technological neutrality principle in the context of the Electronic Communications Convention and the UNCITRAL Model Laws on Electronic Commerce is intended to provide for the coverage of all factual situations where information is generated, stored or transmitted in the form of electronic communication, irrespective of the technology or the medium used.[281]

The importance of this principle in the context of e-commerce regulation, and in related technical regulations and laws, lies in that it allows legal systems and laws to accommodate technological developments by setting a broad technical standards and avoid specifying or preferring some technologies that could be by the passing of time outdated and obsolete.

The same concept was also endorsed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 regarding a common regulatory framework for electronic communications networks and services (recital 18) which requires Member States:

> To ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.[282]

[281] United Nations Convention on the Use of Electronic Communications in International Contracts, para 47
[282] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (*) as amended by Directive 2009/140/EC (**) and Regulation 544/2009 (***) (unofficially consolidated version)

Therefore, it is clear that both UNCITRAL and the EU recognise the concept of technological neutrality, which is of high importance, particularly with the rapid change in the technological era, as it requires drafting legislation that relates to technology in a technology-neutral way and avoiding preferring a particular technology that in time may become obsolete; this is to prevent obstacles to new developments in technology and the need to change some of the provisions.

5.2.3 Freedom of contract

The UN Electronic Communications Convention is regarded as a facilitative rather than a regulatory instrument, taking into account the fact that solutions to the legal difficulties raised by the use of electronic means of communication are mostly sought within contracts. Thus, the party's autonomy has been considered by the UNCITRAL Commission as a vital element in contract negotiations.

Reviewing the purpose of this Convention, it is clear that it does not seek to impose further regulations and requirements on e-commerce, nor to address the issues regarding the inequality of negotiating parties in order to create a protective environment. Rather, the UNCITRAL Commission aims to enhance legal certainty and confidence in the formation and applicability of electronic contracts.

The UNCITRAL Commission considers that the responsibility for regulating e-commerce and consumer protection lies with domestic legislation which could cover issues of this kind. In fact, the Convention assumes that the parties to the contract would be adequately mindful in choosing the most appropriate legal solutions and arrangements based on their specific needs without any significant need for legal protection or legislative guidance. However, this assumption is contrary to the approach that is taken in EU legislation, and in particular, the context of e-commerce needs further protection in order to enhance consumer confidence due to the complexity and ambiguity surrounding e-commerce.

The Convention allows the parties to a contract the freedom to choose the most appropriate legal arrangements. However, with regards to statutory requirements such as the use of a method of authentication, the Convention provides criteria which would satisfy formal requirements, including, for instance, prohibiting the use of a method of authentication that would provide a lesser degree of reliability than the minimum standards provided by the Convention.

In fact, a better approach would be to develop appropriate provisions that can create a balance between a facilitative method according to the principle of freedom of the contracting parties, which allows the contracting parties the autonomy to organise their contract between them in the most appropriate fashion; and between the regulatory approach which is subject the principle of party autonomy concerning the requirements of good faith, fair dealing and the mandatory rules that seek to balance the inequality of parties' bargaining powers in order to reach optimum protection for the weaker party (the consumer).[283]

5.3 Formal requirements

National laws and regulations concerning the making of contracts often specify a large number of formal requirements; for example, the use of paper-based documents and inclusion of particular information therein. Moreover, parties could be required to sign or seal some contracts, or retain originals to be presented upon request, such as certificates concerning insurance, quality or quantity, agricultural, inspection reports, and so on. At first glance such formal requirements could be considered an obstacle to the growth of e-commerce, so UNCITRAL considered this matter carefully, seeking to resolve this issue through the so-called functional equivalence principle.

[283] A H Boss and W Kilian (eds), *The United Nations Convention On the Use of Electronic Communications In International Contracts* (Kluwer Law International 2008)

This principle recognises the existence of these formal requirements, and does not seek to remove these provisions or challenge the concepts underlying them, but instead uses this principle to assist local legislators to adapt these formal requirements in order to accommodate the use of modern technology in commercial contracts without prejudice to such requirements. The functional equivalence approach is based on the analysis of the purposes and functions of the formal requirements. Once these have been accurately identified, it is possible to clarify how these functions might be achieved using modern technologies. Thus, this principle connects formal requirements of their purposes and functions, rather than prescribing a particular equivalent technology, in line with the principle of technological neutrality. Any new means which can achieve the functions and purposes of the existing formal requirements will enjoy the same degree of legal recognition enjoyed by paper-based documents performing the same function. For instance, in the case of a paper-based document, it is difficult at first glance to consider electronic communication in itself as an equivalent due to its different nature. Unlike paper-based documents, electronic communication must be read on a screen or printed. Similarly, regarding retention of the document, in the electronic environment the possibility of altering or amending documents is higher than the paper-based context. These illustrate the types of differences apparent in the nature of the two types. However, by analysing the purposes and functions of the requirements of using a paper-based document, it is possible to establish standards which can be used to determine how these can be achieved in electronic format.

The principle of functional equivalence is illustrated in Article 5 of UNCITRAL Model Law on Electronic Commerce 1996 and Article 8, clause 1 of the United Nations Convention on the Use of Electronic Communications in International Contracts, which imposes the legal recognition of data messages, and recognises that electronic communication should be considered legally equivalent to paper-based documents. However, the Model Law and the Convention are not intended to give an absolute legal value to any electronic data message.

Neither is intended to create a substantive rule on the validity of data messages or to abolish the requirements of some contracts.[284]

5.4 Writing requirements

In fact, in the preparation of the convention, UNCITRAL was trying to identify and analyse the objectives and functions of the writing requirements, and it found that national laws require the use of "writing" for various reasons, such as:

• The written record should provide evidence of the parties' intention of commitment to the contract

• The form of wording should help the parties to realise the consequences of the conclusion of the contract

• Authentication methods such as a signature and seal should be used to provide a written record

• A permanent record of the contract is required to ensure that this cannot be modified without the consent of the parties

• Copies of the contract should be provided to all parties for retention

• In order to facilitate control and subsequent audit for accounting, tax or regulatory purposes

When the working group analysed these functions, they found they could be classified into two types: First, those which relate to the reliability and integrity of the document with more stringent requirements, such as "signed writing", "signed original" or "authenticated". Second, functions that require only writing, such as some national laws requiring written documents,

[284] United Nations, General Assembly, Report of the Working Group on Electronic Commerce on the work of its forty-second session, A/CN.9/546 , (Vienna, 17-21 November 2003) < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V03/904/75/PDF/V0390475.pdf?OpenElement> accessed 22 October 2014

regardless of whether the document is signed or presented in its original format, has evidential weight in the absence of other evidence. [285]

Therefore, after considering these functions, the working group produced an objective standard to determine when to consider electronic documents to be equal to paper-based documents, as Article 9 states that:

> 2- Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. [286]

The reference to accessibility means that the document must be readable by the average user and therefore cannot consist of electronic codes or programming language which can only be read by those with the appropriate technical expertise. UNCITRAL also specifies “to be usable for subsequent reference” meaning it must be possible to retrieve the document or contract at a later date, thus addressing notions such as “readability” or "reproducibility", which might constitute too subjective criteria.

In fact, UNICITRAL have taken an appropriate approach to absorbing the functions of writing and starting with the lowest layer in a hierarchy of formal requirements, to give an objective standard to fulfil each factor of these requirements.

5.5 The availability of contract

Another issue with regard to formal requirements is the availability of contract terms, as in a traditional environment it is more likely that there will be a physical record of the contract or

[285] United Nations Convention on the Use of Electronic Communications in International Contracts, para 144
[286]The United Nations Convention on Contracts for the International Sale of Goods (CISG) United Nations Publication, New York, 2010

document, with the other party holding a copy which would form a reference if the parties were engaged in conflict. However, in an electronic context it is unlikely that the data record would be retained and would be displayed during the contract negotiation only; once it has been signed, nothing is available to view. Moreover, or the hyperlink relating to the provisions incorporated by reference might have been removed or updated. With this in mind, the UNCITRAL commission has discussed and analysed the issue of including an Article which requires the seller to ensure that electronic contract terms or any contract which is negotiated electronically remain available.

Supporters of the need for this Article through the Working Group IV[287] believe that given the nature of the electronic context, it may constitute a real risk to the weaker party, as the agreement is based on the terms and conditions displayed on the screen during the contract process or referred to by hyperlink, and later there may be no possibility of accessing these. This involves consumers or even business entities, and the omission of such a point is not in favour of the party accepting the terms, especially as the electronic context is fast-paced and requires some skill, which not all users will possess equally. [288]

It has also been argued that imposing this obligation would enhance confidence, build trust and legal certainty and encourage good business practice, all of which would increase the growth of e-commerce. It has been suggested, moreover, that the rule should be expanded to cover any subsequent changes in contractual conditions as well.[289]

Therefore, the Working Group IV suggested the following draft Article:

[287] UNCITRAL assigned the topics to working groups. Each group was required complete its substantive task and conduct a discussion without intervention from the Commission. At the end of each working group session, a report was considered and formally adopted for submission to the annual session of UNCITRAL. Working Group IV from 1997 to the present is responsible for Electronic Commerce.
[288] A/CN.9/571 - UNCITRAL - Report of the Working Group on Electronic Commerce on the work of its forty-fourth session (Vienna, 11-22 October 2004) para 178
[289] Ibid

> A party offering goods or services through an information system that is generally accessible to persons making use of information systems shall make the data message or messages which contain the contract terms available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction. [A data message is deemed not to be capable of being stored or produced if the originator inhibits the printing or storage of the data message or messages by the other party.][290]

The opposing view, however, is that applying such rules without any corresponding sanctions for failure to comply with these requirements might lead to the non-enforceability of the provisions expressly agreed upon by the parties, making it pointless to establish such a duty. In addition, it could be argued that any infringement of these rules should be dealt with under domestic law, so it is unclear how this Convention could impose sanctions in such a context.[291]

It has also been argued that if the Model Law and Convention imposing this requirement it will create a contrast between the electronic and paper-based environment, thus departing from the policy that the draft instrument should not create a duality of regimes governing paper-based and electronic transactions.[292]Moreover, it is unlikely that the Convention will use sanctioning tools such as tort liability, administrative sanctions, or contract invalidation because this would lie outside the scope of the Convention and Model Law. Existing texts, such as the United Nations Sales Convention, have not dealt with contract validity.[293]

Having considered the views that have been expressed, the prevailing view was against introducing a duty to make contract terms available, in part due to the lack of consensus on

[290] A/CN.9/546 - UNCITRAL - Report of Working Group IV (Electronic Commerce) on the work of its forty-second session (Vienna, 17-21 November 2003) para 130
[291] A/CN.9/571 - UNCITRAL para 179
[292] A/CN.9/509 - UNCITRAL- Report of the Working Group on Electronic Commerce on its thirty-ninth session (New York, 11-15 March 2002) para 123
[293] A/CN.9/571 – UNCITRAL para 177

Article 15 [16]. Instead, the Commission chose to adopt Article 13- Availability of contract terms:

> Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequence of its failure to do so.[294]

That is, the UN Convention has chosen a "safe harbour" provision which would constitute only a reminder of the applicable domestic legislation, while at the same time avoiding the creation of any substantive rule that would fall outside the scope of the Convention, also it does not impose any consequence for failure to perform the duty.

The EU have taken a different approach by adopting a peremptory provision in Article 10, paragraph 3, of the EU Directive on Electronic Commerce which provides that: "3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them," [295]

Overall, it could be argued that imposing this obligation would enhance confidence, build trust and legal certainty, and encourage good business practice, all of which would increase the growth of e-commerce. Also, since the application is subject to domestic laws, for instance, there would be a wide variety of consequences in the event of the failure to make the terms available.[296] Therefore, it is not appropriate to take an optional approach instead of adopting peremptory provision.

[294] United Nations Convention on the Use of Electronic Communications in International Contracts
[295] Directive on electronic commerce [2000] OJ L 178/1–16
[296] Wang Faye Fangfei "The incorporation of terms into commercial contracts: a reassessment in the digital age." (2015)2 Journal of business law, 87-119.

5.6 Incorporation by reference

The concept of incorporation by reference was adopted by the Commission at its thirty-first session in June 1998 Article 5 bis, and stems from its main objective to facilitate of the use of e-commerce. The concept of incorporation by reference refers to the inclusion in a contract or document of a reference to detailed provisions which are laid out elsewhere and not reproduced full in that location. Some legal systems accept the principle of incorporation by reference in paper-based documents and contracts, and recognise the effectiveness of such provisions which are referred to the main contract.

Article 5 bis refers to the exchange of electronic data using email or digital certificate and to all those forms of electronic communication which facilitate inclusion of the key points of the contract only, and incorporate a reference or a hyperlink to those points which are judged to be of least importance. Hyperlinks are most commonly used to direct readers to the referenced document containing full contract terms or clarifying the provisions of the contract, by embedding this data in a uniform resource locator (abbreviated URL). Hyperlinking can also be used to clarify the meaning of some significant contract terms, instead of the glossary traditionally used in paper-based documents, meaning that terms are only displayed in full when accessed via a pointing device such as a mouse. It is also possible to use public key certificates for this purpose. These which are brief records that are finite in size where the issuer of the certificate, which is third party, seeks to use incorporation by reference due to the limited size of the data message.

In fact, this issue has a rich history and attract attention in Case law in the case of Trebor Bassett Holdings & another v ADT Fire [2012][297] and Security [as Mr Justice Coulson applied

[297] Trebor Bassett Holdings Ltd v ADT Fire & Security Plc (Interim Payment) [2012] EWHC 3365 (TCC)

the principles set out in Circle Freight International Limited v Medast Gulf Exports Limited [1988][298] in which Lord Justice Taylor held that:

> It is not necessary to the incorporation of trading terms into a contract that they are conditions in common form or usual terms in a relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Other considerations apply if the conditions or any of them are particularly onerous or unusual.

Morover, Lord Justice Bingham stated that, in this particular case:

> There was no other contract document between these parties other than the invoice. Each invoice bore the legend – 'all businesses transacted by the Company under the current trading conditions of the Institute of Freight Forwarders, a copy of which is available on request'. That lettering was clear and legible. It was placed immediately below the price payable on the invoice where the eye would naturally light on it ... applying to this case the question 'has reasonable notice of the terms been given?' the only possible answer in my judgment is that it has ... the clear rule of English law is that clear words of reference suffice to incorporate the terms referred to[299].

On the one hand, it could be argued in support of such this Article, as this assertion of incorporation by reference is crucial and vital for the growth of e-commerce which relies on speed and shortcut features such as hyperlinking. There is also support for this Article on the grounds that it seeks to ensure that incorporation by reference in electronic form carries the same legal certainty and effectiveness of such provisions incorporated by reference in a traditional paper-based context.

[298] Circle Freight International Limited -v- Medeast Gulf Exports (1988) 2 Lloyds Reports 427
[299] Ibid

On the other hand, this Article may disadvantage consumers or the weaker party, since some e-commerce companies may try to deceive customers by referring them to many provisions elsewhere; sometimes, these may even include crucial provisions which are made difficult and unlikely to be read carefully. Faya[300] has analysed several cases in this regard, and revealed that there may be three traditional tests for determining the effectiveness and validity of the incorporation of terms into electronic contracts: First, awareness, which means the party who makes the incorporation should draw the other party's attention to the existence of the contract terms, and the other party should give assent to those terms. Second, a "consistency and regularity" test, which attempts to assess the consistent and regular modes of electronic communications. Third, a "reasonableness and fairness" test for unfair terms in contracts.

After all, it is clear that the stance of UNICITRAL is to accept incorporation by reference based on English case law, which is a substantive rule, and would ensure that incorporation by reference in electronic form carries the same legal certainty and effectiveness as provisions incorporated by reference in a traditional paper-based context. This will ultimately enhance confidence in an e-commerce context, but the effectiveness and validity of the incorporation of terms should be evaluated and interpreted through an objective tests that measure the appropriateness and fairness of such incorporation

5.7 Use of automated systems for contract formation

Automated systems have been the subject of much debate in the context of traditional contract theory, in particular with regards to contract formation. In the case of contracts concluded without human intervention, adequate validated automated systems are required in order to ensure their validity. The usage of automated message systems has become an essential part of the e-commerce process and thus in forming electronic contracts, making it imperative to

[300] Wang, Faye Fangfei. "The incorporation of terms into commercial contracts: a reassessment in the digital age." (2015)2 *Journal of business law*, 87-119.

review the compatibility between automated systems and UNCITRAL principles, Conventions and Model Laws.

The general principles of the United Nations Convention on Contracts for the International Sale of Goods allow parties to choose their own method of concluding a contract, meaning that this convention did not preclude using automated message systems for placing orders to buy or sell. Moreover, the same approach was taken in the UNCITRAL Model Law on Electronic Commerce 1996. Although it did not address the automated message explicitly in its provisions, Article 13. Attribution of data messages states:

> (2) Between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:
>
> (a) By a person who had the authority to act on behalf of the originator in respect of that data message; or (b) by an information system programmed by, or on behalf of, the originator to operate automatically.[301]

Since the convention was introduced in 2005, some nine years after the Model Law on Electronic Commerce 1996, it addressed some significant issues which did not feature in the Model Law, including automated message systems, due to the recognition of the vital role these play in e-commerce. In fact, the convention has addressed the issue of using automated message systems for contract formation clearly in Article 12 by stating that:

> A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in

[301] UNCITRAL Model Law on Electronic Commerce (1996) Article 13

each of the individual actions carried out by the automated message systems or the resulting contract.[302]

5.8 Error in electronic communications

The issue of error in electronic communications has been a key element of the discussions on e-commerce laws, due to the high possibility of errors being made in this form of communication. Moreover it can be difficult to correct such errors or withdraw orders once submitted, also it is not easy to distinguish between the error and the mere change of mind. This makes it all the more essential to clarify the situation regarding differences between electronic and paper-based contracts of the issue of error and mistake.

Contracts made over the phone or in person allow the individual who realises a mistake has been made to immediately take action to rectify this by communicating by some means, electronic or otherwise. An incorrect letter can be followed up by a correct version and the recipient then has clear proof that the error has been noted and amended accordingly. However, when dealing with an automated system via a website, someone making an offer may make a technical mistake by mis-clicking the mouse or a keyboard error, and find there is no chance to correct this. This erroneous offer may be accepted and subsequent communication with the corrected information considered as a new binding offer and acted on.

Initially, UNICITRAL chose to avoid making any changes to commercial law or adding any substantive rules to contract law. A similar approach of avoiding rules of validity of contracts has been taken in most UNICITRAL model laws and conventions, for instance, the United Nations Convention on Contracts for the International Sale of Goods (CISG) clearly states in

[302] The United Nations Convention on Contracts for the International Sale of Goods CISG (Vienna, 1980) United Nations Publication, New York, 2010

Article 4 subparagraph (a) that: "it is not concerned with the validity of the contract or of any of its provisions or of any usage".[303]

Analysis of the legal consequences of mistake and error in different legal systems reveals that the rules are complex and vary in their approaches. Some legal systems have attempted to distinguish between different situations to cover those cases in which someone enters into a contract and later changes his/her mind and then claims to have made a mistake in order to avoid the consequences of the original agreement.

The working group considered the usual UNICITRAL approach of avoiding making substantive changes to commercial law or creating unnecessary complexity in contract law principles, but in the final text, the Commission decided to adopt Article 14 about Error in electronic communications[304] on the grounds that it is more likely to relate to the electronic field even though it involves some substantive rules.

The United States Uniform Electronic Transactions Act (UETA)[305] requires the individual who want to avoid the effect of an electronic record that resulted from an error promptly to notify the other party both of the error and of the individual's intention not to be bound stating that it did not intend to be bound by the electronic record or taking reasonable steps to return to the other person the consideration received.[306] However, in keeping with its usual principles of minimal interference in domestic law, the UNCITRAL Commission limited the scope of the article to two conditions: first, input error, and second, error committed by an individual exchanged with an automated system.

[303] The United Nations Convention on Contracts for the International Sale of Goods CISG (Vienna, 1980) United Nations Publication, New York, 2010
[304] United Nations Convention on the Use of Electronic Communications in International Contracts
[305] The United States Uniform Electronic Transactions Act (UETA) Section 10(2) UETA (1999)
[306] Gabriel, 'New United States Uniform Electronic Transactions Act: Substantive Provisions, Drafting History and Comparison to the UNCITRAL Model Law on Electronic Commerce'2000 The. Unif. L. Rev. ns, 5, p.651.

The earliest draft of this Article as prepared by the working group, raises three issues. The first of these, is the obligation on the party offering goods or services through an automated computer system to make available to the customers a technical means which allows them to identify and correct errors prior to the conclusion of a contract. This is clearly based on Article 10 of the E-commerce Directive which requires the provision of "(c) the technical means for identifying and correcting input errors prior to the placing of the order".[307] Secondly, if an individual makes a material error in a data message, he or she has the right to avoid the resulting contract. Thirdly, it identifies those conditions under which the individual enjoys this right. These include a system not providing an opportunity to prevent or correct errors. However, the individual who has committed the error must notify the other party about this as soon as practicable after he/she learns of this. In addition, this individual must not have used or received any material benefit or value from any goods or services resulting from this error.[308]

The working group expressed concerns relating to the enforceability of this positive obligation to provide a correction mechanism. In addition, it considered this to be part of consumer protection legislation which does not lie under the scope of the convention. Its third concern was that this might interfere with substantive contract law. However, despite these concerns, these new provisions were adopted and confirmed.

The working group also debated the possible consequences of error in this context which might include invalidity of the whole contract; avoidability of the contract, or avoidance of the consequences of the error without this invalidating the contract as a whole. Finally, it was concluded that it is necessary to narrow the scope of this Article to create less impact on national laws and legislation. Some proposed that it should cover all situations; for instance, if

[307] Directive on Electronic Commerce [2000] OJ L 178/1–16
[308] UNCITRAL Working Group IV (Electronic Commerce) Thirty-ninth session, New York, 11-15 March 2002 A/CN.9/WG.IV/WP.95 Article 12

someone clicked "I accept" by mistake or had mistakenly sent confirmation without consent, then the right of withdrawal would be the best solution; if someone inputted the wrong quantity, the right of correction would be more appropriate.[309] After long deliberation, the term "withdraw the error" was chosen rather than "correct the error", although the right of withdrawal enables a party to avoid the consequence of error, whilst the right of correction may involve costs to operator systems and may require offers to be kept open for longer to allow for changes to be made in communication.

The working group debate highlights that balancing the interests of the party who is relying on the promise to act upon it and those of a mistaken party not to be bound by an unintended expression of a promise presents a major challenge, as does determining whether something constitutes mistake, misrepresentation or merely a change of mind.

Thus, Article 14 of the Convention limits liability to very specific situations where the error occurs only between a real person and an automated system, when that system does not provide any opportunity for error correction. It also limits the rights of the mistaken party to withdraw the erroneous portion of the electronic communication. The Convention requires two conditions for the right of withdrawal. The first addresses timing, requiring the mistaken party to "notify the other party of the error as soon as possible after having learned of the error and indicate that he or she made an error in the electronic communication". The second condition is that the individual has not "used or received any material benefit or value from the goods or services."[310]

With regards to the first of these conditions, the use of the phrase "as soon as possible after having learned of the error," needs to be clarified to enhance the certainty of electronic

[309] John D Gregory and Joan Remsu, 'Error in electronic communication' in AH Boss and W Kilian (eds) *United Nations Convention on the Use of Electronic Communications in International Contracts* (Kluwer Law International 2008)
[310] United Nations Convention on the Use of Electronic Communications in International Contracts

contracts as the Convention does not specify any set period. However, the most recent Directive on Consumer Rights adopted by the European Commission on 25 October 2011 introduced a 14-day cooling off period, giving consumers the right to withdraw from a contract.

After analysing the function of "withdrawal" of input error which could protect the party who hits a wrong button, Faye Wang[311] suggested a 24-hour time limit depending on the calculation of the starting point of the timing.

In fact, given the characteristics of the electronic communication environment, which include high speed and sophisticated automation, there is a high possibility of a mistake being made which proves impossible to correct before the communication reaches the other party; in that case, as soon as the individual realises this, he/she should take action. Therefore, it is a vital that legislation includes provisions relating to error and mistake. However, for the time being, responsibility may lie with domestic legislation to clarify and specify such provisions in order to avoid concerns relating to this aspect of electronic contracts.

5.9 Electronic communication and contract formation

In the context of traditional contract law, the effectiveness and conclusion of the contract depends on a number of factors, one of which is the time of dispatch and receipt. There are four main theories which can be applied to determine when the acceptance of the offer becomes effective and to clarify the exact time a contract has been concluded: (1) Declaration theory states that a contract is concluded when the addressee declares his/her intention and consent to accept this, and the consideration is the manifestation of the parties' wills; (2) Information theory requires the offeree to know of the acceptance of the contract before it is considered concluded;[312] (3) reception theory, which is applied in most civil law jurisdictions, means

[311] Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China* (Routledge 2010) p 62
[312] Abdulrazzaq Al-Sanhouri, *Contract Theory* (Halabi Legal Publications 1998)

conclusion of the contract depends on the offeror's receipt of the acceptance, and (4) postal-rule theory. This is applied in most common law jurisdictions and is regarded as an exception to the main rule. It considers that the offer has been accepted at the moment of dispatch of the acceptance.[313]

Aware that legal systems use different criteria to determine the exact moment of contract formation, the Convention working group followed established UNICITRAL approach to avoid conflict with existing contractual law on contract formation or making substantive changes to commercial law or creating unnecessary complexity in contract law principles, instead, it attempted to address the technical issues that are most pertinent to electronic communication when determining the time and place of dispatch and receipt.[314]

Determining time and place of dispatch and receipt is highly significant in the context of different jurisdiction and applicable laws because this relates to when the contract is judged to have been formed. This also helps when setting time limits for compliance and allocating risk in the proposed transaction.[315]

5.9.1 Time of dispatch

The Convention has redefined the time of the dispatch of an electronic communication. Whilst in the UNCITRAL Model Law on Electronic Commerce (1996) time of dispatch is given as when this communication "enters an information system outside the control of the

[313] Ewan McKendrick, *Contract Law* (Palgrave Macmillan 2009)
[314] UNCITRAL, Report of Working Group IV (Electronic Commerce) on the work of its forty-first session (New York, 5-9 May 2003) A/CN.9/528
[315] Wolfgang Kilian, 'Time and place of dispatch and receipt of electronic communications' in AH Boss and W Kilian (eds) *United Nations Convention on the Use of Electronic Communications in International Contracts* (Kluwer Law International 2008)

originator,"[316] the convention regards time of dispatch as being "when the electronic communication leaves an information system under the control of the originator."[317]

The Model criteria are consistent with the United States Uniform Electronic Transactions Act (UETA) which in Section 15 notes: "an electronic record is sent when it [...]. (3) enters an information processing system outside the control of the sender".[318] According to Wang[319], the term "leaving" rather than "entering" is employed in order to mirror the notion of dispatch in a non-electronic environment. In practical terms, the result is the same since the easiest way of proving that a communication has left an information system under the control of the originator, is to find the indication, in the relevant transmission's protocol, of the time when the communication was delivered to the destination information system or to any intermediary transmission systems.[320]

5.9.2 Time of receipt

Differences between receipt of electronic communications and their paper-based equivalents make it vital to adopt rules concerning this aspect of electronic communication. In addition, security concerns regarding information and communication technology have led to the use of security measures such as firewalls or filters which can prevent electronic communications from reaching their addressees. Moreover, electronic communication often involves multiple

[316] UNCITRAL Model Law on Electronic Commerce (1996) Article 15
[317] United Nations Convention on the Use of Electronic Communications in International Contracts (2005) Article 10
[318] National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (1999) Annual Conference Meeting In Its One-Hundred-And-Eighth Year In Denver, Colorado, JULY 23 – 30, 1999 <http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf > accessed 19 December 2014
[319] Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China* (Routledge 2010)
[320] Kilian, 'Time and place of dispatch and receipt of electronic communications' in AH Boss and W Kilian (eds) *United Nations Convention on the Use of Electronic Communications in International Contracts* (Kluwer Law International 2008)

intermediaries and addresses, making delivery more complex than for paper-based equivalents.[321]

Thus, when specifying the time of receipt, the Convention differentiates between two cases. The first concerns when the addressee designates a specific address which is then use for communication; in this situation, time of receipt is when the communication becomes capable of being retrieved by the addressee. In the second instance, if the communication has been sent to an address other than the designated one, then the time of receipt is when the communication becomes capable of being retrieved and the addressee is aware of this electronic communication having been sent to the undesignated address. No provision is made for those instances in which the addressee did not designate a specific address. Moreover, in both cases, the Convention presumes that the electronic communication is capable of being retrieved by the addressee when it reaches the user's electronic address. In general, then, this rule is consistent with Article 15 of the UNCITRAL Model Law on Electronic Commerce (1996).

As is the case in the UNCITRAL system, the Convention avoids including details which might be in conflict with domestic laws. These involve communication being overridden, such as encoded messages where the communication is not intelligible or usable by the addressee. The Convention also remains silent on the possible impact of accessibility on timing, for instance if electronic devices are switched off in the evenings or at weekends, or if the address is blocked meaning that electronic communication cannot be received. Wolfgang Kilian[322] argues that uncertainty about accessibility to electronic devices would have a negative impact on electronic communication. Thus, it could be useful to note points of consideration for determining the time of receipt based on this provision:

[321] Ibid
[322] Kilian, 'Time and place of dispatch and receipt of electronic communications' in AH Boss and W Kilian (eds) *United Nations Convention on the Use of Electronic Communications in International Contracts* (Kluwer Law International 2008)

Firstly, accessibility in electronic communication should apply only to a designated address, thus if someone has a designated email address for business purposes, if communication is sent to another email address, this should not be deemed to have been received whether access can be gained to that email address or not.

Secondly, the Convention failed to distinguish between accessibility and retrievability. Even if the electronic communication is accessible, it should not be considered to have been received until the addressee actually retrieves it, for example, in those cases when communication is sent to a non-designated email.

Thirdly, if the addressee does not designate an address then the communication should not be regarded as received until it becomes apparent that the electronic message was sent to this address and the addressee has retrieved it.[323]

Fourthly, firewalls and filters put in place to block junk or suspicious email with viruses or blacklisting services may prevent receipt of important electronic communication. Thus, it could be argued that the originator of the electronic communication may assume that the message has been sent in the normal way, and did not know anything to the contrary. Moreover, the security programme is under the control of the addressee so he/she should bear the responsibility for non-receipt. However, information security measures are increasingly important to prevent threats to data. Moreover, such measures are sometimes not applied by the addressee but at Internet service provider level. Therefore, it is unwise to make the addressee solely responsible in such cases, suggesting the need to find alternative solutions such as electronic reconfirmation records to check whether the message has been received.[324]

[323] Wang, *Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China* (Routledge 2010)
[324] Kilian, 'Time and place of dispatch and receipt of electronic communications' in Boss and Kilian (eds) *United Nations Convention on the Use of Electronic Communications in International Contracts* (Kluwer Law International 2008)

5.9.3 Location of the parties

One of the most significant successes of the Internet has been the creation of a worldwide market, and cross-border contracting is a core aspect of e-commerce. However, establishing the location of parties in the case of commercial websites and e-commerce services can present difficulties. For instance, if the head office of a company is in London, while the technical team is based in China and the payment processing team in New York, how is it possible to determine where the contract has been formed and where the company is established? The location of the parties raises significant concerns regarding the question of jurisdiction and choice of law and which law should govern transactions.

Initially, the Convention working group considered the possibility of imposing a positive duty on parties to declare the place of business, but after careful consideration, it was agreed that it would be inappropriate for a commercial law instrument to include such a duty due to the difficulties of imposing sanctions if there was a failure to make such a declaration. However, as the Convention aims to remove obstacles to cross-border e-commerce, it has realised the importance of determining the location of parties and this issue features in three separate articles.

Article 4 paragraph H, offers a definition of "place of business" as meaning: "any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location." [325]

Article 6 makes provision regarding the rules of the location of the parties. First and foremost, when the party indicates their location, it is presumed that this is their place of business. This clearly gives parties the ability to choose their place of business, by indicating on the contract, or in the negotiation that the place of business is situated in a particular place. In this situation,

[325] UNCITRAL, Report of Working Group IV (Electronic Commerce) on the work of its forty-first session (New York, 5-9 May 2003) A/CN.9/528

the other party should rely on this declaration without requiring further confirmation or investigation. In those cases, where the party does not have a place of business, the rule considers this to be "the person's habitual residence".[326]

In the case of a corporation which has multiple places of business and has not indicated a specific place of business, the Convention has set out the default rule for that situation, which is the place of business with the closest relationship to the relevant contract. This default rule is based on Article 10 of CISG, but the criteria are more detailed, specifying: "(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance."[327] However, this could create uncertainty and duality of regimes in those cases when the party has multiple places, and one is more connected to the contract and the other to its performance.

The Convention has adopted a cautious approach concerning virtual locations in cyberspace, instead relying on determining the physical location of the party. The Convention thus excludes the location of equipment and technology supporting the information system, and the place where a party accesses this. The working group also discussed the use of domain names or Internet protocols to determine the location of the parties but decided not to use these on the basis that the domain name system does not always involve a geographical base, particularly given the differences in standard and domestic requirements for attributing a domain name to a specific country. It was noted that in some instances there is a greater likelihood that a domain name does, in fact, reflect the party's location and it was agreed, therefore, that whilst nothing prevents the domain name being linked to the presumed location of the party, this should not be used as the sole factor in determining location.

[326] Ibid
[327] UNCITRAL secretariat, CISG (Vienna, 1980) United Nations Publication, New York, 2010, Sales No. E10 V14

5.10 Online Security

5.10.1 Introduction to the Model Law (e-signature)

In the practice of normal business transactions, the function of the signature in general is to provide authentication of the signatory as well as being a sign of consent to a binding contract. In the field of e-commerce, the parties are faced with two issues: first, confirming the identity of the other party and ensuring he/she is actually the person who he/she claims to be; second, ensuring the integrity of the message and that it is only received by the person to whom it is presumed to have been sent.

Following the principle of functional equivalence, the provisions of the UNCITRAL Model Law on Electronic Commerce 1996 recognise electronic signatures and state the functions of the signature in an electronic environment. However, due to the increased need for online security, particularly electronic signatures and authentication, it is highly possible that countries may take different approaches to technical issues such as electronic authentication. This means Article 6 of the UNCITRAL Model Law on Electronic Commerce 1996 is not adequate due to this growth in sophisticated authentication techniques. Therefore, a uniform legal model is required to harmonise the legal and technical issues of electronic signatures, one which needs to foster an understanding of new techniques for electronic signatures, as well as enhancing the confidence in and reliability of the new methods.

After adopting the UNCITRAL Model Law on Electronic Commerce 1996 in its 29th session (28 May-14 June 1996) in New York, the Commission placed the issue of electronic and digital signature and certification on the agenda. After careful discussion, the Commission reviewed the grounds for adopting this model based on the new developments in technologies that can be used to authenticate identity, leading to legal certainty.

The Commission recognised the importance of this fundamental principle in Article 7 of the Model Law. However, it sought to extend the content of these provisions and try to harmonise the rules concerning legal recognition of technology on a neutral basis by assisting countries to improve their legislation covering modern authentication techniques. Its long terms aim was to contribute towards the development of international electronic commerce. Moreover, the Commission has recognised the importance of electronic and digital signatures and new methods involving certifying authorities. The Commission stressed that the ability to rely on digital signatures would be key to the growth in electronic contracting, and it would provide a great opportunity to establish common principles, thus harmonising the field of electronic signatures. At that time some countries were preparing new legislation on governing electronic signatures, and there was a worry that the lack of uniformity and uncertainty concerning technical standards might hinder the growth of e-commerce. Thus, UNCITRAL decided to focus on digital signatures and certifying authorities in the context of registries and service providers, without involving the technical issues of digital signatures.

The Commission mandated the Working Group to prepare a model law focusing on :

the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference .

5.10.2 Compliance with requirements for signatures

The cornerstone of the UNCITRAL Model Law on Electronic Signatures 2001 (Model Law on Electronic Signatures) is Article 6, which is concerned with compliance with the requirements for electronic signatures. It states that :

1. Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated.

The objective of this article is to achieve functional equivalence for electronic signatures, so in those instances when a handwritten signature has legal consequences, an electronic signature should have the same consequences and legal effect for when it satisfies the test of reliability. This can be compared to Article 7 of the UNCITRAL Model Law on Electronic Commerce, which gives legal effect to any electronic signature, provided that the method is sufficiently reliable in the light of all circumstance including any agreement between the parties.

The working group argued that allowing the parties the flexibility to determine the degree of reliability could lead to disputes and calls for the court to decide what constitutes a reliable method of signature, probably long after the electronic signature has been used. However, the new Model Law on Electronic Signatures seeks to provide more certainty by providing four objective criteria to determine the technical reliability of electronic signatures. Although this favours newer more sophisticated techniques, the need for confidence is viewed as being of primary importance .

The first criterion states that the electronic signature must be “linked to the signatory and to no other person.” The content of the paragraph makes it clear that it is required to link uniquely to the signatory, without it being unique in itself. Thus, for instance, employees in a large company could share one device for signature creation meaning that the device could be linked to different signatories, so after discussing this concern, the working group decided that the only requirement is for the data to be capable of identifying a specific user without being “unique” in itself .

The second criterion states that the signature creation data must be "under the sole control of the signatory." Again the phrase "sole control" raised concerns as it is a restrictive requirement which might affect business applications where a signature device can be used by several individuals, or a single key is operated by more than one person in the context of a "split-key" or other "shared-secret" scheme. However, it was agreed that "sole control" would still presumably relate to a particular business entity or to those persons jointly.

The third criterion addresses the integrity of the electronic signature, requiring that any alteration to this signature, made after the time of signing, is detectable, whilst the fourth criterion relates to the integrity of the information being signed for electronically. The view was expressed that it would be possible to combine both these provisions covering integrity of the signature and of the information. However, it was finally agreed that these criteria should be regarded as distinct legal concepts due to the functional equivalence approach covering the concept of authentication of signatures and integrity of information .

5.10.3 Conduct of the signatory

During the preparation of this Model Law, consideration was given to inserting the obligations and liabilities of the main parties in electronic signature, namely the signatory, the relying party and any certification services provider. However, this was dismissed as inappropriate given that self-regulation plays a significant role in some countries and due to the rapid evolution of the technical aspects of e-commerce, and instead, a minimal "code of conduct" was drafted for the parties involved .

Thus, regarding the conduct of the signatory, subparagraph (a) requires him/her to exercise reasonable care in preventing any unauthorised use of signature creation data, whilst subparagraph (b) requires the signatory to "notify any person that may reasonably be expected to rely on or to provide services in support of the electronic signature" if he/she knows that the

signature creation data has been compromised, or that there is a substantial risk that it may have been compromised. Subparagraph (c) applies only to those electronic signatures that are supported by a certificate and requires the certificate user to ensure the accuracy and completeness of all material representations made by the signatory that are relevant to the certificate throughout its life cycle, i.e. the period starting with the creation of the certificate and ending with its expiry or revocation .

5.11 Conclusion

Since the beginning of the e-commerce phenomenon in the nineties, formal requirements such as writing, signing, and providing original documents, have been considered obstacles to the growth of e-commerce; therefore, UNCITRAL has sought to resolve this issue through the so-called functional equivalence principle between traditional paper-based methods of documentation, which involve signing and retention of originals, and their modern electronic counterpart. Concerning writing requirements for instance, UNCITRAL has taken an appropriate approach to absorbing the functions of writing in order to bring an objective standard to fulfil each factor of these requirements.

Another issue that has been addressed by e-commerce UNCITRAL legislation is the concept of incorporation by reference, since some legal systems accept the principle of incorporation by reference in paper-based documents, such as the Common law, and recognise the effectiveness of such provisions, which are referred to the main contract. Article 5 of UNCITRAL Model Law on Electronic Commerce 1996 affirms that incorporation by reference in electronic form carries the same legal certainty and effectiveness as provisions incorporated by reference in a traditional paper-based context. This may ultimately enhance confidence in an e-commerce context.

Using automated systems for contract formation has also been recognised, which follows the general UNCITRAL principle of freedom of contract that allows parties to choose their own method of concluding a contract. Also, it has been addressed in Article 13 of UNCITRAL Model Law on Electronic Commerce 1996, which recognises data messages through an information system programmed by, or on behalf of, the originator to operate automatically.

In fact, UNCITRAL has followed an established approach to avoid making substantive changes to contract law or to conflict with existing contractual law, due the wide variety and complexity in contract law principles throughout the world; taking into the account the nature of UNCITRAL as part of UN which addresses the acceding States to the United Nations. Therefore, by following the avoidance approach, the Convention and the Model have not addressed contractual issues, but instead have attempted to address the technical issues of determining the time and place of dispatch and receipt, while leaving the different legal systems to use these criteria to determine the exact moment of contract formation.

On the other side, UNCITRAL has ignored the avoidance approach in the issue of error and mistakes in electronic communications, and decided to intervene and regulate this issue due to the fact that it is considered a key element of e-commerce laws, and it is more likely to relate to the electronic field even though it involves some substantive rules. It is also due to the high possibility of errors being made in this form of electronic commerce.

In the e-commerce field, the parties are seeking to confirm the identity of the other party and to ensure that he/she is actually the person who he/she claims to be; along with ensuring the integrity of the message and that it is only received by the person to whom it is presumed to have been sent. Both of these issues could be fulfilled by electronic signature regulation, which has been fully regulated in the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, which is regarded as a milestone in online security legislation due to its

early adoption at the beginning of the millennium that brought trust and confidence to online users.

All in all, analysing the full picture of the three examples of UNCITRAL legislation in an e-commerce context shows that it represented a significant breakthrough at that time, by adopting the principle of functional equivalence which attempts to give the same legal value as traditional paper-based methods to documentation from its modern electronic counterpart, and to standardise the rules and the detailed regulations throughout the world, given the wide mandate of UNCITRAL.

However, it cannot be denied that UNCITRAL legislation has focused on the recognition of electronic transactions and ignored the regulatory approach to the e-commerce field that has been taken on by some another international best practices, such as EU legislation on e-commerce. For instance, issues of prior information requirements, right of withdrawal, commercial communication, and data protection, are of significant importance in fostering e-commerce transactions, and these points have been addressed in an EU context but ignored in the UNCITRAL legislation.

Chapter 6: E-commerce legislation in the GCC Member States

6.1. Introduction

After reviewing the EU's experience in regulating of e-commerce in Chapter Two, and the UNCITRAL experience of regulation through their Model Laws and Convention, this chapter will explore the approaches which the six Member States of the Gulf Cooperation Council (GCC) have taken towards developing the regulation of e-commerce. These countries are Saudi Arabia, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates (UAE).

This chapter is divided into five main sections. The first of these focuses on the legal status of e-commerce using the concept of functional equivalence and examines the recognition of electronic documents and signatures, the retention of original documents as well as the legal admissibility and evidential weight of data messages in the GCC states. The second section considers electronic contracting. After examining definitions of this concept, it addresses the topics of offer and invitation to treat, theoretical frameworks concerning the time of contract formation, legislation of electronic offer and acceptance, automated message systems, attribution of the data message, acknowledgment of receipt of the electronic record, and time and place of dispatch of electronic record. In the third section, the focus shifts to aspects of electronic security, mainly addressing electronic signature as it is the most reliable method of confirming the identity of the parties. The fourth section about regulatory approach which addresses the topics of prior information requirements, commercial Communication, consumer data protection, right of withdrawal, Regulatory competence and Sanctions. The fifth section discusses the issue of online dispute resolution in the GCC context.

The method of analysis used here will involve reviewing the theoretical framework of the law of the Kingdom of Saudi Arabia first and foremost, and then comparing the practices of Saudi

law with those of other GCC states in order to establish any significant similarities and differences in the different legislative frameworks.

6.2 Legal recognition of electronic transactions

This section will discuss the recognition by the Member States of the GCC of the effects of the laws on electronic trading in accordance with the functional equivalence approach. This was enacted according to the principles of the UNCITRAL Model Laws on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001) which have been clearly confirmed by the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

As previously noted, the principle of functional equivalence is based on the assumption that legal requirements of a traditional paper-based business contract can sometimes be a major obstacle to the growth of e-commerce; therefore, the solution lies in expanding the scope of these requirements and developing an electronic functional equivalent. This approach requires an analysis of a contract's functions and how these can be adapted for electronic means.

One key requirement, for instance, is that a contract should be in written form or available to be read. In addition, the paper-based contract must be retained in its original form or as a copy, and the contract must be authenticated by a method which typically involves a signature.

In keeping with this approach, article 5 of the Saudi Electronic Transactions Law (2007) affirms that electronic transactions shall have full effect and their validity and enforceability shall not be denied on the grounds that they are wholly or partially conducted by electronic means. However, Saudi Electronic Transaction Law (2007) has added extra information requirements for electronic transactions, which will remain in effect and enforceable as long as

access to the details thereof is allowed.[328] Article 5 of the Saudi Electronic Transactions Law (2007) follows UNCITRAL Model Law on Electronic Commerce (1996) article 5 as is the case for the legislation on electronic transactions in all GCC Member States.[329]

6.2.1 The requirement of writing

The validity of a contract that is concluded in writing is a matter of discussion amongst Islamic legal scholars and Saudi law has to some extent been influenced by Islamic law. Some schools of thought consider writing to be an invalid means of forming a contract, except in special situations, for instance in the case in which a party may have a disability or speech impairment which prevents him/her from talking. This argument is based on strict traditional requirements concerning contract validity which specify a verbal contract and also details concerning the time and place of the formation of the contract. These legal scholars argue that writing entails a high risk of forgery. This opinion does not prevent contracts from being documented in writing, but this is not considered to be the actual contract; rather it is simply records what has been agreed verbally between parties.[330] Clearly, considering the formation of a contract in writing to be invalid would be a huge barrier to the legitimacy and validity of electronic transactions. With regard to the risk of forgery, although it can potentially occur, this is not convincing enough to render the formation of a contract in writing invalid. Instead, it raises the importance of the means of authentication such as a signature and methods of online security, which is highly appreciated in the field of e-commerce.

[328] Saudi Electronic Transactions Law, Royal Decree No. M/8 (26 March 2007) art 5

[329] Bahrain Legislative Decree No.28 of 2002 with respect to Electronic Transactions art 5; Qatar Decree Law No. 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law art 20; UAE Electronic Commerce and Transactions Law (2006) Federal Law No. (1) Art 4; Oman's Electronic Transactions Law, Royal Decree 69/2008 art 7. kuwaiti electronic transaction law no 20/2014, Art 3, also follows this with a slight variation in wording.

[330] Mohammed Al-farfor, 'Rule of modern means of communication contracts in Islamic jurisprudence' (1990) 6 Islamic Jurisprudence Journal, vol 2.

In the most of Islamic legal thought, the cornerstone of a valid contract is the expression of the mutual consent of the parties, which is not limited to specific forms such verbal expression but is accepted through any means used in commercial practice.

In some circumstances, the law or the other party may require the contract or transaction to be in writing, therefore, Saudi Electronic Transactions Law asserts that when a document is stored or sent in electronic form, it shall be deemed to have satisfied the requirement of writing if certain conditions are fulfilled. While the UNCITRAL Model Law on Electronic Commerce sets only one condition, namely that the information contained therein is accessible so as to be usable for subsequent reference, the terms of the Saudi Electronic Transactions Law (2007) are stricter, having three conditions which must be met:

- The data message must be retained in the form that it was created, sent or received by, or there must be proof that it accurately represents the information contained in the data message as it was originally created or sent or received in its original form.
- The data message must be accessible for subsequent reference by every person that has a right to access and use the information.
- The information in the data message must be retained as this enables the identification of the source and destination, and the date and time it was sent or received.

This is also followed by all other GCC Member States[331] except for Qatar,[332] which has confined itself to the single condition required by the Model Law on Electronic Commerce.

[331] See Bahrain Electronic Transactions Law (2002) art 5; UAE Federal Law No. 1 of 2006 On Electronic Commerce and Transactions, art 7; Oman Electronic Transactions Law Royal Decree 69/2008, art 9, kuwaiti electronic transaction law 20/2014, Art 9 with some variation in wording.
[332] See Qatar Electronic Commerce and Transactions Law (2010) art 21

6.2.2 Requirement of the original document

In electronic commerce contracts, given that the original document serves as a medium of information that is fixed for the first time, the concept of an original data message acquires a narrower sense as it only involves sending a copy of the data message.

Due to the importance of the status of the original document, some types of original document much be kept by law, including negotiable instruments, documents of title, certificates of quality or quantity, agricultural certificates, inspection reports, insurance certificates, and others. The purpose of this in the traditional paper-based environment is to affirm the notion of the uniqueness of the original; therefore, Saudi Electronic Transaction Law (2007) has addressed it in detail in article 8 and clearly considers the electronic form to be an original form if it satisfies two relevant conditions. Firstly, technical means must be used to ensure the integrity of information included therein from the time it was created in its final form; secondly, it must allow the required information to be provided on request. Although Saudi law states that the regulations will specify the nature of these technical means needed to ensure the integrity of the information, in fact they are not addressed clearly in the regulations. On the other hand, the legislation of some other GCC Member States including Qatar, Bahrain and the UAE[333] do mention the standard of integrity of the information required. For instance Qatar's Electronic Commerce and Transactions Law (2010) specifies that the information must remained complete and unaltered, apart from any change arising from the mere communication, storage or display of the information and which does not alter the content of the information or document. The Qatari Electronic Commerce and Transactions Law (2010) also specifies that the degree of reliability shall be assessed in the light of the purpose for which

[333] Bahrain Electronic Transactions Law (2002) art 7; Qatar Electronic Commerce and Transactions Law (2010) art 23; UAE Federal Law No. 1 of 2006 On Electronic Commerce and Transactions, art 9

the information or document was produced and in the light of all other relevant circumstances.[334]

With regards to this particular point, Qatari, Bahraini and UAE legislation is superior to that of the other GCC Member States due to the quality of their drafting as they combine all the relevant conditions and specify appropriate standards to be achieved.

6.2.3 Signature

There are occasions when by law a document must be signed, so the extent to which the law accepts electronic signatures, and what measures might be needed to accommodate electronic signatures, in their simplest or more sophisticated technological forms such as digital signature, are important factors.

Reviewing the UNCITRAL legislation which addresses electronic signatures, in the original Model Law on Electronic Commerce (1996), only one article addressed the validity of electronic signatures. Later, however, the UNCITRAL Commission realised the vital importance of this topic and developed its more detailed Model Law on Electronic Signatures (2001).

Legislation in the GCC Member States has adopted two different approaches. Saudi Electronic Transaction Law (2007) addresses issues of electronic signatures and their accompanying technical issues together, dedicating article 14 to all issues relating to electronic signatures, and followed by Kuwaiti e-transaction law in a detailed section about electronic transaction (section 4, Article 18)[335]. However, the other GCC Member States have opted in their legislation to separate discussions relating to the recognition of the legal validity of electronic signatures

[334] Qatar Electronic Commerce and Transactions Law (2010) art 23
[335] Kuwaiti electronic transaction law no 20/2014, Art 18

from those which address any technical issues arising from this. The Dubai Electronic Transactions and Commerce Law (2002), for example, states in article 10:

> Where a rule of law requires a signature on a document, or provides for certain consequences in the event of the absence of a signature, an Electronic Signature that is reliable within the meaning of article 21 of this Law, satisfies that requirement.

Technically speaking, the second option seems more logical as it is necessary to confirm the validity of electronic signatures and then deal with technical issues arising from this in a separate detailed section.

6.2.4 Admissibility and evidential weight of data messages

The last part of this section discusses the admissibility of electronic data messages in court and to official authorities. The legislature of the GCC Member States are clearly aware of the functional equivalence principle and when there are certain requirements for admissibility in the traditional paper-based environment this is addressed by adopting new equivalent methods in electronic form. In general Gulf legislation seeks to confirm admissibility and the evidential weight of electronic data messages in court proceedings, and even for the relevant official authorities.

Saudi Electronic Transaction Law (2007) has somewhat different drafting and provisions in this matter. Article 9 affirm that " electronic transactions or signatures shall be admissible as evidence if their electronic records satisfy the requirements set forth in Article (8) of this Law", however, when looking to the requirements of article 8 which is to satisfy the technical means and conditions in order to ensure the integrity of information included herein from the time said record was created in its final form, and to allow for the required information to be provided upon request. However, the technical means are left to the Implementing Regulations

of the Saudi electronic transactions law 2008, which in fact did not seem to be clearly addressed.

However, if electronic records do not satisfy the previous requirements set forth in article 8, the Saudi Law does not prevent this from being admissible as presumptive evidence.[336]

UAE Electronic Commerce and Transactions Law (2006) follows the Model Law on Electronic Commerce, as stated in article 10:

> In any legal proceedings, nothing [...] prevents the admission of a Data Message or Electronic Signature in evidence:
>
> a) On the grounds that the message or signature is in Electronic format; or
>
> b) If it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that the message or signature is not original or in its original form.[337]

However, criticism could be levied at the phrase "best evidence" in 10(b) as it holds some degree of ambiguity, but it could be said that it may give the judiciary discretion to consider it as the "best evidence" available.

While Omani and UAE law[338] use similar wording, in its law Qatar replaces the phrase "best evidence" with "the only evidence that the person adducing it could be expected to obtain"[339] which is certainly more accurate.

With respect to judging the reliability of an electronic record for evidential purposes, Saudi Electronic Transaction Law (2007) sets out three criteria: (1) the method by which the

[336] Saudi Electronic Transaction Law (2007) art 9
[337] UAE Electronic Commerce and Transactions Law (2006) art 10
[338] Oman Electronic Transactions Law Royal Decree 69/2008, art 11
[339] Qatar Electronic Commerce and Transactions Law (2010)

information was created, stored or communicated and the possibility of tampering therewith; (2) the method used for maintaining the integrity of the information; and (3) the method of identifying the originator.[340]

Only UAE Electronic Commerce and Transactions Law (2006) has added the notion of absent proof to the contrary, in relation to the reliability of both electronic signatures and Secure Electronic Records:

> Firstly, when an electronic signature has an absence of proof to the contrary, it shall be presumed as being reliable as the signature of the person to whom it correlates and that it was affixed by that person with the intention of signing or approving the data message attributed to them.
>
> Secondly, when an electronic record has an absence of proof to the contrary, it shall be presumed to have remained unaltered since its creation, and that it is reliable.[341]

This concept does not feature in any of the other GCC Member States' legislation or any of the UNCITRAL Model Laws and Conventions, and it could be considered a useful addition for articles addressing admissibility and evidential weight in court proceedings.

6.3 Electronic contracts

This section will discuss some key issues concerning electronic contracts, including: the meaning of this term and related concepts of offer and invitation to treat; theoretical frameworks relating to time of contract formation; legislation covering electronic offer and acceptance, automated message systems, attribution of data messages, acknowledgment of receipt of electronic records, and time and place of dispatch of electronic records.

[340] Saudi Electronic Transaction Law (2007) art 9
[341] UAE Electronic Commerce and Transactions Law (2006) art 10

6.3.1 Concepts and definitions

It is useful to begin by considering how the term 'contract' is defined within the Saudi legal system which is based on Islamic law:

> The reciprocal desire of two or more parties to initiate a legal commitment where an offer issued by one of the parties meets with the other party's acceptance in such a way that this has a legal consequence regarding its subject matter.[342]

With regards specifically to electronic contract, according to Al Jamal[343], one of the most frequently cited definitions of this is:

> An agreement between two parties or more in which the offer and acceptance are linked by means of electronic communications and technical means thus creating a legal bond which may be modified or terminated.[344]

There are two Islamic school of thought views regarding the substance of the key elements of the contract. The first identifies these as: (1) the contracting parties; (2) the formulation of the offer and acceptance; and (3) the object of the contract. The second view focuses exclusively on the issue of offer and acceptance. Although the first seems to offer more comprehensive cover of all aspects of contractual relations, the second is more practical since the existence and importance of the contracting parties and the object of the contract is self-evident.

However, all scholars of Islamic jurisprudence agree that the most significant condition for the validity of a contract is mutual consent. This is based on many principles of Islamic jurisprudence including the Qur'an verse that clearly states: "Oh you who believe! Squander not your wealth among yourselves in vanity, except it be a trade by mutual consent."[345] In

[342] Muhammad Qodri Basha *Morshed al-Hairan ela Ma'arefet Ahwal al-Ensan* (2nd edn, Dar al-Farajani 1983)
[343] Sameer Aljamal, *Contract through electronic means* (2nd edn, Al Nahda 2007) 67
[344] Sultan Al Hashemi, *E-commerce in Islamic Jurisprudence* (Ashpalia 2011) 80
[345] (Noble Qur'an, 4: 29)

addition, the Prophet Mohammad established mutual consent as the core condition for the validity of the contract, saying that "sale is only by consent."[346]

The focus in this section is the basic principle of contracts, such as offer and acceptance in GCC Member State jurisdiction and their application of e-commerce. To begin with, the definition of 'offer' in English law, according to Chitty:

> An offer can be defined as an expression of willingness to contract made with the intention that it shall become legally binding on the person making it (the offeror) when it is accepted by the person or persons to whom it is made (the offeree).[347]

Under Saudi jurisdiction and Saudi law which is based mainly on Islamic law, the principal definition of an offer refers to what the seller says or acts to show his/her consent to the contract, while acceptance can only be made by the buyer, regardless of whether the buyer's takes the initiative immediately or after the proposal has been made.[348]

Considering the issue in more depth, Jamal attempts to define the electronic offer in terms of Islamic law and states that:

> An electronic offer is an expression of the will of the contracting parties remotely via modern means of communication, including all of the elements and necessary conditions for the conclusion of the contract, and when the offer matches the acceptance.[349]

What is more, according to Majed, in the case of electronic contracts, the electronic acceptance is an expression of the willingness to accept the offer by means of communication such as

[346] Prophetic Saying, 4967. *Sahih Ibn Hibban* (3rd edn, al-Resalah Institution, 1997), 11, 340
[347] Joseph Chitty, *Chitty on contracts: General Principle* (Vol. 1. Sweet and Maxwell 2012)
[348] Al-Dobaiyyan, *offer and acceptance between islamic jurisprudence and law* (Al-Rashid Library Press 2005)13-15, 223-226
[349] Aljamal, *Contract through electronic means* (2nd edn, Al Nahda 2007) 105

email or clicking on a website, or even through live chat, but it must be explicitly expressed, as implied acceptance is not enough in the case of electronic means of communication.[350]

6.3.2 Offer and invitation to treat

In the previous phase of concluding the contract, the forms and expressions of willingness to contract can vary, and depending on that the law, some expressions are considered as a finalised offer whilst others are mere invitations to negotiate or to treat.[351] The underlying importance of distinguishing between the finalised offer and invitation to treat is that in the latter case, the negotiation is still considered to be in progress, meaning that the parties are not obliged to conclude a contract, whereas the offer takes immediate effect and once acceptance has been declared, this creates and concludes the contract.

An attempt to distinguish between offer and invitation to treat had been proposed by Faraj[352] who suggests that the invitation to treat refers to the offeror proposing an offer without determining all the required factors of a finalised offer, such as price, quantity or other specifications. The offer, however, is a positive expression of the willingness to enter into an obligation and should include all necessary conditions and factors involved in the contract.

In this scenario, the difference between the two is functional, as the purpose of the invitation to treat is the mere declaration of the willingness to deal in order to start the negotiation process, whereas the offer is a complete proposal which will become contract once accepted.

Another opinion suggests that the distinction is based on the intention of the parties involved, either to create a complete contract or merely an invitation to treat; however, if a dispute arises then it should take into account any assumptions and relevant circumstances and statements.

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[350] Sulaiman Majed, *Electronic Contract* (Al-Rashid Library Press 2009)

[351] In the English legal system this issue is referred to as 'invitation to treat' while in Arabic legal sources it is known as an 'invitation to negotiate'.

[352] Abdulmunim Faraj, *Source of Obligation* (Al Nahda 1996) 101

The Kuwait Civil Code takes yet another approach, considering that if the offer is directed at the general public, for example a shop display, then this is automatically considered to be an invitation to treat rather than an offer since it is impossible to make an offer to an unlimited number of people. In addition, the intention of the offeror clearly indicates that the intention is to advertise rather than make a finalised offer.

Article 40 of the Kuwait Civil Code states that:

> A publication, advertisement or a current price list or any other statement connected with offers or orders directed towards the public or individuals shall not be considered as implicit offers, notwithstanding any indication to the contrary given by the circumstances of the case.

Islamic legal sources have not yet addressed this issue due to the principle of meeting place in the Islamic legal system which, in basic terms, means that both parties are entitled to withdraw from a contract even after the exchange of an offer and acceptance if the parties remain together at the place of the transaction, which makes determining the time of concluding the contract not that relevant.

6.3.3 Theoretical frameworks of the time of contract formation

This section will discuss the fundamental issue of determining when the contract is formed in Islamic jurisprudence rules of contract as well as in legislation of the GCC Member States.

Abdulrazzaq Al-Sanhouri,[353] who is considered one of the foremost legal scholars in the Arab world and has contributed towards draft many of the contract laws in Arab countries, including GCC Member States' legislation, identifies four traditional theories that determine the exact moment of the formation of a contract.

[353] Abdulrazzaq Al-Sanhouri, *Contract Theory* (Halabi Legal Publications 1998)

The first and most important theory is known as declaration theory and proposes that the contract is formed at the moment when the offeree declares his/her acceptance meaning there is reciprocal willingness to proceed. Applying this theory to the electronic environment means the contract would be formed when the acceptance is expressed and sent by some electronic method, even if the offeree was not aware of that data message.

Dispatch theory considers the contract to be formed once the acceptance has been dispatched to the offeror. Although this theory is consistent with the first theory in essence, the difference is that here it relates to non-instantaneous contracts such as those sent by post or fax, or even the new electronic means of communication such as email. According to Dunmz,[354] this is based on the Postal Rule that is stated in Common Law jurisdiction.

The third theory is reception theory, which means that the contract is formed when the offeror receives the acceptance, even before he/she can access to its content or before he/she becomes aware of such content. However, if the letter is lost, for instance, then the contract would not be formed, therefore it could be said that the risk is divided between both parties, while in dispatch theory only the offeror would bear the risk.

The fourth theory is the information theory which holds that the contract would not be formed until the offeror actually reads it and becomes aware of its content. However, this theory seems to be biased toward the offeror since the offeree cannot determine when the acceptance comes to the notice of the offeror.

After analysing the prevalence of these theories in Islamic jurisdictions generally, and in GCC Member States in particular, Al-Sanhouri [355] concluded that the two main theories are declaration theory and information theory, and that any other principles are derived from these.

[354] Mohammed Al-farfor, 'Rule of modern means of communication contracts in Islamic jurisprudence' (1990) 6 Islamic Jurisprudence Journal, vol 2.
[355] Al-Sanhouri, *Contract Theory* (Halabi Legal Publications 1998) 296

Furthermore, no explicit provision on this matter has been found concerning the time of formation of contract between absentee parties and whether this should be based on the declaration of acceptance or on information theory. However, Al-Sanhouri notes that in Islamic jurisprudence, the contract between absentees is formed at the moment of the declaration of acceptance, while the contract between the parties present requires the voicing of positive acceptance. Moreover, a contract between absentees requires the offeror to communicate his/her offer and in turn for the offeree to declare his/her acceptance to qualify as an unequivocal declaration.[356]

In contrast, one other argument in support of information theory is the general legal rule which holds that the contract is formed when the acceptance is brought to the attention of the offeror, on the grounds that the cornerstone of a contract is the unequivocal willingness of both parties and both need to be fully cognizant of this. While those who advocate the approach of declaration theory such as Amang[357] claim that the time of contract formation should be based on the time at which the declaration is brought to the notice of the offeror.

Analysis of the general laws of contract in the Member States of the GCC concerning a contract between absentees and the time of conclusion of such a contract, the stance favoured by Gulf legislation varies whilst e-commerce laws adopted by the GCC Member States do determine the time of dispatch and the time of receipt.

This theory has been criticised by Yasir [358] on the grounds that it places the conclusion of the contract in the hands of the offeree, since it would be formed only when he/she declares their acceptance, regardless of whether the offeror has become aware of the acceptance or not, and

[356] Ibid
[357] Amang Rahim, Acceptance of electronic contracts (House of Wael publishing and distribution 2006) p 178
[358] Yasir mirdas, Analytical study of Saudi E-commerce law compared with UNCITRAL (King Abdulaziz University 2008) p 75

even regardless of whether the acceptance has reached the offeror or not. This situation may lead to confusion and uncertainty.

6.3.4 Legislation of electronic offer and acceptance

Article 10 of Saudi Electronic Transaction Law (2007) confirms that the offer and acceptance of contracts may be expressed by electronic means, and such contracts shall be deemed valid and enforceable. Furthermore, the validity or enforceability of a contract shall not be denied if it is concluded through one or more electronic records.[359] This article follows the UNCITRAL Model Law on Electronic Commerce (1996) and all GCC Member States have adopted similar provisions.[360]

However, the adoption of this provision could be opposed in the argument of that article, by stating and confirming what could be called axiomatic material, given that there is repetition considering that the previous provisions of recognition and admissibility of electronic data would be enough to affirm the admissibility of an electronic contract. On the other hand, the Model Law on Electronic Commerce (1996) was one of the earliest attempts to develop electronic transaction law, and was seeking to provide confidence and legal certainty of information, including the validity of electronic contracts, at a time when e-commerce was still in its infancy but rapidly establishing itself. Given that the Model Law represented a compromise, seeking as it did to harmonise and unify numerous international laws from different contractual schools, it was inevitable that there would be a degree of legal uncertainty at least during the early days of e-commerce.

It is noted that the Model Law states that "unless otherwise agreed by the parties," which is compatible with freedom of parties, as enhanced by UNCITRAL principles. However, some

[359] Saudi Electronic Transaction Law (2007) art 10

[360] Bahrain Electronic Transactions Law (2002) art 10; Qatar Electronic Commerce and Transactions Law (2010) art 4; UAE Electronic Commerce and Transactions Law (2006) art 11; Oman Electronic Transactions Law (2008) art 12; kuwaiti electronic transaction law no 20/2014, Art 5 with some variation in wording.

GCC member States have chosen to omit such phrases from their legislation in order to avoid the situation where some parties may refuse to accept an electronic contract, and this argument seems convincing.

6.3.5 Availability of contract terms

The requirement of the availability of contract terms is considered a significant issue in the electronic environment, since some electronic platforms do not make the electronic contract available after placing the order, or the hyperlink relating to the provisions incorporated by reference might have been removed or updated.

With regards to Saudi Electronic Transactions Law (2007), it only addresses this issue in regard to the requirement of writing, which means that the law requires the document to be in written form, and that will be satisfied depending on three conditions; one of them is: "Storing an electronic record in a manner allowing for future use and reference." Actually, all Gulf States follow this approach.[361] In fact, this is based on the UN Convention on the Use of Electronic Communications in International Contracts which provides that

> "Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference."[362]

In the EU, the EC Directive on Electronic Commerce (art.10(1)(b)) requires the concluded contract to be filed by the service provider and to be accessible; also, it affirms that the

[361] Saudi Electronic Transaction Law (2007) art 6/1; Bahrain Electronic Transactions Law (2002) art 5/2 ; Qatar Electronic Commerce and Transactions Law (2010) art 20; UAE Electronic Commerce and Transactions Law (2006) art 4/2; Oman Electronic Transactions Law (2008) art 8/B ; Kuwaiti electronic transaction law no 20/2014, Art 9 with some variation in wording.

[362] Article 9/2

"contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them".

However, as explained in section 5.5 , although the UN Convention has chosen to avoid imposing any requirements for contracting parties to make contractual terms available, and instead has made the application of such requirements subject to domestic contractual law, none of the Gulf States have introduced any legislation that imposes any requirement for contracting parties to make contractual terms available, and they have not imposed any consequences for the failure to meet such a requirement.

In fact, the principle of making contractual terms available as a requirement would enhance legal certainty, consumer confidence and predictability in electronic contracts. Thus, it is vital for the Gulf legislation to establish harmonised rules for making terms available as a prerequisite for the electronic contract to be valid, and such rules should take into account the principle of technology-neutrality so as not to hamper technological innovation. This would mean that any form of communication that allows the contract to be recorded, downloaded or printed, while maintaining the integrity and authenticity of the electronic record, would be accepted.

6.3.6 Automated message systems

Article 2 of the Dubai Electronic Transactions and Commerce Law (2002) defines an automated electronic agent as:

> An electronic programme, or system of a computer capable of acting or responding to an act, independently, wholly or partly, without any supervision by any natural person at the time when the act or the response has taken place.[363]

[363] Dubai Electronic Transactions and Commerce Law (2002) art 2

The effectiveness and validity of a contract is based on the existence of an expression of mutual consent by both parties. It is common in e-commerce transactions to pre-programme the computer to initiate actions or to send and resend a message or to email without any human involvement, and such transactions could also occur by programming an interactive website to process orders and conclude contract with buyers without any human interaction; the other frequently used method is to programme an email system to send a message, for instance to conclude the contract.

The solution which was suggested in the early stages of e-commerce was to consider an automated system as a legal person, or more interestingly, to refer to an automated message as being an "electronic agent" which then would involve applying the theory of liability. However this approach has attracted considerable criticism on the basis of several different arguments. First and foremost, regarding an automated message as a legal person raises the question of the ability and legal capacity of an automated message since such pre-programmed data cannot act of its own volition without human involvement or make conscious decisions independently.

Moreover, although automated data has the technical ability to act without direct human involvement, considering this to be a legal person would entail responsibilities and eventually liability for negligent acts. In this respect, automated data clearly cannot give consent of its own individually, hence, it cannot be sued or owe fiduciary duties; instead, it is programmed by the parties to express their will and consent and should be considered merely as a tool for communicating the consent of the parties.

Automated message systems have been used since the earliest days of e-commerce and have been called electronic agents, in those cases, for example, where the owner of a store programmes a website to respond automatically and conclude contracts without any human

intervention. This led to a review of the traditional theory of contracts to ensure their compatibility with such contracts.

It is noted that some do not agree with the title of "electronic agent" which means it must be discussed and categorised under the "agent" section of contract theory on the basis of similarities with general agents; instead, it should be considered a unique system in its own right with special provisions taken and referred to as an "automated system."

Looking at the historical development of electronic transaction law, there is no mention of automated systems in the UNCITRAL Model Law on Electronic Commerce (1996). Dubai's Electronic Transactions and Commerce Law (2002) was the first amongst GCC Member State legislation to address this issue and it stated that contracts should be valid, effective and legally enforceable between automated mediums without any personal or direct involvement of a natural person.

The second paragraph of this article addresses a situation in which one of the parties is an automated system and the other a natural person, ruling that such a contract should be valid on the condition that the person knows or ought to have known that such a system will carry out the task of concluding or performing the contract.[364] Automated systems are also mentioned in the laws relating to electronic commerce and transactions of Saudi Arabia, UAE and Oman.[365]

Although the original Model Law on Electronic Commerce (1996) did not address this matter, the UNCITRAL Commission realised the importance of enhancing certainty in automated systems and relevant mentions were inserted into the United Nations Convention on the Use of Electronic Communications in International Contracts (2005), article 12:

[364] Dubai Electronic Transactions and Commerce Law (2002) art 14
[365] Saudi Electronic Transactions Law (2007), art 11; UAE Electronic Commerce and Transactions Law (2006) art 12; Oman Electronic Transactions Law (2008), art 13, with some variation in wording.

> A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.[366]

Qatar followed a similar approach in its Electronic Commerce and Transactions Law (2010)[367] which states that "A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract" and This could be considered superior to the other approach of other GCC which states that "a contract shall be valid, effective, legally enforceable" as the latter could validate some contracts regardless of other factors.

However, requiring a natural person to know or to say that they ought to have known that the other party is an automated system could cause confusion in the invalidation of contracts if the party claims that he/she did not know and there is no presumption that he/she ought to have known, or if there is a dispute about determining the extent of admissibility of such a presumption. It could be argued that nowadays the overwhelming majority of e-commerce users would be aware of the nature of electronic transaction, and the possibility that the other party could be an automated system; therefore, such a condition could be meaningless and open the door to uncertainty, which electronic commerce laws are seeking to avoid.

[366] United Nations Convention on the Use of Electronic Communications in International Contracts (2005) art 12
[367] Qatar Electronic Commerce and Transactions Law (2010) art 27

Saudi general contract law sets no limitation on any means customarily used in business practice to indicate the consent of the parties. In that regard, article 11 (1) of the Saudi Electronic Transaction Law (2007) expressly states that:

> It is permissible for a contract to take place between automated electronic mediums that include two electronic information systems or more, set and programmed earlier for carrying out such tasks. A contract shall be valid, effective and legally enforceable despite the fact that there has been no personal or direct involvement by any natural person, in such systems, in the conclusion of the contract.[368]

6.3.7 Attribution of data messages

Attribution of data messages is considered to be of high importance when establishing e-commerce; therefore, Gulf legislation and UNCITRAL have addressed this issue in detail, while Saudi Electronic Transaction Law (2007) limits discussion to what it considers the main issues of attribution. Article 12 states that electronic records shall be deemed to have been issued by the originator and identifies three possible types of originator: the originator personally, another person acting on his/her behalf, or an automated system programmed by him/her to do so on their behalf. Intermediaries are not deemed to be originators.[369]

Whilst Saudi legislation on electronic transactions ignores party rules, other GCC Member States do address this in their legislation, for examples Dubai's Electronic Transactions and Commerce Law (2002) states that the addressee is entitled to regard an electronic communication as being that of the originator and to act on that assumption in either of two cases:

First, if the addressee has properly applied a procedure previously agreed to by the originator.

[368] Saudi Electronic Transactions Law (2007), art 11
[369] Saudi Electronic Transactions Law (2007), art 12

Second, if the electronic communication resulted from the action of a person whose relationship with the originator, or with any agent of the originator, enabled that person to gain access to a method used by the originator to identify the electronic communication on its own.[370]

Moreover, the same law addresses three situations in which it would not be valid to attribute the data message to the originator:

1. when the addressee has received notice from the originator that the electronic communication is not that of the originator and has had a reasonable time to act accordingly.
2. if the addressee knew, or was supposed to know, that the electronic message was not issued by the originator, and that they exercised reasonable care or used any agreed procedure.
3. if it was not unreasonable for the addressee to consider an electronic message issued by the originator or to act on the basis of this assumption.[371]

Finally, the Law maintains that the addressee has the right to consider each email received as a separate message, and to act on that assumption, except if he/she knows or should have known, if exercising reasonable care or using any agreed procedure that the data message was a duplicate copy.

Bahrain's Electronic Transactions Law (2002)[372] contains further provisions concerning proof of attribution, including the establishment of evidence on the use of the security system that is pre-agreed between the parties or by using an approved certificate that is the result of implementing the provisions of this law. Alternatively, this can be done by demonstrating the

[370] Dubai Electronic Transactions and Commerce Law (2002) art 15
[371] Dubai Electronic Transactions and Commerce Law (2002) art 15, para 3
[372] Bahrain Electronic Transactions Law (2002) art 13

effectiveness of any security system used to determine the identity of the person assigned to the electronic record.

Attribution provisions are addressed in all GCC Member State legislation, but this varies in detail between summarising the main provision to detailing all issues, including contrary rules and proof of attribution.[373]

6.3.8 Acknowledgment of receipt of electronic records

In general acknowledgment of receipt is considered to be a commercial procedure used by businesses and stores and not a legal principle required by law and this practice has become widespread throughout e-commerce.

Reviewing Gulf legislation reveals that Saudi Electronic Transaction Law (2007) does not state any provisions. Instead, it quotes UNCITRAL drafting and is followed by Dubai's Electronic Transactions and Commerce Law (2002) and has been followed by Kuwaiti electronic transaction law which divides the situations as follows:

If the originator has not agreed with the addressee that the acknowledgment is to be in a particular form or in a certain way, an acknowledgment of receipt may be given by:

A. Any message from the addressee, whether automated or electronic means, or by any other means;
B. Any conduct of the addressee sufficient to inform the originator that the electronic record has been received.

[373] UAE Electronic Commerce and Transactions Law (2006) art 13; Qatar Electronic Commerce and Transactions Law (2010) arts 5-8; Oman Electronic Transactions Law (2008) art 15; Kuwaiti electronic transaction law no 20/2014, Art 11 with some variation in wording.

Moreover, if the originator has stated that the data message is conditional on receipt of an acknowledgment, it shall be treated as if it was not sent from the originator until receipt of an acknowledgment.

If the originator did not state that the data message is conditional on receipt of acknowledgment, the originator may give notice to the addressee stating that the previous data message requires an acknowledgment of receipt, specifying a reasonable time by which the acknowledgement must be received. If the acknowledgement is not received within the time specified, it may be possible, upon notice to the addressee, to treat the electronic record as though it is null and void or invoke any other rights the originator may have.[374]

Although the purpose of this provision is to enhance legal certainty, it can be criticised on the grounds that it overstates protection by requiring additional notification. Also, if the acknowledgement is not received within the time specified, the electronic record may be treated as void, but there is also additional support for this provision, for instance when the originator wants to transfer the offer to another party.

For the purposes of enhancing legal certainty, paragraph 5 of the Dubai legislation adds further confirmation through a rebuttable presumption that when the originator receives the addressee's acknowledgement of receipt, it is assumed that the relevant electronic record was received by the addressee, unless proven otherwise. This assumption does not imply that the content of the electronic record corresponds to the record received.

Technical requirements are also referred to, as in the case where the received acknowledgement states that the related electronic record has met technical requirements, and it is presumed that those requirements have been met.

[374] Dubai Electronic Transactions and Commerce Law (2002) art 16 ; Kuwaiti electronic transaction law no 20/2014, Art 11

Finally, the last paragraph affirms that there must not be confusion between the provisions of this article or with the legal consequences that may follow, either from that electronic record or from the acknowledgement of its receipt.[375]

6.3.9 Time and Place of Dispatch of Electronic Record

It is more likely for e-commerce to take place between parties in different countries or even continents and variable time zones. In addition, it is sometimes the case that a business has multiple sites, meaning that operations could shift between them and that the jurisdiction and applicable law may change as a consequence. Therefore, it is of vital importance to determine the issue of the time of dispatch and of receipt, as well as the place of the parties using objective and measurable standards. This section will discuss these issues.

6.3.9.1 Time of dispatch

Saudi Electronic Transaction Law (2007) determines the time of dispatch as the time when the data message enters an information system not in control of the originator. This is similar to the approach of Dubai and Oman and Kuwait,[376] all of which seem to follow UNCITRAL Model Law. However, the Implementing Regulations of the Saudi electronic transactions law 2008 consider the time of dispatch to be the transmission of the electronic record from the sender's system to any system outside of its control, which indicates the need to analyse the difference between the formula used in the Saudi Electronic Transaction Law (2007), namely, "entering the information system is not in control of the originator," and that of Implementing Regulations 2008: "transition to any system outside the control of the sender" which requires a technical opinion.

[375] Saudi Electronic Transactions Law (2007), art 9; Bahrain Electronic Transactions Law (2002) art 14; Dubai Electronic Transactions and Commerce Law (2002) art 16; Bahrain electronic transaction decree, art 13; UAE Electronic Commerce and Transactions Law (2006) art 14; Qatar Electronic Commerce and Transactions Law (2010) art 2 9-13; Oman Electronic Transactions Law (2008), art 16 with some variation in wording.
[376] Dubai Electronic Transactions and Commerce Law (2002) art 17; Oman Electronic Transactions Law (2008) art 17 and Kuwait electronic transaction law no 20/2014, Art 15 with some variation in wording.

Bahrain's Electronic Transactions Law (2002) addresses the issue in more detail, distinguishing between two scenarios. In the first case, if the originator and the addressee do not use the same information system, the time of dispatch is the time of the record entering either information system and is not subject to the control of the originator or the person on whose behalf it is sent. In the second case, if both the originator and the addressee use the same information system, the time of entry of this record is considered to be when it reaches the attention of the addressee and becomes accessible.[377]

Qatari Electronic Commerce and Transactions Law (2010) also envisages two scenarios but approaches the matter differently. In the usual situation, when the data message enters an information system outside the control of the originator's system, the dispatch of the data message would be said to have occurred once it enters that other information system. Alternatively, if the data message successively enters two or more information systems outside the control of the originator, then the dispatch of the data message would occur when it enters the first of those information systems.[378]

However, as previously discussed (Chapter Five), some argue that the outcomes of these two formulations (either leaving the information system under the control of the originator or entering the information system outside of the control of the originator) would be the same, since the method used to prove that the data message has left the information system would be the reference to the same data protocol as for the time of receipt. However, the difference could lie in those cases in which the parties exchange data messages using the same information system, meaning it would not enter another information system. In addition, the change to the phrase "leaving" reflects the dispatch of a message in a traditional paper-based environment.

[377] Bahrain Electronic Transactions Law (2002) art 15
[378] Qatar Electronic Commerce and Transactions Law (2010) art 14

6.3.9.2 Time of receipt

For the time of receipt, the Implementing Regulations of the Saudi electronic transactions law (2008) has adopted the Model Law approach which addresses this issue in Article 8/2 as if the recipient has designated an information system, thus the time of receipt is when the electronic record enters this specific information system; if the recipient has not designated an information system, then the time of receipt is when the electronic record enters any information system related to the recipient.

However, Saudi legislation overlooks an issue addressed by Model Law, namely, what happens if the recipient has designated an information system but the electronic record is sent to an undesignated system, a scenario which is included in both the legislation of both Dubai and Oman.[379] The most recent legislation, Qatar's Electronic Commerce and Transactions Law (2010), has adopted the UN Convention (2005) approach, considering the time of receipt to be when the data message is accessible by the addressee at that electronic address and the addressee becomes aware that the data message has been sent to that address.[380]

6.3.9.3 Place of dispatch and receipt

The provision of place of dispatch and receipt is considered to be one of the most significant issues, since the place of the parties determines the applicable law. This is one of the issues that varies between the 1996 UNCITRAL Model Law and UN Convention (2005). It is clear that Saudi Electronic Transaction Law (2007) follows the UNCITRAL Model Law which provides that unless the parties agree otherwise, the place of dispatch is deemed to be the place where the originator has their place of business, whilst place of receipt is where the addressee has their place of business. Three criteria are used for determining the place of the parties: if

[379] Dubai Electronic Transactions and Commerce Law (2002) art 17; Oman Electronic Transactions Law (2008), art 16 with some variation in wording.
[380] Qatar Electronic Commerce and Transactions Law (2010) art 14

the sender or the addressee has more than one place of business, their place of business is the one which has the closest relationship to the transaction, or if there is no underlying transaction, the headquarters or principal place of business; if they do not have any separate place of business, the reference would be to their habitual residence.

This approach is also followed by Oman, Bahrain and Kuwait [381] whilst the UAE Electronic Commerce and Transactions Law (2006) has added more detail specifying that the habitual residence for the legal person is considered to be the headquarters or the place where the company is based.[382] Both Qatar's Law (2010)[383] and the new Saudi proposal[384] have added further precautions regarding possible further sources of confusion in relation to electronic data including domain names, Internet protocol addresses or the geographical location of information systems. Therefore, a location shall not be a place of business merely because that is where equipment or any other part of an information system,, article 16 of Qatar's Electronic Commerce and Transactions Law (2010) revokes the legal value of determining the place of business; furthermore, the location of equipment and supporting technology does not indicate the place of business.

This approach is influenced by the 2005 UN Convention, which took a cautious approach due to the specific nature of virtual enterprises, where the place of registration may be thousands of miles from the target market. Registration of domain names can be completed online in just an hour or so and can be used to gain some benefit such as tax avoidance; in such circumstances, the place of business should not carry any value.

[381] Oman Electronic Transactions Law (2008), art 17; Bahrain Electronic Transactions Law (2002) art 15; Kuwaiti electronic transaction law no 20/2014, Art 16 with some variation in wording.
[382] UAE Electronic Commerce and Transactions Law (2006) art 15/4
[383] Qatar Electronic Commerce and Transactions Law (2010) art 16
[384] Proposal for an e-Commerce Law, by Saudi Ministry of Commerce and Industry, last modified 3/5/2015 <http://mci.gov.sa/LawsRegulations/Projects/Pages/ec.aspx#0> accessed 10 June 2015

However, it has been argued that the authorities regulating domain names in Saudi Arabia and other GCC Member States are stricter about attributing domain names to the national code, such as SA for Saudi Arabia, requiring clear proof of an address. Saudi Domain Name Registration Regulations limit the registration of Saudi domain names to the following categories:

- An entity that is actually located in Saudi Arabia.
- A natural person carrying Saudi nationality or a similar document issued by the Ministry of Interior in Saudi Arabia.
- An entity with a registration or license issued by a competent authority in Saudi Arabia
- An owner of a trademark or trade name registered in Saudi Arabia.[385]

The latest proposal for Saudi E-commerce Law[386] follows paragraph 1, article 6 of the UN Convention (2005) concerning location of the parties, meaning the party's place of business is the location indicated by that party. However, such an indication is naturally rebuttable if the other party can demonstrate that the other party's claim to have a place of business at that location is either inaccurate or deliberately false.

Article 4 of Saudi Electronic Transaction Law (2007) presumes that the location of a party is as indicated by that party unless otherwise proven. In practice, this gives the party the choice of location for his/her main business, and this derives its importance from the fact that if a dispute arises, the presumption is in favour of the party who has indicated his/her location, whilst the burden of proof falls on the other party.

[385] Saudi Domain Name Registration Regulation Version 3.0 (2011) <http://nic.sa/en/view/regulation> accessed 25 April 2015
[386] Saudi Proposal for an e-Commerce Law

6.4 Electronic signatures

It could be argued that, despite the critical importance of electronic signatures, and the fact that the GCC Member States agreed in principle to adopt the provisions of the UNCITRAL Model Law on Electronic Signatures 2001 there are significant variations in their legislation relating to the technical requirements relevant to electronic signatures, as the following sections will clarify.

6.4.1 Legal recognition of electronic signatures

Article 14 of Saudi Electronic Transaction Law (2007) adopts a similar approach to the Model Law on Electronic Signatures, stating:

> If a signature is required for any document or contract or the like, such a requirement shall be deemed satisfied by an electronic signature generated in accordance with this Law. The electronic signature shall be equal to a handwritten signature, having the same legal effects.

This has been followed by Kuwaiti electronic transaction law Art 18[387] and both are similar to article 6 of the Model Law which affirms that the requirement for a person's signature would be considered met if an electronic signature is used, if it as reliable as is appropriate for the purpose for which the data message was generated or communicated in the light of all the circumstances, including any relevant agreement. The other GCC Member States take the provisions of the Model Law as the starting point for their own legislation, recognising the key principle of functional equivalence.[388]

[387] Kuwaiti electronic transaction law no 20/2014, Art 18

[388] The functional equivalence principle attempts to make the legal status of electronic documents equal to the traditional paper documents by determining the function of the traditional forms (paper document) and to fulfill some of the technical and legal requirements in order to consider an electronic document functionally equal to paper documents.

Whereas previous sections have indicated a trend towards convergence amongst GCC Member States in their legislative approaches, there are variations and differences in their treatment of technical specifications and requirements.

Saudi Electronic Transaction Law (2007) adopts a strict approach to legal recognition of electronic signatures with article 10 listing six conditions which must be satisfied:

1. The signature must be associated with a digital certificate issued by a certified provider licensed by the Saudi Communications and Information Technology Commission, or a digital certificate approved by the National Centre for Digital Certification (NCDC).
2. The digital certificate associated with the signing must be effective at the time of the signing.
3. The integrity of the data of the signatory's identity, and compatibility with the digital certificate requirements must be maintained.
4. If the signature is associated with an electronic data system for the signatory, then the integrity of technical and logical linkages between the electronic signature system and the electronic data system must be ensured, and it must be devoid of any technical defects that may affect the formation of the contract.
5. A specified minimum standard of technical and administrative infrastructure must be achieved, and related resources must be available to achieve control of the signature and ensure the confidentiality of the data according to the technical requirements contained in the digital certification procedures that are related to the certification services provider.
6. The signatory must conform to all the conditions set out in the procedures of digital certification services that are related to the certification provider for the digital signature.

Saudi Electronic Transaction Law (2007) clearly connects the electronic signature to a digital certificate and it could be argued that this may limit the methods of electronic signatures which

can be used. In addition, specifying a particular type of technology is not the optimal approach and conflicts with the principle of technological neutrality, which recommends that relevant regulations should be drafted in a technologically neutral way that does not prefer a specific type of technology or hinder the advancement of superior technology.

Thus, rather than specifying the type of technology, it would be more beneficial to specify technical standards to be fulfilled in order to satisfy the content of the provisions, following the example of the Model Law on Electronic Signatures, article 6:

An electronic signature is considered to be reliable if:

A. The signature creation is linked to the context in which they are using the site without anyone else's data;
B. The signature's creation data is subject to the time of signing the control of the site without any other person;
C. No change to the electronic signature is made after the signing is detectable;
D. The purpose of the requirement of a signature is to legally confirm the integrity of the information to which the signature is attributed and no change made to that information after the time of signing should be detectable.

This approach has been adopted in Qatar's Electronic Commerce and Transactions Law (2010), article 28, and Oman's Electronic Transactions Law (2008), article 22, Kuwaiti electronic transaction law no 20/2014, Art 19 and Dubai's Electronic Transactions and Commerce Law (2002), article 20, also adopts a similar approach but focus to a greater extent on determining the identity of the party.

The EU Directive on Electronic Signatures (1999) clearly recognises advanced electronic signatures and sets out four standards which an electronic signature must achieve before it can be legally recognised, namely

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/her sole control;
d) It is linked to the data to which it relates in such a manner that any subsequent change to the data is detectable.

Dubai has therefore followed the EU approach in this regard. Article 5 of the EU Directive concerning the legal effects of electronic signatures calls for Member States to ensure that advanced electronic signatures are based on a qualified certificate and created by a secure-signature-creation device. This would satisfy the legal requirements of a signature in relation to data in electronic form in the same way that a handwritten signature satisfies the requirements in relation to paper-based data; and is admissible as evidence in legal proceedings.[389]

The Directive therefore only recognises those signatures which are based on a qualified certificate and created using a secure-signature-creation device. However, article 5 paragraph 2 asserts that Member States must not deny legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that an electronic signature does not have a qualified certificate issued by an accredited certification service provider, or has not been created by a secure signature-creation device.[390] Therefore, although the Directive favours signatures based on a qualified certificate and created by a secure-signature-creation device, due to the level of

[389] Directive on Electronic Signatures art 5
[390] Ibid

security this affords electronic transactions it finally chose a technologically neutral approach in order to allow new technological advancements and not limit the usage of less-reliable electronic signatures.

6.4.2 Conduct of the signatory

Most e-commerce legislation seeks to adopt instructions that must be obeyed in order to make electronic signatures reliable and to avoid their unlawful usage. Article 11/1 of the Saudi Implementation Regulations for the Electronic Transaction Law (2008) requires any person using an electronic signature to take the necessary precautions to avoid any illegal use of the signature's creation data and of equipment related to the personal signature. These precautions include the following:

1) Maintaining the confidentiality of digital certificate and documents issued by the electronic signature certification service provider and not permitting any unauthorised access to them.
2) Applying appropriate techniques and safe solutions as per digital ratification procedures.[391]

The same article establishes an important condition, namely, that the owner of an electronic signature (signatory) must be reported to the certification service provider in the case of any illegal use of his/her signature, as well as documenting the data from illegal usage. Saudi regulations also allow the signatory to use a third-party who specialises in technical review and support to maintain the quality and confidentiality of the signing process, without prejudice to any laws or other regulations, or contract between the parties.

[391] Saudi Implementation Regulations for the Electronic Transaction Law (2007) MCIT Resolution No. 2 2008 <http://www.citc.gov.sa/arabic/RulesandSystems/Bylaws/Documents/LA_006_%20A_E-Transactions%20Act%20Bylaw.pdf > accessed 20 April 2015

The Model Law on Electronic Signatures is drafted differently but aims to achieve similar outcomes, with article 8 requiring the signatory to exercise reasonable care in avoiding unauthorised use of signature creation data. Paragraphs 1 and 2 of the Saudi Electronic Transaction Law (2007) take a similar approach, except for the additional requirement to report any unauthorised use of an electronic signature. Qatar Electronic Commerce and Transactions Law (2010) follows UNCITRAL, which specifies the electronic signatory must:

> without undue delay, use the means available by the certification service providers under article 9 of this law, or otherwise, to make reasonable efforts to notify any person that may be reasonably expected to rely on the electronic signature or to provide services in support of the electronic signature, in the case of detection of two cases:
>
> 1. The signatory knows that the signature creation data have been compromised; or
> 2. The circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised.

Both Dubai and Oman[392] follow the Model Law on Electronic Signatures, obliging the signatory to exercise reasonable care to ensure the accuracy and completeness of all material representations made by him/her that are relevant to the certificate throughout its life cycle, or that are to be included in the certificate.

Finally, the legislation affirms that when the signatory fails to satisfy these requirements, he/she must bear all the legal consequences.

[392] UAE Electronic Commerce and Transactions Law (2006) art 22; Oman Electronic Transactions Law (2008) art 24with some variation in wording. Dubai Electronic Transactions and Commerce Law (2002)

6.4.3 Conduct of the party relying on the electronic signatory

Responsibilities are also defined for the party relying on the electronic signatory but there are variations in GCC Member State legislation. Thus, Saudi Electronic Transaction Law (2007) limits the recognition of electronic signatures to digital signatures that are certified by trustworthy certification service providers which impacts on the conduct of the relying party. Article 12 of this Law requires the person relying on the electronic signature of another party, to exercise due care in verifying the authenticity of the signature, using the data verification of the signature in order to:

1. Ensure that the certificate of the sender has been issued by a licensed provider of certification services, in accordance with the provisions of these regulations, and verify its validity, and that it is not obsolete or cancelled.
2. Ensure that the attached data has an electronic signature which includes a name and address identical to the signature of the owner of the data and the reality of the certificate issued to him/her.
3. Check that there is no alert or warning stating that there may be a defect in the verification mechanism for the signature, or any other defect related origin or content messages, within the message and the signature contained in it.

Saudi regulations are also stricter in the event of a failure to conform to one of the provisions of these regulations, as the electronic signature would be considered voidable and does not specify the identity of the electronic record originator.

The other GCC Member States take a more tolerant approach, accepting a wide range of electronic signatures, and they do not limit recognition to advanced digital signatures associated with a certificate. Both types are accepted when addressing the issue of the conduct of the relying party. Qatar's Electronic Commerce and Transactions Law (2010) for instance,

affirms that in the case of non-digital signatures, the relying party would bear the responsibility and the legal consequences in the failure to take reasonable steps to verify that the electronic signature satisfies the approved conditions. However, in the case of digital signatures associated with a licensed certificate, Qatari legislation follows the Model Law on Electronic Signatures article 11 which obliges the relying party to verify the validity of the certificate, and whether there has been any suspension or revocation limitation to the certificate, this approach has been followed by Kuwaiti electronic transaction law 2014.[393]

Despite the significance of this issue and its important role in the allocation of the responsibilities and the risks between the signatory and the relying party, none of the other GCC Member State legislation has addressed this matter.

6.4.4 Protection of the electronic signature

Dubai Electronic Transactions and Commerce Law (2002) requires the parties to exercise a secure authentication procedure, either prescribed in regulations or commercially reasonable, that would protect the electronic signature from any alteration and that would ensure the signature would be treated as a protected electronic signature. This procedure depends on:

a) the nature of the transaction.
b) the knowledge and skill of the parties.
c) the volume of similar transactions carried out by any of the parties or both of them.
d) the existence of alternative measures.
e) the cost of alternative measures.
f) procedures generally used for similar transactions

[393] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 (United Nations Publication, New York, 2002, Kuwaiti electronic transaction law no 20/2014, Art 20

Other factors may be taken into account to determine whether the electronic signature is protected and to evaluate the extent of the authenticity of the electronic means used for protecting the signature from any alteration or modification. When reviewing the GCC Member State legislation, as it has been found that only Dubai and Oman address this issue. Moreover, it is not addressed by either UNCITRAL or in the relevant EU Directive. However, looking to regional legislation, an identical approach is adopted in article 35 of Jordan's Electronic Transaction Law (2001).[394]

6.4.5 Method of protecting electronic transactions

Oman's Electronic Transactions Law (2008) takes the lead in discussing the methods and means of protecting electronic transactions that would maintain the confidentiality of data messages and prevent unauthorised persons from accessing or corrupting the data messages, such as public key ciphering, firewalls, information filters, non-repudiation means, file and message ciphering technology, protection of back-up data, anti-worm and anti-virus programmes and any other means authorised by the competent authorities. Legislation from the other GCC Member States does not list the methods of protecting the electronic data; instead, they focus on a digital signature with its public key ciphering technology, which will be addressed in following sections.

Since the introduction of the electronic signature, the digital signature has widely dominated the market, due to the fact that it has not only taken the role of the traditional paper-based signature for proving the identity of a signatory and indicating his/her assent, but also because it assures the message's integrity and authenticity, making it very hard or, in the case of the most sophisticated technologies, impossible to hack the message or change any of the content.

[394] Jordan's Electronic Transaction Law No. 85 (December 11 2001)

Digital signatures are created and verified by using cryptography (a branch of applied mathematics) that transforms messages into unintelligible forms and then transfers them back to their original forms. Digital signatures use a method known as “public key cryptography”, which is often based on the use of algorithmic functions to produce two different keys which relate to each other mathematically. The first key is used to create a digital signature or for transforming data into unintelligible forms, while the second key is used to validate the digital signature and to return the data to its original form. These keys complement each other. The so-called “private key” is used by the signatory to create the digital signature, whilst the “public key” is usually more widely known to people dealing with a signatory, and is used by a relying party to verify the digital signature.

In order to verify the authenticity of a digital signature, it must allow access to the public key of the signatory and to ensure that it corresponds with his/her private key; therefore the parties must have a degree of confidence regarding the issue of public and private keys. It is also essential to provide an additional mechanism to establish a link between certain reliable persons and a specific key. Although the level of confidence between parties may be high due to their previous dealings with each other, or because they operate within a closed network group with a strong degree of security, the overwhelming majority of online transactions need a reliable third party to link the identity of the signatory and the specific public key on the other side, particularly when this is taking place for the first time and over an open network such as the web.

For this reason, GCC Member State legislation has paid close attention to this issue in relation to electronic signatures, generally referred to as the “certification authority”, “certification services provider” or “supplier of certification services. The main objectives of these entities is to guarantee that the public key or cryptographic techniques have not been tampered and that the public key corresponds to the private key. Their functions may also extend to providing

keys to end-users as well as publishing a directory of public-key certificates. In addition, they may also manage devices that specify a person's identity, for instance smart cards that can produce and store private keys connecting to a user's unique identity.

Legislation of the GCC Member States contains similar provisions regarding the regulation of certification services providers and determining their duties and responsibilities. Beyond this, however, Saudi Electronic Transaction Law (2007) called for the establishment of a National Centre for Digital Certification, stating the objectives of such a centre and its policies and mechanisms.

GCC Member State legislation in this area is guided by two approaches. The Saudi approach largely focuses on the establishment of a National Centre for Digital Certification to provide certification services and take the central role of both supervising and providing these services. The other GCC Member States limit the law to stating the function of certification services providers and their duties and policies for their establishment, regardless of whether these are private or public sector entities, which gives scope to the establishment of private sector companies in this area with limited supervision by public authorities.

6.4.6 Conduct of the certification service provider

Legislation concerning the duties and responsibilities that are imposed on certification service providers varies amongst the GCC Member States. Dubai chose the drafting from the Model Law on Electronic Signatures for its own legislation, Qatar and Oman opted for different drafting with additional provisions, whilst, as mentioned previously, Saudi regulation focused on the role of the National Centre for Digital Certification in providing such services.

All the legislation agrees concerning the two principal duties of the certification service provider, which were:

1. To act in accordance with representations made by it with respect to its practices.

2. To exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certification certificate throughout its life cycle or that are included in the certificate.

However, there are variations amongst the GCC Member States concerning the other duties of certification service providers. Dubai's Electronic Transactions and Commerce Law (2002), for example, requires these entities to provide some means that would enable a relying party to ascertain the following details:

1. Identity of the supplier of certification services;
2. That the signatory identified in the certificate had control of the signature creation device at a time when the certificate was issued;
3. The method used in identifying the signatory;
4. Any limitation on the purpose or value for which the signature creation data or the certificate may be used;
5. Whether the signature creation data devices are valid and have not been compromised;
6. Whether a timely revocation service is offered.

Qatar's Electronic Commerce and Transactions Law (2010) and Kuwaiti electronic transaction law no 20/2014[395], adds a third requirement for certification services providers, stating that they must "employ trustworthy systems, procedures and human resources in performing its services in accordance with the criteria determined by the Supreme Council".

Moreover, Dubai has added an important provision to its legislation regarding how to determine any responsibility for damage resulting from incorrect or defective certificates, affirming that the provider of certification services would be liable for any losses of any party

[395] Kuwaiti electronic transaction law no 20/2014, Art 22,23

who has contracted with them for the presentation of the certificate, or any losses of any person who has reasonably relied on the certificate issued by the provider of the certification services.

In some specified cases, however, the responsibility for such damages would not be borne by the service provider, including:

1. If any limitations or extents to the scope of its liability toward any relevant person were clearly indicated in the certificate statements.
2. If the service providers could prove by any means that there was no negligence on their part and that they did not commit any fault and that the damage was due to some external factor which was not relevant in any part.[396]

Qatari legislation specifies that the following factors need to be taken into account when determining the responsibility for the damages resulting from problems caused by a certificate:

1) The cost of obtaining certification documents.
2) The nature of the information being certified.
3) The existence and extent of any limitation on the purpose for which the certificate may be used.
4) The existence of any statement or agreement limiting the scope or extent of the liability of the certification service provider.
5) Any wrong-doing by the relying party including negligence or misconduct.[397]

6.4.7 Recognition of foreign certificates

Since it is of great importance to extend the confidence in cross-border transactions amongst GCC Member States they all agree on inserting relevant provisions recognising certificates

[396] Dubai Electronic Transactions and Commerce Law (2002) art 24 para 4
[397] Qatar Electronic Commerce and Transactions Law (2010) art 40

issued by foreign authorities.[398] Saudi regulations[399] for instance affirm that its National Centre for Digital Certification would be the competent authority for accrediting such certificates. However, due to the central role given to this Centre, article 20 requires the certificate to conform to the policy of certification reciprocity within the rules and procedures regulating the centre. The regulations also require the Centre to publish a list of accredited foreign authorities and update them periodically, but ultimately, the provisions give this body broad discretionary powers to refuse foreign certificates if this is deemed to be in the public interest.

Qatar's Electronic Commerce and Transactions Law (2010) affirms that certificates issued outside Qatar shall have the same legal effect as certificate issued by Qatari companies, but the legislation clearly states that any foreign certificate must be issued by a certification services provider that offers a level of reliability that is at least equivalent to the level of reliability under the provisions of this law.[400] Moreover, this Law applies place neutrality rules by affirming that no regard shall be given to the geographic location where the certificate is issued, or to the geographic location of the place of business of the issuer, in determining whether, or to what extent, a certification certificate is legally effective.

6.5 Regulatory approach

Despite the great benefits that e-commerce brings to merchants, entrepreneurs and consumers, and for the whole society, still, online commerce has some limitations due to the physical separation between buyers and sellers. This may lead to uncertainty and to a lack of consumer trust and confidence in buying online; therefore, some of the e-commerce legislation has preferred to take the regulatory approach and chosen to intervene to reduce the barriers and to develop a trustworthy relationship between seller and buyer to foster consumer trust in online

[398] Bahrain Electronic Transactions Law (2002), art 16; UAE Electronic Commerce and Transactions Law (2006) art 26; Oman Electronic Transactions Law (2008) art 42, with some variation in wording.
[399] Saudi Implementing Regulations for Electronic Transaction (2008) art 20
[400] Qatar Electronic Commerce and Transactions Law (2010) art 41

transactions. The regulatory approach is crucial because it affects a number of factors that are essential to online transactions, which may include prior information requirements, commercial communication, consumer data protection, right of withdrawal, regulatory competence, and sanctions.[401]

6.5.1 Prior information requirements

The right to be informed may be defined as the general pre-contractual obligation which requires the seller to inform the buyer of all necessary information, for instance, the seller's name, contact details, place of business, details of the subject matter of a goods or service, as well as the terms and conditions of the transaction. The purpose of this obligation is to restore balance between the parties as the seller usually has all the information about the transaction, but the consumer or buyer usually lacks adequate information, particularly due to technological advances in the online environment, which could increase this gap in the knowledge about the transactions and technical specifications between the parties.

The first requirement is to provide all relevant information concerning the seller and his/her place of business. Due to the distance involved in electronic transactions, it is necessary to provide clear information about the seller's name and address and contact details, as well as the place of business. There are important legal reasons for this since in Islamic law, knowing the other party is a cornerstone of the contractual process. The first legislation in the Arab world that requires clear disclosure of the identity of the seller is the Tunisian Trade and E-Commerce Law (2000), which in article 25 requires that sellers must provide in clear language their details of their identity and address as well as their contact details.[402]

[401] Teo, Thompson SH, and Jing Liu. "Consumer trust in e-commerce in the United States, Singapore and China." (2007) 35.1 *Omega* 22-38.
[402] Tunisian Trade and E-Commerce Law No. 83 of 2000 9 August 2000

The second requirement is to provide all the information and basic terms and conditions relating to the transactions of goods and services. These may include the following:

1) A complete description of the various stages of completion of the transaction
2) The nature and characteristics and the price of the product
3) The cost of delivery and of tax and the insurance where applicable
4) The time limits for prices which refer to offers
5) Terms and condition of guarantees and after-sales service
6) Procedures and methods of payment, and if necessary, the terms of the credit payment
7) Methods and times of delivery as well as methods of implementation of the contract and the consequences of non-completion of commitments
8) The possibility of reverse purchases and cancelling the transaction
9) Methods of return and exchange of the product or return of the amount
10) Methods of terminating the contract and the minimum duration of the contract.

Most of the legislation in the GCC Member States does not address this issue of the seller's responsibility to provide this general information, despite the vital role it would play in building confidence in e-commerce transactions. It is possible that this is due to the fact that these issues are ignored by UNCITRAL Model Laws and Conventions, which focus on the basic principles of recognition of electronic transactions and functional equivalence between traditional paper-based and electronic transactions. During the early stages of e-commerce, the obstacles and barriers could have included the origin of recognition, whereas with the spread of e-commerce, other obstacles have emerged such as the identity of sellers or information about goods or services.

The EU Directive on Electronic Commerce (2000)[403] highlights the importance of this issue by mentioning it in three different articles: Article 5 requires general information to be provided including: the name of the service provider; the geographic address; the details of the service provider, including an email address; the trade register in which the service provider is entered and registration number, or equivalent means of identification in that register; and if the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority.

In the case of the regulated professions, information must be provide about any professional body or similar institution with which the service provider is registered; the professional title held and the Member State where it has been awarded together with a reference to the applicable professional rules in the Member State of establishment and the means to access them.[404]

In relation to commercial communication, article 6 of the Directive requires any commercial communication to be clearly identifiable, as well as the natural or legal person on whose behalf the commercial communication is made. Moreover, promotional offers such as discounts, premiums and gifts, and promotional competitions or games must be clearly identifiable as such, and the conditions which are to be met to qualify for them and the conditions for participation must be easily accessible and presented clearly and unambiguously.

The EU Directive goes beyond this by devoting another article to the information to be provided which, to a certain extent, relates to concluding the contract. Article 10 requires Member States to ensure the following information is given clearly, comprehensively and unambiguously: the different technical steps to be followed to conclude the contract; whether or not the concluded contract will be filed by the service provider and whether it will remain

[403] Directive on Electronic Commerce, OJ L178, 17/07/2000
[404] Directive on Electronic Commerce

accessible; the technical means for identifying and correcting input errors prior to the placing of the order; and finally, the languages offered for the conclusion of the contract.

In the case of the GCC Member States, the only two legislations to date that addresses the issue of information requirements are Qatar's Electronic Commerce and Transactions Law (2010) and the Saudi E-Commerce Law Proposal (2015). In fact, these requirements stated in Qatar's Electronic Commerce and Transactions Law (2010) as follows:

> The name and address of the service provider; contact methods for the service provider, including a contact e-mail address; commercial registry data, or any other similar means, to determine the identity of the service provider; the competent authority that the service provider is subject to for its supervision; codes of conduct governing the service provider and the possibility of accessing them electronically, and finally, any other information that the Council sees as important for the protection of consumers of e-commerce services.[405]

Meanwhile, the Saudi proposal of E-Commerce Law has divided the information requirements into two groups; First: related to the identity and contact details of sellers or service providers in Article 7 which includes the following: "name or trade name and means of contacts, and Commercial Registration data, if applicable".[406]

Second: related to the terms and conditions of the contract, in Article 8 including the following:

a) Technical steps to be followed for the conclusion of the contract.
b) Details of the service provider.
c) Descriptions of the basic characteristics of the goods or services.
d) The price of services and goods, including any additional fees.

[405] Qatar Electronic Commerce and Transactions Law (2010) art 51
[406] Saudi Proposal for an E-Commerce Law (2015) Art 7

e) Arrangements for payment, delivery and the duration and price of the delivery.

f) If any, warranty Terms and Conditions.

g) Whether if the contract to be stored or retained by the service provider. [407]

In fact, the purpose of this requirement of prior information is to enhance consumer confidence in e-commerce due to the nature of distance selling, which involves a seller who is unknown personally to the buyer, or surrounding lack of clarity concerning products. This means that consumers may not be persuaded to shift to e-commerce until they are convinced that it is as reliable and as safe as carrying out transactions in a traditional manner. Therefore, a prerequisite for the development of e-commerce is that consumers must be made fully aware of the seller's identity and all necessary details of the products and services in order to enable them to evaluate both the product and the offer before the contract is concluded.

6.5.2 Commercial Communication

Commercial communication may include advertisements, offers or promotional competitions that seek to attract consumers through carefully selected marketing methods in order to strengthen the reputation of the store and increase sales. Commercial communications can be regarded as a very important issue with respect to regulating e-commerce due to the ease of online advertising. Online advertisements can have a significant impact as they may include fraud, manipulation, deliberate ambiguity and a lack of credibility making it difficult for official authorities to govern commercial communications, which affirms the need for detailed legal materials to address this issue.

Saudi's proposed E-Commerce Law recognises the vital role that commercial communication and promotional advertisements can play in the e-commerce field, therefore, it has addressed

[407] Saudi Proposal for an E-Commerce Law (2015) Art 8

this issue in detail, devoting four articles to it which would serve to regulate commercial communication as well as enhance the confidence of electronic consumers.

Beginning with article 12, which defines the scope of electronic communication as any commercial advertisement made through electronic media primarily designed to encourage the sale of products or services directly or indirectly or to improve the image of the electronic store or of the company or person who is carrying out commercial or industrial activities, whatever the means used.

Article 14 goes beyond that, considering advertising and promotional offers delivered by electronic means as contractual documents, which would complement the contracts of goods and services, and commit to all the contracting parties contained herein regardless of their forms. In order to affirm the transparency and credibility of electronic communications, the Saudi Draft E-Commerce Law requires commercials advertisements delivered via electronic media to clearly include the name of the trader and any distinctive statement and his/her contact details as well as clarifying details of the item.[408]

At the same time, the Saudi Proposed Law prohibits two negative practices widely used in electronic commercial communication that hinder consumer confidence and the credibility of e-commerce. Firstly, it prohibits any advertisements that include false statements or offers presented in way that could lead directly or indirectly to consumers being deceived or misled. Secondly, it prohibits any advertisements that include slogans or trademarks being used unlawfully or any use of counterfeit markings. This step can be considered an excellent means of countering the current widespread negative practice of selling and buying counterfeit

[408] Saudi Proposal for an E-Commerce Law (2015) art 11

markings through electronic means. This is particularly important considering the fact that e-commerce practices are less well regulated and less frequently inspected by official authorities.

The Saudi Law Proposal is more practical in this regard as it requires the Ministry of Commerce and Industry to oblige those who do not comply with the conditions contained in this article to withdraw their advertisements within one business day of being notified. Moreover, in the case of non-compliance, the Ministry would be required to block the website of the offending e-shop with an official statement in coordination with the Ministry of Communications and Information Technology (MCIT).[409]

This practical method of regulating advertisements is a positive step, but it could be argued that without applying sanctions to those electronic stores which violate trademark rules, as well as presenting false, deceiving or misleading advertisements, it will be not be of great usefulness, as is easy to perform such negative practices repeatedly. This is due to the nature of e-commerce, and the ease of re-opening an online store by simply changing the name of the store or the interface page. Applying sanctions, such as financial fines or judicial prosecution for commercial fraud, would be a great step towards enhancing the credibility and consumer confidence in e-commerce.

Qatar's Electronic Commerce and Transactions Law (2010) requires all offers to be described with precision and clarity, and to clearly indicate whether they include any discounts, bonuses or gifts. Finally, to ensure that the conditions to participate are not misleading or deceptive, these must be set out clearly and unambiguously, and need to be accessible.[410]

[409] Saudi Proposal for an E-Commerce Law (2015) art 11
[410] Qatar's Electronic Commerce and Transactions Law (2010) art 53

6.5.3 Consumer data protection

Protecting consumer data in electronic transactions is a vital issue due to its link with fundamental human rights. This explains why in the EU context it was judged to merit a separate directive: Directive 95/46/EC covering the protection of individuals with regard to the processing of personal data and the free movement of such data.[411] As a result it was not addressed by the Directive on Electronic Commerce. More recently, in January 2012, the European Commission proposed a comprehensive reform of this Directive, recognising that strengthening online privacy rights was essential to boosting Europe's digital economy and reinforcing consumer confidence in electronic business transactions. The Commission realised that this modernisation was needed because a technological revolution had taken place since the Directive was originally approved, and the massive expansion in online services posed new challenges for data protection. Differences in implementation between EU Member States can also lead to inconsistencies, legal uncertainty and administrative costs.

Having considered that boosting individuals' confidence in the protection of their data, wherever it is processed, will improve trust and confidence in online business and boost demand in the digital economy, the change has focused on reinforcing individuals' rights of data protection in all areas, mainly by adopting the principle of the right to be forgotten.[412]

With regards to Saudi Arabia, there is a general lack of legislation addressing data protection; therefore, it is extremely important to discuss the issue of data protection in the online business environment. This was not addressed in the existing Saudi Electronic Transaction Law (2007)

[411] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281, 23/11/1995 P. 0031 – 0050

[412] Memo/12/41, Data protection reform, Brussels, 25 January 2012, <http://europa.eu/rapid/press-release_MEMO-12-41_en.htm?locale=en> accessed 20 May 2015

so detailed provisions have been made in relation to this issue in the draft of the proposal for a new E-Commerce Law (2015).

Article 15 clearly prohibits any party who has obtained personal or financial data relating to consumers from retaining this longer than the period required by the nature of the transition. Moreover, this data may not be used for any purpose which was not expressly authorised or permitted, either paid or free of charge, without prior written consent of the consumer to whom it pertains, unless it is required by an official authority or authorised under other laws and regulations.[413]

These provisions place this responsibility on any party who obtains any records containing the personal customer data or any records of electronic communications to the customer, or even data under the control of its agents or employees, to take reasonable steps to ensure that this personal information and any related records are securely protected in a manner befitting its importance.

The only legislation in the GCC Member States that currently addresses data protection issues is that of Oman which contains seven detailed articles that affirm the consent principle for retaining or transferring consumer data. Article 43 allows for any commercial platforms or certification services providers to retain or transfer consumer data only after obtaining clear explicit consent, with the exception of the following:

1) For security purposes at the request of the investigating and security bodies
2) If there is a court order or it is required by law or regulation
3) For financial purposes such as tax accounting or arranging fees

[413] Saudi Proposal for an E-Commerce Law (2015) art 15

4) For the purpose of protection of the vital interests of the person whose data has been processed.

Moreover, it obliges service providers to enable the owner of this data to access and update personal data at any time, and makes service providers responsible for providing the technical means that facilitate this access. Also, when processing the data, the provision obliges service providers to inform the customer of any procedures and technical steps that would be taken, including the identity of the responsible person, the purpose and nature of the process and all necessary details that preserve the integrity of the process and enhance customer confidence. However, Omani provisions prohibit personal data being processed in any way that harms people or undermines their rights or personal freedom. Finally, Omani legislation addresses the issue of transferring personal data outside Oman, and recommends that it must be taken into account an adequate level of protection for these data and in particular the following: the nature of the personal data, the purpose of transferring this, the applicable law of the country that it is being transferred to and its obligations, as well as the technical standards of protecting data in such a country.[414]

6.5.4 Right of withdrawal

One of the crucial means of enhancing consumer confidence in e-commerce is to ensure that they have the right to terminate a contract or the importance of the right of withdrawal. Since the early days of the e-commerce phenomenon, the European Commission has recognised the vital importance of right of withdrawal from a contract. Therefore, this right is clearly enshrined in the EU Distance Selling Directive (97/7) article 6 which addresses in detail the provisions of the right of withdrawal by affirming that:

[414] Oman Electronic Transactions Law (2008) art 43-50

> For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.[415]

When the EU approved the Directive on Consumer Rights (13 June 2014) which replaces the Directive 97/7/EC on the protection of consumers in respect of distance contracts, the issue of right of withdrawal was still given due attention. Modifications included extending the period for withdrawing from a distance or off-premises contract, without giving any reason, and without incurring any cost from what was previously seven days to 14 days in the Consumer Rights Directive.[416]

The proposal for the new Saudi E-Commerce Law affirms the consumer's right to withdraw from an electronic contract during a period of fifteen days following the date of receipt of the goods, or from the date when the contract to provide the service was implemented, as long as the consumer has not used or benefitted from the goods or services. However, the provision places the cost of returning any goods on the consumer. The provisions also exclude the following cases from the right of withdrawal:

1) If the contract deals with goods made at the customer's request or according to the specifications set out by customer, except in the event of a defect or non-conformity with the specifications that have been agreed upon.
2) If the contract deals with video tapes or CDs or digital programmes if they have been opened or used.

[415] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament re art 6 (1) - Statement by the Commission re art 3 (1), first indent, OJ C 144, 04/06/1997 P. 0019 – 0027
[416] Directive on Consumer Rights

3) If the contract deals with the purchase of newspapers and magazines, publications and books.
4) If a defect in the item appears as a result of misuse by the consumer.
5) If the contract involves the services of providing housing, transferring, or feeding.
6) If the contract deals with buying online download service programmes except in the event of a flaw in the programme preventing the completion of the download.[417]

Another important issue addressed by this legislative proposal is the right to terminate the contract due to a delay in delivering and performing the contract. If the trader delays delivery or performance of the contract and another period of delivery or performance of the contract was not agreed with the consumer, then he/she has the right to terminate the contract if the delay occurred in the delivery or execution of the contract exceeds fifteen days from the date agreed for delivery. In addition, the consumer has the right of recovery of any amounts paid under the contract in exchange for products or goods or services or any other obligation affected by the delay.[418]

Attempting to analyse the right of termination of the contract by an individual without any reason will now be examined by reviewing current GCC Member State legislation and the sources of law and its extensions. This area has attracted much attention and debate, particularly due to the conflict with the principles of the binding force of the contract being pursued by legal schools in the Gulf region.

Initially, legislation in the GCC Member States followed the general principle that the contract was deemed to be in force and effective and therefore did not allow the right of withdrawal

[417] Saudi Proposal for an E-Commerce Law art 16
[418] Saudi Proposal for an E-Commerce Law art 17

except in the case of exceptions and specific circumstances; therefore, it became important to adopt the right of withdrawal with general principles and deferred legal opinions.

According to some legal scholars,[419] if a contract entails the right of withdrawal it should be considered as an invitation to negotiate or to treat, rather than being a binding contract, and a specified period of fourteen or twenty-one days is then deemed to be a period of probation granted by the regulators as a result of the special nature of a distance contract. Withdrawal during this period is possible, but after this period, the contract would become binding and withdrawal is no longer possible just because an individual desires this. By adopting this perspective, it is still possible to respect the general principles of the binding force of a contract.

Hassan[420] has proposed a similar view, namely, that a contract with the right of withdrawal is deemed to be a promise to contract, and during the initial period it is an agreement under which one party is the promising party who may accept the conclusion of a contract in the future, when the period of the right to withdraw has finished. At that stage, it becomes a final agreement and a valid contract.

However, both of these views are untenable given that this would lead to the goods in question being under the ownership of the seller during the waiting period, which could lead to unwanted complications, for example, if an item is damaged then the compensatory responsibility lies with the buyer, even though ownership does not transfer to him/her until the conclusion of the contract.

A further opinion proposed by Majed [421] it that the right of withdrawal should be deemed as an additional right dependent on the conclusion of the contract, the contractual relationship

[419] Anwar Sultan, *Sources of Obligation in Jordanian Civil Law: Comparison Study with Islamic Jurisprudence* (House of Culture Publishing and Distribution 2010) 60
[420] Hassan Jmiei, *consumer protection* (Arab Renaissance Publishing House 1996) 44
[421] Majed Sulaiman, *Electronic Contract* (Al-Rashid Library Press 2009) 56

starting from the time of conclusion of the contract. This would occur by mutual consent if the contract fulfils all requirements. Moreover, although the right of withdrawal is exercised by the individual, it should be deemed that the contract has been concluded and ownership has been transferred.

With regards to Islamic jurisprudence, which is an important source of legislation for Gulf countries, all schools of Islamic jurisprudence advocate the right of withdrawal in the case of defective goods, but they differ with regards to other scenarios. According to Al Saeed,[422] many scholars argue that there are two types of contracts: binding and non-binding. In the second type, the contract has fulfilled the contractual requirements but it allows for withdrawal of the contract by any of the contracting parties without the need for mutual consent. This covers different types of contracts, some of which are non-binding by their nature, for instance depository contracts or agency agreements. Other contracts fall into this category due to the so-called Options Theory in Islamic jurisprudence, which means that both parties have the right either to proceed with the contract or to withdraw in specific detailed cases and under particular conditions.[423]

According to Ibn Qudamah al-Maqdisi, "the buyer is not allowed to withdraw from the contract, unless there is a defect in the goods or an option in the contract."[424] So-called suspended contracts depend on the option of viewing the goods or having knowledge of them. In fact, one of the most important conditions for contract validity in Islamic jurisprudence is the viewing of goods before agreeing a contract. Goods may not be sold without the buyer having viewed them unless a clear description is given and there is the option of viewing. One

[422] Mohammed Al-Saeed Rushdie, *contracted by Means of Modern Communication* (Council of Scientific Publications 1998) 82
[423] Abu Ishaq al-Hanbali, *Branches Hanbali Fiqh, Al Mubdi sharh Al Mounia* (Islamic Library 2000)
[424] Muwaffaq al-Din 'Abd Allah ibn Ahmad ibn Qudamah al-Maqdisi al-Hanbali, *Al Mughni: Sharh Al Kabir*, Dar 'Alam al kutub (6th edn,) 30 Al Mughni is considered to be one of the most important source of Islamic jurisprudence".

of the exceptions to this condition is a contract with the option of viewing which would allow the buyer to agree to a contract for goods that he/she has not seen.

Moreover, a conditional option, which involves stipulating in the contract an option for the right to withdraw from the contract, has been extrapolated from the Prophet Muhammad (ﷺ) as narrated by 'Abdullah ibn 'Umar: "A person came to the Prophet (ﷺ) and told him that he was always betrayed in purchasing. The Prophet (ﷺ) told him to say at the time of buying, "No cheating."[425] Moreover, as narrated by Baihaqi "and then you have the option for three nights for the goods you bought."[426]

Thus, Islamic jurisprudence can accommodate the right of withdrawal in online transactions due to the similarities with the traditional view of contracts that occur without viewing goods, which provides the option either to withdraw or to proceed with the contract. In practice, an online contract is concluded without the viewing of goods; thus, it resembles the "conditional option" meaning that the contract may stipulate an option for the right of withdrawal. Therefore, although this issue has attracted considerable debate, it is clear that in Islamic jurisprudence as an important influence on legislation in the GCC Member States that it is possible in general to accommodate the right of withdrawal in online transactions. However, discussion of the details is necessary, such as the minimum and maximum duration of this right and who should bear the cost of the return, and whether there are any cases that would be exempt from this right.

6.5.5 Error in electronic communications

Another key issue addressed by the Saudi draft law is the right to correct error in the electronic communication or withdraw if there is no opportunity to correct this, article 6 stating that:

[425] Sahih al-Bukhari 2117 : Book 34, Hadith 70 : 3, USC-MSA web (English) reference, Book 34, Hadith 328
[426] Al-Sunan al kubra Imam Al-Baihaqi, Hadith 9689, 5 : 272

When a natural person who commits an error in an electronic communication with an automated message system, and that automated message system does not provide an opportunity to correct said error, that person is entitled to withdraw that part of the electronic communication in which the error was made as long as they:

1) Inform the other party of the error as soon as possible after having learned.
2) Have not used what may be received from the goods or services from the other party or received any benefit.

6.5.6 Regulatory competence

One of the most striking points in the Saudi Draft E-Commerce Law is the establishment of the competence of the Ministry of Commerce to supervise the electronic commerce field and to regulate some aspects of e-commerce, by devising terms and conditions and determining roles and responsibilities. These regulations focus particularly on the following three areas:

1) Rating the reliability of online businesses
2) Regulating online auction platforms.
3) Regulating online commercial platforms that act as brokers between sellers and consumers.

6.5.7 Sanctions

One of the distinctive elements in Saudi draft e-commerce law is the sanction and penalties that adopted to provide incentives for obedience with this law and other regulations as it states that:

“Anyone who violates the provisions of this rules shall be punished by one of the following:

a) An official warning.
b) A fine not exceeding one million riyals.

c) Being removed from the commercial register.

A penalty may be doubled in case of repeat offences, and a list of businesses delisted from the commercial register will be circulated in one or more local newspapers." [427]

6.6 ODR and Legislation in the GCC Member States

The formal and procedural requirements set forth in national laws and international conventions may have implications regarding the use of online arbitration, mediation and other types of online settlement. For example, the requirement of the personal physical presence of the parties or their representatives and agents, as well as witnesses and experts before the arbitral tribunal which raises the question of whether those GCC laws can accommodate online dispute resolution. More importantly, to what extent such online arbitral decisions would meet the elements for legal implementation.

The widespread new means of electronic communication and the remarkable boom in e-commerce raise many questions around the possibility of the acceptance of such new online dispute resolutions in Saudi laws and regulations. Saudi Arabia acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) [428] in 1994. This is the most important international convention in the field of implementation of the provisions of foreign arbitral awards, and makes it binding on national courts to implement the provisions of this Convention.

Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that each Contracting State to the Convention should recognise any written agreement in which the parties undertake to refer to arbitration in any disputes that may arise, depending

[427] Saudi Proposal for an E-Commerce Law art 22
[428] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) UNCITRAL United Nations, New York 6 July 1988

on the specific legal relationship, and whether it is contractual or not. Also, a written agreement could mean any arbitration clause in a contract, or an arbitration agreement signed by the parties or contained in letters and telegrams between the disputed parties.[429]

Article 7 of the same convention requires that arbitration should be written. This would be fulfilled if it is written through electronic communication so the information therein would be available for later reference. Electronic communication includes any information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.[430]

But what is the norm in determining the foreign character of the arbitration award until it is recognised and implemented in accordance with this Convention? Article I of the Convention considers the geographical criterion to be the benchmark for a foreign arbitration award. This is the same criterion that was adopted by the Saudi legislator in the current arbitration law in 2012[431]. Also, the Convention requires that the parties agree to the arbitration award and sign such an agreement and other formal requirements.

This raises the question of the extent to which award would meet the formal requirements of the arbitration award. In some GCC Member States, the arbitration clause needs to be approved by a competent authority in the country where the arbitration process has been conducted for implementation of arbitration award. Therefore, consideration must to given as to whether there is an urgent need to add a special article for recognising online dispute resolution so that the Saudi arbitration system will recognise online arbitral awards and other types of ODR.[432] It is

[429] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) UNCITRAL United Nations, New York 6 July 1988 <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf > accessed 13 July 2015

[430] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) UNCITRAL United Nations, New York 6 July 1988

[431] Saudi Arbitration Law Royal Decree No M/34, April 2012

[432] Abdulaziz Mohammed al-Fadhli, 'Online dispute resolution and formal requirements', September 2010, Riyadh

could be argued that incorporating a reference to ODR in GCC arbitration laws would greatly help the competent authority to implement the provisions of foreign arbitral law.

Some of the formal requirements of the arbitration award include, for example, requiring the issuance of the arbitration award by an arbitrator who has a high level of competence and has the ability to carry out this process carefully and professionally. In order for ODR to be accepted and recognised, it needs to be issued by a respected official ADR entity which meets the requirements. [433]

Moreover, the electronic signature, which is deemed an important element of identifying the parties in ODR, must be considered. Therefore, a precise system to facilitate and support the online process used in online dispute resolution is greatly needed.

Another issue arises as to whether it is necessary for the entire arbitration process to be conducted via electronic means for the process to be considered ODR, or whether it would be sufficient if the use of electronic means occurs at any stage of the ODR process. The first group would consider arbitration to be ODR, whether it is wholly conducted through electronic means, or simply uses electronic means at any stage of the process; for instance, using electronic means for the arbitration agreement could mean the other processes require the physical presence of the parties to conduct the arbitration.[434] The second group opposes this, considering that ODR must be conducted entirely using electronic means, meaning the parties would not ever meet physically, and the arbitration hearing session, as well as sentencing, would be held online.[435]

[433] Fatima Al Magthoi, *Online Dispute Resolution in Saudi Legislation* (Naïf Arab University for Security Sciences 2014)
[434] Sami Abu Saleh, *Online Commercial Arbitration* (Arab Renaissance Publishing House, 2004)
[435] Nayla Obeid, 'Modern Trends in International Arbitration' (Dubai Arbitration Centre publications 2007)

This approach has more weight than the first, since it could be argued that all types of arbitration can use some electronic means, such as emailing to inform the parties about their appointment, and this would result in widening the concept unjustifiably. Therefore, limiting the concept of ODR to arbitration which does not involve the physical presence of the parties and solely involves electronic means for all its aspects should prevail.

Online arbitration raises many questions in relation to the legislation that currently governs arbitration procedures in the GCC Member States. This legislation usually assumes the physical presence of the disputed parties or their representatives, and may include witnesses and experts, as well as the use of paper-based documentation. Therefore, in the light of traditional arbitration rules, ODR would not meet such rules and it is necessary to adopt new modern rules to accommodate electronic arbitration and other types of online dispute resolution.

6.7 Conclusion

The functional equivalence principle, which has been enacted and addressed in detail in all GCC legislation according to the principles of the UNCITRAL Models and conventions which seeks to expand the scope of formal requirements and adopting an electronic functional equivalent. Therefore, most of the GCC e-commerce legislation affirms the admissibility value of the electronic document and electronic signature, and considers the originality status of electronic records with some conditions, as well as detailing the variations between such legislation. This would ultimately be reflected in the evidential weight of data messages for court and official authorities.

Before the emergence of the e-commerce phenomenon, most scholars of Islamic jurisprudence agreed that the most significant condition for the validity of a contract is mutual consent. Moreover, GCC legislation realises that the utmost importance needs to be given to recognising the electronic contract and giving it complete legal effect. On the other hand, all GCC

legislation has adopted a similar avoidance approach with regards to determining the time of conclusion of the contract, focusing instead on determining the time of dispatch and the time of receipt, and relying on the general principles of Contract Law. However, it could be argued that the inclusion of a statement concerning the exact moment when the contract is considered to be concluded would enhance legal certainty.

On the one hand, it is important to look at the full picture of GCC legislation, which to some extent focuses on the recognition of electronic transactions and affirming the legal effect of electronic contracts; on the other hand, for the vast majority of GCC legislation, it has been decided not to follow the regulatory approach of e-commerce, and the legislation has not provided detailed rules that would enhance consumer confidence and trust in online commerce.

One of the significant factors in the regulatory approach is the prior information requirement, which is due to the rapid spread of e-commerce, as this may cause a lack of clarity for the trader or over the goods or services, or lack of clarity regarding the terms and conditions. Another issue is that commercial communication is undoubtedly regarded as the cornerstone of e-commerce regulations due to the easiness of online advertising which ultimately means there is wide scope for manipulation, fraud and ambiguity.

Moreover, many online disputes could occur due to the delay in delivery or fulfilment of the contract or non-conformity of the goods with the provided descriptions, so the right of withdrawal is of utmost importance, which is only addressed in detail in the Saudi proposal. Also, errors and mistakes can occur widely in electronic contracts due to the speed and automation of the transaction, which requires the legislation to address possible issues of errors and mistakes in order to enhance consumer confidence in electronic contracts.

What is more, consumer data protection would significantly boost trust and confidence in electronic transactions, and ultimately increase the spread of online commerce. This could be

done by placing the responsibility for adhering to legislation with any party who obtains any personal information by taking reasonable steps to ensure the personal information is securely protected.

In fact, after reviewing the GCC legislation concerning these issues, it has been found that the latest legislation is the Saudi Proposal for e-commerce law (2015) as well as Qatari Electronic Commerce Law (2010) are the exceptions which have regulated most of these issues with some variations of the drafting and to some extent influenced by EU Directives and regulations.

The widespread use of electronic commerce will undoubtedly result in an increase in online disputes, and given the fact that the vast majority of online buyers or traders are unlikely to resolve the dispute through the courts or other off-line settlements, this makes online dispute resolution a vital factor to boost the electronic commerce phenomena.

On the one hand, GCC legislations have regulated or addressed online dispute resolution issues due to the resent adoption of this concept throughout the world, but on the other hand, all of the Gulf States have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention), which may impose the implementation of the provisions of foreign arbitral awards.

Overall, in order to boost the growth of electronic commerce and increase the confidence of online consumers, it is of the utmost important to regulate online dispute resolutions, and it would be of major assistance in facilitating transparent, effective, fast and fair out-of-court resolution of disputes between online consumers and traders.

7. Conclusion

7.1 Overview

This research has explored the concept of e-commerce contracts by analysing the extent to which e-commerce rules in the Gulf States match the standards of consistency and harmonisation in current international best practice (exemplified by the UN, EU and UK). The underlying purpose of this examination is to look ahead to the implementation of e-commerce legislation in the Gulf States, in so doing, this thesis has analysed various aspects of e-commerce in three jurisdictions (namely, the UN, EU and UK) in order to extrapolate lessons that might be learnt by the Gulf States. This concluding chapter reveals the main findings of this analysis in order to highlight the strengths and weaknesses of the different forms of legislation, and to draw comparative lessons from international best practice, which is intended to help the Gulf States with forthcoming reforms in this area.

To obtain this result, the research has explored international best practice in e-commerce contracts, focusing particularly on EU directives and UK legislations the UNCITRAL model laws and conventions, and comparing this with current Gulf States' legislation, in order to analyse the extent of the consistency and harmonisation between the e-commerce rules of these legal systems. Overall, this research has covered three dimensions of e-commerce in a legal context.

First and foremost, it examined contractual issues in order to discover the extent to which legislation could serve to boost certainty and enhance confidence in concluding contracts electronically. Some of the most significant issues related to contracts were also addressed such as application of the concepts of offer and acceptance in relation to electronic contracts, the time of the conclusion of electronic contracts, the location of the parties as well as the time and

place for receipt and dispatch, the use of electronic agents and automated message system, the availability of contract terms and errors in electronic contracting.

Secondly, this research considered online security and identity issues, examining how legal frameworks can help to ensure online security and increase trust and confidence in e-commerce transactions. It focused particularly on the nature and function of the electronic signature since this serves as the main proof of identity in the virtual environment. The evidential value that electronic signatures possess was also given detailed consideration in this thesis.

Thirdly, it explored the concept of online dispute resolution (ODR) and discussed recent EU initiatives that serve as an example of best practice in the area of ODR regulation. It also analysed the regulatory context of alternative dispute resolution in the UK, critically reviewing some successful examples of online arbitration services, including the Uniform Domain-Name Dispute-Resolution Policy (UDRP).

By considering this range of elements and factors, this thesis is able to answer its main research questions by stating, firstly, that there is a great deal of consistency between UNCITRAL e-commerce model laws and the existing legislation in the Gulf States, and secondly, that there are many lessons that the members of the GCC could learn from the rich experience of both EU directives and UK regulations in an e-commerce context. These lessons and recommendations need to be taken into account in any reforms that are intended to enhance the robustness of the e-commerce system in the Gulf area. Therefore, the discussion presented in this thesis not only provides effective lessons for Gulf legislators but it also paves the way for further studies that might be conducted by other researchers with the aim of further enhancing e-commerce legislations. This study, therefore, provides a notable contribution to the limited literature that currently exists in this area of law.

Moreover, since to date relatively little analytical research has been carried out on GCC e-commerce legislation and international best practice, the adoption of best practice will help to support the spread of e-commerce within the Gulf States whilst at the same time eliminating those weaknesses that could be regarded as an impediment to the growth of online business. Lessons learnt from this comparative analysis can also be used to inform future proposals for the harmonisation of legal frameworks covering e-commerce contracts in the Gulf States, since one of the main objectives of the GCC is to achieve consistency and harmonisation in the legislative frameworks of its member states. This research therefore also makes a contribution to helping to ensure the growth of e-commerce within this region and to its continued prosperity.

This concluding chapter will begin by presenting a summary of the main findings of the thesis, followed by a series of recommendations stemming from best practice. Last but not least, potential areas of further study are identified that would merit examination in order to further enhance the robustness of the e-commerce system in the Gulf States.

7.2 The main findings

Having considered various aspects of e-commerce in three jurisdictions, namely, the EU, UN and Gulf States, separately in a detailed comparative analysis, this current chapter will highlight the main findings concerning the respective strengths and weaknesses of these different forms of legislations in order to draw comparative lessons from international best practice.

7.2.1 Research questions

Broadly speaking, with regards to general comparative analysis, it can be seen that there is a wide degree of consistency and harmonisation between UNCITRAL e-commerce model laws and conventions, and the existing legislation in the GCC member states, probably due to the fact that the Gulf States gained early accession to UNCITRAL conventions, meaning that they

preferred to adopt UNCITRAL model law, using similar wording. However, attempting to simply imitate UNICITRAL models in their entirety, without considering the local context, would be likely to cause a negative impact, since there is always space for implementing creative solutions to local issues that might hinder the growth of e-commerce.

On the one hand, legal transplantation is one of the most significant sources of legal development, and as Watson[436] argues, moreover, all schools of law are usually borrowed from elsewhere, which means they were initially developed in a different context. on the other hand, partial or complete adoption of any legislation originally designed for another legal framework, using what might be termed a 'copy and paste' approach to legislation without careful prior assessment and analysis of local issues or problems to explore whether better solutions can be created would create negative impacts on the attempts of legal harmonisation.

In fact, what the Gulf legislations have done is simply importing and adopting most of the UNCITRAL model and convention in e-commerce context, although it is considered one of the most respected international models and the main objective of this UNCITRAL is to facilitate the process of the convergence and harmonisation of laws. However, a median approach which Gulf States should follow is between the extremes of wholesale importing of model laws or their total rejection would affirm the connection between laws and the local context on the one hand, and on other, it would support the importing or transplanting of international best practice rules, whether partially or completely. Against the backdrop of legal globalisation, there are complex issues that need to be considered when interacting with international standards of rules and regulations, meaning it is important to engage with local social and economic factors, in order to maintain the unique characteristics of local rules.

[436] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (1st ed, Scottish Academic press 1974)

With regards to the comparative analysis between the EU context and Gulf State legislation on e-commerce, it can be seen that the EU directives play an active role in regulating the Internet. The EU has sought to create a coherent legal and regulatory framework by applying its key principles of internal market and consumer protection; in addition, it has avoided intervening in national contractual rules. It has removed the obstacles to the growth of e-commerce within Europe by preventing any prohibitions or restrictions on the use of electronic contracts. The E-commerce directive affirms a certain level of transparency by imposing specific information requirements for the conclusion of electronic contracts and for commercial electronic communication and advertising, in order to ensure consumer confidence remains high, fair trading practices are followed and consumers are able to avoid technical errors. Furthermore, the right of withdrawal rules has also been detailed in the EU directives and regulations.

It is important to take into account that the EU context has no general competence over contracts, and therefore it can only act in relation to contracts in the context of consumer protection or the internal market. This is because the competence of consumer protection was granted under the Treaty on the Functioning of the European Union[437] and it was empowered to ensure a high level of consumer protection.

One of the recent and most vital initiatives of the EU introduced to regulate online dispute resolution for e-commerce disputes is the ADR Directive (2013/11/EU) and the ODR Regulation (524/2013), which creates a significant regulatory framework of independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between consumers and traders online. This is achieved by creating a platform for resolving online disputes, which should be accessible to and usable by all online buyers.

[437] Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 - 0390

As previously noted, most of the GCC legislation in the e-commerce field have followed UNCITRAL models and conventions in drafting legislation, with the exception of Qatari Electronic Commerce and Transactions Law (2010), as well as Saudi Arabia's new proposal for e-commerce law (2015), both of which represent a significant shift as it addresses some vital issues that have not been covered in any other GCC legislation. In fact, they have chosen in some parts to take an independent path from the guidance of UNCITRAL, and they are trying to engage with international best practice such as the EU directives, by adopting several significant rules. For example, improving the transparency of electronic transactions by establishing prior information requirements and commercial communication rules, as well as the right of correcting input error and the right of withdrawal and, last but not least, data protection rules. This is a milestone in the transition from the phase of recognition of electronic transactions and building the basic groundwork for electronic transactions, to the phase of adopting a regulatory framework that fits the local context. This is a step forward in improving the e-commerce environment and provides a vital example to improve other GCC's e-commerce legislation.

7.2.2 Contractual dimensions

One of the significant principles that can be learned from EU and UNCITRAL regulation in the e-commerce context is the concept of 'functional equivalence', which seeks to ensure that a contract concluded via electronic means carries the same weight as a traditional contract, giving equal value to electronic writing and signing. Another principle is that of 'non-discrimination', which means information cannot be denied to have legal effect, validity or enforceability, solely on the grounds that it is in the form of a data message.

A further principle adopted by UNCITRAL and the EU is 'technology neutrality'. This emphasises the need to draft e-commerce legislation in such a way that is not limited to specific types of technology, in order to accommodate rapid technological advances so that legislation

is not susceptible to becoming outdated. The principle is intended that the legislations to be flexible, thorough and technologically neutral, which will allow it to remain valid in its application for the foreseeable future. With regards to the recognition of electronic contracts, one of the critical issues is the browse-wrap contract, which refers to a contractual agreement being formed when someone uses a website. The service provider (website owner) may argue that merely using, browsing or downloading content is considered an implied acceptance of the contractual relationship with its terms and conditions. Although no reference can be found in the EU Directive or UNCITRAL to browse-wrap, several cases in the United States affirm the invalidity of this form of contract because the terms and conditions did not come to the attention of the other party, and he or she did not express his/her consent. In fact, reviewing EU directives and regulations affirms the need for the clarity of the terms and conditions before entering into a contract. In fact, the general Gulf State rules of contract require clarity in terms and conditions. However, inserting specific articles into the e-commerce rules to assert the importance of clear consent in forming the electronic contract, and its effect on the validity of the contract, is essential.

On the other hand, a click wrap contract is recognised as being consistently valid and has not experienced wide controversy concerning its validity or legal effect, but a debate could arise concerning the availability of the terms and conditions since some commercial platforms do not keep these available. The E-commerce Directive has responded to this issue by requiring that terms and conditions in their entirety be available to download or reproduce. The UN Convention does not impose any requirements for contracting parties to make contractual terms available in any particular manner, but instead it makes the application subject to national legislative law. In fact, the relevant Gulf States' legislation does not include a duty to make contract terms available or impose consequences for failure to make the terms available; even though such requirements would build consumer confidence and enhance legal certainty,

transparency and predictability in international transactions concluded by electronic means; Therefore, it is recommended that the Gulf States require the terms and conditions of all electronic contracts to be made available during and after the contractual process.

On the other hand, UNCITRAL Model Law on Electronic Commerce (1996) clearly affirms the validity and enforceability of the electronic offer and acceptance, without addressing in detail the different types which exist and their requirements. Like the other Gulf States, Saudi Arabia's Electronic Transaction Law (2007) has adopted the UNCITRAL Model Law. However, taking this approach could be criticised as it does not address the significant issues created by electronic offer and acceptance, being content with simple recognition and admissibility of offer and acceptance by electronic means. However, it must be borne in mind that when electronic transaction law was originally being developed, the key priority at that time was the recognition of electronic commerce, with the UNCITRAL Model Law being intended to avoid intervention in contractual issues. This may justify the adoption of such an approach initially, but contemporary Gulf State laws now need to put effort into addressing the issues which are raised by electronic offer and acceptance.

Failing to determine which action constitutes an offer and acceptance or merely an invitation to treat, could result in confusion or uncertainty in determining the exact moment of conclusion of the contract; therefore, it is wise for electronic commerce legislation to determine exactly which action of the transaction constitutes an electronic offer, and which constitutes an electronic acceptance, particularly for national legislation, since the purpose of the model laws or EU directives is to avoid intervening in objective contractual national rules. Furthermore, identifying the status of offer and acceptance is regarded as the cornerstone of contract law, in order to determine its legal effects, which enhances legal certainty and builds trust and confidence in electronic contracting. The EU Directive on Electronic Commerce does not mention offer and acceptance in order not to have to deal with the complexity of the diverse

national contract laws of Member States, and instead addresses the issue of placing an order, leaving the interpretation to the Member States themselves. For instance, the UK's implementation of Electronic Commerce (EC Directive) Regulations 2002, imports the majority of the Directive's terminology and articles. Regulation 12 offers two possible definitions of the term 'order'. The first defines order as the contractual offer in relation to Articles 10(1)(C) and 11(2) of the Directive, but the regulation also states that in other contexts the term 'order' "may be but need not be the contractual offer." Since the regulations do not provide a clear explanation of the term 'order', the Interim Guidance by the UK Department of Trade and Industry has gone further by affirming that the regulations do not deal with contract formation itself, and that this remains subject to common law and existing statutory provisions. If the doctrine of English contract law is applied, this makes a clear distinction between an offer and invitation to treat, requiring the court to assess the intention of the parties to be bound to a legal relationship.

In fact, determining the exact moment of conclusion of the contract is significant for building confidence and enhancing legal certainty, and it has a direct impact on the rights and obligations of the parties. Therefore, the EU Commission has attempted to harmonise the legislation concerning the time of conclusion of the contract, but due to the variety and differences in EU contract rules, the Commission has decided to avoid intervention of the objective national rules, and it was changed from "Moment at which the Contract is concluded" at the early preparation of the directive to "Placing the Order" in the final draft. Although some projects in EU contract law have been relatively successful, such as the Principles of European Contract Law, it is clear that the legal systems of the Member States still vary substantially in their contract rules, and it would not be an easy task to attempt to harmonise these. Therefore, it is justifiable for the Commission to leave this point, and discussions concerning the placing of an order and whether the meaning of an 'order' is offer or invitation to treat to the Member States themselves.

The UN approach also avoids intervening in national contractual rules, as when it was drawing up the e-commerce models, the working group noticed the wide variety of contractual rules, conditions and requirements governing the time of concluding the contract. It also realised that conflict with fundamental contractual rules may become an obstacle to the adoption of this model and to accession to the UNCITRAL Convention. Therefore, the UN Commission has chosen to avoid adopting any article which may conflict with local contractual rules, instead addressing important technical issues related to electronic transactions, such as "time of dispatch and time of receipt", which would prove useful in determining the time a contract is concluded, depending on specific local rules.

Although the approach taken by EU and UNCITRAL has sought to leave the issue of determining the time of conclusion of the contract to local contractual rules, in practise, all Gulf State legislations has adopted a similar avoidance approach with regards to determining the time of conclusion of the contract, focusing instead on determining the time of dispatch and the time of receipt.

UNCITRAL has addressed important technical issues related to electronic transactions, such as time of dispatch and time of receipt, which are considered to be vital issues due to their effect on forming the contract. Therefore, all Gulf States have addressed this issue of time of dispatch and receipt with variations in wording resulting in the differences between the UNCITRAL Model Law on Electronic Commerce (1996) and the Convention on the Use of Electronic Communications in International Contracts (2005). However, it could be argued that the avoidance approach may lead to a lack of certainty and confidence, particularly in cross-border trading. Also, to some extent, due to the similarities between the general contractual rules of the Gulf States, the inclusion of a statement concerning the exact moment when the contract is considered to be concluded would be an easier task and certainly would enhance

legal certainty. Therefore, the GCC legislation should clarify the exact moment when the contract is concluded.

7.2.3 Security dimensions

Since the emergence of e-commerce, security issues have become a significant part of e-commerce legislation due to the fact that both parties must be able to place their trust and confidence in the identity of the other party, as well as in the integrity of any electronic messages received, to ensure that they have not been altered.

Both functions of identification of parties and authentication of the recorded message could be done through electronic signatures, which would provide both parties with assurance concerning identity and the integrity of the message. From a legal perspective, the role of legislation in this context is to offer the necessary guarantees of a secure and trustworthy online transaction. This can be achieved through recognition of electronic signatures and regulating the certification of service providers.

Considering the wide variety of electronic signature types, although digital signatures are considered the most reliable forms generated via cryptographic tools and involving the use of certification service providers, this has prompted a major debate regarding whether the recognition should be limited to digital signatures or if other methods of electronic signatures should be accepted.

With regards to the EU's position, Directive 1999/93 for Electronic Signatures plays a vital role in guaranteeing the legal status of electronic signatures. However, the Directive has adopted a two-tier system which gives the upper level (the advanced electronic signature) more recognition than the lower one. Digital signatures using encrypted data or certification services receive full recognition as they are certainly the most reliable method. What remains unclear is the status of the lower-tier signatures, which includes a wide range of methods of electronic

transaction. Reviewing several English cases to examine the stance of common law revealed that a flexible approach has been adopted towards accepting new methods of signature.

Moreover, the UNCITRAL Model Law on Electronic Signatures 2001 has sought to harmonise the rules concerning legal recognition of technology on a neutral basis by assisting countries to improve their legislation, covering modern authentication techniques. This could be achieved by adopting functional equivalence for electronic signatures, so in those instances when a handwritten signature has legal consequences, an electronic signature should have the same consequences and legal effect when it satisfies the test of reliability, which is certainly not limited to digital signatures.

7.2.4 Regulatory approach and consumer protection

On the one hand, since the e-commerce phenomenon is constantly developing, the intervention approach by the EU Commission has been incredibly influential when it comes to regulation of the Internet, by creating a coherent regulatory framework through the application of key internal market principles and consumer protection. This is due to its adoption of several directives in an e-commerce context, starting with the Distance Selling Directive (1997), the Electronic Signatures Directive (1999), the E-Commerce Directive (2000), the Service Directive 2006, the Consumer Rights Directive (2011), the Alternative Dispute Resolution (ADR) Directive (2013) and the Online Dispute Resolution (ODR) Regulations (2013); in addition to the Commission's proposal for a Directive on Network and Information Security.

Consumer protection legislation would, on the one hand, enhance consumer confidence in e-commerce. Since consumers are the weaker party, it could be argued that they need special protection, particularly in an open market. Lax or insufficient consumer protection legislation would undermine consumer confidence and ultimately hinder the growth of e-commerce. On

the other hand, however, overly restrictive legislation would probably hinder market growth and innovation in new technologies.

Hence, the best approach is to create a balance between the interests of consumers and those of traders; however, it is not an easy task in the case of the Gulf States, which already suffer from a lack of consumer protection legislation. Thus, the protective rules of e-commerce law should be viewed as an exception to the general principles of freedom of contract. On the other hand, UNICITRAL models take a purely rational economic approach, limiting regulations to simply affirming the legality of electronic contracts and the legal effect of electronic transactions, preferring to apply self-regulation rather than imposing rules. Thus, it would be useful for further research to investigate the impact of the lack of consumer protection measures in the Gulf States on consumer confidence in e-commerce contracts in comparison to EU measures of consumer protection.

Some basic differences can be noted between the EU directives and regulations, and Gulf State legislation in the e-commerce context, suggesting that there are lessons that could be learnt in this regard. However, they mostly cover areas not addressed in other legal systems, which is of the utmost importance in building confidence and enhancing legal certainty in e-commerce.

The prior information requirements can be considered one of the most distinctive elements of a wide range of EU directives. A lack or shortage of prior information is a common feature of e-commerce, which could weaken confidence and the legal certainty of electronic contracting. The E-Commerce Directive (2000) has established rules of disclosure and objective standards that can be measured, and which are reaffirmed in the Consumer Rights Directive (2011). However, most of the Gulf legislation currently lacks such vital rules of prior information requirements; this could prove to be a significant obstacle to the growth of e-commerce and

cross-border purchasing. In fact, prior information requirements have been criticised[438] on two points. First, this leads to further complexity and overlapping of the scope of several EU directives (mainly E-Commerce Directive (2000), Service Directive (2006), and Consumer Protection Directive (2013). although the latest directive should prevail. The second criticism is the overload of these requirements, for instance, the Distance Contract Directives (1997) require nine factors of prior information requirements, and the E-Commerce Directive has added 11 requirements[439]; and finally, the Consumer Protection Directive (2011) added six requirements. This has led to confusion in the application, as shown, for instance, the case of *Bundesverband v Deutsche Internet Versicherung*[440] (DIV) where The Court of Justice of the European Union (CJEU) held that Article 5(1) (c) must be interpreted as meaning that information does not necessarily have to take the form of a telephone number; but may be an electronic enquiry template through which the recipients of the service can contact the service provider via the Internet. In fact, with the smart device phenomenon, of which speed is one of the main aspects, such requirements should be characterised by clarity and the abridgment of the most essential information requirements, such as the identity of the trader; main characteristics of the goods or services; right of withdrawal, and total price.

Another vital issue in fostering the growth of e-commerce is the right of withdrawal, as in an online environment, it would be very difficult without strict rules to withdraw from a contract and return the item. Therefore, the EU Commission has recognised the vital importance of this matter, and it states in the EU Distance Selling Directive (97/7) that a period of at least seven working days is allowed in which to return the items (cooling-off period), whilst the Directive

[438] Arno R. Lodder 'Information Requirements Overload? Assessing Disclosure Duties Under the E-Commerce Directive, Services Directive and Consumer Directive' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar 2014)

[439] in both Article 5 on general information to be provided, as well as Article 10 on information to be provided, which comes under Section 3: Contracts concluded by electronic means

[440] *Bundesverband de Verbraucherzentralen und Verbraucherverbande - Verbraucherzentrale Bundesverband eV v Deutsche Internet Versicherung AG (Case C-298/07)*

on Consumer Rights (2014) extends this to 14 days. UNCITRAL and most of the Gulf State legislation does not include anything comparable.

Commercial communication, which includes advertisements, offers or promotional competitions, plays a vital role in the e-commerce field, but it is currently regulated only in the E-commerce directive, and this area needs to be addressed in the GCC legislation. This is because in the era of social media, consumers spend a lot of time on such services, and many businesses have chosen to interact with customers through social media platforms, either through paid services with the service provider. For that reason, several legal issues have arisen, such as trademark infringement, unsolicited commercial communications which could fall under 'undue influence,'[441] a practice that is clearly is prohibited in the Unfair Commercial Practices Directive (2005)[442] and which needs to be addressed clearly in the Gulf State legislations.

Furthermore, in the process of forming electronic contracts, there is a greater possibility of error and mistakes than for traditional contracts, due to their technical nature and the speed of the transaction process. A review of the EU directives shows that they have addressed this area; however, the e-commerce directive does not determine the legal consequences of the lack of such procedure if, for instance, the service provider does not provide error correction procedures, or there is no confirmation step. Also the directive determines whether such a contract would be void due to a mistake of this type. Therefore, it is recommended that Gulf State legislation includes provisions with regard to error correction, as well as establishing the legal consequences if such a procedure is absent.

[441] 'Unfair Commercial Practices Directive' OJ L 149, 11.6.2005, p. 22–39 Art 2, (J) 'undue influence' means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;

[442] Jan Trzaskowski, 'Commercial Communication in Social Media' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Edward Elgar 2014)

Moreover, the EU E-Commerce Directive (2000) attempts to limit the liabilities of intermediary service providers, for instance, these intermediaries who act as a mere conduit; cache or host the material by affirming that intermediaries would not be automatically held liable for the wrongdoing of their clients, but instead, the liability would be limited to a specific condition.

Two significant cases put to The Court of Justice of the European Union (CJEU) have been reviewed. The first case was a claim by Louis Vuitton Malletier against Google France. Google Inc alleged a number of trademark infringements, since Google offers a paid referencing service called 'AdWords'. The court held that the internet referencing service provider in this case had not played an active role that would give it knowledge of, or control over, the data stored. As it had not played such a role, that service provider could not be held liable for the data which it had stored at the request of an advertiser.

In the second case *L'Oréal v eBay,* L'Oréal accused eBay and a number of its users of trade mark infringement for selling counterfeit products on the online auction site. The court held that eBay could not benefit from Article 14's defence of the e-commerce directive, which is limited to merely technical and automatic processing of data, where there is no actual knowledge of unlawful activity. However, these decisions leave the central question unanswered: what conduct is considered more than merely technical, automatic and passive?

In fact, applying such rules in the Gulf State context would lead to misunderstandings or the misuse of limited liability to provide full exemption from any legal obligations, which may well discourage the monitoring of the content of their clients. GCC legislation also does not need to adopt similar limited liability rules, but should instead re-think the rules to fit with the local context.

7.2.5 The ODR trend

The rapid growth in e-commerce has undoubtedly led to a huge number of online disputes, which may reduce confidence in e-commerce. Therefore, an efficient system of online dispute resolution (ODR) would help to build trust in online transactions and preserve online business relationships in the long term.

One of the most prominent advantages of ODR is that it offers a speedy resolution to disputes, and it is cost saving, self-independent, and has convenient procedures. On the other hand, there are some challenges that limit the potential of ODR, for instance enforcement challenges, due to the difficulties in identifying the location of parties may raise the choice of law issue, and this could reduce the certainty of online dispute resolutions. Technical challenges may also raise concerns around ODR, such as online security, privacy, and the confidentiality of information and authenticity of the parties, since ODR could be described as stranger-to-stranger; therefore, it is important to resolve the issue of authenticity and the identity of the parties.

Another shift in ODR is online mediation, which is regarded as an alternative to win-lose situations in litigation and arbitration, due to the nature of mediation in resolving disputes efficiently by mutual agreement, which, like the sustainable relationship between the parties, will be preserved. Also, the technological revolution has provided easier and more effective methods of online mediation.

Mediation has become an increasingly relevant mechanism in the EU for resolving disputes; therefore, in 2008, the European Parliament adopted mediation Directive (2008) to ensure compliance with fundamental procedural principles such as impartiality, fairness and confidentiality. In fact, the Directive has chosen voluntary mediation but leaves the option for any Member State to make mediation compulsory before judicial proceedings; for instance,

Italy is implementing a mandatory mediation in its national law[443]. However, obligatory mediation would restrict free access to the judicial proceedings that are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom, as well as the EU Charter of Fundamental Rights. But on analysing the nature of the principle of effective judicial protection, it has been found [444]that it is non-absolute, which to some extent would allow for the imposition of compulsory mediation, since the CJEU held[445] that Italian legislation is compatible with the specific provision of the Directive, these principles of equivalence and the principle of effectiveness are not breached by Italian legislation With regard to enforcement mechanisms, the directive does not specify an enforcement procedure, but leaves this to the general principles of the Rome Convention on the law applicable to contractual obligations. This leaves each Member State to decide its own method for procedural matters.

Another milestone occurred in July 2013 when the EU adopted the most vital initiative, the ADR Directive (2013) and the ODR Regulations (2013), which create a significant regulatory framework of independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between online consumers and traders. More importantly, Article 5 of the ODR regulations requires the Commission to create, operate, maintain and fund a user-friendly platform for resolving online disputes, which should be accessible to and usable by all online buyers.

The process of the platform shall start with the submission of complaints through a user-friendly electronic format, and then be processed by the platform by informing the other party

[443] Civil Mediation: published in the Official Gazette Reform Legislative Decree, 04/03/2010 No. 28, Official Gazette 05/03/2010

[444] Marzocco and Nino, 'The EU Directive on mediation in civil and commercial matters and the principle of effective judicial protection' (2012) 19 *Lex et Scientia Journal* 105

[445] Joined ECJ case C-317/08, C-318/08, C-319/08 and C-320/08 Alassini case.

(trader) of the complaint. Once both parties agree to use any ADR entity, that entity must conclude the procedure and make the outcome available within a period of 90 calendar days, as well as be required to transmit the following information to both parties: the subject matter of the dispute; the date of receipt of the complaint file and the conclusion of the ADR procedure; and the result of the ADR procedure.

Due to the nature of ODR and the concerns of online security, the regulations require the process to be in line with the necessary measures to ensure the security of processed information and duties of confidentiality that are part of the EU rules and legislation.

This thesis has reviewed some significant cases in the context of England and Wales that provide evidence of the extent to which these would recognise or support ODR. For example, in Cable & Wireless v IBM[446], the Court endorsed ADR by enforcing mediation clauses, even though this was against the will of one of the parties. Cowl and Others v Plymouth City Council 2001[447], confirmed this principle of supporting ADR in disputes arising between public authorities and individuals. Also, Dunnett v Railtrack 2002[448], demonstrated the cost implications for refusing to engage in ADR. Halsey v Milton Keynes NHS Trust 2004[449] attracted a wide debate as the court only encouraged the use of ADR if it was appropriate according to a list of established factors. This case was reliant on the European Convention on Human Rights as it considers the compelling nature of mediation to be regarded as contrary to Article 6 of this Convention, with the judge referring to a previous case from the European Court of Human Rights.

[446] *Cable & Wireless v IBM* [2002] CLC 1319, [2002] EWHC 2059 (Comm), [2003] BLR 89, [2002] Masons CLR 58, [2002] 2 All ER (Comm) 1041
[447] *Cowl & Ors v Plymouth City Council* [2001] EWCA Civ 1935
[448] *Dunnett v Railtrack Plc* [2002] EWCA Civ 302
[449] *Halsey –v- Milton Keynes General NHS Trust* [2004] EWCA 3006 Civ 576

The last and most recent case, PGF II SA v OMFS Company 1 Limited 2013[450], is a milestone in this field. The Court of Appeal upheld the principles of Halsey and others with regard to awarding costs against a party who did not participate in ADR; moreover, the judgment extended the principle to cover silence, considering it unreasonable to refuse to mediate.

Furthermore, the private sector has played a vital role in providing ODR systems, hence, the thesis has analysed some of the leading providers of online mediation and negotiation. For instance, Square Trade, which is (the main provider of ADR services for eBay, PayPal), may include two types: first, a technological hybrid between negotiation and mediation without the involvement of human intervention; second, mediation through asynchronous email communication but with human intervention, but this service is not free of charge like the automated process. However, the drawback of this service could be a lack of use of new technologies such as video conferencing, as it is based only on written communication, and also it is limited to only certain types of dispute and amounts that can easily be resolved.

Smartsettle also provides dispute settlement and an electronic negotiation method that relies on algorithm analytical mechanisms, in order to facilitate the ability of parties to reach a settlement, even for the most complicated disputes, by establishing their priorities and their preferences regarding the value of the settlement. Next, the software carries out an analysis using an algorithm, and suggests a proposal in order to help parties to reach an efficient settlement by using game theory in order to produce satisfactory outcomes. However, the service suffers from complexity for the average user, and so simplifying the complex processes and making it user-friendly would bring great potential to develop such services further.

With regard to the Gulf States, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also known as the New York Convention, is one of the key instruments

[450] *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 (23 October 2013)

in international arbitration. All of the Gulf States have acceded to this Convention, starting with Kuwait in 1978, Bahrain in 1988, Saudi Arabia in 1994, Oman in 1999, Qatar in 2003, and lastly, the United Arab Emirates in 2006. This means that under the terms of the Convention, it is binding for all national courts of Gulf State countries to implement the provisions of foreign arbitral awards.

However, there is no equivalent ODR initiative in the Gulf States, and all Gulf State legislation has ignored the issue of ODR; such disregard may hamper the overall development of online commerce. The lack of ODR regulations could be due to the fact that this concept has only emerged recently and is not yet well known. The EU initiative relating to ODR was only adopted in 2013, and is regarded as one of the first pieces of ODR legislation in the world.

Another reason for the lack of ODR regulations in the Gulf States is because their legislation follows UNCITRAL Model Law, which has not yet adopted any model or convention relating to ODR. However, a major shift occurred when the UNCITRAL working group III, focusing on ODR, drafted procedural rules for ODR for cross-border electronic commerce transactions during its 31st session held in New York (February 9-13, 2015). Although the significance of ODR regulations in fostering e-commerce growth merit further study.

It could be argued that including ODR in Arbitration Law would be of major assistance in ensuring that the implementation of the provisions of foreign arbitral law is accepted, for instance, the recently adopted Saudi Arbitration Law (2013) which lacks any article that recognise electronic arbitral awards and other types of ODR. Therefore, overall, it is of utmost importance for all Gulf States to adopt new regulations for ODR in order to facilitate the independent, impartial, transparent, effective, fast and fair out-of-court resolution of disputes between online consumers and traders.

7.2.6 Harmonisation and convergence of legislation

There has been increasing cooperation and convergence in the economic field amongst the Gulf States. This began with the establishment of the free trade area, followed by a customs union, and then the creation of the GCC common market. An initiative proposing a monetary union is also under consideration.

Another of the significant objectives set out in the GCC Charter is 'developing common model laws in various fields,' and legal and judicial cooperation forms a substantial part of the GCC's tasks, as it works towards convergence in the laws and regulations of Member States. It is recommended that as part of this process, a legal framework is put into place which would offer some degree of harmonisation and coordination of legislation, thus ensuring legal certainty and consumer confidence in e-commerce throughout GCC Member States. Another possible solution would be to introduce a common model law, learning from the rich experience of the EU Commission which has already adopted several directives in this area, as analysed in this thesis. It is important to take into account that the EU's development of initiatives related to the harmonisation and coordination of legislation was successful despite the wide differences in the legal backgrounds, languages and economic structures of EU countries. In the case of the GCC countries, the legal backgrounds, language and economic structures of the Member States are very similar, which should help to facilitate this process. Anyway, it would be interesting for further research from an empirical perspective to measure the impact that unifying e-commerce legislation in the business environment of Gulf States would have on boosting e-commerce growth, compared with the EU key internal market principle.

7.3 Recommendations stemming from best practice

The thesis reveals that the avoidance approach in the EU directives and UNCITRAL legislation means avoiding the intervention of the objective contractual rules. As a result of that approach,

basic issues such as which electronic action constitutes an offer and acceptance or when exactly a contract is concluded have yet to be determined. This is due to the wide scope of the model laws or directives, and the extent to which they differ from traditional contract rules that make it unwise to try legal harmonisation. This is not the case in the Gulf States since they have very similar sources for their traditional contract rules. Therefore, establishing rules covering the areas alluded to above would be an easier task and would certainly enhance legal certainty, having a direct impact on the rights and obligations of concerned parties. Moreover, it is essential to require that the terms and conditions of contracts are made available during and after the contractual process, as well as inserting specific articles into e-commerce legislation to assert the importance of clear consent in forming an electronic contract, and its effect on the validity of the contract.

Lessons can be learnt from the EU's attempts to create a coherent legal and regulatory framework. This was intended to remove the obstacles to the growth of e-commerce in Europe by affirming a certain level of transparency by imposing prior information requirements for electronic contracts, as well as regulating commercial communication and advertisements and regulating consumers' technical errors. It also regulates the liabilities of intermediary service providers, as well as the right of withdrawal rules, as detailed in the EU directives and regulations.

Furthermore, it is undoubtedly the case that creating an efficient system of ODR would help to build trust in online transactions and preserve online business relationships in the long term. Hence, it of utmost importance to consider the significant lessons of the recently adopted ADR Directive 2013 and ODR Regulations 2013, as well as taking into account ODR service providers in the private sector, in order for the Gulf States to adopt new ODR regulations that would facilitate an effective, fast and fair online resolution of disputes between online consumers and traders, and accommodate the local context of arbitration laws and regulations.

With regards to the coordination of e-commerce legislation, the successful level of harmonisation in e-commerce directive and other related EU directives despite the wide differences in the legal backgrounds, languages and economic structures of EU countries, could provide a vital example of the convergence and harmonisation of laws. The Gulf States could create a legal framework that would offer some degree of harmonisation and coordination of e-commerce legislation as a means of enhancing legal certainty in e-commerce throughout Member States.

To conclude, due to the rapid technological advances in this area, it is essential for Gulf legislators to identify and adopt best international practice in this dynamic field in order to boost economic growth and to increase intra-regional trade between the Gulf States, which is one of the main objectives of the GCC. Hence, the GCC legislation on e-commerce should move beyond mere legal recognition of electronic transactions to addressing more vital issues. It is necessary to remove major obstacles in the e-commerce field, as this will serve to enhance legal certainty in electronic contracts.

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