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Reform of the Iraqi Private International Law on Transnational Online Contracting: Lessons from the EU and the USA

Al-Bayati, Murad

Award date:
2014

Awarding institution:
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**Reform of the Iraqi Private International Law on
Transnational Online Contracting: Lessons from the
EU and the USA**

By

Murad Al-Bayati, B.A (Hons), LLM (Iraq)

**Thesis submitted to Bangor University for the degree of Doctor of
Philosophy**

August 2014

Abstract

Online contracting has witnessed some remarkable developments since the internet became a tool for commerce. Mainly in Iraq, such increased practices of online contracting in the cross-border context have not been accompanied with a parallel development in the law. Against this background, this thesis argues that certain rules found in contracting theory and conflict of laws, especially in the Iraqi law, are not adequate enough to govern the legal obligations and disputes arising out of concluding online contracts on websites.

A comparative analysis of the legal systems in three different jurisdictions will be used to consider the issues in this thesis: the EU, the US, and Iraq. The rationale behind choosing the aforementioned jurisdictions was to evaluate how successfully each of these jurisdictions have been in dealing with online contracting cases and disputes. Furthermore, the ultimate goal is to examine the possibility of adopting the harmonised laws of the EU and the courts-based approach of the US in proposing a proper reform of Iraqi law in the context of jurisdiction and applicable law matters. In the EU, although substantial harmonisation of rules has been implemented by the European legislature to ensure an effective application of the rules governing contractual obligations in both offline and online practices, some rules are still questionable in terms of their application to internet activities. In the US, despite the fact that courts have been challenged by an abundant number of online contracting cases, the application of US personal jurisdiction rules and the validity and enforceability of online choice of court and law agreements remain unsettled. In Iraq, the application of certain rules of traditional conflict of laws is outdated and the rules are not fit to govern the disputes arising out of online contracts concluded on websites.

This thesis concludes that certain reforms of the law, especially Iraqi law, should be more realistic, feasible and appropriate for governing the online contracting process rather than proposing new specific rules for on-line transactions. More specifically, Iraqi legislature should pay more attention to update the Electronic Signature and Transactions Act (IESTA) to provide more legal certainty for contracts concluded on websites. Furthermore, jurisdiction and applicable law rules laid down in articles 14, 15 and 25 of the Civil Code should be also reformed taking into account the special characteristics of the contracting process over the internet.

Dedication

This work is dedicated to:

All innocent people in my country who are victims of savage terrorism every day

To

My parents, my wife Marwa

And to

My sons Mohammed and Abdullah

Acknowledgment

I would like to express my heartfelt thanks and gratitude to all of those who have supported and encouraged me in achieving this work. In the forefront of those, I am very grateful to my supervisor Dr We Shi for his valuable guidelines and insightful comments on this thesis and during the period of carrying out my research. Without him, this thesis wouldn't have seen the light of day. I should not forget to thank all the academic staff of the Law School at Bangor University for their assistance to all research students, specifically Professor Dermot Cahill (the Head of Law School), Dr Yvonne McDermott Rees, Mark Hyland, and Mrs Mairwen Owen (the Law Librarian).

Gratitude should also be given to Dr David Keeble in the English Language Course for Overseas Student (ELCOS) at Bangor University for organising regular courses in legal English writing, which gave me a better understanding of how legal English language should be written.

I am also grateful to my sponsor (Ministry of Higher Education and Scientific Research/Iraq) for funding and offering me the opportunity to complete my PhD study in the United Kingdom.

Last but not least, I will be in everlasting debt to all my family members for their support and encouragement during the course of this research. From the bottom of my heart, I would like to express my sincere appreciations to my parents, brothers, sisters, and my wife, without whom I would not have been able to get the inspiration and patience to finish this work.

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List of Abbreviations

B2B	Business-to-Business
B2C	Business-to-Consumer
C2B	Consumer-to-Business
C2C	Consumer-to-Consumer
CUECIC	The United Nations Convention on the Use of Electronic Communication in International Contracts
ESGNCA	Electronic Signature in Global and National Commerce Act
ICANN	The Internet Corporation For Assigned Names and Numbers
ICLC	Iraqi Civil Law Code
IESTA	Iraqi Electronic Signature and Transactions Act
IGF	Internet Governance Forum
NSI	Network Solutions Inc
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transactions Act
UETA	Uniform Electronic Transactions Act
WGIG	Working Group on Internet Governance
UNCST	United Nations Commission on Science and Technology

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CHAPTER ONE

THE INTRODUCTION

1.1 THEMATIC STRUCTURE OF THE THESIS

New technologies have enhanced the growth of electronic commerce by bringing many advantages and efficiencies for consumers and businesses alike. They have also generated new hybrid legal challenges for existing legal systems. As a result, a new area of law has evolved, variously referred to as cyber law, technology law, or internet law; and it has become one of the most interesting topics of legal research and studies.¹ There are many factors that now enable traders and consumers to buy and sell internationally with ease and speed; these include, the internet, and specifically electronic marketplaces, as well as small portable devices, wifi, 3G and international roaming services.² Undoubtedly, it has become very simple to enter into contractual relations with natural or legal persons from different countries just by a few clicks on a keyboard of a personal computer whilst sitting at home or work and with no need for face-to-face meetings. Consequently, the choices for consumers and the ambit of business activities have transcended national borders. Although the traditional way of contracting (paper - writing - signature) has not entirely disappeared, contracting over the internet, especially by consumers purchasing goods and services, has become more prevalent.³ Nevertheless, many questions and doubts have arisen regarding the

¹ The author will analyse these terms in Chapter 2 of this thesis. For the difference between these terms, see also Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 26. Without doubt, cyber law, technology law and internet law are very broad terms. They can encompass the following areas of law, electronic contracting, conflict of laws, intellectual property, online defamation, online torts, patents, online banking, privacy, and cybercrimes. However, this thesis will only deal with the conflict of laws rules in one specific area, the law of online contracts as well as some basic ordinary contracting rules and their applicability in the online context.

² See the UNCITRAL present and possible future work on electronic commerce in its forty-fourth session, (Vienna, 27 June-15 July 2011) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/814/74/PDF/V1181474.pdf?OpenElement>> accessed 24 May 2014.

³ Colin Scott, 'Regulatory Innovation and the Online Consumer' (2004) 26 *Law & Policy* 477; Tatiana Melnik, 'Can We Dicker Online Or Is Traditional Contract Formation Really Dying? Rethinking Traditional Contract Formation for the World Wide Web' (2008) 15 *Michigan Telecommunications and Technology Law Review* 315.

suitability of existing legal norms that govern this new generation of contracts and the legal consequences resulting from it.⁴

Indeed, one of the most interesting challenges relates to conflict of laws. For some time, timing and geographical location have been regarded as the cornerstone of the conflict of laws rules that govern international contracts. These factors have become less relevant in the realm of the internet and online contracting practices. Accordingly, the major question that this thesis will examine is whether the existing traditional rules and the legal norms and principles, namely, some basic rules of ordinary contracting theory and the jurisdiction and applicable law rules, can be still regarded as a reliable basis for resolving the disputes resulting from the conclusion and implementation of such types of contracts.

In fact, the question of the suitability of existing contracting, jurisdiction and applicable law rules for governing the online contracting environment is not new. There have been various scholarly studies that have addressed such a topic. Furthermore, several attempts have been made by national legislative bodies, regional and international entities and organisational working groups to introduce acceptable approaches when tackling the issues resulting from the conclusion and implementation of online contracts. The proposals have varied from model laws and directives, to international conventions.⁵ At their core, debates regarding the merit of existing legal rules and norms for governing transnational online contracts from a private international law point of view have varied between three main approaches:⁶

⁴ David G Post, 'Against 'Against Cyberanarchy' in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) 71; Amelia Rawls, 'Contract Formation in an Internet Age' (2009) 10 *The Columbia Science and Technology Law Review* 201.

⁵ For example, the Organisation of American States and the Inter-American Specialised Conference on Private International Law (CIDIP) have been involved in active discussions and meetings to create such instruments. Brazil has drafted a convention called, A Draft Convention on the Law Applicable to International Consumer Contracts and Transactions; while Canada proposed A Model Law on Jurisdiction and Choice of Law to Consumer Contracts. The United Nations has also proposed a draft convention called the United Nations Convention on the Use of Electronic Communication in International Contracts. Most recently, the European Parliament and the Council have approved a Regulation 524/2013 of 21 May on Online Dispute Resolution for Consumer Disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR) [2013] OJ 165/1.

⁶ See Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 21-23; Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contract* (Ashgate 2008); Ian Lloyd, *Information Technology Law* (6th edn, Oxford University Press 2011); Laura E Little, 'Internet Choice of Law Governance' [2012] *China Private International Law Forum*, Temple University Legal Studies Research Paper 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045070> accessed 1 May 2014. These schools of thought will be critically analysed in each chapter as necessary.

1. The application of existing traditional conflict of laws rules to online contracting disputes and giving the courts the discretion to modify these rules to be compatible with online contracts and their legal frameworks.⁷
2. The harmonisation and modernisation of the existing traditional conflict of laws rules to match them to the special characteristics of the internet and its environment.⁸
3. The enactment of brand new conflict of laws statutes and legislation tailored to contractual activities and transactions over the internet because the internet has a special nature and so there has to be special legal rules to regulate its framework.⁹

A concise analysis of these three approaches suggests that it is illogical and inappropriate to adopt the first approach for two reasons. First, it is argued in this thesis that some of the existing conflict of laws rules and contracting theory cannot tackle the special characteristics that online contracts have. Second, it might be unrecognised under a civil law system, and certainly under Iraqi law, to give the courts the authority to create new rules or modify existing rules because their role is restricted to implementing and applying the legal norms but not modifying them. It is only the legislature that has authority to do this. Therefore, this approach will be excluded from the scope of this study. Moreover, this thesis will not adopt and analyse the idea of internet-specific rules for online contracts as the third school proclaims. This is because examining this approach is too far from the scope of this thesis

⁷ Probably the best implementation of such an approach was performed by the courts in the US. It will be shown that US courts have applied the same traditional jurisdiction and applicable law rules to online contracting cases where the conclusion or the performance of the contract occurred over the internet. However, when tackling such cases courts have exercised a wide range of discretion and, accordingly, have applied different criteria and tests to assess the merit of asserting jurisdiction and applying the law of the forum to legal activities that take place over the internet such as slide-scale, targeting and the effectiveness test. In 1996, Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit delivered a presentation entitled 'Cyberspace and the Law of the Horse' at the Cyber Law Conference. Judge Easterbrook argued that attempting to enact new rules for cyberspace is like trying to make laws for horses. There is no law for horses and there is no law for cyberspace. Traditional laws govern cyberspace in the same way that they govern all other things in the world. Judge Easterbrook stated that: 'Now you can see the meaning of my title. When asked to talk about 'Property in Cyberspace', my immediate reaction was, 'Isn't this just the law of horses?' I don't know much about cyberspace; what I do know will be outdated in five years (if not in five months!); and my predictions about the direction of change are worthless, making any effort to tailor the law to the subject futile. And if I did know something about computers networks, all I could do in discussing 'Property in Cyberspace' would be to isolate the subject from the rest of the law of intellectual property, making the assessment weaker.' Frank H. Easterbrook, 'Cyberspace and the law of the horse' [1996] University of Chicago Legal Forum 207, 208.

⁸ This is the current approach of EU law in terms of jurisdiction and applicable law matters on contractual obligations as well as the specified rules on consumer protection even though both Brussels and Rome I regulations have not included internet-specific rules. However, the European legislature has sought to formulate certain rules that clearly address online activities. An in-depth consideration and analysis of these rules will be carried out in this thesis.

⁹ This approach was the most common one in the early days of the internet and it began to challenge different areas of law that governed legal activities over the internet, such as contracting, defamation and intellectual property issues. David Johnson and David Post were the best-known proponents of this school of thought. Despite the fact that most proponents of this school have abandoned the theory, there is still a strong academic and scholarly tendency towards promoting online dispute resolution (ODR) instead of traditional court litigation.

due to time and theme limitations.¹⁰ More specifically, the author is not in favour of the notion of dealing with online legal activities separately to traditional ones as the adoption of such an approach may affect the legal certainty and predictability of many existing rules. This should not be understood as prejudging the feasibility of enacting internet-specific rules but, rather, this reason should be seen in conjunction with the time factor when excluding such an approach from the thematic scope of this thesis.

The main argument of this thesis will rely upon the second approach and will examine its suitability for regulating online contracting cases. In other words, this thesis will mainly focus on the existing rules of ordinary contracting and private international law to examine how the different legal regimes have dealt with disputes arising out of the implementation of online contracts, and to what extent these rules have been successfully applied to settle online contracting disputes. The analysis will be based on the idea of reforming some existing norms and rules. This reform should not be understood as an attempt to change basic rules of private international law or ordinary contracting theory in terms of contractual activities over the internet but, rather, to examine the effectiveness of different existing connecting factors¹¹ to determine the factor that is most compatible with the characteristics of the internet. Therefore, this thesis will analyse the status quo of the law governing international contracts, mainly, the jurisdiction and applicable law rules and certain concepts of traditional contract law, and how effectively these rules have been applied to the online contracting practices in Iraq, the EU and the US.

It should be emphasised here that this thesis argues that some of the existing legal rules are unsuitable for resolving disputes which arise out of contracting electronically in a multinational contractual setting due to the special characteristics and features of the internet. The nature of the internet may have less of an effect on contract formation than might be supposed as the process of online contracts does not differ significantly from the traditional contract process and therefore, the same traditional rules can be applied to it.¹² Nevertheless, some problematic issues remain and can be considered challenging issues, such as the

¹⁰ This is a separate area of study and it is beyond the scope of this study. One of the most interesting aspects of this area of study is online dispute resolution (ODR) which includes online mediation and online arbitration.

¹¹ Such as the place of contract formation, the place of contract performance, and the place of contractual parties (the law of domicile and nationality).

¹² It is a well-established rule now that most of legal systems give a legal validity to contracts concluded using electronic means as same as the legal validity which is given to traditional contracts.

signature, the contractual capacity, identity, the terms and conditions of the online contracts and the liability of internet service providers (ISPs).¹³

This thesis is divided into two main parts. The first part will focus on online contracts in terms of their qualities, legal characterisation, classifications and a selection of problems which occur during the formation process. The second part will examine the jurisdiction and applicable law rules applicable to cross-border online contract disputes in Iraq, the US and the EU. Iraqi private international law will be analysed alongside personal jurisdiction and conflict of laws rules of the US as well as available case law. Regarding the EU, analysis will be carried out on EU Council Regulation (EC) No 44/2001 of 22 December on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation), and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligation (Rome I). Finally, reference will also be made to the Hague Convention on the Choice of Court and Choice of Law Agreements as examples of international instruments. This thesis will not refer to the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures as they are not binding conventions for countries and their provisions are not mandatory rules in spite of their vital role in developing the legal foundation and providing the countries with default rules to enhance their legislation in the domain of electronic contracts.

With regard to the first part of this thesis, this topic has a special significance imposed by the current situation as well as the future, and its importance can be deduced from both the theoretical and practical points of view. From the theoretical standpoint, the subject deals with the concept of international contracts of sale over the internet in terms of its definition, features, legal characterisation, classifications and formation, besides various issues related to such types of contracts. From the outset, it should be noted that such kinds of contracts are not exceptions to the provisions and rules of the general theory of contracting. These are concluded upon the mutual agreement and consent of the parties and do not, therefore, turn away from the general framework of the traditional contracts either in structure or content. The only differences are that they are concluded at a distance between two parties who are not present, and they are processed by electronic means, including hardware and software, such as mobile phones and tablets and the website designs that facilitate the conclusion of contracts.

¹³ However, due to the narrow scope and limitations of this thesis, no space will be allocated for discussing and analysing the liability of ISPs.

From a practical point of view, the actual practice confirms the ever-increasing development of electronic commerce. This fact should be borne in mind by anyone intending to conclude a contract over the internet, especially in the absence of adequate legislative provisions that regulate the contracting process as a whole. This statement mainly applies to the situation under Iraqi law where neither the existing legal norms nor the practice of Iraqi courts for online contracting cases have been able to establish a sufficient foundation for resolving disputes in online contracts.

As to the second part of this study, the emergence of disputes in online contracting were expected in the digital environment, and that is exactly what has taken place over the last decade. Disputes normally emerge because of breaches of terms and conditions, causing damage to a third party, infringing trademarks and trade names of a third party, or disputes concerning the performance of the contract and the physical and non-physical delivery of goods. The problem with disputes involving online contracting liability lies in the fact that the predominant factor in the legal relation is that the parties hold different nationalities, have different places of residence, and that the problems pertain to websites with unknown locations or unknown servers.

The other factor is that the applicable law and the competent jurisdiction are not clearly defined. Even when the law and the court are agreed upon by the contracting parties through the online contract, a controversy can arise over the validity and the enforceability of such terms and conditions. This conclusion relies upon the fact that there might be a possibility that one party did not read the terms and conditions of the online contract. These are usually incorporated into the seller's website and introduced to the buyer during the contract formation process either by click-wrap or browse-wrap agreements. It is very likely in online contracting scenarios that one of the contracting parties does not have the option to discuss and negotiate the contract's terms and conditions with the other party. In this case, the question arises over whether or not the adhesion rules can apply. Additionally, such a contract may fall within some legal systems that do not include governing provisions for online contracts or do not recognise such a contractual agreement between the parties. For example, most electronic marketplaces and websites have incorporated the choice of court and choice of law clauses in the terms and conditions of their contract; while Iraqi law

recognises the choice of law agreement it does not, in some circumstances, recognise the choice of court agreement.¹⁴

Equally important, in case of the absence of parties' choice of the governing law and the competent jurisdiction, what then is the law that should be applied in this case? What and where is the court of competent jurisdiction? Without doubt, this will require analysis and scrutiny of the traditional connecting factors applicable to the contractual obligations to find out how they have been applied by different legal regimes to cases of online contracting.

Different legal systems have had great success in pinpointing the legal challenges of online contracts, especially in respect to the contracting process, verification, intellectual property and the security of information. They have not made great headway in the domain of collective confrontation, the problems of jurisdiction and the applicable law in the environment of online contracting liability. This statement would greatly apply to the situation under the Iraqi law.

1.2 RATIONALE & SIGNIFICANCE

This thesis aims to address both the practical and scientific issues of this topic. The practical significance of the topic is manifested in its correlation with the types of contracts that build up and increase day by day in such a steady and continuous manner. The ever-increasing number of such contracts has become a tangible reality in the lives of nations and individuals and their value has exceeded billions in many cases.

The scientific or legal rationale is represented in the fact that this study aims to enlighten those transacting over the internet and support nations in their efforts and approaches. The aim is to understand online contracts that take place through the internet and attempt to draw the attention of those who are interested in contracting online to the potential risks of doing so. These relate specifically to the implementation of contractual obligations and the parties' contractual liability. This study presents a comprehensive analysis of all legal issues that are applied to transnational online contracts.

Finally, the importance of this topic is also manifested in the originality of the legal research in this domain. Although there have been several studies that have addressed the legal

¹⁴ This point will be analysed in-depth in Chapter 5 of this thesis.

implications of online contracts, there are still certain aspects of this area that have not yet been covered sufficiently by the legal studies and researches, such as online consumer-to-consumer contracts. Moreover, and most importantly, the gaps have not yet been reported in other jurisdictions, especially in the Iraqi legal system.

1.3 AIMS & OBJECTIVES

This thesis aims to build up a legal infrastructure for the new generation of distance contracts that take place over the internet, given that some of the existing rules of private international law and ordinary contracting theory have become unsuitable for regulating such types of contracts and their legal implications. This thesis also seeks to determine the status quo of the Iraqi legal system which lacks effective legal provisions that litigants can rely on to settle their litigations. This study aims to diagnose some virtual problems which come about during the process of formation of online contracts. Additionally, it attempts to find the proper legal solution for them, such as the problem of parties' identities and their contractual capacity, the negotiation, online terms, and conditions of contract.

The research attempts to present a comprehensive analysis and evaluation of the status quo in Iraq, the US and the EU in terms of jurisdiction and applicable law rules in order to examine their suitability for governing transnational online contracts. Accordingly, based on the main notion that reform of Iraqi private international law has become a pressing issue, this thesis includes some suggestions and proposals for reforming the rules of jurisdiction and applicable law in Iraq.

It also endeavours to be comprehensive about all the types of online contracts that take place over the internet; these include, business-to-business (B2B), business-to-consumer (B2C), and consumer-to-consumer (C2C). A clear distinction will be made between these three types in order to examine whether the rules of conflict of laws apply to all of them or whether each category enjoys special characteristics and, therefore, that special rules apply to each category.

Finally, this thesis seeks to draw special attention to the third category of online contracts, C2C ones, as these lack sufficient legal regulation. Despite the enactment of many national laws and regional and international conventions in the last decade, as a means of keeping pace with the significant increase in using the well-developed communication means in a

contracting process, the scope of such legislation has mainly focused on the first two types of contracts.

1.4 SCOPE & LIMITATIONS

This thesis examines the law of online contracts from the perspective of private international law; more specifically, jurisdiction and applicable law matters and certain aspects of ordinary contracting theory as well.¹⁵ Given that the term ‘online contract’ may encompass more than one type of contract, such as contracts concluded over telephone, Skype, Messenger, video conference, and exchange of emails, it is important to mention that all these types of online contracts are excluded from the scope of this thesis. This thesis will aim to examine only one type of online contract, contracts concluded over the internet, namely, in electronic marketplaces, i.e., the websites of retailers and manufacturers. Although from an analytical point of view these types of contracts are different; nevertheless, the term ‘website contracts’ will be used to mean all of them. It should also be mentioned that website contracts can include another category of online contracts, i.e., ‘mobile contracts’.¹⁶ Even though these replicate website contracts, not all website have mobile apps that enable consumers to buy through their mobile phones.¹⁷

Most importantly, it is argued that under the law of website contracts, the definitions of business and consumer have become problematic in themselves. An online contract between two parties in an electronic marketplace can be B2B, B2C, C2B and C2C. Accordingly, while this thesis is mainly limited to analysing one type of online contract, the scope of the thesis

¹⁵ In addition to jurisdiction and applicable law matters, private international law also deals with the enforcement of foreign judgments. However, this thesis will not cover issues relating to the enforcement of foreign judgments in terms of online contracting cases for two reasons. First, it is submitted that no significant novel issues would arise, for the purposes of this thesis, when a judgment is attempted to be enforced in another jurisdiction. Second, assuming that the enforcement of foreign judgments may have some peculiarities in the context of internet cases, it would be beyond the scope of this thesis to cover it and would require a separate study.

¹⁶ Mobile contracts are those which can be concluded directly through an application (mobile app) that is downloaded onto a smartphone. Most well-known electronic marketplaces and retailers, such as eBay, Amazon, and Apple have now designed mobile apps with which items can be sold and checked more easily and with greater speed than the website contracting process.

¹⁷ See Desponia Anagnostopulu, ‘E-Commerce in International and European Union Law: The Policy of the European Union on Digital Agenda and Strategy’ (Jean Monnet Chair, New Dimensions on EU Legal Studies Research Essays Series, 2013) <<http://afroditi.uom.gr/jmc/wp-content/uploads/2013/06/Research-Essay-No-11.pdf>> accessed 25 April 2014. From a private international law perspective, such a new kind of website contract might be more problematic. The mobile phone is more portable than the laptop computer. The laptop computer may need a wire or wifi internet in order to connect to the web; however, through a mobile phone the connection to the Internet can be done via 3G technology.

will be extended to include all types of online contracts which take place on a website. The thesis will not include an analysis of the law of online C2B contracts for two reasons: first, the rarity of its application in online contracting scenarios; and second, there might not be so much difference from a jurisdiction and an applicable law point of view between B2C and C2B contracts.

The author has encountered some difficulties in the preparation of this academic work. Firstly, the theme of the thesis has put the author under the responsibility to tackle more than one legal area apart from private international law, such as contract law and consumer protection laws. In addition, the subject of the research has obliged the author to resort to more than one legal system by analysing the status quo of the legal regimes in the jurisdictions which are the subject of the methodology of this thesis.

Secondly, there is an absence of online contracting case law in Arabic countries generally, and in Iraq especially, upon which the author can rely on to carry out a comprehensive legal analysis and find proper solutions to the legal challenges and problems brought up by the thesis. This means that there will be no opportunity to make use of them in order to get to know the real meaning intended by some legislative rules that lack clarity.

1.5 RESEARCH QUESTIONS

The main questions posed by this thesis are: To what extent are the existing jurisdiction and applicable law rules and some of the ordinary contracting rules suitable for governing online contracting cases? To what extent have the different legal systems succeeded in applying them to their own jurisdictions?

Defining the challenges and problems facing online contracting entails a comprehensive overview of the entire process from beginning to end. Only after this is done can these problems and challenges be pinpointed, and their extent understood. This is a necessary process in order to find reasonable solutions for them.

Generally, online contracts, in the same way as traditional contracts, go through three main interdependent stages: negotiation, conclusion and implementation or the carrying out of the obligations. It might be possible then to define the most important challenges and problems of this topic according to the above classification. In other words, according to what happens before, during and after online contracting.

1.5.1 The Challenges and Problems at the Stage Preceding the Actual Contracting

In general, online contracting on a website equates to a demand for goods or services, where the requester is resident in a place other than the place from which the goods or services are requested, or where the provider of the goods or services is domiciled. The response regarding the availability of the goods or services would be communicated online as well. Just as in normal shops, the situation could be that online goods or services are also displayed and, accordingly, the information site on the internet represents the means of display and specifies the place of contracting, the price and its alternative in case of online service. This stage, which precedes actual contracting, has three main problematic issues and challenges.

Firstly, there is the consumer's right in B2C contracts to negotiate with the seller about the displayed items on the website because the special features of these contracts make it very difficult for the consumer to do so. The consumer can only click the 'accept' or 'continue' icons in click-wrap and browse-wrap agreements. This process undoubtedly creates an unfair balance between the consumer as the weaker party, and the seller or service provider whose rules and conditions are non-negotiable. Secondly, there is a lack of a clear distinction between an 'offer' and an 'invitation to treat' in website contracts and this creates confusion for non-expert consumers and they are unaware of the consequences of clicking on 'accept' or 'agree'. More specifically, this may apply to some online advertisements that are directed at specific groups of people which include a price and specifications of the goods or services without any clarification over whether they are negotiable or not. The final challenge is that the contract terms and conditions are not displayed visibly enough on the website so that the buyer can peruse them.

1.5.2 The Challenges and Problems at the Stage of Concluding the Contract

This is the stage where the offer and acceptance meet online on the website, and this is achieved in various ways according to whether it is a sale of goods or services and the means of contracting involved. In general, the desire of the seller meets with the desire of the buyer, and the agreement is reached through the internet. At this stage, four main problems can surface.

The first problem is that due to the special nature of such contracts it is very difficult for each party to verify the identity of the other, and in most cases, they do not know each other. Indeed, this is one of the unique features of the internet and distinguishes it from other means of distance selling, such as telephone, telex, fax and email. The challenge is magnified when the contract is done without human interaction such as by an automated message system. In such situations, it is difficult to determine the legal enforceability of the contracts.

The second problem is when the contract is concluded by an electronic agent or online intermediary as a third party and a facilitator between the seller and buyer in the online contract. In such cases, it is difficult to determine a number of factors: the direct parties to the contract; the legal characterisation of the third party; the extent of the liability of the electronic agent or online intermediary; whether the ISP can be considered a third party in the electronic contract; and finally, the extent of the ISP's responsibility in the online contract.

The third problem is the validity and the enforceability of the online contract, and the binding means of contracting. Such validity is guaranteed in traditional contracts by the fact that the law acknowledges the way of expressing consent. However, the same outcome may not be guaranteed in online contracts concluded over the internet. As for the enforceability of the online contractual clause, it may seem more problematic than the validity of the online contract itself. Certainly, there is a difference between the validity and the enforceability and such a difference may appear as a main issue in online contracting cases.

The final problem that might appear at this stage is the signature; specifically, how an online contract can be signed; what is its degree of acceptability as evidence, how the information is able to be saved in the system information and whether the information is retrievable for evidentiary purposes.

1.5.3 The Challenges and Problems at the Stage of Carrying Out the Contractual Obligations

There are challenges for the seller, the supplier of the goods or services who is committed to deliver the goods or perform the service, and the buyer or customer who is obliged to pay the price. The commitment to deliver creates the possibility of the failure to deliver the goods, a delay in delivering them or the delivery of incorrect or inconsistent items with the specifications contained in the agreement. There is also the problem of delivering intangible

goods, such as software programmes, games and songs. To some extent, these are challenges that are similar to those existing within the domain of traditional contracts; however, the special characteristics of online contracting give them another flavour.

1.5.4 The Challenges and Problems at the Stage of Online Contracting Disputes: Jurisdiction and Applicable Law Issues

In the realm of the internet, all geographical borders cease to exist. It is therefore difficult to determine which country should assert its jurisdiction over a dispute and which law should apply if the parties have different nationalities and different places of domicile. Ambiguity also arises over the place where the contract would have been concluded or would have been performed. Indeed, these problems already exist in the traditional practice of international contracts. In the online environment, these challenges have become more problematic and more ambiguous as the existence of geographical locations, which the traditional conflict of laws relies upon, has been put into considerable doubt with the rise of the internet. In fact, this subject has raised a lot of issues and a lot of divisions between private international law scholars as regards to the definition of the law to be applied to the transnational online contract, and the competent jurisdiction charged with considering the disputes that emanate from them, including its interpretation, its implementation, its invalidation and the compensation. This is especially so when the contracting parties have different nationalities and when they belong to different jurisdictions with different legal systems and ideologies. In this case, many questions arise. These questions are subsidiary ones and will be answered in the relevant chapters in turn:

1. What is the law that would apply to such contracts? Is it the law which the two contractual parties agree upon in the online contract? If the answer is yes, to what extent do the parties' freedoms extend? Is their freedom to choose the law that applies to their online contract absolute? Alternatively, are there any limitations and restrictions to their freedom to choose the law that will apply to their potential disputes?
2. What would be the solution if the two parties did not agree upon the law that would govern their dispute resulting from the transnational online contract? Which law would be applied in such a case? Is it the law of the seller, or the law of the buyer, or the law of the country where the online contract was concluded, or the law of the country where the online contract was performed?

3. A question would also arise in cases of multiple places of performing the obligations originating from the online contract. Which law should apply in such cases?

Most importantly, all the questions raised above can emerge in both traditional and online contracting scenarios. As it has been mentioned above, the application of the rules of conflict of laws to online contracts will, in some circumstances, be inconsistent due to the special characteristics of the internet. Contracts take place over the internet and they are concluded and performed in an intangible place with no physical borders, a fact that goes against territory-based conflict of laws rules where the rules of existing private international law are relied upon. In other words, dealing through contracting over the internet actually takes place between information and communication technology systems and websites which do not rely on place or physical presence as an essential or key element for their being. It makes it difficult or even impossible at times to define exactly the place where the contract was concluded. It would be equally difficult to determine who is charged with carrying out the major or principal obligation in the contract due to the complex nature of online processed contracts.

Moreover, there might be another problem regarding the determination of the conflict of laws rules in online contracts if one of the contractual parties or both of them belong to a country whose laws do not approve of computer outputs or do not approve of the online contractual selection of the law or the court. This might be the true state of affairs under Iraqi law, for example, which does not recognise the choice of court agreement in some circumstances. This is surprising given that such a choice has become a basic contractual clause in almost every website contract today. Given that such enforceability might not be guaranteed in some jurisdictions, and the consequence would be the wasting of the rights when the two contracting parties are surprised by the fact that the law with which they agreed to govern their contract does not acknowledge or approve of the documents because they are not in a traditional paper format and are not duly signed. It should be mentioned here that the latter statement might not apply to the online contracts concluded over websites. Most website contractual terms and conditions are written by the website operator or the seller, and the buyer does not have the option to revise them.

Having said the above, the following are the most significant subsidiary questions:

- Are the traditional applicable law and jurisdiction approaches which have been applied by Iraqi law still suitable for governing online contracts that take place on websites?

- To what extent have the US personal jurisdiction and conflict of laws rules been successfully applied by the US courts to cases that have involved online contracting disputes?
- Is the application of the Brussels Regulation and the Rome I Regulation sufficient to accommodate online contracts and their disputes? Or is there still inconsistency with the contracts concluded over the website in terms of their effectiveness to resolve online contracting disputes in the context of applicable law and jurisdiction matters?
- Are the customary rules that appeared with the internet and international commerce independent and sufficient enough to govern the contractual online activities that take place over the internet?

1.6 THESIS STATEMENT

It is still a matter of debate whether the existing jurisdiction and applicable law rules governing traditional contracts have successfully been applied to online contracting cases. As for EU private international law (Brussels and Rome I Regulations), it is still a debatable matter whether or not the harmonisation has achieved its goal of accommodating both online and traditional contractual activities jointly within the jurisdiction of EU Member States. More precisely, many issues remain unresolved in the context of online contracting practices, such as Article 15 of the Brussels Regulation and Article 6 of the Rome I Regulation.

In the US, the status quo might be more uncertain as traditional jurisdiction and applicable law rules have been applied to inter-state as well as international online contracting cases. There is still no certain consensus among the courts about the interpretation and application of these rules and, their stability in the online contracting context. In other words, the proper applicability of personal jurisdiction, minimum contact and long-arm jurisdiction rules may still not sit well in online contracts practices.

Most importantly, the same statement can be given regarding the situation in Iraq as it relies upon Articles 14, 15, and 25 of the Iraqi Civil Law Code (ICLC) which deal with the cases of jurisdiction and applicable law in contractual matters.¹⁸ The difference is that the courts in Iraq have not yet been confronted with cases involving online contracting disputes.

¹⁸ In Iraq, there is no codified private international law. The latter's rules are incorporated to the Iraqi Civil Code in articles 17-33. Jurisdiction and applicable law rules applicable to contractual obligations can be found in the

Regardless of the debate about how the intangible elements of the internet should be regulated, it is undeniable that cyberspace is now all-pervasive and contracting via the internet has become the rule after it was the exception. If this trend continues, there will be a great likelihood that certain conflict of laws norms will no longer seem appropriate¹⁹. More specifically, the traditional connecting factors of the place of contracting and the place of performance have been applied and laid down in the laws of most countries²⁰ but these elements have become inappropriate for the online environment and probably will not function as criteria to determine the jurisdiction and applicable law. In addition, most up-to-date conventions and laws still lack explicit provisions, especially in the field of jurisdiction and applicable law on transnational online contracts, whilst all the signs indicate that online contracts will witness a dramatic increase in the next few years.

Finally and most importantly, this thesis argues that among the existing connecting factors which are being applied by different legal systems to international contracts, the most suitable one for online contracting cases might be the ‘most closely connected’ approach. With the special characteristics that online contracts contain, it might be fruitless to confine the court by rigid connecting factors such as the place of contracting or the place of performance which can be difficult to determine in contracts concluded over the internet. Instead, it would be better to apply rules that are more flexible and give the courts room for discretion to find and apply the law of the country to which the online contract is most closely connected.

1.7 METHODOLOGY

This is black-letter law research which mainly relies upon critical legal analysis of valid statutes and legislation, the available case law as well as the existing library-based literature on the topic. The doctrinal methodology of this thesis is based upon the process of identifying and analysing the targeted problematic areas in the law regarding the subject matter of the thesis. Then it will be examined how the different legal regimes have dealt with such problematic areas and how these jurisdictions have applied such laws to these problematic

articles 14, 15 and 25 of the Civil Code. These will be thoroughly discussed and analysed throughout the chapters of this thesis.

¹⁹ In favour of same argument see Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity* (Cambridge University Press 2007); see also Chapter 2 of this thesis, page 35 (n98)

²⁰ For example, it is applied by Iraqi law, the laws of many American States, the EU’s up-to-date Regulations (Brussels and Rome I), and the United Nations Convention on the Use of Electronic Communication in International Contracts.

aspects; both of these depend on a critical analysis of the national or regional laws and up-to-date case law in each jurisdiction. In other words, the method of this research will rely on analysing each part of the study at the national law or regional law levels to examine its suitability and predictability to accommodate and govern the ever-increasing and developing transnational online contract concluded on websites. This will aim to highlight the inconsistent areas of such laws, demonstrate their inappropriateness, and suggest feasible solutions for them.

The aim of this thesis is to deal with an issue which has become a matter of global concern due to the global and borderless nature of the internet, that is to say, the transnational online contract over the internet. From this, it can be argued that analysing the existing legal regimes at national and regional levels could be the most fruitful methodology to guarantee the originality of the work as well as maximise the significance of the research and its contribution to knowledge. One important point should be clarified here; the approach of this thesis is not a straight comparative analysis approach between three legal systems in each part of the study but, rather, it is a critical analysis of the status quo of the law relating to online contracts in these jurisdictions regarding the matters of jurisdiction and applicable law only. These jurisdictions have been chosen by taking into consideration the following facts. Iraqi law represents the traditional conflict of laws rules that have not yet been changed, and are still assumed to be applicable to online contracting cases. US law represents the leading jurisdiction which applies the common law approach to online contracting cases. Finally, EU law represents the approach of harmonisation of conflict of laws rules with the aim of governing online contracting activities in jurisdiction and applicable law matters through the Brussels and Rome I Regulations.

1.8 ORGANISATION OF THE THESIS

The structure of this thesis is based on seven chapters. The chapter following this chapter (Chapter 2) will deal with a crucial preliminary issue which is the analysis of the nature of cyberspace and electronic marketplaces. Chapter 3 will be allocated to illustrating the concept of transnational online contracts by reviewing the different definitions for online contracts, specifying their legal characteristics and clarifying the different types of online contracts according to different classifications. In Chapter 4, more specifications will be deployed to illustrate the pre-dispute stage of online contracting. In fact, this chapter can be regarded as

the cornerstone of this thesis because it will examine some special specifications in the online contract which lead to disputes that need to be settled according to the jurisdiction and applicable law rules. Indeed, finding out some solutions for such problematic issues could be one of the main ways to reduce online contractual disputes. Chapter 5 will deal with the existing jurisdiction rules and their applicability to online contracting disputes in online B2B, B2C and C2C contracts. Chapter 6 will examine the applicable law rules and their applicability to online contracting disputes. Finally, Chapter 7 will be the conclusion and will include supporting justifications and suggested recommendations.

CHAPTER TWO

PRELIMINARY ISSUES: THE INTERNET AND ELECTRONIC MARKETPLACES

2.1 INTRODUCTION

In order to tackle the topic of this thesis, there is a need to analyse two closely related issues from a private international law perspective: contracting activities and legal activities in cyberspace generally. Indeed, it might be fruitless to carry out a proper analysis on the law of online contracts without building up a general understanding about the nature of cyberspace. It has been argued in Chapter one that certain existing legal rules might be inadequate when it comes to governing legal issues resulting from using the internet in carrying out different legal activities. As far as the jurisdiction and applicable law issues in cyberspace are concerned, giving sufficient significance to highlighting some questionable characteristics of the internet and competence issues over the complex metaphor of cyberspace should come first because it might lead to fruitful results later in the advanced stages of this thesis. As a result, it is not sufficient enough for analysing the suitability of customary conflict of laws in the online environment without a clear understanding of cyberspace itself, and whether it is amenable to the existing traditional rules or not. It is also important to demonstrate or rather uphold the rationale behind the author's assumptions and justifications in the previous chapter. Accordingly, this chapter will aim to examine some issues regarding the internet and cyberspace that are very closely related to private international law which the main part of this thesis primarily deals with.

The essence of this chapter will mostly entail a sort of metaphorical and imaginative analysis of the main controversial leanings prevalent among scholars about the regulation of online activities rather than a textual analysis based on judicial and legislative factors. Therefore, no comparison between legal regimes will be carried out in this chapter but a deep critical analysis of the principal thoughts will be sought instead. This chapter will be divided into five sections; the section following this introduction will briefly attempt to highlight issues of terminology. That is to say, the analysis of several terms which are commonly used today to describe the new area of law that deals with technology. A conclusion will then be drawn

about the most appropriate and accurate designation which can encompass this whole area. In Section three, the author will attempt to discuss and analyse the borderless nature of cyberspace - the notion that has been widely debated and most questioned from a private international law perspective. Section four will be allocated to discussing and analysing internet governance and competence questions of cyberspace; this is a topic that is much more debatable and problematic and has a close connection to the core of private international law, in particular, jurisdiction and applicable law issues. This will be done in order to outline a comprehensive picture of this chapter and to prepare a path for Chapter four which will be about the pre-online contractual disputes because it is useful to examine the virtual places where the cross-border online contracts are negotiated, concluded and disputed, i.e., electronic marketplaces, specifically their special characteristics and complicated legal nature. All these points will be analysed in Section five of this chapter. Finally, Section six will be the last section and will summarise the main conclusions that the writer has drawn.

2.2 TERMINOLOGICAL ANALYSIS

It is a fact that the legal studies dealing with the relations and interactions between law and contemporary technologies are developing very rapidly. There is still, however no common consensus about the most appropriate and most accurate designation to describe this area of study. It is understood that the scope of law and technology is very broad in sense and thus it can encompass a wide range of legal aspects that are incorporated from more than one branch of law, such as civil law, criminal law, private international law, commercial law and banking law.

Due to this, various terms have been used by scholars, writers and researchers to refer to this field of study, including computer law,¹ cyber or cyberspace law,² internet law,³ and

¹ See for example, Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (Oxford University Press 2011); David Bainbridge, *Introduction to Computer Law* (5th edn, Pearson Education Limited 2004); Richard Raysman, *Computer Law: Drafting and Negotiating Forms and Agreements* (Law Journal Press 1984).

² See for example, Robert Bird and Others, *Cyber Law: Text and Cases* (Cengage 2011); Jonathan Rosenoer, *Cyber Law: The Law of the Internet* (Springer 1997); Raymond S R Ku and Jacqueline Lipton (eds), *Cyberspace Law: Cases and Materials* (3rd edn, Aspen Publisher 2010); Hannibal Travis (ed), *Cyberspace Law: Censorship and Regulation of the Internet* (Routledge 2013).

³ See for example, Graham J H Smith (ed), *Internet Law and Regulation* (Sweet & Maxwell 2007); Chris Reed, *Internet Law: Text and Materials* (Cambridge University Press 2004); Andrej Savin, *EU Internet Law* (Edward Elgar Publishing 2013).

information technology law (IT law).⁴ Against this background and at this early stage of the thesis, it might be a useful point of analysis to consider whether these terms are synonymous and share identical components. A short analysis of each of these will be conducted in order to determine the most appropriate one which adequately accommodates this field of the legal branch.⁵

Firstly, it is common legal knowledge that legal terms are relatively very specific and the accuracy of any definition of any term relies on its comprehensibility and comprehensiveness for the legal discipline for which it has been designated.⁶ Moreover, the determination of the most appropriate and accurate terminology may require a neutral analysis to be conducted. In other words, terminological analysis should be based on a comprehensive examination of the framework of this area of law in general and not just for the theme of this study which is specific to online contracts on websites.

2.2.1 Computer Law

Computer law is one of the earliest terms used by authors to describe this new branch of law.⁷ In the author's opinion, using this designation in the present day does not reflect the real nature of the field of study for two reasons: first, because its specification is just for computer legal-related issues; second, this designation might have been appropriate two or three decades ago when the computer was a novel invention and the sole technology for exchanging information and conducting a transaction over the internet in its earlier form. The technology has witnessed a significant leap and small portable, internet-browsing devices have become a prominent feature of daily life. Thus, it can be argued that this term lacks technological neutrality and cannot be interpreted more broadly than it is.

⁴ For example, Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press 2010); Ian Lloyd, *Information Technology Law* (6th edn, Oxford University Press 2011); Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2012) Anne-Marie Mooney Cotter and Colin Babe (eds), *Information Technology Law* (Cavendish 2004).

⁵ In fact, this question has already been discussed by Svantesson in his book; however, the writer here will attempt to analyse the question more broadly and include another term that was not addressed by Svantesson. See Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 26.

⁶ Arthur L Corbin, 'Legal Analysis and Terminology' (1919) 29 *The Yale Law Journal* 163.

⁷ In 1978, David Bender published one of the earliest books addressing the legal challenges of computer technology. In this book, he addresses the issue of using computer outputs and their value in the law of evidence and rules of procedure. See David Bender, *Computer Law: Evidence and Procedure* (M Bender 1978); see also Michael D Scott, 'Book Review : Computer Law : Evidence and Procedure' (1978) 1 *The John Marshall Journal of Information Technology & Privacy Law* 745.

2.2.2 Cyber & Cyberspace Law

The other expression which has been used very widely⁸ is cyber law or cyberspace law'. Lexically, the term 'cyber' is always followed by a noun or adjective to relate it to electronic communication networks, especially the internet,⁹ whilst 'cyberspace' refers to data banks and networks which are considered a place.¹⁰ As it is obvious from the linguistic definition above, the terms cyber and cyberspace law seem reasonable designations and are quite appropriate terms but, arguably, not the most appropriate because their scope is rather specific to internet-related legal issues,¹¹ and not predictable for other types of technologies which exist or will exist in the future.¹² In other words, it also lacks terminological neutrality and comprehensibility as well.

There is an interesting opinion which argues that the term cyberspace is not a synonym for the internet¹³ and its meaning is much broader than what the internet could mean.¹⁴ Certainly, the notion of cyberspace in the broad sense is still one of the most controversial issues to date, however, a more specific and critical analysis on the nature of the cyberspace from the legal point of view will be discussed separately in this chapter of the thesis. Nevertheless, what can be stated here is that the relation between the internet and cyberspace can be described as follows: the internet is the medium by which information messages and data are transmitted within the circumference of cyberspace.¹⁵

⁸ See (n 2).

⁹ A S Hornby and others (eds), *Oxford Advanced Learner's Dictionary*, vol 9 (8th edn, Oxford University Press 2010).

¹⁰ *Collins Cobuild Advanced Dictionary* (Heinle Cengage Learning 2009) 281.

¹¹ Svantesson (n 5) 26.

¹² For example, telex or fax communications.

¹³ See Darrel C Menthe, 'Jurisdiction in Cyberspace: A Theory of International Space' (1998) 4 *Michigan Telecommunications and Technology Law Review* 69. Menthe comments on that: 'The terms "cyberspace" is sometimes treated as a synonym for the Internet, but is really a broader concept. For example, we know exactly how the Internet began, but not at what point the connections between a few domestic computers metamorphosed into a global virtual community that we now call cyberspace. The term "cyberspace" emphasizes that it can be treated as a palce".

¹⁴ *ibid.*

¹⁵ See Bill Young, 'Navigating Cyberspace: Introduction to Cyberspace' (*University of Texas, Department of Computer Science*, 9 January 2013) <<http://www.cs.utexas.edu/~byoung/cs329e/slides1-introduction.pdf>> accessed 2 May 2014.

2.2.3 Internet Law

The same criticism that has been levied at cyberspace law can also be applied to this designation.¹⁶ In fact, the first impression that comes to mind when hearing the term internet law is the contemporary legal concerns that have emerged as a result of using the internet in different aspects of life; more specifically, the growing amount of research that has been carried out in different areas of law, such as online intellectual property infringement, online defamation and online contracts which this study deals with in particular. However, it cannot be argued that using internet law would be the feasible term because it is not comprehensive and predictable enough. In other words, it is not guaranteed that the internet will remain the sole technological mean for communication in the future. Therefore, the term ‘internet law’ might not cover the entire techno-legal issues.

2.2.4 Technology Law & Information Technology Law

It seems sensible to argue that both technology law and information technology law are better terms than the others due to the possibility of encompassing the entire area of this branch of law in the current time or for prospective scientific inventions that may appear in the future as well as their predictability. The term technology, which refers to methods, systems and devices that are the result of scientific knowledge being used for practical purposes¹⁷ is much more comprehensive,¹⁸ neutral, and predictable; and, therefore, it might seem the most preferable term for legal certainty and predictability. For these reasons, the terms technology law or information technology law will be used in this research rather than other terms when the intention is to address the comprehensive nature of this area of law.

As far as terminological analysis is concerned, it is relevant to shine a spotlight very briefly on another area. There have been abundant studies dealing with the legal aspects of contracting by distance communication means; this is on a large-scale and encompasses a variety of well-known technologies. Here all previous communication technologies will be disregarded and the focus will be on the latest and most distinctive technology: the internet. Writers have been using different designations to refer to contracts concluded over the

¹⁶ The writer agrees with Svantesson that internet law and cyberspace law are very specific only to internet related legal issues and not all technology that may emerge in the future; See Svantesson (n 5) 26.

¹⁷ *Collins* (n 10).

¹⁸ Svantesson (n 5) 26.

internet; these are: electronic contracts, the most common ones, online contracts and internet contracts.

Firstly, the term electronic contract (e-contract) is not specific to the internet but also encompasses a variety of non-traditional communication means, such as the telephone, telex, and fax, which are also electronic devices. Therefore, it is not accurate in the narrow sense to specify the term electronic just for a contract concluded over the internet. Accordingly, it might be more preferable to use internet contracts when referring to contracts that are negotiated, concluded and that may also be performed over the internet.

The internet involves two main ways to communicate and interact with people: email and websites. These are remarkably different to each other from a legal point of view.¹⁹ More precisely, the legal doubts and controversial points surrounding email communication are much less than website communication.²⁰ As a result, almost all recent studies have tended to deal with continuous legal issues resulting from concluding contracts over websites.²¹ That being the case, the designation 'web contract' should be used instead of 'internet contract' for legal and terminological accuracy.

2.3 THE BORDERLESS INTERNET: REALITY OR FICTION?

The internet is often described by authors as global and at times as borderless. Both attributes can be argued to function as synonyms of each other.²² In other words, it seems that each feature is complementary to the other because of the internet's worldwide availability, anywhere and at anytime, regardless of political and jurisdictional boundaries. This allows us to say that it is a global medium for communication and information exchange. This feature can be described as the most interesting and challenging characteristic of the internet, especially from a private international law perspective.²³

¹⁹ Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate 2006) 383.

²⁰ Dan Jerker B Svantesson, 'The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know about the Internet' (2005) 13 *International Journal of Law & Information Technology* 39.

²¹ Karen Mills, 'Effective Formation of Contracts by Electronic Means: Do We Need a Uniform Regulatory Regime?' (World Summit in Information Technology, Tunis, November 2005).

²² Wolfgang Kleinwachter, 'WSIS and Internet Governance: The Struggle Over the Core Resources of the Internet' (2006) 11 *Communications Law Journal* 1.

²³ Svantesson (n 20).

Generally speaking, the main structure of the internet is based on a technology called the Internet Protocol System (IP address) which does not adhere to any kind of international frontier restrictions.²⁴ For normal users, the IP address and domain names do not include any indications that reveal the geographical location of the computer or the server with which the user accesses the network or the country from which the user is exchanging information.²⁵ As a result, the internet's infrastructure is based on an open environment system that enables people worldwide to freely exchange and transmit data without any consideration for their political and geographical boundaries.²⁶ In other words, the geographical locations of the internet users are not important, thus, information messages and data can be freely exchanged between individuals belonging to different jurisdictions.²⁷ Without doubt, this attribute makes the internet a distinctive means of communications and a problematic one for private international law.

Against this fact, the borderless nature of the internet has also been doubted by some writers. It has been argued that the internet should no longer be conceived as borderless and it can no longer be described as ubiquitous due to the emergence of blocking technologies, such as internet filtering technology and a very advanced technology called geo-location,²⁸ which allows for the identification of the geographical location of internet users.²⁹

In an interesting article, Schultz³⁰ argues that the notion of the borderlessness of the internet or its global nature is a popular misconception.³¹ Schultz draws an absorbing analogy by

²⁴ Raymond Shih Ray Ku, 'Open Internet Access and Freedom of Speech: A First Amendment Catch-22' (2000) 75 *Tulane Law Review* 87; Jonathan Zittran, 'Be Careful What You Ask For: Reconciling a Global Internet and Local Law' in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) 13; Todd Evan Lerner, 'Playing the Blame Game, Online: Who Is Liable When Counterfeit Goods Are Sold Through Online Auction Houses?' (2010) 22 *Pace International Law Review* 241.

²⁵ Julia Hörnle, 'The Jurisdictional Challenges of the Internet' in Lillian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 21; George I Zekos, 'Personal Jurisdiction and Applicable Law in Cyberspace Transactions' (2000) 3 *The Journal of World Intellectual Property* 977.

²⁶ Vinto G Cerf, 'Who Rules the Net?' in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) VII; Andrew P Sparrow, *The Law of Internet and Mobile Communications: The EU and US Contrasted* (tfn Publishing 2004) 43.

²⁷ Hörnle (n 25).

²⁸ Jack Goldsmith and Tim Wu refer to this in their book as 'putting borders on the net'. See Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusion of a Borderless World* (Oxford University Press 2008) 58; Marketa Trimble, 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation' (2012) 22 *Fordham Intellectual Property, Media and Entertainment Law Journal* 567.

²⁹ Dan Jerker B Svantesson, "'The times they are a-changing'" (every six months) – The challenges of regulating developing technologies' [2008] *Forum on Public Policy* 1-16 <http://works.bepress.com/dan_svantesson/24> accessed 2 May 2014. Svantesson argues that: 'The dream of a truly borderless and location-independent Cyberspace is over. Evidence supporting this assertion is plentiful. With an ever increasing amount of location-based online services, there can be no doubt that the Internet is undergoing fundamental change'; See Dan Jerker B Svantesson, "'Imagine There's No Countries ...'" – Geo-identification, the Law and Not So Borderless Internet' (*Bond University*, 14 February 2007) <http://epublications.bond.edu.au/law_pubs/132/>

saying that the global nature of the internet has fragmented into different bordered and regional places worldwide, in the same way that billiard balls scatter across a billiard table.³² He justifies this by saying that there is an undeniable dark side to the internet which takes the form of online gambling, online intellectual property infringement, online defamation, and offensive websites, which has resulted in many negative consequences to the public interest, and the economic and social life of different countries.³³ As a consequence, the authorities in those countries have started to impose technical obstacles to prevent certain websites and online available materials from being accessible within their political and geographical territories.³⁴ Based on this undeniable fact, it has been argued that the internet is no longer global.³⁵ Svantesson shares the same thoughts and argues that the internet nowadays is substantially different than the internet a few decades ago.³⁶ He comments that ‘the dream is over’.³⁷

Neutral analysis should be carried out in order to determine the veracity of this idea. Without doubt, some countries have started exercising different levels of censorship on websites by using technologies, such as blocking, filtering or implementing geo-location technology to identify the geographical location of internet users. Many countries for many reasons are now imposing a high level of censorship on the information flow of the internet within their jurisdiction either by internet traffic or by filtering technology.³⁸ However, it can still be

accessed 2 May 2014. For more details about the literature of this school of thought and its advocates see Joel R Reidenberg, D Stanley, Nikki Waxberg, and Megan Bright, ‘Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law’ (*Fordham Law School*, June 2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309526> accessed 3 May 2014.

³⁰ Thomas Schultz, ‘Carving up the Internet: jurisdiction, legal orders, and the private/public international law interface’ (2008) 19 *European Journal of International Law* 30.

³¹ *ibid*

³² *ibid*

³³ See also Ronald Deibert, ‘The Growing Dark Side of Cyberspace (... and What To Do About It)’ (2012) 1 *Penn State Journal of Law & International Affairs* 260.

³⁴ Schultz (n 30).

³⁵ *ibid*

³⁶ Svantesson (n 29).

³⁷ *ibid*; Svantesson states that: ‘Indeed, today, it is getting difficult to view the Internet as borderless. So-called geo-location technology making it possible for internet actors to identify the geographical location of those they come into contact with challenges the Internet’s borderless nature’. (n 29) 15.

³⁸ William H Dutton and others, ‘Freedom of Connection- Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet’ (2010) Oxford Internet Institute. For example, China, Syria and Saudi Arabia are at the forefront of these countries. See Svantesson (n 5) 35; See also Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 295.

argued that internet communication is borderless.³⁹ Two points of analysis need a little more attention here; one is factual, and the other is an appraisal.

From a *de facto* point of view, both Svantesson and Schultz wrote their articles in 2008. Six years have passed and the internet is still transcending borders in a broad sense, and it is still the supreme method or maybe the sole means of exchanging and sharing information globally. Thus, the free flow of information is still a valid notion to some extent.⁴⁰ The number of states that substantially restrict the borderless nature of the internet with technological fences are still fewer in comparison to those that do not. Not only that but also from an e-commerce perspective, consumers in Wales, for example, are still able to buy digital products online from an American company in the US.⁴¹ There is still a limited number of online retailers and businesses that use geo-location technologies to deny shoppers located in undesirable jurisdictions access to their websites to order and buy products.⁴² In fact, the majority of businesses are continuing to expand their online commercial presence rather than restrict it. This attitude is in line with the EU's current policy and on-going efforts to encourage a free and fluent e-commerce movement between Member States.⁴³

³⁹ However, before illustrating such an argument, it is necessary to stress here that a 'borderless internet' does mean that legal activities which occur over the internet do not exist within the jurisdiction of any country, nor will this thesis argue in favour of this. The intention here is to emphasise that internet communications still disregard the geographical borders of countries.

⁴⁰ However, at the same time it cannot be said that there is an absolute freedom of information on the internet. Even the most democratic countries that uphold basic human rights in their constitutions, policies and communities exercise a sort of censorship on ISPs for security, social and moral considerations.

⁴¹ For instance, a British consumer ordering goods from eBay's American website.

⁴² For example, a UK based internet searcher who visits the Aljazeera Sport website www.aljazeerasport.net from a server and IP address located in the UK and tries to subscribe to the Aljazeera Sport encrypted channels package available on the Hot Bird satellite and accessible from the UK will be presented with the following message when the subscribe button is clicked: 'Access denied: This service is not available for your country or origin. Your IP address is 147.143.85.154'. Obviously, such websites use geo-location technology to determine first the geographical location where the buyer is accessing the network and then to block them from processing the contractual transaction. Not surprisingly, eBay international also uses this technology when an online retailer does not wish to sell items to consumers or businesses from certain jurisdictions. For example, when the writer attempted to buy a tablet device from an American online retailer on eBay's international website from a UK IP address, the following sentence appeared under shipment section: 'Not available to United Kingdom'. For more details about geo-location technology see Dan Jerker B Svantesson, 'How Does The Accuracy of Geo-Location Technology Affect The Law' (2008) 2 Masaryk University Journal of Law and Technology 20; Trimble (n 28).

⁴³ Recently, the EU has made a significant effort to achieve this aim. For instance see paragraph (1/introduction) of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions COM (2009) 557 final of 22 October 2009 on Cross-Border Business to Consumer e-Commerce in the EU, which sets out: 'At a time when households are under financial strains, the European Union is spending more time searching for and comparing offers online in the hope of finding the lowest prices. Cross-border online shopping has two key benefits for consumers: An increased range of products to choose from and the possibility to save money. Consumers living in remote areas will also benefit from being able to access goods cheaply. For business too, it opens up new markets and consumers and rewards innovative and competitive companies. The potential of the online Market is considerable.' See also European Commission's Digital Agenda for Europe and its particular plan to create a

On the other hand, appraising these technological fences in a neutral way leads us to question the extent to which they really constrain the global nature of the internet. To some extent they do but, in a broad sense they do not. In order to formulate the idea in a clearer way, three scenarios can be imagined. The first two are related to internet traffic and filtering technologies, and the final scenario is about geo-location technology.

The first scenario is where a country imposes a very high level of internet traffic on the exporting and importing of data over the internet network within its political territory to block information and materials that do not comply with its political, social, or ethical policies. The country is affecting the neutrality of the internet but not its borderlessness because its citizens can still send and receive information globally over the internet albeit not in an absolute and completely free manner.

The second scenario is where a country attempts to implement a kind of technological fence to block data from being sent and received in its territory and to make the internet's information flow only accessible nationally within the range of its geographical borders, not internationally as it should be. In other words, only native websites, publications and any other online material will be accessible to its nationals within its political and geographical boundaries.⁴⁴ If this becomes a reality then it can be said that the borderless feature or global nature of the internet has been replaced. From a practical and technical point of view, there is no such national authority, except for the Internet Corporation for Assigned Names and Numbers (ICANN), which can easily shift some websites or information away from the internet.⁴⁵ Accordingly, it can be said that such a scenario is not applicable in reality and it is highly likely that this will remain the case. This is one of the features that makes the internet remarkably different to other sorts of communication technologies.⁴⁶

The third scenario concerns a company or trader that uses geo-location technology to block shoppers located in certain jurisdictions from accessing its website or rather from purchasing

single digital market in EU countries
<http://ec.europa.eu/information_society/newsroom/cf/pillar.cfm?pillar_id=43&pillar=Digital%20Single%20Market> accessed 2 May 2014.

⁴⁴ Imagine a consumer in country X trying to access a website or download an article from a website operated and located in a server in country Y and suddenly the following message appears on the screen: Sorry your access to this website has been denied because your service provider's zone is only available within the jurisdiction of country X.

⁴⁵ Markus Muller, 'Who Owns the Internet? Ownership as a Legal Basis for American Control of the Internet' (2005) 15 Fordham Intellectual Property, Media and Entertainment Law Journal 710.

⁴⁶ It is technically possible for authorities in a country to block all incoming and outgoing international phone calls from landlines or mobile networks but it is impossible to do this with internet data.

its products. The dimension of the analysis in this scenario is slightly different. It is necessary to differentiate between two possibilities: the website that totally blocks its content from being viewed by the residents of a certain country; and the website that makes its content fully available for shoppers worldwide but prevents the completion of the contract of sale process by buyers from a specific jurisdiction. The latter scenario might be very prevalent at present.

If the first assumption is the case, it can be said that the notion of the ‘internet without borders’ will turn into the ‘internet with borders’, and the argument discussed above can be more logical because the surfer is completely deprived from accessing the website, and the online information flow has been seriously diminished in such a circumstance. Exercising such a high level of blocking is very rare in the e-commerce realm and most websites that tend to block buyers from certain countries or regions prefer to use the second choice.

Specifically, the websites’ content and advertisements are available globally without excluding any shopper from any country; however, the conclusion of the online contract is not available to some buyers from undesirable jurisdictions due to delivery, payment or dispute resolution issues. Again, it might be true to say that the borderlessness of the internet is not satisfied here or it has been affected by some restrictions as illustrated above; however, in the broad sense, it can still be argued that the internet is a borderless means of communication in those circumstances as long as the information is globally accessible.

In conclusion, no one can ignore the fact that the technologies that constrain the freedom of the fluent flow of information exchange over the internet are being used by different countries and websites at different levels. The implications of these technologies on the global nature of the internet are debatable. It has been argued that technological fences, such as internet traffic, filtering, and geo-location could diminish that feature of the internet in some circumstances.⁴⁷ Even so, broadly speaking, the internet is still globally available regardless of any national or regional boundaries. Taubman’s words are fitting here: ‘Conceptually, it was born global: and in practice, it is famously blind to national boundaries’.⁴⁸

⁴⁷ See our analysis in this chapter.

⁴⁸ Antony Taubman, ‘International Governance and the Internet’ in Lillian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 18.

2.4 GOVERNANCE: INTERNET OR CYBERSPACE⁴⁹

Oliver Lebond, the Chair at the Advisory Committee of ICANN, stated that: ‘No single country can dictate laws on the internet as control shifts innovation’. The internet is a multi-stakeholder platform and not for any single government to control’.⁵⁰ The term governance refers to the activity or the mechanism by which a country, a company, or an organisation can be governed and controlled.⁵¹ Specifically, it refers to authorities which are eligible to make decisions and have control over the internet’s main pillars, such as domain names, IP addresses, data transmission and free content circulation.⁵² In order for any entity, whether tangible or intangible, to be the subject of governance, it must meet some conditions and requirements from a legal point of view. The ownership of the subject matter of the governed entity is the most important prerequisite. In the context of the internet, the question of who owns the internet has been deeply debated.⁵³ This point will be discussed later in a more analytical manner.

A simple way to illustrate how the internet works and how it connects countless computers worldwide is to say that the internet is a ‘networks of networks’.⁵⁴ This modest way of describing the internet does not necessarily mean that its interpretation is at the same level of simplicity. Conversely, the reticulated nature of the internet’s infrastructure gives rise to a controversial point of view about the central authority, and the place where the decisions are made and the internet is controlled.⁵⁵ Determining whether internet governance is based on centralisation or decentralisation is still a debatable matter.⁵⁶

It has been widely thought that internet networks do not rely on a central or general connecting headquarters in order to create a connection between computers, in contrast to

⁴⁹ This section will include a brief history of the internet as far as its governance is concerned. However, it will not illustrate the entire history of the internet.

⁵⁰ Oliver Lebond (Chair At-Large Advisory Committee of the Internet Corporation for Assigned Names and Numbers ICANN, ‘Permissionless Innovation’ (Lecture at Bharathidasan Institute of Management, India, 31 January 2012); Olympia Shilpa Gerlad, ‘Control of internet will stifle innovation, says expert’ (*The Hindu*, 3 February 2012) <<http://www.thehindu.com/news/cities/Tiruchirapalli/article2854608.ece>> accessed 3 February 2014.

⁵¹ *Oxford Advanced Learner’s Dictionary* (n 9).

⁵² Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) xv ; Muller (n 45).

⁵³ *ibid*

⁵⁴ Andrew Guadamuz, *Networks Complexity and Internet Regulation: Scale-Free Law* (Edward Elgar 2011) 71.

⁵⁵ Thierer and Wayne (n 52).

⁵⁶ The main actors in this ongoing debate are the US government on the one side and the rest of the world on the other as will be illustrated below.

other means of communication, such as the telephone.⁵⁷ Without prejudging the exactness of any analogy, addressing the entire framework of internet governance is still a nebulous and manifold matter.⁵⁸ It can be said that there are two possible ways that the internet can be governed. The first way is of greater interest for public international law studies than private international law. It has been widely debated and contains more political influences than legal ones, and has been seen as the core of internet governance in the literature. The second way is more controversial: it has been extensively debated, is of a predominantly legal nature rather than a political one and is most relevant to private international law generally and to the thesis of this study specifically.⁵⁹

2.4.1 Internet Governance

In respect of the first interpretation of internet governance, this relates to the question about the ownership of the internet,⁶⁰ more specifically, whether the internet is centrally governed by its owners or whether it has been decentralized. This debate has very deep roots⁶¹ going back to 1993⁶² when the internet witnessed a dramatic leap from its use by the US military and academics to a global and multifunctional means of communication.⁶³ This occurred

⁵⁷ In this regard, Guadamuz (n 54) says: 'Most communication networks rely on centrality of communications in one form or another; for example, the telephone network is a good example of a system that relies on central connecting points from one end to another, known as exchanges'. See: Guadamuz, *Networks Complexity and Internet Regulation: Scale-Free Law* (n 54) 71. See also Kleinwachter (n 22). There is an interesting analogy that compares a fishnet and a spider web with the internet's networks and argues that the internet's network infrastructure is very similar to a fishnet in the way that it is established, and that this works in a different way to a spider web. Accordingly, the Internet's network, similar to the fish net, has no central or focal point where the administration is managed. Unlike the spider web which simply collapses if its central point is destroyed.

أحمد عبدالكريم سلامة, القانون الدولي الخاص النوعي: الألكتروني- السياحي- البيئي (مطبعة النهضة العربية- الطبعة الأولى, بيروت ٢٠٠٢) ص٢٧, مشار إليه في : خالد ممدوح إبراهيم, أبرام العقود الألكترونية (دار الفكر الجامعي- الأسكندرية ٢٠٠٨) ٣١ , هامش ٣١ Ahmed Abdul Kareem Salama, *Qualitative Private International Law: Electronic, Tourist and Environmental Perspective* (1st edn, Arab Revival Publishing 2002) 27, cited by: Khalid Mamdooh Ibrahim, *Concluding the Electronic Contract* (Universal Intellect Publishing 2008). 31, n 4.

⁵⁸ Taubman (n 48).

⁵⁹ However, there is an argument, which states that the controversy over how the Internet should be governed has obscured the dividing line between public and private international law. For more information on this point, see Guadamuz (n 54) 71.

⁶⁰ Lawrence B Solum, 'Models of Internet Governance' in Lee A Bygrave and Jon Bing (eds), *Internet Governance* (Oxford University Press 2009) 48.

⁶¹ *ibid* 48.

⁶² Before 1993, it was clear for all how the Internet was invented by an American scientist and later on funded by the US government through the National Science Foundation (NSF). See Jonathan Weinberg, 'Governments, Privatization, and 'Privatization': ICANN and GAC' (2011) 18 Michigan Telecommunications and Technology Law Review 189.

⁶³ Jon Bing, 'Building Cyberspace: A Brief History of Internet' in Lee A Bygrave and Jon Bing (eds), *Internet Governance* (Oxford University Press 2009) 8.

simultaneously with the involvement of the internet in international trade and, surprisingly, with the growth in the value of domain names in the global market.⁶⁴ The debate over governance is still ongoing; no national law, regional or international convention provides a definitive answer to the question of the nature of authority on the internet.⁶⁵

In the debate's early stages, the US government rejected international demands for international cooperation on internet governance as it believed that the internet was an American invention and it should be governed by its owners,⁶⁶ even though this attitude was never explicitly expressed by it.⁶⁷ The American claim to ownership of the internet has been widely criticised and it has been stated that neither tangible nor intellectual property rules reinforce such a pretension.⁶⁸

In any case, the internet being invented and developed by an American scientist does not justify the notion of US dominance over its control. If we are to accept the notion of American ownership of the internet, they may also have to accept a Russian partnership as a Russian scientist⁶⁹ invented and developed the internet satellites⁷⁰ that enable data transmission and distribution. The factual state of affairs is that the principal body responsible for the internet's main feature, ICANN, is located in the state of California in the US and the extent of the US government's oversight over ICANN has been a matter of debate.⁷¹

The United Nations and the European Commission have been the two main bodies that have opposed the role that the US has carved out for itself.⁷² Both have argued that the internet is a

⁶⁴ Kleinwachter (n 22).

⁶⁵ Lee A Bygrave and Terje Michaela, 'Governors of Internet' in Lee A Bygrave and Jon Bing (eds), *Internet Governance* (Oxford University Press 2009) 106.

⁶⁶ Muller (n 45).

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ The Russian Scientist Pyotr Kapitsa. The Soviet Union sent the first satellite to outer space in 1957.

⁷⁰ The satellite is not the sole means for data transition over the Internet, cables passing under oceans are another means; however, the satellite can cover almost all geographical areas worldwide and the cable cannot.

⁷¹ Weinberg (n 62).

⁷² Rogers (n 38) 72. For more information about the European Commission's role in Internet governance, see Jamal Shahin and Matthias Finger, 'ICANN's GAC and the Global Governance of the Internet: The Role of the EU in Bringing Government Back to Internet Governance' (GIGANet Conference, Hyderabad, India, December 2008). For more information about the UN's role, see the website of United Nations Commission on Science and Technology for Development (CSTD) at <www.unctad.info> and the United Nations Working Group on Internet Governance (WGIG) at <www.wgig.org>. See also World Summit on the Information Society's website (WSIS) at <www.itu.int> accessed 2 May 2013. Recently, the European Commission confirmed that the US still has most of the control of the Internet. Neelie Kroes, the European Commissioner for Digital Affairs added that: 'Given the US-centric model of internet governance currently in place, it is necessary to broker a smooth transition to a more global model while at the same time protecting the underlying values of open multi-stakeholder governance'; Ian Traynor, 'Internet Governance too-US Centric, Says European Commission' (*The Guardian*, 12 February 2014)

global medium and that it should not be under the dominant control of one country.⁷³ It is worth noting that the way that these two have attempted to counter the US's control has been different. Non-European United Nations countries⁷⁴ have expressed a desire to transfer authority to the UN's inter-governmental organisation⁷⁵ and the EU's position has been to call for control of the internet to be under a neutral private sector entity without governmental intervention.⁷⁶ Due to the growing international opposition to the US government's heavy involvement in Network Solutions, Inc. (NSI),⁷⁷ the latter decided to transfer its powers to a new private independent organisation, ICANN), which was formally established in California on 21 November 1998.⁷⁸

According to its bylaws, ICANN is an independent, private and not-for-profit organisation and it has been mainly responsible for managing and structuring domain names, dispute resolution and IP address settings.⁷⁹ The extent of the US government's oversight over ICANN has been much reduced over the last years.⁸⁰ Nonetheless, the creation of ICANN by the American authorities was not widely welcomed because even with this its power over the internet did not diminish. ICANN continues to follow the US government substantially, and it is bound by a contract which can be abrogated unilaterally by the US government.⁸¹

Accordingly, the United Nations started to engage in a long round of negotiations and meetings to reach an agreement by which all nations could take part in administering the internet.⁸² On 21 December 2001, the UN General Assembly⁸³ approved a two-phase World Summit on the Information Society (WSIS), the first phase was held in Geneva in December 2003, and the second phase was in Tunisia in November 2005. Not surprisingly, a month before the Tunis summit, the US Senator Norm Coleman released a statement saying that: 'The United Nations has no place controlling the internet',⁸⁴ the press headline was: 'US

<http://www.theguardian.com/technology/2014/feb/12/internet-governance-us-european-commission>> accessed 3 April 2014.

⁷³ Kleinwachter (n 22).

⁷⁴ This standpoint was supported by representatives of 20 countries.

⁷⁵ Kleinwachter (n 22).

⁷⁶ *ibid*; See also Lloyd (n 4) 467.

⁷⁷ The institution that was responsible for managing domain names before the ICANN's foundation was funded by the US government. See Weinberg (n 62).

⁷⁸ Kleinwachter (n 22).

⁷⁹ Weinberg (n 62).

⁸⁰ *ibid*

⁸¹ See Muller (n 45).

⁸² Rogers (n 38) 72

⁸³ UNGA Res 183 (2002) UN Doc A/Res/56/183.

⁸⁴ Paul Hue, 'Sen Coleman: the UN must not control the Internet' (*Reformed Leftist*, 7 November 2005) <http://reformedleftist.blogspot.co.uk/2005/11/sen-coleman-un-must-not-control.html>> accessed 30 May 2012.

Senator: Keep UN away from the internet'.⁸⁵ No fruitful agreement was achieved. The participants agreed to the current ICANN administration and the decision was made to carry out further work by establishing an Internet Governance Forum (IGF) to examine ICANN's role, which would work independently from the governments' involvement.⁸⁶ In 2009, the US government and ICANN reached an agreement called the 'Affirmation of Commitments' by which the US government approved the transfer of its remaining powers to the Governmental Advisory Committee (GAC) which encompasses representatives from a wide range of countries.⁸⁷ Even so, the relations between GAC and ICANN,⁸⁸ and between ICANN and the US government,⁸⁹ remain uncertain and controversial.⁹⁰

In fact, it can be said that neither the Geneva Summit nor Tunis succeeded in reaching an acceptable consensus about involving the United Nations in the control of the internet alongside the main control of ICANN.⁹¹ As such, it seems more realistic to say that the international efforts which have been taken to internationalise internet governance have failed and have been hampered by the conflicting desires of the US and other nations. Accordingly, it would be true to say that the internet remains under centralised governance by an independent body (ICANN) situated in the US, where its degree of independence from the US government is still questionable.

2.4.2 Cyberspace Governance

In terms of the second sense of internet governance and one that is more closely to the heart of private international law, its interpretation takes a different dimension and could be seen as a sort of metaphysical speculation. More clearly, the meaning of governance turns from the question of political and administrative control of the internet's main infrastructure into a matter of competence and the sovereignty of law to govern cyberspace. In other words, the

⁸⁵ Declan McCullagh, 'US Senator: Keep UN Away From The Internet' (*CNET*, 18 October 2005) <http://news.cnet.com/Senator-Keep-U.N.-away-from-the-Internet/2100-1028_3-5900690.html> accessed 30 May 2012.

⁸⁶ Roy Balleste, 'A Primer on Internet Governance' (2011) 15 *AALL Spectrum* <<http://www.aallnet.org/main-menu/Publications/spectrum/Archives/Vol-15/No-5/pub-sp1103-Internet.pdf>> accessed 2 May 2014. The Internet Governance Forum has annual meetings. To date, it has met eight times; the last meeting was in Bali, Indonesia on 25 October 2013 and the forthcoming is to be held in Istanbul, Turkey on 2-5 September 2014. For more details; see IGF website at <www.intgovforum.org>

⁸⁷ Weinberg (n 62).

⁸⁸ *ibid*

⁸⁹ Lloyd (n 4).

⁹⁰ Weinberg (n 62).

⁹¹ Kleinwachter (n 22).

debate's centre of gravity spins around the question of the merits of the physical laws of the world and the degree of its appropriateness to govern cyberspace, as well as the legal activities that arise from it.⁹²

For a long time, the relation between law and territoriality has been crucial. The law developed when the notion of states, political borders and nationality began to be established.⁹³ Thereafter, the rules of jurisdiction have evolved and now encompass subjective and personal jurisdiction.⁹⁴ The internet has not changed any of these rules but rather it has thrown into question their suitability of application to online activities.⁹⁵ Regardless of the debate about how and who controls the tangible or intangible elements of the internet,⁹⁶ it is an undeniable fact that cyberspace now has an overwhelming influence and interacting via online computer communications is becoming the rule after it was the exception.⁹⁷ If this continues to happen systematically, which seems likely, there is a great likelihood that certain jurisdictional grounds will no longer be seen as appropriate.⁹⁸ Consequently, one of the biggest challenges that private international law is currently facing is how to control the ubiquity of the internet and how to determine its borders.⁹⁹ Thus far, almost all nations have struggled with how to compromise between deep-seated legal rules and new revolutionary cyberspace;¹⁰⁰ meanwhile, this space still has no physical boundaries, no need for entry visas and, lastly, no government with whom to carry out negotiations.¹⁰¹

Broadly speaking, it could be affirmed that there are two main irreconcilable schools of thought in the literature about how cyberspace can or should be controlled and governed from

⁹² See Cerf (n 26).

⁹³ Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 Michigan Law Review 843.

⁹⁴ *ibid*

⁹⁵ Joel R Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 University of Pennsylvania Law Review 1951; Ray August, 'International Cyber-Jurisdiction: A Comparative Analysis' (2002) 39 American Business Law Journal 532. In this context, August comments that 'The challenge in determining if and when courts have jurisdiction over activities conducted on the Internet would not be great if the Internet were confined to a single geographical area, or if it were neatly divisible along territorial boundaries into distinct local networks. By its nature, however, the Internet is international: it disrespect local and national jurisdiction. The challenge, therefore, is to create rules that work smoothly across local, national, and international boundaries'

⁹⁶ It is worth noting that the internet, in principle, consists of a number of tangible and intangible elements; the tangible elements are embodied in the backbone, main routers, cables, and satellites, while the intangible infrastructure is mainly the root files, IP address and TCP/IP protocol. For more technical details of these elements and how they work, see Muller (n.45) and also Lloyd (n 4)).

⁹⁷ Christopher M Kelly, 'The Cyberspace Separatism Fallacy' (1999) 1 Texas International Law Journal 413.

⁹⁸ Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity* (Cambridge University Press 2007) 3.

⁹⁹ Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices EU, US and China* (Cambridge University Press 2010) 6.

¹⁰⁰ Kohl (n 98) 3.

¹⁰¹ Rogers (n 38) 5.

the point of view of the principle of legal sovereignty, with each school is subdivided into different thoughts.¹⁰² The first tendency might be best described as quixotic while the other one can be seen as more realistic.¹⁰³ It is submitted that neither of these schools of thought present solid solutions nor are they entirely infeasible as each of them has well-justified arguments.

The proponents of the first notion¹⁰⁴ argue that cyberspace is a unique phenomenon and has its own jurisdiction which ignores all territorial factors.¹⁰⁵ Accordingly, it does not adhere to and it cannot be governed by the jurisdiction of a single country or a group of countries.¹⁰⁶ This idea was first judicially considered in the place where the internet began, in 1997, when the US Supreme Court interpreted the term cyberspace with the following words: ‘Taken together, these tools constitute a unique medium known to its users as ‘cyberspace’, located in no particular geographical location but available to anyone, anywhere in the world, with access to the internet’.¹⁰⁷

Adherents to this concept have disagreed about the sovereignty and competence of national laws in governing this borderless and ubiquitous place as well as the proposed solution or the mechanism by which legal certainty can be given to cyberspace activities. They are therefore split into two conflicting views: no state’s land and law, every state’s land but not law.

2.4.2.1 No State’s Land and Law

According to the proponents of this notion, the relation between the principle of sovereignty of the law and cyberspace is divergent or rather inconsistent with each other,¹⁰⁸ and they can

¹⁰² See Melise R Blakeslee, *Internet Crimes, Torts and Scams* (Oxford University Press 2010) 30.

¹⁰³ *ibid* 30.

¹⁰⁴ The exponents of this thought are also referred to as “cyber-libertarians”. See Lorna E Gillies, ‘Addressing the ‘Cyberspace Fallacy’: Targeting the Jurisdiction of an Electronic Consumer Contract’ (2008) 16 *International Journal of Law and Information Technology* 442. David Johnson and David Post, two American scholars, are the Godfathers of this school. See David Johnson and David Post, ‘The Rise of Law in Cyberspace’ (1998) 48 *Stanford Law Review* 1307. In 2008, Post wrote an article in which he affirmed his previous reflection about cyberspace and its regulation. He defended the notion of the need for self-governing rules to govern the cyber-world, and re-affirmed the borderless nature of cyberspace by saying that: ‘[A]t the moment, there is no law of the place-nothing that can fairly be called “Second Life law” or “There.com law” or “Lineage II law”- because no institutions or process for making “law” have been developed in any of these virtual worlds. They are, at the moment, truly law-less places - or, more precisely, places where code, and only code, is law.’ See David Post, ‘Governing Cyberspace Law’ (2008) 24 *Santa Clara Computer & High Technology Law Journal* 883.

¹⁰⁵ Johnson and Post (n 104).

¹⁰⁶ G I Zekos, ‘State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction’ (2006) 15 *International Journal of Law and Information Technology* 1.

¹⁰⁷ *Reno v ACLU*, 117 S Ct 2329, 2334-35 (1997) in Menthe (n 13).

¹⁰⁸ Justin Hughes, ‘The Internet and the Persistence of Law’ (2003) 43 *Boston College Law Review* 359.

never exist in harmony.¹⁰⁹ They see that sovereign states enforce their national laws on the persons and activities within their territory as part of the country's sovereignty and the law's supremacy.¹¹⁰ The ubiquitous nature of cyberspace and its non-compliance with geographical factors makes the states' attempts to assert jurisdiction over it meaningless.¹¹¹ In *Gorman v Ameritrade Corp.*,¹¹² the defendant unsuccessfully argued that he was not the subject of the personal jurisdiction of the hearing court because he pursued a business through a website which exists in a virtual place and not within the geographical district of the hearing court.¹¹³ The Court of Appeal stressed that: "Cyberspace", however, is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortars'.¹¹⁴

Advocates for treating cyberspace as a separate jurisdiction that is not submissive to any jurisdiction in any country suggest that the notion of international space could be an alternative.¹¹⁵ In an interesting article, Menthe advocates this notion and argues that the deep analysis of the nature of cyberspace leads to conclude that the cyber-world is a distinctive realm where no particular jurisdiction can apply, and thus it should be regulated according to that assumption.¹¹⁶ Based on what has been argued, it can be said that, following Menthe, cyberspace is the fourth type of what is known in international law as 'international space' after Antarctica, outer space, and the high seas.¹¹⁷ Menthe goes on to state that: 'Jurisdiction in cyberspace requires clear principles rooted in international law. Only through these

¹⁰⁹ *ibid*

¹¹⁰ Reidenberg (n 95)

¹¹¹ Hughes (n 108) 359. In his article, Hughes refers to an example that shows how unsuccessful the attempts have been to extend the principle of sovereignty to cyberspace. The Australian Broadcast Authority (ABA) is the body responsible for exercising some degree of censorship on websites that are hosted and accessible in Australia. The ABA has a complaints system by which it receive complaints from people reporting offensive websites, such as pornographic websites, in order to block them. In 2000, the ABA received notifications against 139 websites making pornographic materials available to access in Australia. Not surprisingly, only six of these websites were operated by servers located in Australia and under the ABA's authority while the rest were accessible in Australia but hosted in servers in different countries and accordingly, the ABA had no control over them. Recently, the Irish High Court ruled that it had no jurisdiction over an internet defamation case where the defamatory materials were published outside Ireland and the defendant was not domiciled in Ireland. The Court stressed that: 'The publication in question by the respondent was on a subscription site only accessible to people paying a fee. In the instant case, the publication was seen only by a subscriber in Belfast and the publication was from a company based in the United Kingdom. Hence publication which fulfills the requirements of section 28 of the Act of 2009 has not been made out.' See *CSI Manufacturing Limited v Dun and Bradstreet* [2013] IEHC 547 <<http://www.courts.ie/80256F2B00356A6B.nsf/0/9890D3D36DD9B51180257C40005690D7?Open&Highlight=0.Dun.Bradstreet.&language=en~>> accessed 4 April 2014.

¹¹² *Gorman v Ameritrade Corp* 293 F3d 506 (DC 2002)

¹¹³ James R Pielemeier, 'Why General Personal Jurisdiction Over 'Virtual Stores' Is a Bad Idea' (2009) 27 *Quinnipiac Law Review* 625.

¹¹⁴ *ibid*; see also Blakeslee (n 102) 30.

¹¹⁵ Menthe (n 13).

¹¹⁶ *ibid*

¹¹⁷ *ibid*

principles can courts in all nations be persuaded to adopt uniform solutions to questions of internet jurisdiction'.¹¹⁸

The question that arises here is what is the legal system that applies in international space and to what extent is it adaptable in cyberspace? As Menthe illustrates, nationality is the key solution to assert jurisdiction on legal activities that occur in cyberspace. In addition, this can apply respectively to Antarctica, outer space, the high seas, and cyberspace.¹¹⁹

Making an analogy between cyberspace and international space is a very interesting approach and an inspiring metaphor. It contradicts itself in one simple way: the foundation of this argument is based on the claim that cyberspace is completely different to the physical world and, therefore, the laws of the latter are not applicable to cyberspace. The analogy is based on a comparison between cyberspace and international space, which is a part of our physical world. What is more, the law applicable in international space is the law that has been agreed internationally (international treaties), and certainly it is one of the main sources of physical international law not cyberspace international law.¹²⁰ In other words, extending the rules that apply in international space to cyberspace (nationality is a connecting factor) is like a tacit recognition that the laws of the physical world are still applicable in an online environment. This is a clear contradiction of the main argument on the perspective itself. Even if we accept the notion of nationality as a connecting factor in cyberspace activities, it is necessary to consider how effective it would be as a means for settling disputes in cyberspace. Given that location is irrelevant in cyberspace, Menthe argues that the factor of nationality is the better alternative to deploy.¹²¹ In practice, this would work in the same way that it works for outer space and the high seas: the aircraft or vessel is governed by the law of the country whose flag it carries (the law of the flag).¹²² Therefore, in cyberspace the governing law would be the law of the nationality of the users involved in the online activity.¹²³

This solution sounds feasible but, for the most part, it would not be suitable. It seems that this idea has overlapped between cyberspace itself as a metaphor and the activity that takes place over it. As for cyberspace itself, it could be said that there is a sort of rationality in the comparison between cyberspace and international space from the perspective that no specific

¹¹⁸ *ibid*

¹¹⁹ *ibid*

¹²⁰ There is no area of law called 'cyberspace international law'. This term was created for the purposes of this thesis and to make the discussed idea clearer and more understandable.

¹²¹ Menthe (n 13) 69, 71.

¹²² *ibid*

¹²³ *ibid*

country can claim the ownership of international space to assert its own jurisdiction. The same thing applies equally to cyberspace where no particular jurisdiction can control it from the point of view of the sovereignty of laws. The activities that occur over cyberspace have a different dimension and vary in their classification and the legal order that they follow. Other substantial factors cannot simply be ignored. For instance, there are on-going debates regarding the suitability of the traditional connecting factors in private international law in the context of the online contract.¹²⁴ Different factors have been examined, such as the place of concluding the contract, the place of performance, the place of the web server and the place of the parties' residence, but nationality has not been suggested as a connecting factor.¹²⁵ The same issue applies in non-contractual liability arising from electronic tort such as defamation where two different factors are causing a controversy: the place of downloading material and the place of uploading material, but not the nationality of the defamer.¹²⁶

Arguably speaking, it might be better to look beyond the words of any legal rules and seek the soul of legislation where we can realise that there are different factors that should be taken into consideration when suggesting solutions for any jurisdictional challenges. Certainly, one of these is to seek proper redress for litigants but it is not the sole aim. When we reach the point where we have to prioritise one solution over others, we have to give the priority to the choice that could achieve legal justice as well as what is appropriate for the litigants even if it might not be the easiest way to settle the dispute itself.

2.4.2.2 Every State's Land but Not Law

Svantesson provides a different expression for this: 'every man's land'¹²⁷ He sees that, instead of cyberspace not being tied to a jurisdiction or territory, cyberspace exists in every jurisdiction at the same time.¹²⁸ In fact, this notion, like the former one, was first used as a metaphor to describe the ubiquitous nature of cyberspace and it seems more likely now that it

¹²⁴ This point will be analysed in Chapters 5 and 6 of this thesis.

¹²⁵ Even in civil law countries which rely on nationality as a connecting factor, nationality is not a recognised factor in contractual dispute resolution.

¹²⁶ See James Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford University Press 2011) 542.

¹²⁷ According to Svantesson, the term 'every man's land' can be interpreted in two different ways. First, it reflects the factual visualisation that the global Internet has been accessible by an unlimited number of people worldwide unrestrainedly and regardless of their social, ethical, economic and political backgrounds. The second interpretation relies on a metaphorical imagination which refers to the ubiquitous nature of cyberspace that is under the jurisdiction of every state. The latter is a controversial matter and has been discussed above. Svantesson, *Private International Law and the Internet* (n 5) 2-4.

¹²⁸ *ibid* 3.

has become more of a reality than it was,¹²⁹ although in a different way as ‘every state’s law’. In other words, it sounds logical to conclude that the term ‘every state’s land’ was introduced by the cyber-libertarians; however, this was understood in a completely different way than it is today. As a matter of fact, despite the controversy that surrounds it, it could be argued that ‘every state’s law’ has become a widely-accepted reality. For example, the country-of-destination approach, which is the backbone of the EU’s private international law in consumer contracts,¹³⁰ when applied to transnational online contracts or rather to website contracts, the seller of online goods and services should expect the possibility of being sued for contractual liability in each EU country where his or her website is accessible.¹³¹ This issue will be discussed in greater depth in Chapters five and six of this thesis.

In a very accurate analysis, Hughes makes a distinction between two contexts; ‘the internet as a special jurisdiction’ and ‘the internet as a special kind of jurisdiction’.¹³² While the internet as a special kind of jurisdiction represents the view of those who argue that cyberspace is amenable to the offline world’s law in the form of a separate set of rules; the special internet jurisdiction or ‘the Kingdom of the internet’¹³³ as Hughes describes, is a different flavoured argument to the one made by cyber libertarians.¹³⁴

According to the ‘every state’s land but not law’ approach, cyberspace is an electronic, intangible sphere with no spatial elements at all, existing everywhere and at every time on the one hand,¹³⁵ and nowhere and at no time on the other hand;¹³⁶ exactly like the air that we breathe, no physical existence, no colour, no flavour exists in each part of our world. What makes this space an unprecedented phenomenon is that it is a gate that enables any number of individuals, organisations, businesses, even governments to meet, share and transfer information.¹³⁷ The gate to this realm is in every computer or smart phone that is connected to the global network.¹³⁸ Therefore, a combination of these intangible elements¹³⁹ should have its own self-organisation rules and should be kept away from the authority of the laws of

¹²⁹ *ibid* 3.

¹³⁰ Brussels and Rome I Regulations.

¹³¹ Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 150.

¹³² Hughes (n 108).

¹³³ Hughes (n 108) 69.

¹³⁴ See Post (n 104).

¹³⁵ Zekos (n 106).

¹³⁶ *ibid*

¹³⁷ Zekos (n 106).

¹³⁸ *ibid*

¹³⁹ To be more precise, the writer’s intention here is cyberspace as (a metaphor) not the internet’s infrastructure which consists of tangible and intangible elements. See (n 96).

the physical world and intervention by governments – an idea put forward by Johnson and Post a few decades ago.¹⁴⁰ Through these self-organisation rules, easier and more appropriate governing mechanisms will be put together by cyberspace actors who represent different communities.¹⁴¹ In other words, these rules would be formulated by the users of cyberspace, not based on the state's legal rules but based on the structure or software architecture of cyberspace itself.¹⁴² They would be much more technology-based than traditional legal-based rules.¹⁴³

Indeed, this interesting metaphorical visualisation of cyberspace brings to mind Wachowski's famous film *The Matrix*. The film imaginatively pictures a different virtual cyber-world beyond the networks and computers in a very similar way to, or probably inspired by, Johnson and Post's depiction of cyberspace. The *Matrix* is just a popular science fiction film whereas Post and Johnson's theory still has great influence.

A couple of years after they published their theory, Post and Johnson were widely criticised by some scholars and academics for their unrealistic and overstated vision of cyberspace.¹⁴⁴ A vocal opponent of the notion of independent regulation of cyberspace was Justice Easterbrook.¹⁴⁵ Easterbrook argued that there was no such thing as 'the law of cyberspace' and compared it to 'the law of horses', which does not exist.¹⁴⁶ Easterbrook argued that the law governs everything; people should allow judges and lawmakers to focus on the law and technologists should focus on technology.¹⁴⁷ There are a few commentators who are still influenced by Post and Johnson's thoughts, such as Reidenberg and Zekos.

¹⁴⁰ Hughes (n 108).

¹⁴¹ *ibid*

¹⁴² Joel R Reidenberg, 'States and Internet Enforcement' (2003) 1 University of Ottawa Law & Technology Journal 213.

¹⁴³ *ibid*

¹⁴⁴ For instance, Uta Kohl in her sober-minded book *Jurisdiction and the Internet* says the following: 'When I first came across Johnson and Post's article, 'Law and Borders- The Rise of Law in Cyberspace' (1996), in 1998, it impressed me. The authors seem to prove quite conclusively that states could not possibly, in all rationality, apply their laws to online activity and that this new cyberspace was completely beyond their legitimate and actual supervision. And yet, at the same time, the first cases were emerging where states did exactly that. Over the following years, while investigating competence in cyberspace, the article has stayed with me and my views on it have almost come full circle: from being fascinated by it and utterly convinced of its accuracy, to rejecting most of it, to finally admire the brilliance that lies in the confident simplicity of its core ideas and in its provocative imperfections'. See: Kohl (n 98) ix.

¹⁴⁵ See Frank H Easterbrook, 'Cyberspace and the Law of the Horses' in Raymond S. R. Ku and Jacqueline Lipton (eds), *Cyberspace Law: Cases and Materials* (2010) 5.

¹⁴⁶ Lawrence Lessig, 'The Law of The Horse: What Cyberlaw Might Teach' (1999) 113 Harvard Law Review 501.

¹⁴⁷ Greg Lastowka, 'Foreword: Paving the Path of Cyberlaw' (2013) 38 William Mitchell Law Review 1.

Through their work on technical-based self-organisation rules, Reidenberg and Zekos have shown that this notion may have become more prevalent than it ever was before. For example, the increasing academic interest in online dispute resolution (ODR), such as online arbitration and online mediation because they are easier and cheaper means than the traditional court litigation to settle online disputes¹⁴⁸ can be, to a great extent, seen as a developed version of Post, Johnson and Reidenberg's thoughts about cyberspace self-organisation rules.¹⁴⁹ In addition, one of the biggest electronic marketplaces in the world, eBay, has developed a system through which all complaints or disputes between eBay users, both buyers and sellers, can be reported to and resolved by an online mechanism called the 'eBay Resolution Centre'¹⁵⁰ rather than following expensive traditional court procedures.¹⁵¹ Therefore, it might be a kind of unfairness or a lack of neutrality to think or claim that Post and Johnson's 'Kingdom of the internet'¹⁵² has proven to be an entirely fanciful school of thought. While it is possible to question some of its principal aspects, other aspects remain, to some extent, rational and accepted in the light of rapidly and continuing changes in technology in general and cyberspace in particular.

It is now possible to start analysing the second school of thought after a sufficient discussion on the first school, that is to say, the second and maybe the most realistic doctrine. The devotees¹⁵³ of this school of thought argue that cyberspace has some distinctive features that make it a challenge for the laws of the physical world; however, that does not mean that it is

¹⁴⁸ For example, see Julia Hörnle, *Cross-Border Internet Dispute Resloution* (Cambridge University Press 2009) 320; Pablo Cortès, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We are and How to Move Forward' (University of Leicester, Legal Studies 2014) available electronically at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324945> accessed on 30 May 2014. However, such an increased trend toward using alternative dispute resolution is not confined to online transnational contracts but also traditional contracts as well; Richard Alderman, 'The Future of Consumer Law in the United States- Hello Arbitration, Bye-Bye Courts, So-Long Consumer Protection' in Christian Twigg-Flesner Deborah Parry, Annette Nordhausen and Geriant Howells (eds), *The Year Book of Consumer Law* (Ashgate 2008) 257.

¹⁴⁹ In favour of the same argument, see Graf-Peter Calliess, 'Transnational Consumer Law: Co-Regulation of B2C E-Commerce' in Olaf Dilling, Martin Herberg, and Gerd Winter (eds) *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing 2008) 225. Faye Wang's thoughts regarding cyberspace and private international law are also in favour of this argument: 'The determination of private international law in cyberspace requires legal experts to have special knowledge about IT systems and to interpret new and existing legal concepts for the online environment'. Wang (n 99) 6.

¹⁵⁰ eBay, 'Resolution Centre' <<http://resolutioncentre.ebay.co.uk/>> accessed 5 May 2014

¹⁵¹ See Andres Guadamuz, 'eBay Law: The Legal Implications of The C2C Electronic Commerce' (2003) 19 *Computer Law & Security Report* 468.

¹⁵² The writer has quoted this phrase from Justin Hughes in his designation for David Johnson's approach about cyberspace. See Hughes (n 108) 359,369.

¹⁵³ Gillies refer to the exponents of this argument as 'The Traditionalists' because they argue that cyberspace is capable of being under the governance of traditional rules. See (n 104). However, the writer thinks that this designation might not be accurate enough to describe the proponents of this school, while it can be said that it is true description for one group of the school, it is not necessarily to correct for the other tendencies in the same school of thought. Jack Goldsmith and Tim Wu, two American commentators, are the leading supporters of this school. See Wu, (n 28).

not amenable to the sovereignty of the national jurisdiction of countries.¹⁵⁴ Some of the advocates go much further and emphasise that the ubiquitous and borderless nature of cyberspace is a widespread fallacy.¹⁵⁵ More specifically, the hindrance of determining the competent law and jurisdiction in case of more than one jurisdiction having a nexus to the cause of action already existed before the advent of the internet,¹⁵⁶ and the private international law rules have been found to settle this sort of conflict. Nevertheless, the emergence of the internet has made these difficulties much more complicated.¹⁵⁷

It is notable that while the proponents of such a notion have agreed about the capacity of states' laws to govern cyberspace, they also have profoundly disagreed about the extent of that capacity and competence, and thus, have diverged into different leanings.¹⁵⁸ Fundamentally, or at least theoretically, as far as the conflict of laws rules are concerned, three solutions have been proposed. First, the existing rules hitherto have, for the most part, the appropriate capacity to rule the online environment and its activities.¹⁵⁹ More specifically, private international law's provisions are efficient enough to accommodate or rather to govern activities over the cyberspace.¹⁶⁰ Second, the internet has undoubtedly created new challenges for traditional law; however, it can be said that these rules have so far proved adequate for applying to the online medium provided that feasible harmonisation and reforms have been achieved.¹⁶¹ Third, neither existing traditional rules nor harmonised laws can provide help to the proper governance of cyberspace; thus, a new set of legislations should be adopted instead.¹⁶² Consequently, it can be said that we are confronting three distinct ideas

¹⁵⁴ Gillies (n 104).

¹⁵⁵ *ibid.* See also Kelly (n 97); Wu (n 28).

¹⁵⁶ Gillies (n 104).

¹⁵⁷ *ibid.*

¹⁵⁸ See Jonathan Harris, Michael M Bridge and James Fawcett, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2005) 529, cited by Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contract* (Ashgate 2008) 4.

¹⁵⁹ Svantesson (n 29) 258. See also Wang (n 99) 126.

¹⁶⁰ Svantesson (n 5), Svantesson also adds that: 'As far as possible, instead of the creation of new norms for electronic commerce and internet operation, existing principles, rules and procedure can and should be applied'; Svantesson (n 29), 5.

¹⁶¹ Hill (n 131) 21-23.

¹⁶² See Amit M Sachdeva, 'International Jurisdiction in Cyberspace: A Comparative Perspective' (2007) 13 *Computer and Telecommunications Law Review* 73. In this context, Sachdeva says: 'Cyberspace is a borderless world, world of its own. It refuses to accord to the geopolitical boundaries the respect that private international law has always accorded to them and on which it is based. Therefore, there is a need to have a different solution to this different problem. The solution is neither in adopting a hands-off approach nor in simply extending mutatis mutandis the existing conflict rules.' Recently, some states in the US have enacted special choice of law rules for transnational electronic consumer contracts; this is called The Uniform Computer Information Transactions Act (UCITA). See Jacques Delisle and Elizabeth Trujillo, 'Consumer Protection in Transnational Contexts' (2010) 58 *The American Journal of Comparative Law* 135.

within one main school of thought; unadulterated traditionalism, innovative traditionalism and contra-traditionalism.¹⁶³

In general, it is arguable that cyberspace is broad, enigmatic and problematic enough to confound all the proposed approaches mentioned above. It cannot be stated that one solution is perfect and another is not. It has been said before that there might be good, very good, or excellent solutions; nevertheless, no perfect or miracle cure can be alleged as long as the technology is continuing to develop. Arguably speaking, examining the legal competence issues in cyberspace requires a perspicacious rumination and stereoscopic vision. Cyberspace, per se, is a very complex and fictional metaphor. From the perspective of the correlation between the law and the internet, the matter is controversial and has diverse dimensions; therefore, different factors play different roles in the way that an acceptable approach can be sought.

As a principal proposition and for the sake of putting everything on the right track, it is fairly important to stress that the framework of technology law is very broad and touches on more than one legal branch. Simply put, one approach might be perfectly suited to one branch of law but may be unsuitable for another branch. To put it in a practical and factual way, most traditional rules in contract law, for instance, could be applied effectively to an online contract in the same way as traditional ones as long as the substance or the soul of law has not been profoundly contradicted by the special nature of the cyberspace activity.¹⁶⁴ For example, there is no substantive contradiction between conventional acceptance and online acceptance in the way that can be expressed either by writing or by clicking on the keyboard button as long as the intention is the same.¹⁶⁵ The same statement may be true for other branches of law, such as criminal law, administrative law or banking law.

As far as private international law is concerned, the interpretation can be quite different. It cannot be denied that the laws should be reformed as long as the communities are continuing to develop, and the lifestyle of different communities is changing from the point of view that the law is found to regulate the different habits of human beings. Different areas of law

¹⁶³ These designations have been created by the writer but are based on the analysis of different schools of thought.

¹⁶⁴ However, it is still argued in this thesis that there are some aspects of ordinary contracting theory which might be regarded as problematic for the internet. The rules regarding the basic contracting theory and its applicability to the contracting process over the internet will mostly be addressed in Chapter 3 and 4 of this thesis.

¹⁶⁵ However, the distinction between the offer and invitation to treat is one of the points which becomes blurred when the sales process occurs over a website; see the extensive discussion and analysis about this topic in Chapter 4 of this thesis.

govern different aspects of human activities. As for the role of conflict of laws, cyberspace has challenged this area of law more considerably than others; ‘borderless and portability’.¹⁶⁶ In other words, the claims of private international law’s adequacy to accommodate cyberspace activities contradicts the legal nature of the conflict of laws’ rules itself, and the rational basis which these rules have been enacted for. More specifically, the rules of private international law have been found and evolved relying upon the fact of territoriality, which can be seen as an irrelevant matter in internet activities.¹⁶⁷

In addition, another fact has to be given special attention, namely, that online transnational activity over the internet from a private international law perspective is strikingly different from what it was ten or maybe twenty years ago. For example, while electronic commerce activities were limited to certain developed countries, such as the US and some EU countries, new actors are now involved in electronic commerce, such as China, Japan and Malaysia. What is more, consumers in almost all countries now have access to the websites of manufacturers and retailers from their home countries. Goods and services can easily be purchased and ordered from different places and countries, which can be shipped by a variety of fast and convenient shipping companies, such as DHL, DPD, USPS and FedEx. Software can even be bought that can be directly downloaded to a computer hard drive.¹⁶⁸ Therefore, it is arguable that transnational activity over cyberspace has become more international, ubiquitous, and ambiguous. Equally, the reality has proven that the internet has been turned into a matter of global concern because it exists in every country’s jurisdiction, unless purposeful actions are taken by each country to cut itself off from the global network through censorship.

Under those circumstances, it can be argued that any appropriate approach, whatever it would be, which regulates cyberspace cannot be achieved without making it a global solution. The European Union has already achieved a well-harmonised jurisdiction and applicable law rules which can apply to both offline and online transnational activities within 28 Member States.

¹⁶⁶ Svantesson considers the portability to be the most problematic and challenging feature for private international law. See Svantesson (n 20); see also Ivonnely Colon-Fun, ‘Protecting The New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transaction’ (2007) 12 Fordham J Corp & Fin L 233; Hörnle (n 25) 122.

¹⁶⁷ Sachdeva (n 162); see also Hörnle (n 25) 122.

¹⁶⁸ Along the same lines, Hill adds: ‘Previously, the consumer involvement in a transnational contract happened occasionally, while enjoying abroad with a summer holiday, traditionally by direct contact with the seller in the marketplace. Currently, thousands of consumers every day are parties to cross- border transactions with traders and consumers from other jurisdictions while sitting in their home or office, electronically through World Wide Web and without any physical presence. Thus, the internet has massively extended the way for consumers to enter in transnational consumer contracts. Hill (n 131) 12.

It is clear that the internet extends beyond EU countries. Certainly, this does not diminish the significance of the EU's achievement and its impact on the law of online contracts; however, one should wonder about the disputes that might occur between users from EU countries and non-EU countries, such as the US or Iraq. Without doubt, it can be viewed as a sort of unfairness that the internet has equally challenged all the countries worldwide, while the level of the law's expediency and response to the challenges in each country is entirely different. It is difficult for private international law rules to compromise between well harmonised laws and deep seated traditional laws; they might not come to a convergence that would enable a dispute to be resolved effectively.

Therefore, it is better to confront the global internet with a global instrument or suppress the borderless nature by geo-location, filtering and blocking technologies.¹⁶⁹ To formulate the expression in another way, in terms of competence and cyberspace, it is difficult but not impossible to get the utmost benefits from the internet and keep absolute control over it by traditional laws at the same time.¹⁷⁰ Henceforth, it has become a crucial matter that private international law rules should be transferred from the states' national laws into internationally concurrent rules. The only thing that can be said against this approach is that it is not feasible and not easy to achieve under the current situation because of the different economic, social and political policies of countries which contradict and conflict with each other. However, it is certainly not an impossible task.¹⁷¹ In the meantime, it sounds rational that cyberspace cannot be governed by one approach. Indeed, selecting a feasible approach requires a comprehensive and neutral analysis of all the possible solutions and combinations of factors that need to be taken into account, such as hard laws, soft laws, direct regulation, co-

¹⁶⁹ See also Kohl who is in favour of this argument. Kohl (n 98).

¹⁷⁰ Kohl makes the same argument by saying that: 'The system of national law and the transnational internet are inherently irreconcilable. To resolve that tension, regulators are faced with a very simple choice indeed: either makes law more transnational or online activity less transnational. And this is always the only choice: there is no middle way, no grey between the black and the white. Just as you cannot squeeze a size 14 person into a size 8 jacket, you cannot hold into national laws whilst at the same retaining the transnational internet.' See Kohl (n 98); see also Norbert Reich, 'Transnational Consumer Law-Reality or Fiction?' (2009) 127 Penn St. Int'l L. Rev 859; Burke T Ward and Janice C Sipior, 'The Internet is the Place to Be, But Where is Legal Jurisdiction: A United States Perspective' (European and Mediterranean Conference on Information System, Dubai 2008); <<http://www.iseing.org/emcis/emcis2008/Proceedings/Refereed%20Papers/Contributions/C%2017/EMCIS2008-WardSipior.pdf>> accessed 29 May 2014.

¹⁷¹ In fact, the notion of global rules or international-based conventions to deal with the issues of jurisdiction and applicable law in transnational disputes has been the subject of some serious attempts by the Hague Conference on Private International Law. For more details, see <<http://www.hcch.net>> accessed 5 May 2014. However, the global rules either can be harmonised to accommodate offline and online activities alike, or special rules just for online activities. It is also worth noting that UNIDROIT has recently called for international rules for transnational consumer contracts to provide unique rules or rather global principles. See Louis F Del Duca and Daniel Nagel Colin Rule, 'Online Small Claim Dispute Resolution Development- Progress on a Soft Law for Cross- Border Consumer Sales' (2011) 29 Penn St Int'l L Rev 651.

regulations, self-organisation, national harmonisation and international harmonisation.¹⁷² The only thing that the author can confidently argue is that the bordered traditional national laws cannot simply be placed in borderless cyberspace without real reform.

2.5 ELECTRONIC MARKETPLACES: CHARACTERISATION & LEGAL NATURE

When considering the jurisdiction and applicable law issues in international contract disputes, there are two main elements which can be considered of particular importance to private international law. First, the proper legal characterisation of the contractual parties depending on the subject matter of the transnational dispute, and the contracting parties themselves. That is to say, the legal capacity and the contractual identity of the parties; whether they are acting as a business buyer, business seller, consumer buyer or consumer seller. Second, the geographical location where the parties are located, the contract is concluded or performed, or where the breach occurs. It is clear that with the rise in website contracts and electronic marketplaces, the above-mentioned elements have also become a dilemma for private international law and have cast doubt over its effectiveness.¹⁷³

Over the last decade, the EU has made significant achievements in harmonising its laws in order to keep pace with technological advancements and to fill the legislative gaps caused by using continuously developing means of concluding contracts.¹⁷⁴ Nevertheless, it can be said that the harmonisation of rules, which have been suggested as one of the solutions to regulate internet-related issues, might have, to some extent, lost its rationality after the advent of a new generation of internet contracts. As for the US, there is currently no stable legislative and jurisdictional framework for disputes over websites.¹⁷⁵ Arguably, courts have not completely succeeded in applying personal jurisdictional rules to activities arising on websites accessible from American states.¹⁷⁶ In Iraq, the situation is much more uncertain; harmonisation of jurisdictional rules has not occurred, nor have the courts been confronted and challenged with such cases.

¹⁷² However, it should be made clear at this point that such a thought is not the main argument of this thesis even though it might be an argument in a future piece of work, which might be beyond the scope of this thesis.

¹⁷³ Sachdeva (n 162).

¹⁷⁴ Zia Akhtar, 'Distant Selling, E-Commerce and Company Liability' (2012) 33 *European Competition Law Review* 497.

¹⁷⁵ Burke T Ward and Janice C Sipior, 'Where in the World Is Internet Jurisdiction: A US Perspective' (2010) 4 *International Journal Value Chain Management* 5.

¹⁷⁶ *ibid*; Blakeslee (n 102) 30.

One of the most elusive features of transactions over the internet is the anonymity of the contractual parties¹⁷⁷ as well as other distinctive specifications that make the online environment a distinguishing realm and comparatively different from the offline environment.¹⁷⁸ Generally speaking, electronic commerce includes a wide range of business activities where the parties communicate and negotiate by electronic means rather than through a physical presence.¹⁷⁹ The broad interpretation of this definition leads us to say that electronic means encompasses any form of communication facility, including the telephone, telex, fax and email.¹⁸⁰ Nevertheless, the unique characteristics of communications through websites call for it to be treated separately.¹⁸¹

Online sales transactions on websites are commonly referred to by writers and academics as web contracts,¹⁸² and the website itself that offers goods or services are referred to as electronic marketplaces. These include websites such as eBay and Amazon. Electronic marketplaces can be defined as websites that enable both businesses and consumers to offer their goods and services for sale and that manage transactions electronically without physically meeting.¹⁸³ Arguably, concluding online contracts over electronic marketplaces raises many questions about the legal characterisation of contracting parties, and whether they are acting as consumers or aiming to pursue commercial transactions. The unique feature of the transactions over such marketplaces results in a sort of fogginess and this includes the characterisation of the online contract and whether it is a B2B, B2C or C2C contract.¹⁸⁴ Consequently, determining the afforded protection to the consumer as well as the competent jurisdiction and applicable law will be more problematic as, from the conflict of laws point of

¹⁷⁷ The anonymity of the contractual parties and the legal implication in the online contracting process will be addressed in-depth in Chapter 4 of this thesis.

¹⁷⁸ For more information about the characteristics that make the Internet different from other types of communication see Svantesson (n 20).

¹⁷⁹ Colon-Fun (n 166).

¹⁸⁰ Smith (n 3) 798.

¹⁸¹ Svantesson (n 20).

¹⁸² This narrowly refers to the sale transaction itself which takes place on a website and does not mean the wider concept of online contracts over the internet – these are referred to as click-wrap and browse-wrap agreements.

¹⁸³ For example, eBay describes itself as: ‘eBay is the world’s online marketplace, enabling trade on a local, national and international basis. With a diverse and passionate community of individuals and small businesses. eBay offers an online platform where millions of items are traded each day’; <<http://pages.ebay.co.uk/aboutebay.html>> accessed 5 May 2014.

¹⁸⁴ Christine Riefa, ‘The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?’ (2009) 14 *Lex Electronica* 1 <http://www.lex-electronica.org/docs/articles_244.pdf> accessed 5 May 2014.

view, each category of these contracts is governed by a certain set of rules and provisions. These will be analysed thoroughly in Chapters five and six of this thesis.¹⁸⁵

In order to point out the central problem more accurately, it might be useful to distinguish between two types of electronic marketplaces on the internet. The first are websites operated by the manufacturing firms themselves which are managed by their marketing and sales departments. These sell their products through a website which carry their domain names and which is usually the same as their trade name.¹⁸⁶ Two categories of online contracts can be formed over such websites: B2B and B2C, which are governed by regulations and directives within the EU, namely: the E-commerce Directive,¹⁸⁷ the European Parliament Directive on Consumer Rights,¹⁸⁸ and the Rome (I)¹⁸⁹ and Brussels¹⁹⁰ Regulations. Obviously except for the E-commerce Directive, which this thesis has argued needs to be reformulated considering the recent advancements in information and communication technology (ICT),¹⁹¹ the other rules were originally enacted to govern traditional contractual activities and then harmonised to make them applicable to online activities.¹⁹² It is still arguable that the harmonisation of laws in the domain of consumer protection and private international law of online B2B, B2C and C2C contracts are not free from criticism. This point will be discussed in a more analytical manner in a different chapter of this study.¹⁹³

¹⁸⁵ It is one of the important points of this thesis that the meaning and definition of the consumer are very problematic in the online context; and the EU's definition of consumer may need to be reconsidered. For more details about this point, see Chapter 6 of this thesis.

¹⁸⁶ For example, www.apple.com, www.sony.com.

¹⁸⁷ European Parliament and the Council Directive 2000/31/EC of 8 June on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce) [2000] OJ 178/1.

¹⁸⁸ European Parliament and the Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64.

¹⁸⁹ European Parliament and the Council Regulation 2008/593/EC of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ 177/6.

¹⁹⁰ Council Regulation 2001/44/EC of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ 12/1.

¹⁹¹ The European Commission is currently working on updating the E-commerce Directive (Action 9 of the Digital Agenda for Europe). For more details, see the EU's website <http://ec.europa.eu/information_society/newsroom/cf/fiche-dae.cfm?action_id=168&pillar_id=43&action=Action%209%3A%20Updating%20the%20eCommerce%20Directive> accessed 5 May 2014.

¹⁹² However, it should be noted that the recent European Union Directive on Consumer Rights aims to accommodate consumer protection in respect of online contracts. This can be understood clearly from Recital (20) of the preamble of the Consumer Rights Directive which states that: 'The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or services-provision scheme, with the exclusive use of one or more means of distance communications (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded.'

¹⁹³ See Chapters 5 and 6 of this thesis.

The second, and the most relevant and problematic type of electronic marketplaces are the websites which function as facilitators between sellers and buyers.¹⁹⁴ Unlike the first type of websites, transactions over these can include three contractual parties: the seller, the buyer and the forum provider or marketplace operator.¹⁹⁵ So that two sorts of online contracts can be concluded - a contract between the buyer and the seller on the one side, which is the direct sale contract of the item offered by the seller over the website¹⁹⁶ and a contract between each party and the service provider (marketplace), by which each party agrees to the website's terms and conditions of use (the user agreement).¹⁹⁷ In this case, the website operator makes a profit by taking a commission from the seller and, therefore, the website operator can be considered the third party in the contract.¹⁹⁸ In addition, there is the potential for a third category of online contracts on websites: online C2C contracts.¹⁹⁹

In contrast to traditional marketplaces, online or virtual marketplaces are a distinctive realm with no geographical borders, and no time and space limitations.²⁰⁰ Mostly, none of the dealers know each other or can identify their location, and no personal contact occurs.²⁰¹ In addition, the triangular shape of the contractual relationship²⁰² and the process of the sales transaction, especially when it takes the form of an online auction, raises the issue of the legal character of such websites and whether they can be considered auctioneers or not. It also raises the question of the contractual identity of the service provider (website operator) and whether it can be designated as a seller or just a facilitator. In addition, it is important to determine the legal liability of the marketplace owner against the buyer concerning the sold items through the website.

Regarding the first issue, comparing a traditional auction and an online auction takes on some importance in determining whether the EU's rules on consumer protection can be applied to

¹⁹⁴ Guadamuz (n 151).

¹⁹⁵ Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet' (2009) 27 *Pennsylvania State International Law Review* 609.

¹⁹⁶ *Sayeedi v Walser* 15 Misc 3d 621, 835 NYS 2d 480 NY 2007.

¹⁹⁷ *ibid*

¹⁹⁸ *ibid*

¹⁹⁹ Online C2C contracts are not governed by the EU rules on consumer protection nor are they included in the scope of Rome and Brussels Regulations on applicable law and jurisdiction matters. This issue will be discussed separately in Chapters 5 and 6 of this thesis when addressing the jurisdiction and applicable law matters in online C2C transactions.

²⁰⁰ Reich (n 170).

²⁰¹ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer in the Twenty-First Century: Fit for Purpose?' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 89.

²⁰² Barral (n 195).

such a type of contracts.²⁰³ Consequently, the consumer will be deprived of the protection afforded to him by virtue of Article (3/1) of Directive 97/7 EC on the Protection of the Consumer in Respect of Distance Contracts, which explicitly excludes contracts concluded by auction from its scope of application in spite of being a B2C contract.²⁰⁴ There is not yet any case law in the UK which reveals whether such marketplaces can be considered as auction forums.²⁰⁵ The traditional common law does not contain a normative definition of the term auction.²⁰⁶ Under those circumstances, it might be quite difficult to find out whether it can be compared to a traditional auction or not, and most likely it cannot be viewed statutorily as a traditional auction despite the featured convergence between them.²⁰⁷ It can be said that this analysis has a very logical foundation; however, the legislators at the European Parliament have laid aside the ambiguity about this controversial point in the proposal for a Directive on Consumer Rights which defines an auction as follows:

[A] method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the service. A transaction concluded on the basis of fixed-priced offer, despite the option given to the consumer to conclude on it through a bidding procedure is not an auction.²⁰⁸

It can be clearly observed that this Article gives the same legal recognition and enforceability to online auctions as traditional auctions and this can be concluded from the phrase ‘means of distance communication’ in the Article.²⁰⁹ After defining the term auction, the Directive does not include any provisions that exclude an auction from its scope of application in contrast to Directive 97/EC as it has been illustrated above. Although the Directive excludes the contracts based on the fixed-priced offer with the possibility to conclude the contract by the

²⁰³ Christine Riefa, ‘To Be or Not to Be an Auctioneer?’ Some Thoughts on the Legal Nature of Online ‘eBay’ Auctions and the Protection of Consumers’ (2008) 31 *Journal of Consumer Policy* 167.

²⁰⁴ *ibid*

²⁰⁵ Smith (n 3) 781.

²⁰⁶ *ibid*

²⁰⁷ Riefa (n 203). In Germany, the Federal Supreme Court ruled that eBay’s auction sale between two individuals did not amount to a traditional auction sale. See the ruling of the German Federal Supreme Court in BGH (DE) 03. Nov [2004] *Bundesgerichtshof* (Case No. VIII ZR 375/03); an English version summary of the judgment is available at <http://www.eu-consumer-law.org/caseabstracts_en.cfm?JudgmentID=28> accessed 5 May 2014; Gerald Spindler, ‘Internet-Auctions versus Consumer Protection: The Case of the Distance Selling Directive’ (2004) 6 *German Law Journal* 725.

²⁰⁸ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final article (2/15).

²⁰⁹ Christine Reifa, ‘Recommended Changes to the Definitions of ‘auction’ and ‘public auction’ in the proposal for Directive on Consumer Rights’ in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 378.

bidding process from the auction definition,²¹⁰ it might not make any sense in the context of the B2C web contracts as long as both the ordinary online contract and the online auction are governed by the same rules in the proposed Directive.

Interestingly, after its formal entry into force on 14 November 2011, the definition for auction was removed from the final approved version. Moreover, the Directive has made it clear that selling goods to consumers through a bidding process on online platforms should not be covered by the scope of a public auction within the meaning of the Directive.²¹¹ Under those circumstances and because the Distance Selling Directive has been replaced by the Consumer Rights Directive, it should have become clear that online auction sales cannot be considered to be equivalent to traditional auction sales from a legal point of view. It can still be argued that the main gap has not yet been filled by the Consumer Rights Directive with regard to online C2C contracts that are out of the scope of current and forthcoming instruments. In that situation and in the absence of governing rules, it could be said that online C2C contracts in electronic marketplaces represent a new hybrid generation of electronic contracts which have emerged as a result of the famous marriage between two technological parents: the internet and the computer. Whether or not it can be termed an auction, it does remain a different type of web contract with a specific feature that does not currently make it subject to consumer protection laws.²¹²

The other point that makes transactions over these kinds of marketplaces²¹³ ambiguous is the legal and contractual status of the forum provider or website operator. To put it another way, when the consumer buys goods from another consumer through a third party facility which is an electronic marketplace, by doing so, is he concluding the contract with the direct seller or with the website operator or with both? Apart from this, what type of contract does this entail? Is it B2C or C2C? As it has been illustrated before, purchasing over electronic marketplaces involves three contractual parties; the seller, the buyer and the marketplace

²¹⁰ This statement typically applies to some types of eBay contracts where the seller places the term 'Buy it now' besides the item offered for sale.

²¹¹ Consumer Rights Directive 2011/83/EU Recital (24) which reads as follows: 'The use of online platforms for auction purposes which are at the disposal of consumers and traders should not be considered as a public auction within the meaning of this Directive'.

²¹² Louis F Del Duca and Daniel Nagel Colin Rule, 'Online Small Claim Dispute Resolution Development-Progress on a Soft Law for Cross-Border Consumer Sales' (2011) 29 Pennsylvania State International Law Review 651. See also Office of Fair Trading, 'e-Consumers Protection: A public Consultation on Proposals' (July 2010) <http://www.of.gov.uk/shared_of/consultations/eprotection/oft1252con.pdf> accessed 5 May 2014.

²¹³ The intended marketplaces here are those that work as facilitators between the buyer and the seller, such as eBay and Amazon.

provider.²¹⁴ The seller, by purchasing any item through the website, is at most concluding two different contracts at the same time: most obviously with the buyer but also with the marketplace operator in agreeing to its terms and conditions of using the website.²¹⁵ As a consequence, there is the possibility of a dispute arising out of such types of transactions between either the buyer and the seller or between the users and the website itself. A different approach will be taken in either case in terms of jurisdiction and applicable law.

It is important to distinguish between two scenarios: firstly, the website that works as a seller and a facilitator;²¹⁶ secondly, the website that works only as a facilitator between the buyer and the seller or rather just a forum that enables individuals to offer their goods and services for sale.²¹⁷ Certainly, if the consumer uses a marketplace website to purchase goods or services from the website operator itself then the contract would be a B2C; the service provider would be the goods or services seller, and the contract would be governed by the E-Commerce Directive and consumer protection laws. However, the verdict is not the same in the second scenario. In this case, the marketplace provider could not be considered a seller of the item but rather a mediator between the two parties. Thus, the question arises about the legal liability of the online marketplaces for the legality of products and services sold over their websites. In such cases, if the website or marketplace operator can be considered an ISP²¹⁸ then it will be governed by the obligations and requirements laid down in the E-Commerce Directive and not just considered a mediator between the seller and the buyer.²¹⁹ It would therefore be liable for any transaction through its website.²²⁰

The latter point brings us to the question of whether the website that works as a facilitator can be classified as an ISP as stated in the E-Commerce Directive.²²¹ The Directive defines an ISP as any legal or natural person who sought to engage in economic activity and provide an information service to society by using a technical infrastructure.²²² Furthermore, the Directive explains the scope of an information service; it includes activities such as online information, online advertising, online shopping and online contracting.²²³ Accordingly, even

²¹⁴ Barral (n195).

²¹⁵ Riefa (n 203).

²¹⁶ For example, Amazon marketplace's search engine gives the buyer a variety of sellers and sometimes Amazon itself is one of the sellers.

²¹⁷ Such as eBay's website.

²¹⁸ Barral (n 195).

²¹⁹ *ibid*

²²⁰ *ibid*

²²¹ Riefa (n 203).

²²² Electronic Commerce Directive 2000/31/EC article (2/B,C).

²²³ *ibid* para 18.

though the buyer does not pay anything to the forum provider for using the website, the latter makes a profit by charging a commission to the seller.²²⁴ On that basis, it can be argued that such marketplaces can be classified as ISPs. The European Court of Justice (ECJ) stressed this latter sentiment in *L'Oreal SA v eBay International*.²²⁵ The court ruled that eBay was liable for the product sold over its website if it appeared that it had played an active role in promoting the sale process over its website.²²⁶ The verdict in this case was based on the fact that an online marketplace provider can be responsible for the sale of unlawful products through its website between its users despite the fact that such websites are not playing an interactive role in encouraging such transactions.²²⁷ The same attitude was adopted by the High Court in France in *Louis Vuitton Malletier SA v eBay Inc.*,²²⁸ where the court stated that eBay was not just a facilitator between users but rather an interactive party in the contractual process and, therefore, it could not claim a limited liability against a breach of intellectual property under French law.

On the other hand, the courts in the United States take a different view. In *Gentry v eBay*²²⁹ where the claimant failed to gain a ruling against eBay for counterfeit products that were purchased over eBay's auction site, the court found that eBay was just a facilitator and was not responsible for making certain of the legality of the products that were offered by different users for sale. This was in fact the responsibility of the parties.²³⁰ An American court made a similar judgment in *Doe v SexSearch.com*²³¹ where the plaintiff had sexual relations with a minor that he had met through an online dating website. The young woman posted in her profile that she was eighteen years old, and the man was arrested and found guilty of unlawful sexual behaviour with a minor as she was actually fourteen years old. The

²²⁴ Barral (n 195).

²²⁵ Case C-324/09 *L'Oreal SA v eBay International* [2011] ECR I-06011.

²²⁶ Birgit Clark and Maximilian Schubert, 'Odysseus between Scylla and Charybdis? The ECJ Rules in *L'Oréal v eBay*' (2011) 19 *Journal of Intellectual Property & Practice* 1.

²²⁷ The ECJ stressed in *L'Oreal* that: 'Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31'. Case C-324/09 *L'Oreal SA v eBay International* [2011] ECR I-06011, para 6.

²²⁸ *Louis Vuitton Malletier SA v eBay Inc* (2008) Tribunal de Grande Instance [2010] ETMR 10.

²²⁹ *Gentry v eBay Inc*. Super Ct. No GIC746980 (Cal. Crt. App, June 26, 2002) cited in: Guadamuz (n 151).

²³⁰ *ibid*

²³¹ *Doe v SexSearch.com*, 502 F. Supp. 2d 719, 722 (ND Ohio 2007) cited in Juliet M Moringiello and William L Reynolds, 'Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008' (2008) 64 *Business Lawyer* 1. See also: Jon Burns, 'Doe v SexSearch.com: Placing Real-Life Liability Back Where It Belongs in A virtual World' (2007) 9 *North Carolina Journal of Law & Technology* 69.

plaintiff sued the website and argued that the service provider was liable for the misleading information posted on the website by its user. The Federal Court rejected the plaintiff's claim and ruled that such a website works as a mediator between two users and not a content provider. As a result, it cannot be responsible for the content posted by the website's users by virtue of Section 230 of the Communications Decency Act 1996.²³²

It is also relevant to mention here that the US policy on consumer protection adopts economic regulations which promote commercial competition and economic prosperity in the market,²³³ yet exposes consumers to the risks of not being, to some extent, effectively protected in online transactions.²³⁴ This is in contrast to EU policy which promotes social regulations to maintain a premium amount of protection on the consumer.²³⁵ Finally, it is worth noting that the considerable difference between the EU approach and the US approach on the liability of virtual marketplaces should bring into focus the consumer contracts over electronic marketplaces, such as eBay, between EU consumers and American traders; in particular, the applicable law, jurisdiction, and enforcement of judgment issues. The same question can also be asked about online transactions between users from the EU or the US, and users from the rest of the world. This matter requires further thoughtful analysis and this will be done in the next chapters of this thesis.

2.6 CONCLUSION

The aim of this chapter was to examine the virtual place where the online contracts take place, that is to say the internet and electronic marketplaces. Firstly, it was argued that the correlation between law and technology is dynamic, controversial and its framework is very broad. In terms of a terminological analysis, many designations have been used to refer to this branch of law. The main question that has arisen in this regard is the accuracy of each of these terms and whether they can be considered synonyms. It was argued that when a broad, all-encompassing and neutral sense is sought, then the term 'technology law' is the most appropriate designation. On the other hand, 'internet law' is more specific in meaning to contemporary legal matters arising from using the internet, including of course, the theme of

²³² *ibid*

²³³ Jane K Winn and Mark Webber, 'The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants' (2006) 29 *The Business Lawyer* 1.

²³⁴ *ibid*

²³⁵ Ward and Sipior (n 175).

this thesis and many other legal subjects. As part of this analysis, it was stated that the term ‘internet contracts’ or ‘web contracts’, if more specificity is intended, are a better description than the widely used term ‘electronic contract’. The latter designation is not exclusive to the internet but can indicate any contract that can be concluded using an electronic device, such as a telephone, telex or fax.

With regard to the borderless nature of cyberspace, there has been a tendency to cast doubt on the global and cross-border characteristic of the internet and this is based on the recent developments of blocking technologies and factual censorship activities on the internet by some countries. By relying on more than one fact, the author has argued that the borderless nature of the internet has been confined but not wholly terminated as some commentators believe. The internet, in a broad sense, is still global and its borders are still transcendent. In terms of internet governance, it can be said that it is one of the most controversial, nebulous and attractive areas for research. In an unusual manner and in contrast to other studies that examine internet governance from one particular aspect, it has been stated that the term internet governance can be interpreted in two distinct ways and each one is more interesting than the other.

On the one hand, internet governance can refer to the political and administrative control of the internet’s main infrastructure and this is the predominant interpretation. Long-running debates have arisen about the US government’s administrative and political control over the internet and international efforts to suppress its dominance and influence over the ICANN. It is still thought that this situation is imperfect. On the other hand and most interestingly and closely-related to the core of this thesis, the meaning of internet governance can go much further, entering into intangible cyberspace, and to the question of the matter of legal governance. In this respect, the conclusion is based on the fact that cyberspace cannot simply be governed by one approach. As far as private international law rules are concerned, it can be confirmed that some principal traditional rules will no longer be deemed adequate enough in the online world. In fact, private international law rules have to be reformed by considering some distinctive features of the nature of legal activities that take place over the internet. Meanwhile, when the law interacts with cyberspace, different factors have to be brought to our attention, including, the harmonisation of laws, the globalisation of laws, direct regulation, co-regulation and self-regulation rules.

With regard to electronic marketplaces, it has been concluded that these websites represent the borderless face of cyberspace in the context of online contracts. Its distinct nature challenges traditional private international law from more than one aspect: the possibility of determining the contractual identity of the parties, the definition of the consumer, the new face of contracting (C2C),²³⁶ the online auctions and country-of-destination approach and its problematic application to online activities. All these points have become a matter of global concern for the application of jurisdiction and applicable law on transnational online contracts, to which we now turn.

²³⁶ See a similar argument to such a conclusion in Kate Tokeley, 'Towards a New Regulatory Regime for New Zealand Online Auction' (2011) 2011 New Zealand Law Review 91. Tokeley argues that: 'In face-to-face trading situations, it is obvious whether or not the seller is a trader. However, this "in trade" limitation is likely to be problematic in the context of an online auction. With the exception of real estate agents and motor vehicle dealers, most suppliers do not identify on their auction site whether they are a business or a private individual. It is difficult, if not impossible, for consumers using these auction sites to distinguish between those suppliers acting as individuals and those who are acting "in trade". In traditional transactions, the distinction is usually easy to make. The seller is either a business and runs the business from a store location or the seller is a private individual and selling one-off items through the classifieds in the newspaper. There is no equivalent bright line in the world of online auction.'

CHAPTER THREE

TRANSNATIONAL ONLINE CONTRACTS: LEGAL CERTAINTIES & AMBIGUITIES

3.1 INTRODUCTION

In the previous chapter, the characteristics of internet technology and electronic marketplaces have been thoroughly discussed and analysed from different legal points of view. In order to fully illustrate the contracting process over the internet, it is necessary to have a more in-depth look at the essence of such a kind of contract before approaching its problematic aspects. Following the successful age of fax and email communications, the internet has opened new prospects for information technology law. While for a long time debates have been focusing on contract formation and performance over the telephone, telex, and fax; the internet has brought to the fore a new generation of electronic contracts.¹ To the present, the internet has been providing four basic ways to enter into binding agreements and carry out different kinds of transactions: contracts concluded via email exchanges; contracts concluded by voice over internet protocol (VOIP);² contracts concluded by electronic data interchange (EDI);³ and finally, through online contracts on websites.⁴

As it has been illustrated throughout Chapter one of this thesis, the scope of this thesis will only cover the last type of electronic contract mentioned above, which is probably the most recent means of communication for concluding a contract: online contracts on websites. Like its predecessors which enabled distance contracting methods, contracting on websites has resulted in a tide of scholarly debate about the merits of the internet to establish valid agreements. These arguments now acknowledge that online contracts over websites do not differ fundamentally from the general concept of contracting and meeting of minds.⁵

¹ Graham J H Smith (ed), *Internet Law and Regulation* (4th edn, Sweet & Maxwell 2007) 775.

² Such as Skype, Google Talk, Yahoo Messenger and many similar services provided by many telecommunication companies.

³ See Smith (n 1) 773, 774.

⁴ Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 28; Donnie L Kidd and William H Daughtery, 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions' (2000) 26 Rutgers Computer & Technology Law Journal 215.

⁵ Juliet M Moringiello and William L Reynolds, 'From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting' (2013) 72 Maryland Law Review 452. Moringiello and Reynolds

Nevertheless, due to the special characteristics of internet communications over the internet, scholars have remained sceptical about some other aspects of online website contracts.⁶ Such doubts have not directly challenged the main idea of contracting theory itself but rather doubt has been cast over certain issues of online contracting that could directly touch other areas of law and make its application controversial, such as timing and location of online contracts. Based on what has been said above, this chapter will not address the basic contract law requirements for online contract formation on websites but rather a descriptive and analytical approach will be adopted for the sake of reviewing the main relevant aspects of online contracts in relation to the theme of this thesis. Accordingly, the chapter will be divided into four sections: historical perspective, definitions, classifications and, finally, the most relevant parts of the research which are the issues of timing and location in online contracts.

3.2 HISTORICAL PERSPECTIVE

Since the prevalence of electronic contracting methods, scholars have raised different questions and challenges that may appear when applying the traditional governing laws to such a type of contract.⁷ In fact, during the time that many of these legal doubts and challenges have become well-settled concepts in law, other questions have remained unanswered and controversial.⁸ From a general legal perspective, the history of the interaction between the internet and law dates back to the early 1990s when the internet was first being examined for its commercial use.⁹ Prior to the mid-1990s, various legal issues came into existence because of the introduction of electronic mail (email) as a way of communicating and concluding contracts;¹⁰ nevertheless, no private international law issues had appeared at that stage because the internet had not yet been developed.¹¹

comments on that: 'It took a while to flesh out those and other new doctrines, but it is safe to say that between, say, 1932, when contract law changed little. In other words, a student who could pass a contracts exam in 1932 could also pass the exam in 2000. The reason for this quiescence in doctrine is easy to see in retrospect. Because there was no disruptive technology in the period from 1932 to 2000, the law did not have to respond to technological changes.' 452, 453.

⁶ *ibid*

⁷ Robert Lee Dickens, 'Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases' (2007) 11 *Marquette Intellectual Property Law Review* 379.

⁸ *ibid*

⁹ Michael L Rustad and Diane D'Angelo, 'The Path of Internet Law: An Annotated Guide to Legal Landmarks' (2011) 12 *Duke Law & Technology Review* 1.

¹⁰ Sharon Christensen, 'Formation of Contracts by Email – Is It Just the Same as the Post?' (2001) 1 *Queensland University of Technology Law & Justice Journal* 22; John W Cooley, 'New Challenges for

Emails can be considered the starting point for the spread of electronic contracting over the internet and certain doubts have been raised by scholars about these, such as the validity of offer and acceptance exchange via electronic mail and whether it can amount to a valid contractual agreement.¹² Scholars no longer have concluded and court now holds that agreements reached by the exchange of emails are just as valid as their traditional counterparts. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Ltd*,¹³ the High Court of England and Wales held that the exchange of emails between the claimant and defendant amounted to a valid and enforceable agreement.¹⁴ Although the validity and enforceability of contracts concluded by email exchanges have become a well-acknowledged concept in law,¹⁵ there have still been some occasions where the courts have had to examine the validity of such contracts. For instance, in *University of Plymouth v European Language Centre Ltd*,¹⁶ the Court of Appeal in England and Wales ruled that email communications between the claimant and defendant did not amount to a definite offer and acceptance of a valid contract.¹⁷ In another similar dispute, however, the Scottish Court of Session ruled in *Baillie Estates Ltd v Du Pont (UK) Ltd*¹⁸ that the language used in emails exchanged by the parties was affirmative enough to constitute valid letters of offer and acceptance for an enforceable contract. Moreover, in another case, *J Pereira Fernandes SA v Mehta*, the authenticity of an unsigned email between the claimant and defendant was also disputed.¹⁹

Consumers and Businesses in the Cyber-Frontier: E-Contracts, E-Torts, and E-Dispute Resolution' (2001) 13 Loyola Consumer Law Review 102.

¹¹ Rustad and D'Angelo (n 9).

¹² Paul Fasciano, 'Internet Electronic Mail: A Last Bastion for the Mailbox Rule' (1997) 25 Hofstra Law Review 671; Valerie Watnick, 'The Electronic Formation of Contracts and the Common Law 'Mailbox Rule' (2004) 56 Baylor Law Review 175.

¹³ *Golden Ocean Group Ltd v Salgaocar Mining Industries Ltd* [2012] WLR 3674.

¹⁴ See Andy Harris, 'Dealing with Online Contracts and Electronic Signature' (*MBM Commercial*) <<http://mbmcommercial.co.uk/news/article/dealing-with-online-contracts-and-electronic-signatures.html>> accessed 5 November 2013.

¹⁵ Andrew D Murray, 'Entering Into Contracts Electronically: The Real W.W.W' in Edwards, Lillian and Waelde, Charlotte (eds), *Law and the Internet: A Framework for Electronic Commerce* (Hart Publishing 2000) 17.

¹⁶ *University of Plymouth v European Language Centre Ltd* [2009] EWCA Civ 784.

¹⁷ However, the England and Wales Court of Appeal (Civil Division) ruled in a different case that a contract made over the exchange of emails between the plaintiff and defendant was valid and enforceable. The Court of Appeal referred to the District Court Judge's conclusion in this case, which was worded as follows: 'I find that Mrs Neal did enter into a contract with NPH on 28 November 2006 on the terms set out in the email of 24 November 2006 and accepted by her in her email of 28 November 2006'. See *Nicholas Prestige Homes v Neal* [2010] EWCA Civ 1552, para 13.

¹⁸ *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSOH 95, [28], [32].

¹⁹ *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch). In this case, the Chancery Division Judge granted a summary judgment in favour of the claimant by stating that the automatic insertion of the email address into the header of the email sent by the defendant was sufficient indication of the sender's authenticity even though the email itself was not signed by the defendant nor did it include his name. However, in the appeal process, the High Court dismissed the summary judgment and held that such an action did not amount to a valid signature

In the US, there have also been a few recent cases where courts tackled the validity of contract formation by email exchange. For example, in *Glencore Ltd v Degussa Engineered Carbons LP*²⁰ the Northern District Court of New York ruled that an ‘arbitration agreement’ included in a contract made by an email exchange between the plaintiff and defendant was valid, and the “agreement in writing’ requirement laid down by the New York Convention was satisfied in such a kind of contract.²¹ Not surprisingly, a few weeks later a similar decision was affirmed by the same court in *Copape Produtos de Petroleo Ltda v Glencore Ltd*.²² In any event, it has been submitted that no considerable legal issues regarding contract formation or conflict of laws matters have arisen in email exchanges that do not also apply to exchanges by post.²³

The revolutionary change of the commercial internet started in the years following the mid-1990s where the internet had been widely used in promoting, buying, and selling goods and services.²⁴ Indeed, online contracting cases increased dramatically after the advent of the internet and its rapid involvement in commercial activities by different sized businesses where the courts started examining the validity and enforceability of website click-wrap and browse-wrap agreements.²⁵ *Groff v America Online, Inc*²⁶ was one of the earliest cases where the court enforced the website terms and conditions on a lawyer who had unsuccessfully argued that they did not apply to him because clicking on the ‘I agree’ button was an insufficient factor for expressing the consent of the party to be bound by such terms and conditions.²⁷ After 2000, there was a sharp increase in the number of cases where the US court tackled the validity and enforceability of website click-wrap and browse-wrap

under the Statute of Frauds 1677; Tim Andrews, ‘Be Careful What You’re Signing’ (2007) 190 Property Law Journal 16; Rogers (n 4) 36.

²⁰ *Glencore Ltd v Degussa Engineered Carbons LP*, 2012 WL 223240 (SDNY, 24 Jan 2012).

²¹ See Marc J Goldstein, ‘E Mail Contracting and the ‘Agreement in Writing’ Requirement on the New York Convention’ (Marc J Goldstein, February 2012) <<http://arbblog.lexmarc.us/2012/02/e-mail-contracting-and-the-agreement-in-writing-requirement-of-the-new-york-convention/>> accessed 5 May 2014.

²² *Copape Produtos de Petroleo Ltda v Glencore Ltd*, 2012 WL 398596 (SDNY, 8 Feb 2012); *ibid*

²³ Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 25, 26; Murray (n 15); Fasciano (n 12). According to Moringiello and Reynolds, contract law did not change since its codification in the First Restatement in 1932 until 2000 when commercial websites evolved and began to prevail in international commerce. Technologies that appeared between the period 1932-2000 such as the telegraph, telex, telephone, fax, and email did not have a significant impact in changing the theory of contract law; See Moringiello and Reynolds (n 5).

²⁴ Michael Geist, ‘The Shift Toward ‘Targeting’ for Internet Jurisdiction’ in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) 91; Rustad and D’Angelo (n 9).

²⁵ Moringiello and Reynolds (n 5).

²⁶ *Groff v America Online, Inc* No CA No PC 97-0331, 1998 WL 307001 (RI Superior Ct, 27 May 1998).

²⁷ *ibid*; Martin Samson, ‘Groff v America Online, Inc’ (*Internet Library of Law and Court Decisions*, 2014) <http://www.internetlibrary.com/cases/lib_case20.cfm> accessed 6 May 2014.

agreements.²⁸ Some of them will be analysed in this thesis. Interestingly, the growth of commercial websites and the steady increase in transnational online contracting which the internet has greatly facilitated has opened the door to jurisdiction and applicable law disputes to appear in court cases.²⁹

The leading case where a court examined the jurisdictional issues of website activities was in the US in *Zippo Manufacturing Co v Zippo Dot Com, Inc.*³⁰ The United States District Court of Western District of Pennsylvania created the sliding-scale test by distinguishing between two types of websites: passive and active, as criteria when applying the traditional minimum contact test of the personal jurisdiction law over out-of-state residents.³¹ Owing to the rapid change in the function and the mechanism of commercial websites in pursuing cross-border commercial activities, US courts have adopted different approaches when dealing with jurisdictional issues of website activities, such as the targeting and effectiveness tests.³²

Nevertheless, during the time that the internet has started providing many advantages for merchants seeking to do business with out-of-state consumers and businesses, it has also increased the risk of being the subject of out-of-state litigation for disputes arising out of such online transactions.³³ Consequently, businesses have started to incorporate jurisdiction and applicable law clauses in their website terms and conditions specifying their own countries' laws and jurisdictions.³⁴ The validity of such clauses has been widely disputed,³⁵ and there is

²⁸ For example, see the series of electronic contracting case law surveys in the US over the period 2001-2011, written by Juliet M Moringiello and William L Reynolds <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 6 May 2014.

²⁹ Lorna E Gillies, *Electronic Commerce and International Private Law* (Ashgate 2008) 16.

³⁰ *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa 1997).

³¹ Raymond SR Ku and Jacqueline Lipton, *Cyberspace Law: Cases and Materials* (3rd edn, Aspen Publisher 2010) 39. The history of traditional minimum contact test in US personal jurisdiction rule dates back to 1945. More specifically, in *International Shoe v Washington*, 326 US 310 (1945), where the US Supreme Court handed down a landmark decision regarding the US personal jurisdiction rules by affirming that out-of-State corporate could be a subject to State's personal jurisdiction if a minimum contact has been satisfied between that corporate and the forum State. Abandoning, by doing so, the territorial factors that was used for a long time by US courts when asserting personal jurisdiction over out-of-State defendants. See Alan Reed, 'Optimal Rule-Selection Principles in Anglo-American Contractual Jurisdiction' (2008) 11 *Touro International Law Review* 23.

³² See Burke T Ward and Janice C Sipior, 'Where in the World Is Internet Jurisdiction: A US Perspective' (2010) 4 *International Journal Value Chain Management* 5; Thomas Schultz, 'Carving up the Internet: jurisdiction, legal orders, and the private/public international law interface' (2008) 16 *European Journal of International Law* 30.

³³ Jacques Delisle and Elizabeth Trujillo, 'Consumer Protection in Transnational Contexts' (2010) 58 *The American Journal of Comparative Law* 135.

³⁴ David Naylor and Antonis Patrikios, 'Mass Market Online and Technology Contracting' in Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (6th edn, Oxford University Press 2007) 133.

abundant case law addressing this issue; this will be addressed respectively throughout the chapters of this thesis. Moreover, it is a well-settled fact that the consumer protection laws have also barred the application of jurisdiction and applicable law clauses, especially in EU law which has maintained a high standard of rules in this respect.³⁶

Statutorily, as a response to the dramatic development of online contracting technologies, many jurisdictions have started to react by enacting new laws that are mainly aimed at providing legal validity for such contracts or regulating their procedural aspects without touching on the basic concepts of contract law and for the most part, private international law rules.³⁷ In the EU, the first regulation on electronic contracts was made with the Distance Selling Directive.³⁸ This Directive aimed to protect consumers when entering into contracts at a distance with businesses located in other Member States. The Directive in its Annex (1) lists some of the means of distance contracting, such as email and fax; however, the internet was not included.³⁹ On 8 June 2000, the European Parliament and Council approved the E-commerce Directive⁴⁰ which can be considered the leading instrument governing the framework of online contracting.⁴¹ The E-commerce Directive does not directly provide clear requirements for electronic contract formation although it is clear from the language of the Directive that the technological neutrality approach is favoured, giving national legislatures of the Member States space and freedom to enact rules that are more flexible and technologically neutral.⁴² Relatively more recently, on 25 October 2011, the European Parliament and the Council approved the Consumer Rights Directive 2011/83/EU⁴³ which expressly includes websites as a means of distance contracting.⁴⁴ As for the EU's private

³⁵ See Kayleen Manwaring, 'Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK' (2011) 5 Studies in Ethics, Law and Technology 1 <<http://www.bepress.com/selt/vol5/iss1/art4>> accessed 21 January 2012.

³⁶ The EU's consumer protection approach will be analysed in Chapters 5 and 6 of this thesis.

³⁷ In fact, there has been wide scholarly debate regarding the conflict of laws rules and its applicability to online contracting cases. This point has been explored in Chapter Two of this thesis.

³⁸ European Parliament and Council Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts [1997] OJ 144/19 (Distance Selling Directive).

³⁹ See Annex (1) of the Distance Selling Directive.

⁴⁰ European Parliament and the Council Directive 2000/31/EC of 8 June on Certain Legal Aspects of Information Society Service, in Particular Electronic Commerce, in the Internal Market [2000] OJ 178/1 (E-commerce Directive).

⁴¹ Jane Kaufman Winn and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' (2002) 27 European Law Review 567.

⁴² *ibid*

⁴³ European Parliament and the Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64 (Consumer Rights Directive).

⁴⁴ For example, Recital 39 of the Directive states that: 'It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order'.

international law, and of more relevance to this thesis, although the European legislative body has been seeking to maintain unified rules for both offline and online activities, arguably both Rome I and Brussels Regulations have included some rules which specifically address online contracting issues.⁴⁵

In the US, efforts to regulate the legal framework of electronic contracting first began with the draft Article of the Uniform Commercial Code (UCC) which addressed issues related to software and licensing agreements.⁴⁶ The actual codification of legal provisions regulating some types of electronic contract were implemented in a number of Acts, including the Uniform Electronic Transactions Act (UETA), the Electronic Signatures in Global and National Commerce Act and the Uniform Computer Information Transactions Act (UCITA).⁴⁷ Again, these statutes have aimed to provide legal validity to electronic contracts in the same way as traditional paper contracts but not to create new substantive norms for electronic contract formation.⁴⁸ Regarding the private international law rules, the Second Restatement of Conflict of Laws is the governing instrument of applicable law matters on contracts and tort.⁴⁹ As for the jurisdictional issues, US personal jurisdiction rules govern the cases where the US court can assert jurisdiction over non-resident defendants in both contractual and non-contractual claims.⁵⁰ Similarly, both the Restatement Second and the personal jurisdiction rules have been set for traditional contracting disputes. However, US courts have had a long history in dealing with cyberspace cases; accordingly, many approaches have been established and have evolved from courts applying such rules to online contracting cases. These will be analysed in-depth in this thesis.⁵¹

With regards to Iraq, although it has become a well-established branch of law for a couple of decades, the law of electronic contracts was not codified until late 2012 when the Iraqi

⁴⁵ For example, the 'Directing of Commercial Activities' approach, which has been adopted in both Rome I and Brussels Regulations.

⁴⁶ Scott Glickson, 'Point, Click and Buy: Contracting for Online Products and Services' (1997) 13 Computer Law & Security Report 436.

⁴⁷ Dickens (n 7); Moringiello and Reynolds (n 5).

⁴⁸ Sylvia Mercado Kierkegaard, 'E-Contract Formation: U.S. and EU Perspective' (2007) 3 *Shidler Journal of Law, Commerce & Technology* 12.

⁴⁹ Willis LM Reese, 'Conflict of Laws and the Restatement Second' (1963) 28 *Law and Contemporary Problems* 679; Shirley A Wiegand, 'Fifty Conflict of Laws 'Restatements': Merging Judicial Discretion and Legislative Endorsement' (2004) 65 *Louisiana Law Review* 1.

⁵⁰ See James Martin, 'Personal Jurisdiction and Choice of Law' (1980) 78 *Michigan Law Review* 872.

⁵¹ See also (n 32).

Parliament passed the Electronic Signature and Transactions Act (IESTA).⁵² The aim behind the enactment of this Act was to provide legal validity to contracts concluded between parties electronically.⁵³ With regards to the applicable law and jurisdiction matters, the same traditional rules governing the applicable law and jurisdiction matters in contracts are applied in Iraq without distinction between the offline and online environment; neither has there been any kind of harmonisation of these rules based on recent developments elsewhere.⁵⁴

3.3 DEFINITIONS

Before providing definitions, it should be noted first that online contracts are not exceptions to the traditional contracting process.⁵⁵ Contract law has always sought to disregard the means by which an agreement between parties is reached as long as the meeting of the minds and valid contract formation have been satisfied in such agreements.⁵⁶ In *Hotels.com v Canales*,⁵⁷ the court did not pay special attention to the method with which the online booking of hotel rooms had been made but rather the court focused on whether the consumers who made the reservation had sufficient notice of the plaintiff's terms and conditions prior to making their reservations.⁵⁸ For one of the members of the class action, the court did not enforce the hotel's terms and conditions because she had made her booking by telephone where it was impossible for her to review such terms and conditions. As for other class action members who made reservations over the website, the appellate court reversed the trial

⁵² The new law was enacted by the Iraqi Parliament on 25 September 2012. The Act formally entered into force on 5 November 2012 and was published in the official journal of Iraqi legislation (Waqaa- Al_Iraqia الوقائع العراقية); OJ No 4256 <<http://www.moj.goviq/view.205/>> accessed 6 May 2014.

⁵³ Article 2 of the Act:

المادة الثانية من قانون التوقيع الإلكتروني والمعاملات الإلكترونية: يهدف هذا القانون الى ما يأتي:
أولاً- توفير الأطار القانوني لاستعمال الوسائل الإلكترونية في اجراء المعاملات الإلكترونية.
ثانياً- منح الحجية القانونية للمعاملات الإلكترونية و التوقيع الإلكتروني.
ثالثاً- تعزيز الثقة في صحة المعاملات الإلكترونية و سلامتها.

⁵⁴ Namely, Articles 14, 15, and 25 of the ICLC.

⁵⁵ Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press 2009) 30; Chris Reed, 'Electronic Commerce' in Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (6th edn, Oxford University Press 2007) 199.

⁵⁶ Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2012) 236.

⁵⁷ *Hotels.com v Canales* 195 SW3d 147 (2006); Woodrow Hartzog, 'Website Design As Contract' (2011) 60 *American University Law Review* 1635. In this case, the trial court found that each consumer who has been charged for 'taxes/fees' by Hotels.com was eligible to join the class certification irrespective of the method, by which he/she has contacted the Hotels.com by stressing that: [W]hether one class member contacted Hotels.com by phone and another did so online is irrelevant to certification because Hotels.com has admitted that the 'taxes/fees' charge was established by a formula that was identical, regardless of how, when or where the customer rented a room.

⁵⁸ See Moringiello and Reynolds (n 5).

court's verdict and ordered the decision to be reconsidered by carrying out further analysis to find out whether sufficient pre-notice of the arbitration clause had existed.⁵⁹

When dealing with the definition of online contracts no novel issues should be expected but, rather, the peculiarity seems to be procedural rather than substantial, that is, from the perspective of contract law. Additionally, it has been commonly noted in the academic literature that writers and scholars have alternated between the terms 'electronic contracts' and 'online contracts' when addressing different legal issues associated with the contracting process over the internet.⁶⁰ Without doubt, the internet is an effective electronic means for concluding contracts, which can be done by the exchange of emails or over the internet.⁶¹ In contrast to the internet, email contracting is not always done online and instantaneously. Therefore, whereas the theme of this thesis only covers contracts that are carried out online on websites, the term 'online contracts' has been used throughout this thesis.⁶²

Broadly speaking, the technological neutrality definition of online contracts are those paperless agreements that are reached instantaneously through a technological means of communication without the physical presence of the parties and probably without having the opportunity for one party to negotiate the contract's terms and conditions with the other party.⁶³ Such a comprehensive definition can encompass a wide range of existing online contracting methods, including in particular, the internet and no doubt other new methods that might appear in the future. In the EU, the E-commerce Directive does not provide a direct definition for online contracts;⁶⁴ however, an explicit reference to the term 'online

⁵⁹ See the Court of Appeal's conclusion regarding the enforceability of arbitration and choice of law clauses in the plaintiff's website terms and conditions against the consumers who made a hotel booking over the plaintiff's website; <http://www.duanemorris.com/site/static/195_S_W_3d_147.pdf> accessed 6 May 2014.

⁶⁰ For example, Juliet M Moringiello and William L Reynolds use the term 'electronic contracts' in their electronic case law survey (cases between 2004-2010); the series of cases is available through the following link <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 6 May 2014. On the other hand, there have been many writers frequently using the term 'online contracts'. For example, see Karen A Shiffman, 'Replacing the Infancy Doctrine Within the Context of Online Adhesion Contracts' (2012) 34 Whittier Law Review 141; William J Cordon, 'Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwraps Agreements?' (2004) 16 Regent University Law Review 435; Hasan A Deveci, 'Consent in Online Contracts: Old Wines in New Bottles' [2007] Computer and Technology Law Review 1. This point has also been analysed in Chapter 2 of this thesis.

⁶¹ Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 International Journal of Law and IT 34.

⁶² However, the analysis of terms used in describing the contracts concluded by electronic means and the branch of law which deals with such a topic have been carried out separately in Chapter 2 of this thesis under the section titled *Terminological Analysis*.

⁶³ Kidd and Daughtery (n 4) 215.; See also

محمد حسين منصور, المسؤولية الإلكترونية (منشأة المعارف- الإسكندرية ٢٠٠٦) ١٧

[Mohammed Hussain Mansour, *The Electronic Liability* (AL-Maa'rif Institution- Alexandria 2006) 17].

⁶⁴ Winn and Haubold (n 41).

contracts' has been made in the Directive as part of the broader concept of Information Society Services.⁶⁵ Furthermore, and more clearly, the Directive also reveals that the term 'online contracts' can encompass activities such as selling goods and their delivery online;⁶⁶ however, this is done without explicitly mentioning websites.

In the US and other common law countries, the term electronic or online 'transactions' is in more common usage than electronic or online contracts.⁶⁷ There may be no point in differentiating between the two terms as it is obvious that the word 'transaction' is the broader concept which, without doubt, encompasses the binding contracts from the legal point of view.⁶⁸ The US UETA,⁶⁹ however, uses the term 'automated transactions' and provides a more technical definition which can typically address the contractual process on websites. The definition is as follows:

[A] transaction conducted or performed in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.⁷⁰

Indeed, such a definition may seem more specific to the nature and the way by which the online contracts or transactions are concluded and performed over most commercial websites. More precisely, the processes of completing transactions on websites, such as by placing an order or bid are, in fact, automated and pre-programmed by the vendor and, in most cases, are not reviewed by humans. Take eBay as an example; by merely clicking on the 'buy it now' or 'place a bid' buttons, the buyer or the bidder instantly receives an automated email from eBay confirming the completion of a purchase or the placing of a bid. The whole process of placing the order and receiving the confirmation email is automated and is without human intervention.⁷¹ The same analysis would also apply to the website terms and conditions where

⁶⁵ Recital 21 of the Directive states that: 'the coordinated field covers only requirements relating to on-line activities such as online information, on-line advertising, on-line shopping, on-line contracting'.

⁶⁶ Recital 18 more specifically provides that: 'Information Society Services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods'.

⁶⁷ Davidson (n 55) 30.

⁶⁸ *ibid* 30.

⁶⁹ The Act is adopted and currently in force in the majority of states; see <<http://www.ncsl.org/issues-research/telecom/uniform-electronic-transactions-acts.aspx>> accessed 6 May 2014.

⁷⁰ UETA § 2 (2). Exactly the same definition is provided by the US's UCITA §102 (7).

⁷¹ For example, eBay on its website explains how the system of automatic bidding the so-called 'bid increment' works: '1 When you place a bid, you enter the maximum amount you're willing to pay for the item. The seller and other bidders don't know your maximum bid; 2 We'll place bids on your behalf using the automatic bid increment amount, which is based on the current high bid. We'll bid only as much as necessary to make sure that

the website visitors have to agree before starting to use the service which the website provides.

In Iraq, the IESTA does not use the language of online contracts in its provisions; the term 'electronic contract' is used instead. In any event, it cannot be disputed that contracts concluded on websites are one of the forms that fall under the term 'electronic contracts'. Article 11 of the IESTA provides a more technologically neutral definition for electronic contracts by stating that electronic contracts are contracts concluded by the exchange of offer and acceptance by electronic means.⁷² Without doubt, the term 'electronic means' is a broad criterion which can include a wide range of technological distance contracting means; therefore, the adoption of such a definition by the Iraqi lawmakers seems felicitous indeed.⁷³ It has been noted that all definitions illustrated above, especially the statutory ones, have aimed to be as technologically neutral as possible, and this should indeed be the case. Nevertheless, whereas this thesis deals with online contracting issues on websites; it might be necessary to provide some more details about the substance of such a type of contract and how it has evolved.

Most importantly, the general meaning of online contracting on websites is manifested in the agreement between the website operator and the visitor to the website in the terms and conditions of using the website, which are commonly referred as the 'user agreements'.⁷⁴ Website user agreements are comprehensive contractual terms and conditions which govern all issues relating to using the website, such as the rules governing the buying and selling on the website, intellectual property, warranty and disclaimers, and dispute resolution clauses.⁷⁵ Accordingly, such terms and conditions should also govern online transactions or contracts of sale of goods and services, as well as using the service on the website.

There have been some definitions of website contracts which refer narrowly to the online contract on a website as only a contract for purchasing goods and services, or as it is

you remain the high bidder, or to meet the reserve price, up to your maximum amount; 3 If another bidder places the same maximum bid or higher, we'll notify you so you can place another bid. Your maximum bid is kept confidential until it is exceeded by another bidder.' See eBay's automatic bidding <<http://pages.ebay.com/help/buy/automatic-bidding.html>> accessed 6 May 2014.

⁷² المادة ١١ من قانون التوقيع الإلكتروني والمعاملات الإلكترونية "العقد الإلكتروني: ارتباط الأيجاب الصادر من احد المتعاقدين بقبول الآخر على وجه يثبت أثره في المعفود عليه والذي يتم بوسيلة الكترونية"

⁷³ See Faye Fangfei Wang, *The Law of Electronic Transactions: Contemporary Issues in the EU, US and China* (Routledge 2010) 52.

⁷⁴ Tatiana Melnik, 'Can We Dicker Online or Is Traditional Contract Formation Really Dying? Rethinking Traditional Contract Formation for the World Wide Web' (2008) 15 Michigan Telecommunications and Technology Law Review 315.

⁷⁵ Hartzog (n 57).

sometimes referred to: the ‘internet order’.⁷⁶ Nevertheless, it should be stressed that online contracting over a website is broader than merely placing orders to buy products and services; rather, it is a binding agreement between the website and its users that governs all legal aspects that may arise out of using the website. Consequently, merely accessing a website may constitute a binding contract even though no transaction takes place.⁷⁷ This should not be understood to mean that the online contract to purchase a product over a website is not different from the online contract for using that website. By accessing the seller’s website and placing an order to buy an item a person is entering into two separate online contracts; the online contract for using the service that the website provides (user agreement), and the online contract for purchasing an item. The terms and conditions of the purchase contract are certainly provided in and governed by the website’s user agreement to which the buyer has agreed when first accessing the website.

The online contracting process between the website and its users usually takes the form of two kinds of agreements: click-wrap and browse-wrap.⁷⁸ In click-wrap agreements, the terms and conditions are usually presented to the website users in a digital format, where the website surfers are required to read them on the computer screen and tick a small box at the end of the page prior to starting to use the service or place the order.⁷⁹ Without ticking the small ‘accept’ or ‘agree’ box, the process of the transaction cannot be continued.⁸⁰ In the browse-wrap agreements, the website terms and conditions are not presented directly on the website for the users to read but rather they are available by clicking on a hyperlink on the website.⁸¹ Historically, click-wrap and browse-wrap were first used by scholars and academics in the US.⁸² The first judicial reference to the term click-wrap was made by the

⁷⁶ See Farooq Ahmad, ‘Electronic Commerce: An Indian Perspective’ (2001) 9 *International Journal of Law & Information Technology* 1.

⁷⁷ This is one of the interesting points that will be addressed in this thesis, see Chapter 4 and Chapter 5 of this thesis. However, for a brief overview about this part see Cheryl B Preston and Eli W McCann, ‘Unwrapping Shrinkwraps, Clickwraps, and How the Law Went Wrong from Horse Traders to the Law of Horse’ (2012) 26 *BYU Journal of Public Law* 1.

⁷⁸ Rowland, Kohl and Charlesworth (n 56) 236.

⁷⁹ Cordon (n 60).

⁸⁰ Francis M. Buno and Jonathan A. Firieden, ‘Maximizing the Enforceability of Click-Wrap Agreements’ (1999) 4 *Journal of Technology Law & Policy* 1; Sherman Kahn and David Kiferbaum, ‘Browsewrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service’ (2012) 5 *New York Dispute Resolution Lawyer* 33.

⁸¹ Paul Horbal and Donald H MacOdrum, ‘Browse wrap agreements catch notice of courts’ (*Association of Corporate Counsel*, 20 July 2012) <<http://www.lexology.com/library/detail.aspx?g=51bfb5cc-3754-4811-b73d-cdaf52f6a0df>> accessed 6 May 2014; see also Andrews Kurth Dean W Harvey, Thomas G. Woolsey, ‘Second Circuit Clarifies E-Commerce Contract Formation’ (*The National Law Review*, 30 November 2012) <<http://www.natlawreview.com/article/second-circuit-clarifies-e-commerce-contract-formation-requirements>> accessed 6 May 2014.

⁸² Moringiello and Reynolds (n 5).

Southern District Court of California in *Stomp Inc v NeatO LLC*.⁸³ The court in this case incorrectly concluded that a click-wrap agreement was a type of licensing shrink-wrap agreements by stating that:

The term "click-wrap agreement" is borrowed from the idea of "shrink-wrap agreements," which are generally license agreements placed inside the cellophane "shrink-wrap" of computer software boxes that, by their terms, become effective once the "shrink-wrap" is opened.⁸⁴

It was incorrectly held that click-wrap agreements were borrowed from shrink-wrap agreements,⁸⁵ whereas it is quite evident that both types of agreements are different from each other in terms of the way consent is given. Moreover, shrink-wrap agreements are not online agreements but rather software licensing agreements that become valid after opening the wrapping cellophane of a software package.⁸⁶

In any event and under normal circumstances, both click-wrap and browse-wrap agreements have been held to be enforceable as long as the visitor to the website had sufficient notice of the terms and conditions of the website prior to starting to use it.⁸⁷ To a greater extent the author would agree with the notion that online wrap contracts are different from traditional paper contracts in terms of the legal challenges that they may present and the new formalism and internet customary practice of contracting which they have established.⁸⁸

3.4 CLASSIFICATIONS

Categories of online contracting over the internet are varied and can be classified according to different perspectives. Some of these classifications might be considered unique to both online and offline contracting methods. Other classifications have been created by taking into consideration the distinctive online contractual process over the internet. Basically, online

⁸³ *Stomp Inc, v NeatO LLC*, 61 F Supp 2d 1074 (1999).

⁸⁴ *ibid* [11].

⁸⁵ *ibid*

⁸⁶ Winn and Haubold (n 41); Rustad and D'Angelo (n 9).

⁸⁷ *Hotels.com v Canales* No04-05-00315, 2006 Tex App LEXIS 803 (Ct App, 1 Feb 2006); Juliet M Moringiello and William L Reynolds, 'Survey of the Law of Cyberspace : Internet Contracting Cases 2004 – 2005' (2005) 61 *Business Lawyer* 433. See also Hartzog (n 57); Nancy S Kim, 'The Duty to Draft Reasonably and Online Contracts' in Severine Saintier, Keith Rowley, Larry A Dimatteo and Qi Zhou (eds), *Commercial Contract Law: Transnational Perspective* (Cambridge University Press 2013) 181.

⁸⁸ See Nancy S Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press 2013) 5.

contracts over the internet can be classified into four areas:⁸⁹ (1) the characterisation of the parties involved in the online contractual relationship; (2) the means of internet communication that is used to conclude the online contract; (3) the process of concluding and performing the online contract over the internet; and (4) the consideration of the contractual parties behind concluding the online contract or the subject matter of the online contract for which the parties have contracted.

Firstly, in terms of the contractual parties the online contract can be classified into four categories: B2B, B2C, C2B, and C2C. It is clear that the rules governing the jurisdiction and applicable law issues over each kind of transaction differ from one category to another,⁹⁰ and it is the core subject of this thesis to examine the legal implications arising out of such contracts. There might be no necessity for further illustration about what the definitions of these transactions are as the basic notion of what business and consumer transactions mean are well-known facts in law. The categorization of online transactions according to the divisions above is not peculiar to internet practice but occurs in traditional offline contracting as well. Nevertheless, as far as online contracting on websites is concerned, it should be stressed that the meaning of business and consumer transactions is sometimes a complex and controversial matter;⁹¹ this point will be addressed elsewhere in this thesis.⁹²

Secondly, regarding the electronic means that are used to complete transactions over the internet, online contracts can be classified into two categories: email contracting and website contracting.⁹³ Once again, there is no need to re-illustrate what has been written previously about email and website contracting in the first section of this chapter.⁹⁴

Thirdly, as for the contractual process over the internet, online contracts can be classified into two categories: wholly online contracts and partly online contracts. The distinction between wholly and partly online contracts was addressed by a study carried out by the Hague

⁸⁹ It should be noted that these designations of online contract, under this section of the thesis, already exist and are widely used in the academic literature; however, the writer attempts here to classify these sorts according to four main perspectives, which the writer has created himself.

⁹⁰ At least within the EU, the jurisdiction and applicable law differentiate between B2B and B2C contracts. In the US, there is no federal law that grants the consumer a separate protection in terms of jurisdiction and applicable law matters; however, such a protection has been guaranteed by the law of some states. Iraqi private international law also does not differentiate between business and consumer transactions in jurisdiction and applicable law matters. The emphasis on this point will be made in the Chapter 5 and 6 of this thesis.

⁹¹ For example, see Chapter 5 (n 68).

⁹² More obviously in Chapter 5 and Chapter 6 of this thesis.

⁹³ See also Wang (n 73) 52.

⁹⁴ See the first section of this chapter entitled: *A historical perspective*.

Conference on Private International Law.⁹⁵ The study affirmed that jurisdictional norms, such as the place of performance, will remain relevant when the performance of the contract is carried out offline and even though the contract itself has been concluded over an online communications medium. When the electronic contract is entirely concluded and performed online, the study found that factors such as the place of contract formation or its place of performance might be irrelevant.⁹⁶ Wholly online contracts are those which are concluded and performed on websites with no physical presence needed for contractual fulfilment.⁹⁷ In contrast, partly online contracts only involve the conclusion of the contract by electronic means but not its performance.⁹⁸

Indeed, when it comes to the practice of online contracting on websites, the distinction between wholly online and partly online contracts becomes an interesting point. Arguably, factors such as the place of concluding the contract are considered a challenging issue in contracts concluded online but performed offline, such as ordering goods over the internet and the delivery of the items physically to the address of the buyer.⁹⁹ From a conflict of laws perspective, the matter becomes more complex when both the conclusion of the contract and its performance are performed instantly online on websites, for example, the purchase of intangible goods or services such as software and songs where the items are downloaded directly to the purchaser's computer.¹⁰⁰ In this case, the determination of the place where the contract is performed will certainly become a more controversial matter than it would be where the delivery of the item bought online was made physically.¹⁰¹

Finally, and most importantly, considering the subject matter of the contract to which both parties have agreed, online contracts on websites could involve the sale of goods, the sale of services, the sale of mixed goods and services, or transactions involving the agreement to

⁹⁵ See the Preliminary Document No 7 of April 2000 for the Attention of the Special Commission of May 2000 on General Affairs and Policy of the Hague Conference; Catherine Kessedjian, 'Electronic Data Interchange, Internet and Electronic Commerce', Prel Doc No 7, 2000 Hague Conference on Private International Law <http://www.hcch.net/upload/wop/gen_pd7e.pdf> accessed 6 May 2014.

⁹⁶ *ibid*

⁹⁷ Hill (n 23) 11.

⁹⁸ *ibid* 11; Smith (n 1) 775.

⁹⁹ Smith (n 1) 795.

¹⁰⁰ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumers in the Twenty-First Century: Fit for Purpose?' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 89, 126; 'In the physical world, principles have long been worked out which determine, for example, when and where performance of a contract is deemed to have occurred. The problem is that equivalent principles have not been worked out in the metaphysical Internet world'.

¹⁰¹ See Wang (n 73) 131.

transfer computer information.¹⁰² Given that this thesis only deals with online contracts on websites which include the sale of goods or services, computer information transactions will not be addressed in this section as they are beyond the parameters of this thesis.¹⁰³ This again is not a specific classification for online contracts but it also exists within the realm of traditional sales contracts. Under normal circumstances, there should be a clear understanding of what each category of contract involves; however, the distinction between sale of goods contracts and sale of services contracts may become blurred when the contract involves a mix of goods and services, the so-called ‘hybrid contracts’.¹⁰⁴

In the EU, the E-commerce Directive does not provide definitions for the terms ‘goods’ and ‘services’. Such definitions are partly provided in another EU instrument, the Consumer Rights Directive.¹⁰⁵ According to the Consumer Rights Directive:

‘[G]oods’ means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity.¹⁰⁶

Although there is no definition of the term ‘service’ in the Directive, it does provide a definition for ‘service contract’ by stating that:

[A] ‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to consumer and the consumer pays or undertakes to pay the price thereof.¹⁰⁷

Accordingly, contracts that include the sale of items which do not fall within the scope of the definition of ‘goods’ illustrated above should presumably be regarded as a sale of services, not goods.

¹⁰² Hill (n 23) 11; Kidd and Daughtery (n 4).

¹⁰³ In the US, such types of transactions are regulated by the UCITA which defines these as: ‘an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information.’

¹⁰⁴ Kidd and Daughtery (n 4).

¹⁰⁵ European Parliament and the Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64.

¹⁰⁶ Consumer Rights Directive, article 2 (3). Nearly the same definition is provided by the Proposal of a Common European Sale Law Regulation in Article 2 (h), which states that: ‘ ‘goods’ means any tangible movable items; it excludes: (i) electricity and natural gas; and (ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity’.

¹⁰⁷ Consumer Rights Directive, article 2 (6).

In the US, the UCC provides a more comprehensive definition for the term ‘goods’ in Section § 2-105, which reads as follows:

‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale [emphasis added] other than the money in which the price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.

In Iraq, the law does not use the word ‘goods’ when referring to the tangible movable things that have a financial value but rather the term ‘moveable property’ is used instead. Article 62 (2) of the ICLC defines moveable property as any object that can be moved from one place to another without damaging its nature or the benefit of its usage, such as money, products, animals or anything movable that can be weighed.¹⁰⁸

Based on what has been explained above, it can be noted that the law in the US and Iraq, in contrast to the EU law, does not confine the definition of ‘goods’ to tangible moveable items. It might be assumed, at least under the US and Iraqi jurisdictions, that the term ‘goods’ should normally include both tangible and intangible products.¹⁰⁹ As far as online contracting on websites is concerned, the question regarding the nature of intangible products is of particular significance to the purchase of some types of products that have become increasingly prevalent on the internet, the purchases of so-called ‘digitized products’.¹¹⁰ These include computer games, songs, e-books and computer software programs. It has been widely debated whether such types of products should be categorised under the sale of goods or the sale of services.¹¹¹ Academic opinion has been split over the nature of these intangible

المادة (٢/٦٢) من القانون المدني العراقي: "المنقول كل شيء يمكن نقله و تحويله دون تلف فيشمل النقود والعروض والحيوانات والمكيلات والموزونات وغير ذلك من الأشياء المنقولة"

A very similar definition is adopted in the US by the Code of State of New Orleans which defines the ‘tangible personal property’ as: ‘A personal property that can be seen, weighed, measured, felt or touched, or that is in any other way perceptible to the sense’; Ken Moon, ‘The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?’ (2009) 8 European Intellectual Property Review 1.

¹⁰⁹ It will be illustrated below that, under the EU law, intangible products might not be considered either goods or services but rather a special kind of product which is a mix of services and goods.

¹¹⁰ Svantesson defines the digitized goods or products as ‘[p]roducts that have been transformed from a physically tangible object to a purely digital combination of binary code (e.g., electronic books), or a product that has been removed from its physically tangible carrier and is kept as a purely digital combination of binary code (e.g., mp3 files, MPEG videos and software)’.

Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 432. In the EU, the Consumer Rights Directive provides the following definition for ‘digitized goods’: ‘Digital content means data which are produced and supplied in digital form’. However, a more comprehensive definition is provided in the Proposal of European Common Law Regulation which reads as follows: ‘digital content means data which are produced and supplied in digital form, whether or not according to the buyer’s specification, including video, audio, picture or written digital content, digital games, software and digital content which

products, whether such products are purely goods, purely services, or a combination of both.¹¹²

It appears that such uncertainty is more obvious in the application of EU law¹¹³ where the definition of ‘goods’ is confined to tangible moveable products as it has been illustrated above.¹¹⁴ Moreover, the EC Directive on the Legal Protection of Computer Programs does not address or make reference to such an issue.¹¹⁵ For example, in the UK, such a point has been specifically addressed by a research report prepared for the UK Department for Business, Innovation, and Skills.¹¹⁶ The study reached the conclusion that confining the meaning of ‘goods’ to tangible objects may raise serious doubts regarding consumer purchases of intangible downloadable products and have implications on the application of consumer protection laws in the UK.¹¹⁷ There are very few cases in the UK that directly address the legal characterisation of products that include digital content.¹¹⁸ One of these is *Eurodynamics System Plc v General Automation Ltd*,¹¹⁹ where the court implicitly stated that transactions involving intangible digitized products should be considered a sale of goods after reaching the conclusion that transferring software programs constituted the transfer of a product.¹²⁰ There is no available case law that explicitly discerns which standards the courts should use when determining the legal nature of digital products nor has such an issue been

makes it possible to personalise existing hardware or software’; See Stephan Balthasar, ‘The Draft Common European Sales Law - Overview and Analysis’ (2013) 24 *International Company and Commercial Law Review* 43.

¹¹¹ See Hill (n 23) 28; Wang (n 73) 131.

¹¹² For a review of these different academic views, see Hill (n 23) 28-30

¹¹³ N Helberger and others, ‘Digital Contracts for Consumer’ (2012) 36 *Journal of Consumer Policy* 37.

¹¹⁴ Noriko Kawawa, ‘Contract Law Relating to Liability for Injury Caused by Information in Electronic Form: Classification of Contracts - A Comparative Study, England and the US’ (2000) 1 *The Journal of Information, Law and Technology* <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/kawawa/> accessed 7 May 2014.

¹¹⁵ The European Parliament and the Council Directive 2009/24/EC of 23 April on the Legal Protection of Computer Programs [2009] OJ 111/16.

¹¹⁶ Robert Bradgate, ‘Consumer Rights in Digital Products: A Research Report Prepared for the UK Department for Business, Innovation and Skills’ (Institute for Commercial Law Studies, Sheffield University 2010). It has been argued that the interpretation of the definition of ‘goods’ provided by the UK Sale of Goods Act 1979 should lead to the conclusion that computer software products cannot be considered goods but only information. However, a counter argument against such a notion contends that computer software is more than mere information because, after installation, the software usually becomes a part of the hardware and has a direct effect on it; see Rowland, Kohl and Charlesworth (n 56) 453.

¹¹⁷ *ibid* para 8; For example, paragraph 16 of the reports addresses the possible implications of buying the digitized products in respect to the rule of implied terms in the UK Sale of Goods Act 1979, which reads as follows: ‘In the present context the weakness of the implied terms is that they only apply to transactions for the supply of ‘goods’. There is considerable doubt whether a transaction involving the supply of intangible “products” in digital forms can be said to be a transaction relating to goods, it being argued that goods must be tangible (although there is no explicit trace of such a requirement in legislation)’.

¹¹⁸ Rowland, Kohl and Charlesworth (n 56) 441.

¹¹⁹ *Eurodynamics Systems Plc v General Automation Ltd* Unreported 6 September 1998; John N Adams, ‘Software and Digital Content’ (2009) 4 *Journal of Business Law* 396; Kawawa (n 114).

¹²⁰ See *ibid*.

addressed by the ECJ. The Consumer Rights Directive provides a clear criterion regarding the legal characterisation of digitized products in terms of being considered as goods or services. Recital 19 of the Directive states that:

If digital content is supplied on a tangible medium, such as a CD or DVD, it should be considered as goods within the meaning of this Directive ... contracts for digital content, which is not supplied on a tangible medium, should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts.

Thus, according to the Consumer Rights Directive, the online purchase of a computer software or multimedia file that can be downloaded directly from the website onto the buyer's computer is neither a sale of a good nor a sale of a service. The Directive does not provide further provisions regarding the legal implications of such a type of online contract except the rules concerning the consumer's right of withdrawal in such a type of contract. By doing so, this leaves the matter relating to other legal aspects of these kinds of products uncertain.¹²¹ Nevertheless, the Directive still leaves the door open regarding types of digitized products which are not provided in tangible mediums by clarifying that such products are neither goods nor services.¹²² Under those circumstances, a definite conclusion about the legal nature of digitized goods that are not supplied in tangible mediums under EU law might be difficult to draw, and it would be reliant on the national law of each Member State.¹²³ Arguably, it would have been better if the Directive had set up stand-alone rules for contracts, including these types of products.¹²⁴

The distinction between goods and services in terms of digitized products was addressed by the ECJ in *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Linhort*.¹²⁵ The question referred to the ECJ by the Austrian Supreme Court of Justice related to the characterisation of license agreements to distribute DVDs and CDs of a famous singer's concert. The ECJ followed the Advocate General's Opinion and ruled that the 'the license agreement' to transfer the right of DVD and CD distribution did not qualify as 'the provision

¹²¹ Helberger and others (n 113).

¹²² However, in the UK and depending on some case law, it has been argued that contracts, including the supply of information, should be regarded as a sale of goods not services. See (n 114).

¹²³ See also N Helberger and others (n 113).

¹²⁴ In favour of this notion see also *ibid*.

¹²⁵ Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Linhort* [2009] ECR.

of service' within the meaning of the second indent of Article 5 (1) (b) of the Brussels Regulation.¹²⁶ More specifically, the ECJ stressed that:

The second indent of Article 5 (1) (b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, is to be interpreted to the effect that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for provision of service within the meaning of that provision.¹²⁷

In the author's opinion, it seems unwarranted to specify that the sale of intangible downloadable products on websites should not be deemed sales of goods. To illustrate this, any person can go to any computer shop and buy software in CD format inside a cellophane-wrapped package which includes the shrink-wrap license agreement inside the box. Alternatively, the exact same software can also be purchased over the internet by visiting the manufacturing company's website and downloading it directly onto a computer. Arguably, the purchased item, i.e., the software license, in both cases is intangible; it is just the medium that is different. There might be no point in distinguishing between the software stored on a CD and the same software stored on the website server.¹²⁸ In any event, the determination of the legal characterisation of digitized goods looks set to remain an unsettled matter in EU law and the rule may certainly vary between Member States, especially with the absence of the ECJ ruling in this regard.

¹²⁶ Veronika Gaertner, 'AG Opinion on the Interpretation of Art. 5(1) of Brussels I Regulation' (*Conflict of Laws.Net*, 28 January 2009) <<http://conflictoflaws.net/2009/ag-opinion-on-the-interpretation-of-art-5-1-brussels-i-regulation/>> accessed 7 April 2014.

¹²⁷ Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Linhort* [2009] ECR, para 1. However, this is not the only case where the ECJ tackled the question of distinguishing between contracts of sale of goods and contracts for the provision of services. In C-381/08 *Car Trim GmbH v Key Safety Systems Srl* [2010] ECR I-01255 the ECJ ruled that 'Article 5 (1) (b) [Brussels I] must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5 (1) (b) of that regulation'. See also about this ruling, Veronika Gaertner, 'ECJ: Distinction between "Sale of Goods" and "Provision of Service" in Terms of Art. 5 (1) (b) Brussels I (Car Trim)' (*Conflict of Laws.Net*, 8 March 2010) <<http://conflictoflaws.net/2010/ecj-distinction-between-sale-of-goods-and-provision-of-services-in-terms-of-art-5-1-b-brussels-i-car-trim/>> accessed 7 April 2014.

¹²⁸ In this regard, Svantesson provides a very good example indeed by saying that 'if a consumer purchases a paper version of the Encyclopaedia Britannia in an ordinary bookstore, this is clearly a supply of goods. If the consumer orders a paper version of the encyclopaedia via the Internet, this is also clearly a supply of goods. If the consumer purchases the encyclopaedia via the Internet and takes delivery of a digitized version, this is still a supply of goods. But if the consumer contracts with Britannia.com for online access to the latter's database, the consumer contracts for the supply of a service'; see Svantesson (n 110) 432.

In the US, the situation is clearer regarding the legal characterisation of digitized goods.¹²⁹ Although the UCITA does not provide guidance on this, the courts, in relying on the definition of ‘goods’ in the UCC, have been in favour of considering the digitized products as goods not services. In *Wachter Mgt Co v Dexter and Chancy, Inc.*,¹³⁰ the court ruled that the contract that included a sale of computer software should be considered a sale of goods pursuant to the UCC even though the contract itself also included a clause by which the seller was required to provide a training session on how to use the software.¹³¹ In the author’s view, although there are no explicit statutory rules or available case law that distinguish between tangible and intangible goods, the situation under Iraqi law does not raise considerable doubts. The definition of moveable property according to Iraqi law, in theory, encompasses tangible and intangible objects.¹³² Selling intangible digitized products, such as computer software, games, and digital, audio or video files instantly on websites would be considered a sale of goods and not services under Iraqi law.

One might wonder what the value is of distinguishing between sale of goods and sale of services in terms of the application of law, especially the jurisdiction and applicable law matters. In this regard, Hill provides an accurate analysis of the potential legal implications of distinguishing between ‘goods’ and ‘services’, particularly in cross-border online consumer contracts. According to Hill, the first problem arises in the application of paragraphs (a) and (b) of Article 15 of the Brussels Regulation where the consumer is given the protection in terms of sale of goods on ‘instalment credit terms’¹³³ and ‘a loan repayable by instalments’¹³⁴ without extending the protection to cover contracts for the sale of services.¹³⁵ Moreover, he sees that the distinction between goods and services raises similar questions in the consumer protection rules in Article 5 of the Rome Convention. This distinction may not raise further questions after the replacement of Article 5 in the Convention by Article 6 in the Rome Regulation, which now uses more neutral language by using ‘consumer contract’ which certainly encompasses both the sale of goods and services.¹³⁶ The main implication of

¹²⁹ Adams (n 119).

¹³⁰ *Wachter Management Co v Dexter & Chaney Inc* 282 Kan 365, 144 P3d 747 (2006); Juliet M Moringiello and William L Reynolds, ‘Survey of the Law of Cyberspace: Electronic Contracting Cases 2006-2007’ (2007) 63 *Business Lawyer* 219.

¹³¹ See *ibid.*

¹³² See (n 108).

¹³³ Brussels Regulation, article 15 (a).

¹³⁴ Brussels Regulation, article 15 (b).

¹³⁵ See Hill (n 23) 30.

¹³⁶ See also Peter Rott, Hans-W Micklitz and Norbert Reich, *Understanding EU Consumer Law* (Intersentia 2009) 283.

distinguishing between the goods and services may appear under the application of consumer protection laws, especially within the framework of EU law where some of the consumer protection rules have been deemed to include the consumer purchase of goods but not services.¹³⁷

3.5 TIMING & LOCATION

The question regarding *when* and *where* the contract is concluded is not a novel issue and its history can be traced back to the time when distance contracting prevailed and the postal rule had evolved.¹³⁸ It can be said that the meaning of *when* and *where* may have become difficult to deal with in cases of electronic contracting.¹³⁹ Historically, the application of the postal rule to contracts concluded over distance has not had any problematic issues associated with it.¹⁴⁰ Arguably, as far as online contracts on websites are concerned, the postal rule may still be relevant for determining the time and the place of concluding some types of online contracts, but probably only in those jurisdictions which do not yet have regulatory laws for electronic transactions. The question of when and where the online contract has been concluded might be of particular importance for private international law, as the proper determination of these two factors is particularly relevant to solving the jurisdiction and applicable law issues in online contracts.¹⁴¹

It can be argued that the legal implications of determining the place where the online contract is concluded is more relevant to this thesis than issues related to the determination of the timing in online contracts. This is due to the fact, as will be shown in the coming chapters, that most connecting factors in private international law used to determine the jurisdiction and applicable law issues in contractual obligations are mainly based on geographical

¹³⁷ Svantesson (n 110) 432; Bradgate (n 116). Most importantly, Adams argues that the absence of proper consumer laws targeting the legal issues regarding the consumers' purchase of downloadable digitized products over the Internet website may have a profound impact in depriving the European consumer from being protected by their national law when purchasing such a kind of product from non-European merchants such as American businesses; see Adams (n 119).

¹³⁸ *Adams v Lindsell* [1818] EWHC KB J59; Murray (n 15).

¹³⁹ Sara E Smith, 'The United Nations Convention on the Use of Electronic Communication in International Contracts (Cuecic): Why It Should Be Adopted and How It Will Affect International E-Contracting' (2008) 11 *SMU Science & Technology Law Review* 133;

نورا كاظم الزامل، 'ميعاد أبرام العقد الإلكتروني' (٢٠٠٩) ٢ مجلة القادسية للعلوم القانونية والسياسية ٣٤٥
Noora Khadhim AL-Zamily, 'The Time of Electronic Contract's Conclusion' (2009) 2 *AL-Qadysia Journal of Law and Politics* 345.

¹⁴⁰ Murray (n 15).

¹⁴¹ Wang (n 73) 63.

elements. Such as the place of contract formation, the place of contract performance or the place of the seller's residence.¹⁴² This does not mean that the timing of contract formation does not have any legal significance on issues of conflict of laws. For example, under Iraqi law, the applicable law to the legal activity regarding a moveable property should be determined by relying on the law of the country where the moveable property exists at the time of occurrence of the legal activity.¹⁴³ It is argued that such a rule governs only specific types of moveable properties where the requirement of formality is considered necessary in order for the legal activity to be deemed valid.¹⁴⁴ In such instances, the legal activity on the moveable property cannot take effect without satisfying these formalities, which could be the requirement of writing the contract, the actual handling of the moveable property or the registration of the legal activity in the competent governmental authority offices.¹⁴⁵ Apart from jurisdiction and applicable law issues, determining the time of the online contract formation would also be relevant in cases such as identifying the proper moment when the ownership of the property should be transferred, and the acceptor party's right in revocation before the contract becomes legally binding.¹⁴⁶

3.5.1 The Timing in Online Contracts

Generally speaking, the contract shall be concluded at the time that unequivocal acceptance meets the offer to constitute a valid and binding agreement.¹⁴⁷ This process generally remains unambiguous when traditional face-to-face contracting is examined; however, when it comes to the practice of online contracting over the internet, the situation could be argued to merit

¹⁴² Bernhard Maier, 'How Has the Law Attempted to Tackle the Borderless Nature of the Internet?' (2010) 18 International Journal of Law and Information Technology 142 <<http://ijlit.oxfordjournals.org/cgi/doi/10.1093/ijlit/eaq001>> accessed 7 May 2014.

¹⁴³ المادة ٢٤ من القانون المدني العراقي: "يسري بالنسبة للمنقول قانون الجهة التي يوجد فيها هذا المنقول وقت وقوع الامر الذي ترتب عليه كسب الحق او فقده"

[Article 24 of the Iraqi Civil Law Code: "movable property shall be governed by the law of the country where it exists in the time of occurrence the legal activity on it".]

¹⁴⁴ غالب علي الداوودي وحسن محمد الهداوي, القانون الدولي الخاص: تنازع القوانين- تنازع الاختصاص القضائي- تنفيذ الأحكام الأجنبية (الطبعة الثالثة, دار العاتك للنشر (٢٠٠٩) ص ١٥٠

[Ghalib Ali AL-Dawoodi and Hassan Mohammed AL-Haddawi, *Private International Law: Conflict of Laws, Conflict of Jurisdiction and Enforcement of Foreign Judgments* (3rd edn, AL-Attick Publishers 2009) 150.]

¹⁴⁵ ibid 150.

¹⁴⁶ Jeff C Dodd and James A Hernandez, 'Contracting In Cyberspace' (1998) 201 Computer Law Review and Technology Journal 1; Abdulrahman Alzaagy, 'The Time of Concluding the Contract in E-Commerce from Islamic Legal Perspective' (2012) 6 CyberOrient <<http://www.cyberorient.net/article.do?articleId=8029>> accessed 7 May 2014.

¹⁴⁷ Edwin Peel, *The Law of Contract* (13th edn, Sweet & Maxwell 2011) 25.

different analysis.¹⁴⁸ At first glance, it may seem that the traditional postal rule that applies in distance contracts should also apply to determine the time of contract formation on websites, similar to the process of offer and acceptance exchange through fax and email. When applying the traditional norms to determine the timing of online contract formation over a website, some scholars have observed that website communications do not benefit from the norms of the postal rule in terms of identifying the proper time of concluding the contract, and it would be more logical to consider website contracting in the same way as instantaneous contracting over a telephone line.¹⁴⁹

In the author's opinion, the instantaneous nature of website contracting is not a matter of dispute; however, it is argued that the analogy between contracting over a website and contracting over a telephone line, and assuming that the contract is concluded at the time when the online buyer presses the 'place order' or 'buy it now' button, might not reflect the actual practice of website contracting in some cases.¹⁵⁰ In other words, the affirmative expression of acceptance over the telephone by saying, for example 'yes' or 'sure' where the contractual parties can hear and probably know each other, might not be comparable to clicking on 'place order' or 'buy it now' on a website where each party is anonymous and at least one of them is a pre-programmed automated machine. This analysis comes up against a problem when distinguishing between the offer and invitation to treat of website advertisements for goods and services. This will be analysed in-depth in Chapter four of this thesis; however, a very concise analysis is necessary here to clarify the author's view. It is not always true to assume that the online contract over a website is concluded at the moment of clicking the 'place order' button, as the website display of goods with their prices may not constitute a valid offer but only an invitation to treat.¹⁵¹ This is especially so if the traditional

¹⁴⁸ Alzaagy (n 146).

¹⁴⁹ See Murray (n 15); In this regard, Murray argues that: 'The best way to imagine the transfer of data between the computers is to treat it as a telephone conversation between computers rather than two individuals'; see also Amelia Rawls, 'Contract Formation in an Internet Age' (2009) 10 *The Columbia Science and Technology Law Review* 201; Dodd and Hernandez (n 146). The same notion is upheld by some Iraqi academics. For example see:

محمد جمال محمد طاهر, 'التعاقد بين حاضرين وخصوصيته في عقود التجارة الإلكترونية' (٢٠١٢) ١٢ مجلة الرافدين للحقوق ٤٢
[Mohammed Jamal Mohammed Tahir, 'Instantaneous Contracting and Its Particularity in Electronic Commerce Transactions' (2012) 12 *Rafidain Journal of Law* 42.]

¹⁵⁰ In favour of this argument, some have argued in similar terms that: 'Therefore, if the present internet cannot be regarded as being analogous to the telephone or telex, the rules on instantaneous communication should not apply ... It would seem therefore that neither the rules on instantaneous communication nor postal acceptance can slavishly be applied to the Internet'; see Smith (n 1) 816.

¹⁵¹ See Chapter Four of this thesis. However, in favour of the same argument, see Valerie Watnick, 'The Electronic Formation of Contracts and the Common Law 'Mailbox Rule' (2004) 56 *Baylor Law Review* 175. Watnick argues that: 'While the layman may think it patently clear that a contract has been formed when the consumer leaves the website and has committed to pay for something, other legal commentators have posited

common law approach is taken into consideration.¹⁵² Some websites, upon placing the internet order, send notification to the buyer stating that his/her order is being processed and the sale will be completed once the shipping notification is sent to the purchaser.¹⁵³ In such instances, it cannot also be assumed that the online contract has been concluded upon clicking on the 'place order' icon. Accordingly, as far as this part of the analysis is concerned, the analogy between the website and the telephone may not appear very accurate and different factors should be taken into account, such as the difference between the common law and civil law approaches, the technical structuring of the website itself, and the customary rules of the internet and electronic commerce transactions.¹⁵⁴

In the EU, the E-commerce Directive does not lay down direct rules that determine the time of concluding the electronic contract. Article 10 (1) (a) of the Directive provides a general rule that requires the service provider to determine 'clearly, comprehensively and unambiguously and prior to the order being placed, the different technical steps to follow to conclude the contract'.¹⁵⁵ Without doubt, although no explicit rules for the timing of electronic contract formation are set forth in this Article, the Directive makes it a strict obligation that the retailer or service provider should technically optimize his website in a way that the time of concluding the contract should become clear to the other party and that this should be done prior to placing the order. One possible and common solution to comply with such a requirement is by incorporating clauses into the website terms and conditions stating explicitly the moment when the contract becomes binding.¹⁵⁶ As for online consumer contracts, the Consumer Rights Directive provides more specific rules regarding the timing of the contract conclusion in case of distance communications to ensure that consumers are well-informed as to the time when they are in a binding agreement. Article 8 (2) of the Directive states that:

The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with

that this ultimate "checking out" may really be an offer to purchase by the consumer? If this is the case, how and when does the other party manifest his acceptance? The answer to this question is not clear under existing common or statutory law'.

¹⁵² *Fisher v Bell* [1961] 1 QB 394; Catherine Elliott and Frances Quinn, *Contract Law* (9th edn, Pearson 2013) 15.

¹⁵³ Such as the Apple process of online purchase over its online store <http://www.apple.com/uk/>. See the present author's analysis of this point in the next chapter.

¹⁵⁴ As it has been said above, this point will be discussed thoroughly in Chapter 4 of this thesis.

¹⁵⁵ E-commerce Directive, article 10 (1) (a).

¹⁵⁶ Reed (n 55) 203-204.

the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.

In the US, the UETA provides rules to determine the time when the electronic acceptance has been sent and received;¹⁵⁷ however, they do not determine the time when the electronic acceptance becomes valid and binding. Although its scope does not cover all types of online contracting, such a determination has been well-determined in the UCITA which sets out rules that explicitly determine the time of concluding the contract by stating that the electronic acceptance should become valid from the time when it reaches the offeree.¹⁵⁸ Even though the application of UCITA has been limited to computer information transactions, it has been argued that the US courts might be in favour of applying the receipt rule rather than dispatch rule when determining the time when the electronic acceptance should take effect by relying on some precedents of US courts,¹⁵⁹ and the statutory provision of the Restatement Second of Contract.¹⁶⁰ Such a notion has also been upheld by some American scholars who have argued that the postal rule has no place when an electronic instantaneous means of contracting is used to reach a binding agreement.¹⁶¹

Under Iraqi law, the rule of receipt is applied. However, simply receiving acceptance is not enough to assume that the contract has been concluded; the offeror should also have become aware of the arrival of the acceptance to his mail box or email inbox.¹⁶² Acceptance becomes valid when the offeror is informed of it.¹⁶³ The application of this rule to the offer and acceptance made over websites should not create any controversial issues; however, it might be necessary to have confirmation of the receipt of the acceptance by the website operator in

¹⁵⁷ UETA § 15.

¹⁵⁸ UCITA § 203 (4) (a).

¹⁵⁹ *Romala Corp v United States* 20 Cl Ct 435, 443 (1990); Rawls (n 149).

¹⁶⁰ § (64) of the Restatement Second of Contracts provides that: 'Acceptance given by telephone or other medium of substantially instantaneously two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other.'

¹⁶¹ See Professor Allan Farnsworth, 'Contracts § 3.6 (1990)' cited by Rawls (n 149).

¹⁶² المادة (٨٧) من القانون المدني العراقي: "١. يعتبر التعاقد ما بين غائبين قد تم ف المكان والزمان اللذين يعلم فيهما الموجب بالقبول مالم يوجد اتفاق صريح أو ضمنى أو نص قانوني يقضي بغير ذلك. ٢. ويكون مفروضاً أن الموجب قد علم بالقبول في المكان والزمان اللذين وصل اليه فيهما."

[Article (87) of the Iraqi Civil Code Act: '1. A contract between parties at distance shall be concluded at the time, and in the place where the offeror gets informed with offeree's acceptance unless stated by agreement any other provision. 2. Such a determination supposed to have been done at the time, and in the place where the acceptance has been received.'].
انظر: عبدالمجيد الحكيم, عبدالباقى البكري و محمد طه البشير, الوجيز في نظرية الألتزام في القانون المدني العراقي (الجزء الأول) - مصادر الألتزام (١٩٨٠) مطابع وزارة التعليم العالي والبحث العلمي ٤٨

[Abdull Baki AL-Bikry and Mohammed Taha AL-Basheer Abdull Majeed AL-Hakeem, *The Theory of Civil Obligation in The Iraqi Law* (Ministry of Higher Education and Scientific Research 1980)].

¹⁶³ Tahir (n 149).

order to prove the exact time when the contractual obligations became due. By confirming this rule, the IESTA has laid down that an electronic document shall be regarded as sent at the time that it enters into the recipient's data processing unit.¹⁶⁴

Based on what has been said above, the author believes that the following holds true about the timing of contract formation over websites. In the case of an absence of rules dealing with electronic transactions, traditional postal rules may apply to those websites which only make invitations to treat but not legally binding offers. In such occasions, the contract could be concluded at the time when the seller sends a confirmation email to the purchaser stating that the offer has been accepted and the contract has been concluded. If the display of goods on the website were to be considered a valid offer and not just an invitation to treat; the contract would be deemed concluded at the time of clicking the 'buy it now' icon. Nevertheless, because of the special characteristics of website communications which distinguish it from telephone conversations where the contractual parties over the website do not know, see, or hear each other, a further action would be required to ensure that the online contract has been concluded at the time of placing the internet order. This action could be done, for instance, by an instantaneous window pop up message or automated email which would appear or would be sent simultaneously as the website order was placed.¹⁶⁵

المادة (٢٠ / أولاً) من قانون التوقيع الإلكتروني والمعاملات الإلكترونية العراقي: "تعد المستندات الإلكترونية مرسلية من وقت دخولها نظام معالجة معلومات لا يخضع لسيطرة الموقع أو الشخص الذي أرسلها نيابة عنه مالم يتفق الموقع والمرسل إليه على غير ذلك"

It is necessary here to briefly review the rules regarding the time of dispatch and receipt of electronic communications set forth in the United Nations CUECIC. The writer agrees with the notion that this Convention could be of particular significance for those countries that do not yet have regulatory rules for electronic transactions. The adoption and application of this Convention as a national law would greatly enhance the legal certainty of electronic-commerce transactions in such countries. See Luca G Castellani, 'The United Nations Electronic Communications Convention - Policy, Goals and Potential Benefits' (2010) 19 Korean Journal of International Trade & Business Law 1. Article 10 of the Convention provides thorough rules for the time of dispatch and receipt in electronic contracts by stating that: '1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator, the time when the electronic communication is received. 2. The time of receipt of an electronic communication is the time when it becomes capable of being received by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that electronic communication has been sent to that address. An electronic Communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.'

¹⁶⁵ It is worth noting that such a point has also been addressed by the UK Department for Business, Innovation & Skills in its prepared answer about the Draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations. See Department for Business, Innovation & Skills, 'Draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations' (BIS/13/1113, 2013) <https://www.govuk/government/uploads/system/uploads/attachment_data/file/228497/bis-13-1113-draft-consumer-contracts-information-cancellation-and-additional-payments-regulations.pdf> accessed 18 October 2013. The answer of the UK Department specifically addresses the question of the proper time where the businesses are required to provide the consumer with a confirmation of the purchase in case of selling

2.5.2 The Location in Online Contracts

At the beginning of this section it was demonstrated that the issues arising from determining the place or the country where the online contract is concluded may gain more significance when dealing with private international law matters.¹⁶⁶ Again, the postal rule may still remain relevant when determining the geographical place where the online contract is concluded because, traditionally, the determination of such a place would also have been reliant on the exact time when the contract was legally formed.¹⁶⁷ Consequently, the place where the online contract was concluded would be either the place from which the acceptance was sent (postal rule),¹⁶⁸ or the place where the acceptance was received (the rule of receipt).¹⁶⁹ In both instances, the situation could be seen as problematic in contract formation on websites due to the portability and the borderlessness of internet communications.¹⁷⁰ For example, the offeree may occasionally place his order using a portable smartphone or tablet from a country where he/she is spending the holidays or running a business during a business trip.¹⁷¹ In the same manner, the electronic acceptance may reach the information system of the offeror simultaneously in many countries where the servers, the management of the business website

instantaneous downloadable digital products. Its answer reads as follows: ‘Generally, confirmations should be sent to the consumer once the contract has been concluded and not later than the delivery of the goods or before the commencement of the service. In the case of digital downloads where performance is often immediate, the trader should ensure that the confirmation is sent earlier than, or simultaneously with, the commencement of the download.’

¹⁶⁶ See (n 141).

¹⁶⁷ Glatt (n 61). For example, Article 87 of the ICLC provides that, in case of contracts made by distance communication means, the contract shall be deemed concluded at the time and in the place where the offeror has knowledge of the offeree’s acceptance; see (n 162). Similarly, the traditional postal rule in the common law determines the time and the place of the contract formation from the moment when the offeree dispatches his acceptance to the offeror’s address; Dicey, Morris and Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 377; Julia Hörnle, ‘The Jurisdictional Challenges of the Internet’ in Lillian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 125.

¹⁶⁸ Postal rule and mailbox rule have the same meaning; however, the first designation is more common in the English legal theory, whereas the second is used more by American legal scholars.

¹⁶⁹ Wang (n 73) 63.

Article 10 (3) of the CUECIC states that: ‘An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at place where the addressee has its place of business, as determined in accordance with article 6.’ Article 10 (4) of the CUECIC states that: ‘Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.’

¹⁷⁰ Dan Jerker B Svantesson, ‘The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know about the Internet’ (2005) 13 *International Journal of Law & Information Technology* 39.

¹⁷¹ Hill (n 23) 12.

and the agency branches are located.¹⁷² The same question over whether the website communication is instantaneous also arises here as the determination of the place of contract formation is also reliant on answering this question properly.¹⁷³ The analysis of such a point has been done thoroughly in the previous section so it is not necessary to repeat it here.

What is clear is that such a problematic point could be more manifest in those countries which do not yet have a regulated framework of electronic-commerce transactions. For example, regarding the traditional rule of receipt, the place of the contract formation in a transaction between an American trader and an English business could be done in China where the latter's main manufacturing lines, management of website orders, computer information system and servers are located, and the letter of acceptance was first received.¹⁷⁴ Similarly, the rule of dispatch might not also be better to apply than the rule of receipt as the consumer may place his or her order from a place which does not have any link to the disputed contract, as mentioned above. In such a hypothetical situation, determining the legal jurisdiction where the contract is concluded is not certain enough, and consequently, it would be equally important to find out the proper link between the disputed contract and one of the jurisdictions that the online contract may have a connection with. More analysis on the 'place of contract formation' and its application to online contracting over a website will be carried out in Chapter 5 and 6 of this thesis; however, it is necessary to illustrate here how the laws regulating the framework of electronic transactions have dealt with the place of contracting in electronic commerce transactions.

In the EU, the E-commerce Directive does not provide explicit or implicit rules regarding the place where electronic contracts is formed between businesses within EU Member States, nor have such rules been included in the Consumer Rights Directive regarding B2C contracts.¹⁷⁵

¹⁷² Smith (n 139).

¹⁷³ For example, under English common law, it is a well-established rule that the place of contract formation when entering into contracts by instantaneous communication means, such as telephone or telex, is deemed to be the place where the acceptance was received by the offeror. See *Entores v Miles Far East Corporation* [1955] 2 QB 327 (CA); Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 443.

¹⁷⁴ Reed (n 55) 202.

¹⁷⁵ In fact, although the E-commerce Directive does not provide rules regarding the place of electronic contract formation it is worth noting that the Directive, at the same time, establishes a very important rule regarding the place of establishment of internet sellers who provide their services through the internet in Recital 19 of the Directive which reads as follows: '[The] place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment, it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to his particular

As far as the jurisdiction and applicable law matters are concerned, it could be argued that determining the place where the online contract is formed may not have particular significance under the application of EU private international law. Consumers are well-protected in the EU because they have the right to sue businesses in their home countries and apply the law of their home countries as well. On the other hand, the general rule laid down in the Brussels and Rome Regulations on the jurisdiction and applicable law gives the country where the contractual parties reside the competence rather than the country where the contract is concluded. As for the general jurisdiction rule, the dispute should be heard in the Member State where the defendant is domiciled,¹⁷⁶ whereas the applicable law should be the law of the country where the seller has his habitual residence.¹⁷⁷ Even in special jurisdiction rules set forth in the Brussels Regulation for disputes relating to contractual obligations, the Regulation upholds the place of contract performance rather than the place of its formation as a connecting factor for assigning the proper jurisdiction.¹⁷⁸

In the US, the place of contract formation could be relevant in some states where the applicable law on the contractual obligation relies upon the place of contract formation.¹⁷⁹ In this respect, the US UETA provides very useful rules in facilitating the determination of the place where the electronic contract is concluded. According to the UETA:¹⁸⁰

Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business.

If the traditional postal rule were to be upheld, the online contract would be concluded at the place where the offeree has its principal place of business or residence and regardless of the actual place where, technically, the electronic acceptance was first received, such as the place

service. Such a rule shall play a vital role in jurisdiction and applicable law matters in business-to-business contracts under the Brussels and Rome Regulations, where the place of the seller's residence is the general rule when determining the competent court and applicable law issues.' The same assumption has been also established by the CUECIC in its Article 10 (4) which states that: 'Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where electronic communication is deemed to be received under paragraph 3 of this article'.

¹⁷⁶ Brussels Regulation, article 2 (1), (2). However, the Regulation does not provide a definite interpretation about how such a factor is satisfied under the application of the Regulation. In such a case, the national law of each Member State will decide whether or not natural persons are domiciled in their jurisdictions. See: Reed (n 31).

¹⁷⁷ Rome Regulation, article 4 (a), (b).

¹⁷⁸ Brussels Regulation, article 5 (a), (b).

¹⁷⁹ James Fawcett and Janeen M. Carruthers, *Cheshire, North and Fawcett: Private International Law* (Sir Peter North (ed), 14th edn, Oxford University Press 2008) 666.

¹⁸⁰ UETA, § 15 (d).

where the website servers are located. Conversely, the contract would be concluded in the place of the offeror's business or habitual residence in case the rule of receipt is applied.

In Iraq, the place of the contract formation is a main connecting factor for determining the competent court to hear the contractual dispute¹⁸¹ and a complementary factor for determining the proper applicable law on transnational contractual obligations.¹⁸² Regarding the determination of such a place in contracts concluded at distance using electronic means, the situation under the application of Iraqi law is not much different to the US approach. In order to determine the place where the electronic contract is legally formed, Article 87 of the Iraqi Civil Law Code and Article 21 of the IESTA should be applied in conjunction with each other. More specifically, while Article 87 of the Civil Law Code provides that the acceptance becomes valid from the time when it reaches the offeror and he becomes aware of it, Article 21 of the IESTA stipulates that the electronic record will be deemed to be received at the place where the offeror has its principal business.¹⁸³

Last but not least, it would be important here to refer to the United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC), which provides the same rules as the UETA and the IESTA have applied regarding the place where the electronic communications are sent and received. According to the UN Convention, the electronic record will be considered sent from the place where the offeror has its place of business, and will be deemed received in the principal business place where the offeree is registered.¹⁸⁴ In this regard, the author would agree with the argument that, even though the UN Convention does not deal with private international law issues, namely, the jurisdiction and applicable law and only applies to transnational electronic B2B contracts, it does establish very good grounds for sorting out the problem of jurisdiction and applicable law by setting rules for the time and place of conclusion of electronic contracts.¹⁸⁵ As for consumer contracts, the rules could be adapted by considering the place where the consumer is habitually resident as the presumed place of the contract formation.

¹⁸¹ ICLC, articles 14 and 15.

¹⁸² ICLC, article 25.

¹⁸³ See also جليل الساعدي, "تنازع القوانين في التعاقد عبر شبكة الأنترنت" (٢٠٠٧) ٢٢ مجلة العلوم القانونية ١٣٥.

[Jaleel AL-Saaedy, 'Conflict of Laws on Contracts Concluded Over the Internet' (2007) 22 The Journal of Legal Science 135].

¹⁸⁴ Article 10 (3) of the United Nations, which reads as follows: 'An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6'.

¹⁸⁵ See Wang (n 73) 64.

Finally, and as stated above, further critical analysis on the place of online contract conclusion will be carried out in Chapters 5 and 6 of this thesis. When analysing the issue of the timing and location where the online contract on a website has been concluded, a distinction between two types of binding agreements over the website would seem very important in order to address it from an analytical point of view, as the findings regarding each type could be different. It has been made clear in this chapter that accessing a website to buy goods and products may constitute, from a legal point of view, two different online contracts. The first is the binding agreement between the website operator and the visitor to the website in the terms and conditions of using the website (user agreement). It is more likely that this is a contract for providing a service. The second is the binding agreement between the website as a seller and the visitor as a purchaser buying a product that is offered by the website owner or another third party. This usually comes into effect upon clicking the 'buy it now' or 'place order' buttons. Arguably, both types of website agreements do not raise the same doubts and challenges over the rules of timing and location of contracts. The analysis of this point will be done in Chapters 5 and 6 of this thesis when addressing the jurisdiction and applicable law matters.

3.6 CONCLUSION

It has become part of black letter law that any mutual agreement cannot be deprived of its validity merely because it has been reached by non-traditional means of contracting, as long as the basic requirements of contract formation have been satisfied. The law has acknowledged this fully and applied this fact respectively to different types of non-traditional means of contracting that have appeared over the years, including contracts concluded by post, telephone, telex, fax and email. Presumably, nothing has changed in the basic contract law rules to mean that websites are different from its predecessors as an electronic means to reach legally binding agreements. Website click-wrap and browse-wrap agreements have been held as valid as long as the accepting offeree has been sufficiently notified about them prior to being bound by the contract. Despite what has been just said, the argument can still be made that contracting on websites has some special characteristics that distinguish it from other electronic means of contracting, and which may lead it to represent a challenge to some aspects of contract law. These issues have been analysed briefly in this chapter, such as the sophisticated nature of website terms and conditions (website user agreements), the legal

characterisation of digitized products and whether they are categorized as goods or services, and the determination of the time and location of online contracts on websites.¹⁸⁶

From the perspective of contract law, it has been found that many controversial points arising out of these issues may still remain relevant when addressing online contracts on websites. On the other hand, because the internet has increasingly facilitated the conclusion of cross-border transactions between businesses and consumers alike, factors such as the timing and location of the contract have become more relevant when matters of conflict of laws are examined; more specifically, the jurisdiction and applicable law issues over transnational online contracts. Hence, the role of this chapter among the other chapters of this thesis is clearer. It acts as a preliminary step prior to the analysis of the main theme of this thesis which falls mainly within the conflict of laws area in relation to the transnational online contracts. Finally, it is important to mention that most of the law reforms examined under this chapter have targeted the regulation of the framework of the electronic commerce transactions rather than aiming to regulate the proper settlement of its disputes as well. As a result, the analysis of the application of traditional private international law on contractual obligations to online contracts on websites will be the aim of this thesis in its upcoming chapters.

¹⁸⁶ The writer will carry out in-depth analysis of these issues in the upcoming chapters of this thesis.

CHAPTER FOUR

PRE-DISPUTE STAGE: SELECTED PROBLEMATIC ISSUES

4.1 INTRODUCTION

In the previous two chapters it was determined that the internet has directly affected some areas of law and that it has become difficult for well-established legal norms to govern fast-paced development of technology. One of the areas that has been considerably challenged by the technological characteristics of the internet is the conflict of laws rules.¹ Before starting to analyse how these rules have dealt with disputes relating to on-line contracting cases, it is necessary to examine first why the on-line contracting process itself is problematic in some specific occasions, and what exactly are the issues that make online contracts so controversial and more difficult to settle. It can be argued that the law of online contracting has matured and become a well-established topic in contract law.² It is also argued that certain issues may still be emerging and are the focus of some scholarly and judicial debate.³ The link between this chapter and the following chapters is very close: this chapter will identify the reasons for disputes in online contracting processes on websites; and the following chapters will address them. More specifically, this chapter will highlight some selected issues that could be the reason for the frequent occurrence of contractual disputes when contracts are concluded on websites or electronic marketplaces. Certainly, the theme of this chapter will be more related to contract law than private international law; however, this is inevitable and necessary in this field of study.

4.2 INVITATION TO TREAT & OFFER IN ONLINE CONTRACTS

In the traditional practice of contract formation, the process usually starts when one party invites the other to make a deal and this is then followed by an offer. The contract is concluded upon the acceptance of such an offer, provided that both parties have promised

¹ The narrow sense of the conflict of laws rules is intended here, which encompasses only the jurisdiction and applicable law matters.

² Juliet M Moringiello and William L Reynolds, 'Electronic Contracting Cases 2008-2009' (2009) 65 Business Lawyer 317.

³ Juliet M Moringiello and William L Reynolds, 'Electronic Contracting Cases 2009-2010' (2010) 66 Business Lawyer 1..

each other to fulfil a valid consideration.⁴ Each of these steps is assumed to be distinct from each other and they should not, under normal circumstances, raise any considerable issues in such regard.⁵ When it comes to online contracting practices, the matter could be slightly different, particularly in cases where the contracting occurs on a website.⁶ Statutorily, electronic contracting legislation in both the EU and the US, namely, the E-commerce Directive, the UCITA and the UETA, are silent about the matter of a distinction between the offer and invitation to treat in the buying and selling process on the internet.⁷ This is also the case with the IESTA. On the other hand, although it does not address the issue on websites specifically, the CUECIC provides a direct provision about this issue by stating that the proposal to make a contract via electronic communications should be regarded as an invitation to treat but not an offer.⁸

Traditional rules governing the invitation to treat, offer and the acceptance in traditional contracts differentiate between auction sale contracts and shop display contracts.⁹ Even though the main theme of this thesis deals with one type of online contract, contracts that take

⁴ Edwin Peel, *The Law of Contract* (13th edn, Sweet & Maxwell 2011) 72; Max Young, *Understanding Contract Law* (Routledge-Cavendish 2010) 60. Interestingly, some have argued that the consideration as a requirement of a valid contract formation only exists in the common law regime; see Hasan A Deveci, 'Consent in Online Contracts: Old Wines in New Bottles' (2007) 13 *Computer and Technology Law Review* 1. The author of this article states that: 'It is basic, black letter law that there are three stages to a contract: the invitation to treat, the offer and the acceptance. In common law, but not in civil law, there is also the requirement of consideration: representing the value (financial worth) of an exchange in the bargain.' To a great extent, the writer does not agree with this argument. Consideration is a basic pillar of a valid contract in the civil law regime as well. For example, under the Iraqi civil law system, Article 126 of the ICLC provides that:

المادة ١٢٦ من القانون المدني العراقي تنص على انه: "لا بد لكل التزام نشأ عن العقد من محل يضاف اليه يكون قابلاً لحكمه, ويصح ان يكون المحل مالاً, عيناً كان أو ديناً أو منفعة, أو أي حق مالي آخر كما يصح أن يكون عملاً أو امتناعاً عن عمل"

[Any contractual obligation should be fulfilled in accordance with a valid consideration. Consideration could be money, credit or any financial worth right; it also can be an agreement to do a specific job or abstain from doing it.] For more details about the theory of consideration in contract law see Stephen Waddams, 'Principle in Contract Law: The Doctrine of Consideration' in Richard Bronaugh, Stephen GA Pitel and Jason W Neyers (eds), *Exploring Contract Law* (Hart Publishing 2009) 51.

⁵ However, under the common law, it might be difficult sometimes to distinguish between an offer and an invitation to treat as the sole criterion for distinguishing between them is mainly dependent upon the intention of the party. See Peel (n 4) 11, 12; Robert Upex and Geoffery Bennett, *Davies on contract* (10th edn, Sweet & Maxwell 2008) 8. Even in the Iraqi civil law system, the ICLC does not provide any definitions for the invitation to treat, offer or the acceptance except in Article 79 which provides that an offer could be made in any form that clearly reveals the intention of the party to make a valid offer, such as writing, speaking or gesticulating.

المادة ٧٩ من القانون المدني العراقي: "كما يكون الأيجاب أو القبول بالمشافهة يكون بالمكاتبة وبالإشارة الشائعة الاستعمال ولو من غير الآخرس وبالمبادلة الفعلية الدالة على التراضي وبأخذ أي مسلك آخر لا تدع ظروف الحال شكاً لأدلته على التراضي."

⁶ Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 24.

⁷ Sylvia Mercado Kierkegaard, 'E-Contract Formation: US and EU Perspective' (2007) 3 *Shidler Journal of Law, Commerce & Technology* 12.

⁸ Article 11 of the Convention reads as follows: 'A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information system, including proposals that make use of interactive application for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.'

⁹ See Peel (n 4) 12, 13.

place on websites,¹⁰ the analysis will focus on two types of sales: online auction sales and website sales because these two types appear to be the most comparable to traditional auction sale and shop display sale contracts. More specifically, online sale contracts¹¹ that take place over the internet are mainly concluded over two types of websites: those of traders, retailers and manufacturers, and those that function as virtual marketplaces, so-called internet or electronic marketplaces.¹²

4.2.1 Online Auctions¹³

In the traditional common law system, offering goods for sale by auction is not deemed an offer but an invitation to treat.¹⁴ The offer is made when the item receives the highest bid, and the acceptance occurs when the auctioneer approves such a bid, provided that no reserve has been lodged with the auctioneer.¹⁵ The same rule is applicable in the Iraqi civil law system.¹⁶ Applying such a rule in online auction sales may result in a sort of uncertainty, in particular, on the question regarding the listing of items for sale on the online auction websites and whether such a listing is considered as a valid offer or just an invitation to treat.¹⁷

¹⁰ Website contracts encompass two main categories; contracts concluded on electronic marketplaces and contracts done on retailers or manufacturers' websites. This point has already been discussed in the previous chapter.

¹¹ The general meaning of online contracts is meant here; these include B2B, B2C, C2B, and C2C.

¹² Electronic marketplaces can be defined as systematic virtual places where businesses can advertise and offer their products, and consumers can choose and buy a wide variety of products. The whole contracting process of offer, acceptance, payment and sometimes the delivery are all done electronically and online with a significant level of ease and efficiency; see Troy J Strader and Michael J Shaw, 'Electronic Markets: Impact and Implications' in Troy J Strader Shaw, Michael J, Robert W Blanning (eds), *Handbook on electronic commerce* (Springer 2000); see also Martin Grieger, 'Electronic Marketplaces: A Literature Review and a Call for Supply Chain Management Research' (2003) 144 *European Journal of Operational Research* 280.

¹³ The analysis here is beyond the point of comparison between the traditional auction and online auction, and whether the rules governing the traditional auction can be applied to the online auctions. It is also beyond the parameter of this thesis to do so; however, this point has briefly discussed in somewhere else of this thesis; see Chapter 5.

¹⁴ Peel (n 4) 12.

¹⁵ *ibid* 12. This rule is also applied in US statutory provisions in § 2-328 of the UCC which reads as follows: '(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.'

¹⁶ المادة ٨٩ من القانون المدني العراقي تنص على انه: "لا يتم العقد في المزادات الا برسو المزايدة ويسقط العطاء بعطاء ازيد ولو وقع باطلا أو بأقفال المزايدة دون ان ترسو على احد. هذا مع عدم الاخلال الواردة في القوانين الاخرى.

Article 89 of the ICLC: [No valid contract shall be concluded in auction sales unless the highest bid is received, and the auctioneer has approved it. A tender shall be aborted with the presence of another higher bidder even though the latter might be invalid.] However, the Iraqi law does not provide any further rules regarding the cases where the auction can be made with or without reserve.

¹⁷ Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information Technology Law* (4th edn, Routledge 2012) 241.

In the EU, the E-commerce Directive does not address this issue.¹⁸ In addition, the European Parliament and the Council's Proposal for the Regulation on a Common European Sales Law¹⁹ (CESL) does not include any interpretative provision concerning such a question, although a separate section has been allocated in the regulation for 'Contracts Concluded by Electronic Means'.²⁰ It seems that such a matter is for the national laws and courts in each Member State to determine. They need to consider whether making goods available for sale in the online auction site constitutes an offer or just an invitation to negotiation. There are only a few EU cases regarding such an issue; however, a couple of interesting cases can be found in Germany and the Netherlands.

In Germany, in *Ricardo.de*,²¹ the Federal High Court ruled that posting items for sale on an online auction website should be regarded as a valid offer and the highest bid should be considered an acceptance. A binding contract should be concluded when the acceptance (highest bid) occurs regardless of whether it is significantly less than the actual price of the offered item. The claimant in this case was a consumer who won an auction of a car offered for sale through an online auction website. The seller set up a minimum starting price from which the auction should have started (approximately 50% less than the actual value of the car. Unfortunately, the car only received one bid by the end of the determined time and this was equivalent to the starting price set by the seller. The claimant made the payment and contacted the buyer to organise delivery. The seller refused to sell the car at that price and argued that there was no binding contract between them because he had only made an invitation to treat and was not committed to accepting any offers (bids).²² Interestingly, the

¹⁸ See also Hill (n 6) 24.

¹⁹ Commission, 'Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law' COM (2011) 635 final.

²⁰ *ibid* part II, Ch 2, Sec 3. Article 24(3)(a) provides that: 'The trader must provide information about the following matters before the other party makes or accepts an offer: The technical steps to be taken in order to conclude the contract'. This obligation is already provided in the E-commerce Directive in Article 10(1)(a). In fact, although this Article does not refer to any criterion that can be used to distinguish between the offer and the invitation to treat in online contracts in general, it provides a good standard that, if it applies, it would make the pre-contractual steps to conclude the online contracts very clear. Consequently, the question of whether it is an offer or an invitation to treat would not arise.

²¹ *Ricardo.de* BGH, 7 November 2001, Az VIII ZR 13/01. See also Peer Zumbansen, 'Contracting in the Internet: German Contract Law and Internet Auctions' (2001) 7 German Law Journal <<http://www.germanlawjournal.com/article.php?id=65>> accessed 7 May 2014; Rowland, Kohl and Charlesworth (n 17) 241; Hans-W Micklitz, Jules Stuyck and Evelyne Terry (eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 200.

²² Surprisingly, the terms and conditions of the online auction's website, to which both the parties agreed, provided that offering goods on the website for sale should be regarded as an invitation to treat but not an offer; however, at the same time it provided that the seller was required to accept the highest bid. In the writer's opinion, such a clause in the website's terms and conditions was set down to grant the buyer the choice to

District Court of Münster²³ upheld the seller's argument and ruled to nullify the online contract. It did so by relying on the German auction law²⁴ which states that offering goods through auction platforms is an invitation to treat but not an offer. Moreover, the court held that it was illogical to expect the seller to accept to sell the car at a price that was 50% less than its real value on the market.²⁵ Not surprisingly, the ruling of the District Court was reversed on appeal by the Appeal Court of Hamm.²⁶ Instead of relying on the German auction law, the court based its decision on the website's terms and conditions which clearly provided that sellers are committed to accepting the highest bidder's offer. In addition, the court reached the conclusion that listing the car on the online auction website could be considered an offer and not just an invitation to treat – in accordance with the nature and the custom of internet buying and selling.²⁷ The conclusion which the Court of Appeal reached was affirmed later by the German Federal High Court.²⁸

The German courts²⁹ in this case were challenged to prioritise between two options: applying the traditional auction law and relying on the logical facts and circumstances of the case on the one hand, and upholding the terms and conditions of the online auction website and taking into account the custom and practice of the internet on the other. It seems that the trial court attempted to infer the real intention of the seller in order to find out whether he was seriously willing to make an offer when he set up a minimum starting bid price for the car. It also appears that the trial court may have been more sympathetic than relying on facts in this case as it found it illogical that someone would accept to sell his car at a price which was 50% less than its real value. In order to provide its legal reasoning the court relied on the statutory German law on traditional auctions, ignoring the terms and the conditions of the website to which both the parties had agreed. The trial court did not base its ruling on factors such as the user agreement of the online auction website being unconscionable or not clearly presented enough nor was such a plea argued by the defendant in the trial. It is quite illegitimate for the court not to validate the terms and conditions of use of the online auction

revoke his bid in case no other bids were placed. See Zumbansen (n 21); Rowland, Kohl and Charlesworth (n 17) 241.

²³ Landgericht Münster.

²⁴ BGB, § 156.

²⁵ Zumbansen (n 21).

²⁶ Oberlandesgericht Hamm.

²⁷ See Zumbansen (n 21).

²⁸ See Rowland, Kohl and Charlesworth (n 17) 241.

²⁹ The Court of First Instance, the Court of Appeal, and the Federal High Court.

website. As a result, the ruling of the trial court was overruled by the Court of Appeal, and its ruling was subsequently affirmed by the Federal High Court.

In the Netherlands, courts have reached similar conclusions. In *Exco Cars BV v X*, a case between a Dutch business and a German consumer³⁰ the Den Bosch Court of Appeal reviewed the verdict of the Court of First Instance regarding the distinction between an offer and an invitation to treat in an auction sale contract concluded over eBay's website. A Germany-resident defendant, X, bought a car engine from the claimant *Exco cars*, a company based in the Netherlands over eBay through an online auction process. Prior to placing his bid, X emailed the buyer enquiring about the cost of the item's shipment to Germany. This was determined at €100 by the seller in its reply to the buyer's enquiry. Having agreed to the seller's condition, X placed his bid and won the item. This was confirmed by an email sent to him from eBay and, accordingly, he sent payment to the seller, including the shipping cost. Two days after winning the item and making the payment, X received an email from the seller asking him to make an extra payment of €600 as a shipping cost and return his old engine. Upon rejecting the seller's new terms and conditions regarding the extra shipment cost and the demand for the old replaced engine, X received a notification of payment refund from the seller, informing him of the cancellation of the sale.

X brought proceedings against the seller before the District Court of Hertogenbosch claiming that the seller had failed to fulfil his contractual obligation of delivering the good because he did not have the right to change the terms and conditions of the sale after the sale contract had legally been concluded. In his pleading, the seller argued that there was no binding agreement because his advertisement on the eBay website was only an invitation to treat and no valid offer was made. As regards the confirmation email which had been sent to the buyer, the seller argued that it had not been issued by him but by eBay's automated mail system. Consequently, he was not liable for it because it was sent without his consent. When examining such an argument, the District Court found that listing items for sale on an eBay auction qualified as a valid offer and the highest bid should be regarded as an acceptance of that offer. The court reached the verdict that *Exco* had made a valid offer and the contract had

³⁰ *Exco Cars BV v X* Court of Appeal Den Bosch 14 July 2008, LJN BE0004; Huub de Jong, 'Contracting online – a review of recent Dutch cases' (*Bird & Bird*, 10 May 2010) <<http://www.twobirds.com/en/news/articles/2012/contracting-online-review-recent-dutch-cases-050510>> accessed 7 May 2013. The name of the defendant is not revealed by the court in its official transcript and therefore it is referred to as X. This may be attributed to privacy related issues. The original verdict of the Dutch Court can be found through the following link: <<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSHE:2008:BE0004>> accessed 7 May 2014.

been concluded when the highest bid had been received. The seller was thus obliged to fulfil his consideration. *Exco* appealed against the decision of the District Court but, unsurprisingly, the Den Bosch Court of Appeal upheld the ruling.³¹

Apart from the interesting point that was raised about the automatically generated emails that are sent to buyers upon placing their bids or orders,³² the findings of both the District Court and the Court of Appeal seem quite logical. It is crucial that when examining the question of the eBay listing, and whether it is an offer or only an invitation to treat, the characteristics of the eBay's auction process should be analysed first. eBay offers its sellers four different ways to list items for sale over its website: (1) 'buy it now', (2) 'buy it now' with the option of 'make offer', (3) 'place bid', and finally (4) 'place bid' with the option of 'buy it now'.³³ Clearly, the first two methods³⁴ are not an auction process sale but rather a category of website display sale; therefore, they will be examined in an upcoming subsection.

From a contract law standpoint in respect of traditional auction sales,³⁵ when the seller announces an item for sale by an auction, he/she is deemed to be making an invitation to treat but not a valid offer³⁶ because it cannot be deemed that there is a valid contract unless the auctioneer accepts the highest bidder's offer.³⁷ In the context of eBay auction practices the rule can be different. When a seller lists an item for sale on an eBay auction with 'place bid' only, he/she is more likely to be making a valid offer because the winning bidder is obliged to

³¹ However, in addition to the question of a distinction between an invitation to treat and an offer in online contracts, and owing to the fact that the litigation in this case was between two parties residing in the Netherlands and Germany, the Dutch District court examined first the issues of jurisdiction and applicable law matters. The court found itself competent to assert jurisdiction to hear the dispute pursuant to Article 2 of the Brussels Regulation. Regarding the applicability of the Dutch law to the dispute, the court inferred the parties' implicit agreement on Dutch law. However, in the writer's view, whether the Dutch Court had jurisdiction to hear the dispute or whether Dutch law was applicable or not to the subject matter of the case would have been reliant on the category of the online contract: whether it was B2B or B2C. Indeed, in this case, the writer finds it difficult to identify whether the defendant was a business or a consumer as the name is not revealed by the court in its official transcript. The writer is aware that only the names of individuals are anonymised by the court in the Netherlands due to privacy issues. Accordingly, if the defendant in this case was a consumer, neither the Dutch Court nor the Dutch Law was competent to govern the dispute pursuant to consumer protection rules in the Brussels and Rome Regulations. The question of jurisdiction and applicable law is the centre of gravity of this thesis; therefore, it will be examined and analysed in-depth in separate chapters of this thesis; see Chapters 5 and 6.

³² Regarding this point, see Rowland, Kohl and Charlesworth (n 17) 244, 245.

³³ See Julia Layton, 'N-CAP Users' Guide: Everything you Need to Know about the Internet - How eBay Works' ; <http://e-association.ca/cim/dbf/how_ebay_works_-_english.pdf?im_id=56&si_id=305> accessed 7 May 2014; Dawson J Price, 'Leaving Feedback: An Analysis of eBay, Online Auctions, and Personal Jurisdiction' (2014) University of Illinois Law Review 1.

³⁴ 'buy it now' and 'buy it now' with the option of 'make offer'.

³⁵ It has been clarified in the aforementioned paragraphs that this is a consensual approach in both the common law regime and civil law regime. See (n 14), (n 15) and (n 16).

³⁶ Peel (n 4).

³⁷ *ibid* 12; see also UCC § 2-328 (3) and ICLC (n 16) art 89.

purchase the item and is directed automatically to *PayPal* to pay the price.³⁸ Moreover, the fact that an eBay listing is an offer is a clearly stated clause in eBay's terms and conditions to which both the buyer and seller agree to when opening an eBay account.³⁹ An exception to this is when the highest bidder is not obliged to complete the transaction.⁴⁰ The same analysis applies when the seller lists an item for sale through the auction with the option of 'buy it now' at a fixed price. Without doubt, an offer is made in both cases; however, it is made in two different ways.⁴¹ One might argue that when the seller announces the 'buy it now' price beside the option of placing a bid, he is setting a reserve price and would not accept to sell the item to the highest bidder if it was below that price. The auction listing is an invitation to treat while the 'buy it now' listing is an offer. At first glance, this may seem misleading for new users of eBay; however, in fact, it is not because according to eBay's auction sale process the seller is required to dispatch the item to the winning bidder even if his bid is below the fixed 'buy it now' price determined by the seller.⁴²

Indeed, this point may be considered a grey area between the offer and invitation to treat and eBay buyers should be aware of it. Such a scenario might be sensible when the seller includes an extra clause providing an undisclosed reserve price that he would not accept to sell the item below. This kind of clauses is uncommon in online auction practices; however, it happens sometimes on eBay. eBay does not normally allow users to change the rules of selling and buying; however, it does give the sellers space to write the description, the specifications, and any further information regarding the items which they are offering for

³⁸ See also Rowland, Kohl and Charlesworth (n 17) 240, 241.

³⁹ For example, the eBay UK's user agreement states under the 'Purchase Conditions' that: 'As a buyer, you are responsible for reading the full item listing, including any instructions the seller provides, before making a bid or a commitment to buy. Unless otherwise stated, by making a bid or commitment to buy an item on eBay, you are committing to buy the item. If you make a commitment to buy or your bid is the winning bid or is otherwise accepted, you enter into a legally binding contract with the seller and must purchase the item.' <<http://pages.ebay.co.uk/help/policies/user-agreement.html>> accessed 7 May 2014.

⁴⁰ *Begraft v eBay Inc* Superior Court of New Jersey (1 October 2003) (Unpublished New Jersey trial court decision), a copy of the verdict can be found at <http://eric_goldman.tripod.com/caselaw/begraftvebay.pdf> accessed 7 May 2014. In this case, the plaintiff, an eBay seller, filed a complaint against eBay and an eBay bidder for causing damages to him. Mr Begraft listed New Jersey ski/tennis resort on the eBay auction sale with a minimum start price \$1, 000, 000, 00. After the auction has been closed at the determined time, the highest bidder, Davies Jamie won the item at the price of \$3,900,000. However, Davies Jamie submitted a bid retraction request, which was accepted by eBay. Upon this retraction, eBay announced the second highest bidder as a winner of the item, whose bid was \$2,500,300. The plaintiff argued that eBay caused him to lose the amount of the highest bid, which was significantly higher than the second highest bid, and that eBay was not permitted to retract the bid after the contract had legally been concluded. The court found that eBay's approval of the bid retraction had fallen with the exceptional cases where such actions are allowed according to the eBay's terms and conditions.

⁴¹ Sellers probably prefer to use this method either to ensure they get the lowest price which they have in their minds or declare the highest price that they wish their items to reach.

⁴² The High Federal Court in Germany also reached this conclusion in *Ricardo.de*. See *Ricardo.de* (n 21).

sale. Some sellers tend to use the field allocated for the item's description to include such extra clauses. The first question that arises is whether such a clause is enforceable against the highest bidder if the offer is below the undisclosed reserve price. In case validity is given to such a clause, the listing of the seller shall be considered an invitation to treat, the highest bid will be considered an offer, and the contract will not be concluded unless the seller accepts the offer. In the author's view, the users of online auction websites or any other online services websites cannot revise the online terms and conditions of the website merely by unilateral actions.⁴³ Therefore, such a clause may not have any legal validity.

US courts have used the same way to deal with the question of listing items on online auction websites.⁴⁴ In *Lim v the .TV Corporation Int'l*,⁴⁵ the Court of Appeals of the State of California addressed the question of the use of online auction platforms to offer goods for sale, and whether it qualifies as a valid offer or not. A South Korean businessman, Je Ho Lim, entered into an online auction to buy a domain name entitled *Golf.tv* from Delaware-based business DotTV, a company that specialised in selling domain names ending with the extension *.tv* over an online auction website operated by them. Mr Lim placed his bid and was the highest bidder to win the domain name *Golf.tv* and this was later confirmed by an email of congratulations sent to him by the seller (auctioneer) which also asked him to make payment. After making the payment, which was debited from his bank account, Lim received an email from the seller informing him that it had decided to retract its acceptance and release him from his bid (offer). The sale was cancelled and his payment was refunded. Lim brought proceedings against the defendant before the Superior Court of Los Angeles County⁴⁶ claiming for a breach of contract after it was concluded upon his acceptance of the defendant's offer. Lim argued that offering the domain name on the online auction website was an offer from the defendant, and his bid was an acceptance of this offer; therefore, the

⁴³ *AV v iParadigms LLC* 562 F 3d 630 (4th Cir 2009).

⁴⁴ In Australia, the Supreme Court of New South Wales State reached the same conclusion in an online auction case between two eBay users, which the courts in Germany, the Netherlands, and the USA also reached. See *Peter Smythe v Vincent Thomas* [2007] NSWSC 844 (3rd August 2007) <<http://www.austlii.edu.au/au/cases/nsw/NSWSC/2007/844.html>> accessed 7 May 2014; Rowland, Kohl and Charlesworth (n 17) 241. Interestingly, the court in this case rejected the defendant's argument of unawareness of eBay's terms and conditions regarding the online auctions rules by making an interesting assumption. The court stressed that the defendant was a professional eBay seller who had previously been involved in auction selling and buying over eBay's auction process; therefore, he should have known the rules of eBay and how it operates. Accordingly, the plea that the defendant would not accept to post the item on the eBay's auction, if he knew that he was making a valid offer, was an inadmissible argument; Kanchana Kariyawasam and Scott Guy, 'The Contractual Legalities of Buying and Selling on eBay: Online Auction and the Protection of Consumers' (2008) 19 *Journal of Law, Information and Technology* 42.

⁴⁵ *Lim v The .TV Corporation Int'l* 99 Cal App 4th 684, 121 Cal Rptr 2d 333 (2002).

⁴⁶ *Je Ho Lim v The .TV Corporation International* (Super Ct No BC236227) Haley J Fromholz, Judge.

defendant did not have the right to cancel the contract of sale unilaterally. The defendant countered that there was a misunderstanding by the buyer concerning the consideration of the auction sale, and the offering of the domain name was an invitation treat and not offer; consequently, the email sent to the plaintiff was to accept his offer and congratulate him for winning the name --*golf.tv* and not *Golf.tv*⁴⁷ Surprisingly, the trial court upheld this argument and ruled to dismiss the plaintiff's action. In the Appeal, the court reversed the trial court's decision and ordered it to overrule its previous verdict in accordance with the fact the contract was concluded at the time when the highest bid was made, emphasizing that the defendant had made an offer, and the bid of the plaintiff was an acceptance of such an offer.⁴⁸

In Iraq, it could be assumed that Iraqi courts would uphold the same approach that their counterparts in the EU and US have adopted. This assumption cannot be assured under the Iraqi civil law system. The discretionary powers of the judges in Iraq are confined by the provisions of statutory rules.⁴⁹ As it has been stated previously in this section, according to Iraqi law, offering goods for sale by an auction process is an invitation to treat but not a valid offer.⁵⁰ Applying such a rule in online auction sales, such as eBay's auction may result in different outcomes than these decisions which the courts in the US and some EU countries have reached. In the author's opinion, a court in Iraq would be required to give more priority to internet custom and practice when interpreting the statutory rules for brand new types of cases that they had not dealt with before.

⁴⁷ The plaintiff argued that this contention was based on illogical facts because the extension '--golf.tv' was not a recognised extension for websites.

⁴⁸ In the reasoning of the judgment, Justice Epstein stated the following: 'Offering the name at auction was an offer, and plaintiff's bid was an acceptance, conditioned on there being no higher bids. Since plaintiff accepted the offer precisely as it was made, and no one submitted a higher bid, a contract resulted between the parties. Plaintiff's acceptance of dot TV's offer was pursuant to established law as well as Internet custom and practice, and in accordance with policies and procedures established by defendant.'

⁴⁹ المادة الاولى من القانون المدني العراقي: "١. تسري النصوص التشريعية على جميع المسائل التي تتناولها هذه النصوص في لفظها او فحواها. ٢. فاذا لم يوجد نص تشريعي يمكن تطبيقه حكمت المحكمة بمقتضى العرف, فاذا لم يوجد فيمقتضى مبادئ الشريعة الاسلامية الأكثر ملاءمة لنصوص هذا القانون دون التقيد بمذهب معين, فاذا لم يوجد فيمقتضى قواعد العدالة" [Article 1 of the ICLC: "1. The legislative provisions shall apply to all matters covered by this code in its textual and substantial construction. 2. In the absence of applicable legislative provision, the judge shall pass his ruling in accordance with the custom. In the absence of the custom, the judgment shall be made in accordance with the Islamic Law principle. In case no such principles exist, the judgment shall be passed in accordance with the principle of natural law and the rules of equity".]

المادة الثانية من القانون المدني العراقي: "لا مساغ للاجتهد في مورد النص"
[Article 2 of the ICLC: "No discretionary powers shall be conferred where the applicable statutory provisions exist".]

⁵⁰ See (n 15); see also

عبدالمجيد الحكيم, عبدالباقي البكري ومحمد طه البشير, الوجيز في نظرية الألتزام في القانون المدني العراقي (الجزء الأول-مصادر الألتزام ١٩٨٠) مطابع وزارة التعليم العالي والبحث العلمي ٤٠

[Abdull Baki AL-Bikry and Mohammed Taha AL-Basheer Abdull Majeed AL-Hakeem, *The Theory of Civil Obligation in The Iraqi Law* (Ministry of Higher Education and Scientific Research 1980) 40].

From the above, it can be submitted that internet custom and the online marketplace practices may have created some rules which have become very well understood by those people involved in buying and selling online, and these rules are different from the rules applicable to the traditional practices or legal activities. It should be assumed that every person who has a general understanding of buying and selling online is aware that when he lists an item on an eBay auction he is making an offer and is only permitted to revoke it if no bid has been received. This right of revocation cannot be used once an item receives a bid except in certain circumstances. This does not mean that such an assumption is absolute in its application; consumers and those less likely to be involved in online transactions should think carefully before placing bids on online auction websites. Such bids should not be taken lightly as they are legal actions which may lead to binding agreements. Having said this, it has been noted from the examined case law that the uncertainty between the invitation to treat and the offer has been used as a counter argument by some online auction sellers in order to disavow their contractual obligations; however, such a plea has not been upheld by courts.

4.2.2 Websites' Display ⁵¹

The other kind of online contracts where the distinction between the offer and invitation to treat can be a matter of uncertainty are those contracts that take place over electronic marketplaces, and the websites of retailers and manufacturers.⁵² In other words, the question arises whether displaying products on a website with its prices by the seller is an offer to sell or just an invitation to treat. Traditionally, common law and civil law systems have approached this in a different way. In the common law, such a display is an invitation to treat but not an offer;⁵³ the offer occurs when the customer picks up the item and takes it to the

⁵¹ It should be understood here that the only interactive websites would be examined in this section. It is assumed that, the display of goods, its prices, and other information related to it on the non-interactive website should not raise any questions whether it is an offer or only invitation to treat. It would be presumed that such a display is an invitation to treat and not a valid offer. Because such a type of websites does not allow the conclusion of the contract directly over the website itself, but the buyer needs to use the seller's contact information displayed on the website to contact him for the conclusion of the contract such as the telephone, email or at the seller's premises. For more details about such an analysis; see: Christoph Glatt, 'Comparative Issues in the Formation of Electronic Contracts' (1998) 6 International Journal of Law and IT 34.

⁵² Some scholars have argued that such a matter should be paid a considerable amount of attention because identifying the place where the online contract is concluded should rely upon the proper analysis of this issue. See Rowland, Kohl and Charlesworth (n 17) 237. Accordingly, the link between this part of the thesis and its main theme should be assumed to be very closely related because it will be demonstrated in this thesis that determining the place of contracting in the online contract might be one of the problematic issues in the jurisdiction and applicable law matters. See Chapters 5, 6.

⁵³ Peel (n 4) 13; Upex (n 5) 9; Robert Duxbury, *Contract Law* (2nd edn, Sweet & Maxwell 2011) 16.

seller to pay for it, and it will be the seller's option to accept this offer or not.⁵⁴ Under the civil law regime, such a display is considered a valid offer and not only an invitation to treat.⁵⁵

Therefore, the extent to which the application of these traditional rules to websites is consistent must be considered. Some academics argue that website displays of products are not that different from traditional shop displays; therefore, the same rule should be applied, i.e., an invitation to treat but not offer.⁵⁶ On the other hand, other academics have argued that offering goods to the public over a website is not just an invitation to treat but a valid offer.⁵⁷ By suggesting a middle-ground approach, some have gone on to apply an interesting test indeed, by making a distinction between non-interactive and interactive websites.⁵⁸ According to this approach, the display of goods and services on websites that only provide information about things like quality, specification and prices, without allowing the completion of transactions and payments is only an invitation to treat in the same way as advertising in newspapers or on television.⁵⁹ Where the website goes further than merely displaying the specifications of the products and allows for the completion of the purchase transaction by taking payments and the address of the buyer for delivery, then the action would become more than just an invitation to treat and can potentially be seen as a valid offer.⁶⁰

In order to carry out a convincing analysis on this part of research, it will be helpful to make a distinction between two different types of website displays: electronic marketplaces and the

⁵⁴ *Fisher v Bell* [1961] 1 QB 394; Catherine Elliott and Frances Quinn, *Contract Law* (9th edn, Pearson 2013) 15.

⁵⁵ For example, Article 80 of the ICLC provides that:

المادة ٨٠ من القانون المدني العراقي تنص على انه: "١. يعتبر عرض البضائع مع بيان أثمانها أيجاباً، ٢. اما النشر والأعلان وبيان الأسعار الجاري التعامل بها وكل بيان آخر متعلق بعروض أو بطلبات موجهة للجمهور أو للأفراد فلا يعتبر عند الشك أيجاباً وإنما دعوة للتفاوض"
[Article 80 of the ICLC: '1. The display of goods with its prices shall be regarded an offer, 2. The advertisement of goods with the possible range of prices for the public shall not, under the normal circumstance, be considered an offer but only an invitation to treat']. The same rule is applied in the German Civil Code; see Rowland, Kohl and Charlesworth (n 17) 238.

⁵⁶ Hill, *Cross-Border Consumer Contracts* (n 6) 24; Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 27; Andrew D Murray, 'Entering Into Contracts Electronically: The Real W.W.W.' in Edwards, Lillian and Waelde, Charlotte (eds), *Law and the Internet: A Framework for Electronic Commerce* (Hart Publishing 2000) 17; David Naylor and Antonis Patrikios, 'Mass Market Online and Technology Contracting' in Chris Reed and John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (6th edn, Oxford University Press 2007) 106; Glatt (n 51); Daniel Bates, 'Mistakes in Online Transactions-The Lessons to be Learned from Kodak' (Internet Newsletter for Lawyers, April 2002) <<http://www.venables.co.uk/n0203mistakes.htm>> accessed 7 May 2014.

⁵⁷ Rowland, Kohl and Charlesworth (n 17) 238.

⁵⁸ See Sharon Christensen, 'Formation of Contracts by Email – Is It Just the Same as the Post?' (2001) 1 Queensland University of Technology Law & Justice Journal 22.

⁵⁹ *ibid*

⁶⁰ *ibid*

websites of manufacturers and retailers. In the case of online marketplaces, such as Amazon or eBay, goods and products from a variety of brands and producers are offered for sale with pre-fixed prices.⁶¹ Buyers, upon placing their orders and making payments receive emails from the electronic marketplace, but not from the actual sellers, confirming receipt of the order.⁶² At first glance, such a display may seem a valid offer, and the customer's order is an acceptance of such an offer.⁶³ This analysis can also be confirmed by the nature of electronic marketplaces which function as facilitators between the sellers and buyers and are not the owners of the offered items. It should be noted that one rule cannot be applied to all types of online marketplaces as the terms and conditions of sale and the technical characteristics and design of each website is different. For instance, on Amazon's website there are two categories of products offered for sale: products offered by Amazon itself and products offered by third party sellers. Amazon makes it clear that an item offered by it is not a binding offer but only an invitation to treat.⁶⁴ Amazon does not make it clear enough whether the same rule is applicable for third party sellers who use the website to offer their goods. It seems that the same rule does not apply, and items listed by sellers other than Amazon itself constitute valid offers and not only invitations to treat.⁶⁵ Moreover, it is not logical that a

⁶¹ For example, Amazon's terms and conditions of sale state that: 'Amazon allows third party sellers to list and sell their products at Amazon.co.uk. In each such case, this is indicated on the respective product detail page. While Amazon as a platform provider helps facilitate transactions that are carried out on the Amazon platform, Amazon is neither the buyer nor the seller of the seller's items. Amazon provides a venue for sellers and buyers to negotiate and complete transactions. Accordingly, the contract formed at the completion of a sale for these third party products is solely between buyer and seller. Amazon is not a party to this contract nor assumes any responsibility arising out of or in connection with it nor is it the seller's agent. The seller is responsible for the sale of the products and for dealing with any buyer claims or any other issue arising out of or in connection with the contract between the buyer and seller. Because Amazon wants the buyer to have a safer buying experience, Amazon provides the Amazon a-to-z guarantee in addition to any contractual or other rights. For conditions relating to the sale by third parties to you on Amazon.co.uk see the Participation Agreement.'

⁶² However, Amazon is now functioning as a virtual marketplace and an online seller of a variety of goods as well.

⁶³ The writer is in favour of this notion.

⁶⁴ Term 1 of Amazon's condition of sale provides that: '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 (the "Dispatch Confirmation E-mail"). If your order is dispatched in more than one package, you may receive a separate Dispatch Confirmation E-mail for each package, and each Dispatch Confirmation E-mail and corresponding dispatch will conclude a separate contract of sale between us for the product(s) specified in that Dispatch Confirmation E-mail. Your contract is with Amazon EU SARL. Without affecting your right of withdrawal set out in section 2 below; you can cancel your order for a product at no cost any time before we send the Dispatch Confirmation E-mail relating to that product.'

⁶⁵ This can be deduced from the wording of term 5.1 of Amazon's Participation Agreement, which provides that: 'Amazon will confirm each order to the seller and the buyer. Sellers must dispatch items sold within two Business Days once the order confirmation is made available to them. If and when Amazon makes functionality available to the seller, which allows seller to display a product availability message on the Site the seller must,

seller would pay listing fees and commission to an electronic marketplace simply to make an invitation to treat. The same assumption is applicable to eBay's 'buy it now' sale process where the sale contract would be done when the buyer clicks the 'buy it now' button and makes the payment. It is undisputed that when the buyer adds the option of 'make offer' besides 'buy it now', he would certainly be making an invitation to treat.

As for products that are advertised by producers and manufacturers on their own websites,⁶⁶ analysis suggests that the situation is slightly different. The seller of the displayed or advertised item is the owner of the website itself; exactly like the owner of a shop who offers his products in his storefront. If the analogy between the physical shop display and a manufacturer's website advertisement (virtual display) is apposite, then the conclusion can be that the same traditional rules would apply under both common law⁶⁷ and civil law. For example, when ordering products from Apple UK over its website www.apple.co.uk, Apple includes the following information in an email sent to the buyer: 'Once we have finished processing your order and it has shipped, you will receive an email with an updated delivery estimate'. Under the common law, this email should not be interpreted as an acceptance of the offer but rather the acceptance occurs when the seller notifies the buyer that the item has been shipped to his address.⁶⁸

This notion was also accepted in the UK *Argos* and *Kodak* cases where mistakes had been made in pricing of offered items on a website. Argos mistakenly priced a colour TV on its website at £2.99 instead of £299.⁶⁹ Hundreds of customers placed orders online thinking that it was a bargain. The same thing happened with Kodak in 2002, where it offered a digital camera on its website at £100 instead of its actual value of £329.⁷⁰ In both cases, Argos and Kodak refused to sell the products arguing that the items had been priced mistakenly, and the

dispatch items sold in accordance with the product's availability stated on the Site at the time of the order. Sellers must provide a full refund to any buyer who remits payment, if the item cannot be shipped in accordance with this clause A.5.1. Sellers must provide the refund promptly via their Amazon Seller Account in accordance with clause B.6.1, but in no case later than thirty (30) days following the date the order was confirmed or 3 calendar days after the maximum estimated delivery date stated on the Site at the time of the order (as the case may be).'

⁶⁶ Such as, www.apple.com, www.sony.com, www.samsung.com.

⁶⁷ *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [1953] 1 QB 401, Court of Appeal.

⁶⁸ Bates (n 56); For example, Apple sends the following email to the buyer when the ordered item is shipped: 'We are pleased to inform you that your order W479832439 has shipped. Please see the details of the shipment below. Your Delivery Reference Number is 8246811616. We expect your order to be delivered to your shipping address on or before 06/02/2013.'

⁶⁹ Guy Veysey and Michael Chissick, 'The Perils of On-Line Contracting' (2000) 6 *Computer and Telecommunication Law Review* 121; Bates (n 56); Stuart Barry, 'The Argos Case: Caveat Vendor' (*Swan Turton Solicitors*, 15 October 2014) <http://www.swanTurton.com/ebulletins/archive/STBargos.aspx#_UgEGJZKTh8E> accessed 7 May 2014.

⁷⁰ *ibid*

advertisement was only an invitation to treat and not a valid offer. Courts did not have the opportunity to examine this issue because the disputes were settled before reaching the courts.⁷¹ Most recently, Screwfix mistakenly priced all items offered on its website at £34.99 while the actual price of some items was £1,599.99.⁷² Thousands of customers made online orders to buy a variety of items priced mistakenly on the website. After dispatching the orders to the customers, Screwfix became aware of the mistake and consequently decided to cancel all orders and issue refunds to the customers. The cancellation did not take effect against those customers who had already received their items. No legal action has yet been reported by the customers against the online retailer, but the central issue is the distinction between the invitation to treat and the offer on websites.

It is questionable whether the claim that a website display was only an invitation treat is an acceptable ground to escape honouring pricing errors unilaterally. In 2003, both Amazon UK and US relied on such an argument to cancel hundreds of online orders on Hewlett Packard pocket computers and 36-inch televisions, which were priced mistakenly.⁷³ Apart from Amazon's online terms and conditions, considering that online orders are offers to the retailer, the receipt of automated confirmation emails upon placing the orders should be seen as the seller's acceptance of these orders if the traditional common law rules are to be taken into account.⁷⁴ It appears that Amazon has noted the potential for these sorts of costly mistakes and so has made it very clear on its terms and conditions that an online purchase is not regarded as completed until the dispatch notification is sent to the buyer.⁷⁵

⁷¹ *ibid*

⁷² Nicole Blackmore, 'Do Retailers Have to Honour Pricing Mistakes?' (*The Telegraph*, 29 January 2014) <<http://uk.finance.yahoo.com/news/retailers-honour-pricing-mistakes-112633714.html>> accessed 7 May 2014.

⁷³ Matthew Broersma, 'Amazon Won't Honor Pricing Mistake' (*CNET News*, 19 March 2003) <http://news.cnet.com/2100-1017_3-993246.html> accessed 29 March 2014; Benjamin Groebner, 'OOPS! The Legal Consequences of and Solutions to Online Pricing Errors' (2004) 1 *Shidler Journal of Law, Commerce & Technology* 1 https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/354/vol1_no1_art2.pdf?sequence=1> accessed 29 March 2014.

⁷⁴ See (n 68).

⁷⁵ *ibid*. However, the present author agrees with the argument that online contracts should be void in case there is an obvious mistake in the price even though the other requirements of contract formations have been met in the transaction done over the website. See Graham JH Smith (ed), *Internet Law and Regulation* (Sweet & Maxwell 2007) 796. In Singapore, the Court of Appeal acknowledged this fact in *Chwee Kin Keong v Digilandmall.com Pte Ltd* where six buyers had ordered more than 1600 laser printers priced mistakenly on the defendant's website at the price of \$66 each instead of the original price \$3,854. The court stressed that such a contract cannot be regarded as valid despite the satisfaction of the other contracting requirements because the buyers were aware enough of the price mistake by the online retailer. The Court held that: 'As a general rule, a party to contract was bound even though he may have made a mistake in entering into the contract. However, a party who was aware of the error made by the other party could not claim that there was consensus ad idem'. See *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] Civ App No 30 SGCA 2005 [30], [31].

The author favours the argument that there is a difference between the webpage window that displays the items with its prices and the ‘place order’ or ‘buy now’ webpage window.⁷⁶ It is undisputed that the webpage where the products are advertised with its prices is an invitation to treat; however, by clicking on any item’s specification, the buyer will be guided onto a new webpage which is called the ‘internet ordering’ page: the ‘offer’ webpage.⁷⁷ The buyer’s act of clicking on ‘place order’ or ‘buy now’ indicates his acceptance. Consequently, after the order is placed and the payment is taken from the buyer, the online contract should be deemed concluded and the seller cannot unilaterally cancel the contract. In the EU, such an argument is also confirmed by Article 8 of the Consumer Rights Directive.⁷⁸ This provides that:

The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the word “order with obligation to pay” or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader.

In any event, in the author’s opinion, the terms and conditions of the website should make it clear enough for the website users, as Amazon UK did, whether placing an ‘internet order’ is only making an offer to the seller or accepting the seller’s offer. The way that such a statement is made should be visible and very clear to the buyer during the contractual process.⁷⁹

⁷⁶ Alasdair Taylor, ‘Offer and Acceptance Online’ (*SeqLegal*, 8 July 2011) <<http://www.seqlegal.com/blog/offer-and-acceptance-online>> accessed 8 May 2014.

⁷⁷ *ibid*

⁷⁸ European Parliament and Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ 305/64.

⁷⁹ See also paragraph 39 of the Consumer Rights Directive Preamble which makes it clear that: ‘It is important to ensure for distance contracts concluded through websites that the consumer is able to fully read and understand the main elements of the contract before placing his order. To that end, provision should be made in this Directive for those elements to be displayed in the close vicinity of the confirmation requested for placing the order. It is also important to ensure that, in such situations, the consumer is able to determine the moment at which he assumes the obligation to pay the trader. Therefore, the consumer’s attention should specifically be drawn, through an unambiguous formulation, to the fact that placing the order entails the obligation to pay the trader.’

4.3 TERMS AND CONDITIONS OF INTERNET WEBSITES ⁸⁰

Without doubt, the terms and conditions⁸¹ for using a website can be considered the most important part of that website due to the significance of the legal implications that could result from it.⁸² Unfortunately, most people, including professionals,⁸³ who use websites to buy goods or services do not read this important information nor are they aware of its significant legal implications.⁸⁴ Reasons for this vary, but it is clear that people think such terms and conditions are either not enforceable or not negotiable.⁸⁵ In *Pollstar v Gigmania Ltd*⁸⁶ the court acknowledged this fact by saying that, ‘the court agrees with the defendants that many visitors to the site may not be aware of the license agreement’.⁸⁷

In traditional paper contracting practice, the contractual terms and conditions are usually printed on the back of the written contract or attached to the contract in a separate paper format. Online contracting has approached the formatting of terms and conditions in three

⁸⁰ The terms and conditions of websites encompass a number of consequential legal clauses, which every user should be aware of it such as the choice of court, choice of law, warranty and disclaimers and so other important contractual terms. However, as long as the choice of court and choice of law clause will be analysed and examined in-depth in specifics chapters of this thesis, the main attention will not be paid to them in this section of the thesis.

⁸¹ These terms are also referred to as ‘User Agreement’.

⁸² Jonathan D Frieden, ‘Website Terms of Use: Common Issues Facing E-Commerce Businesses’ (*The National Law Review*, 24 July 2014) <<http://www.natlawreview.com/article/website-terms-use-common-issues-facing-e-commerce-businesses-3rd-series>> accessed 8 May 2014.

⁸³ See *Feldman v Google, Inc* Civil Action No. 06-2540 (2007) US Dist. In this regard, Riefa describe the terms and conditions of eBay as follows: ‘One remarkable example is that of eBay, the online auction site. The terms and conditions are so precise, that many fully-fledged lawyers feel overwhelmed by the task of reviewing the terms and conditions and their associated documents. Indeed, on eBay, users have access to much information which to be fully understood needs to follow a link to the definition of particular terms or to policy documents. The architecture of the site and the way links are organised impede a direct return to the original terms and conditions page, meaning that even the most versed lawyers end up literally lost.’

See Christine Riefa, ‘The Reform of Electronic Consumer Contracts in Europe : Towards an Effective Legal Framework?’ (2009) 14 *Lex Electronica* 1 <http://www.lex-electronica.org/docs/articles_244.pdf> accessed 12 March 2014. In the same way, some have interestingly described the website terms and conditions as follows: ‘[W]ith some Internet companies terms and conditions being longer than Shakespeare’s Hamlet, could it be that “unfair clauses” in agreements are not even worth the paper they are printed on it?’; Alex Hudson, ‘Is Small Print in Online Contracts Enforceable?’ (*BBC News Technology*, 6 January 2013) <<http://www.bbc.co.uk/news/technology-22772321>> accessed 8 April 2014.

⁸⁴ Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 324; Oliver Bray, ‘The App Factor : How Apps Are Changing the Legal Landscape’ (2013) 24 *Entertainment Law Review* 1. See also the UK Office of Fair Trading, ‘Empirical Study on Consumer Contracts’ (February 2011) <http://www.offt.gov.uk/shared_offt/market-studies/consumercontracts/oft1312.pdf> accessed 8 May 2014.

⁸⁵ Nancy S Kim, ‘The Duty to Draft Reasonably and Online Contracts’ in Severine Saintier, Keith Rowley Larry A. Dimatteo and Qi Zhou (eds), *Commercial Contract Law: Transnational Perspective* (Cambridge University Press 2013) 181.

⁸⁶ *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (2000).

⁸⁷ See also Kayleen Manwaring, ‘Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK’ (2011) 5 *Studies in Ethics, Law, and Technology* 1. <<http://www.bepress.com/selt/vol5/iss1/art4>> accessed 8 May 2014.

different ways:⁸⁸ shrink-wrap,⁸⁹ click-wrap⁹⁰ and browse-wrap agreements.⁹¹ Regardless of the method that is used by the vendor on its website, the central question regarding online contractual terms and conditions can be manifested in the following principal question: are the legally formulated clauses on websites binding and enforceable?⁹²

In the EU, Article 10(3) of the E-commerce Directive, under Section 3: ‘Contracts concluded by electronic means’, provides that the general terms and conditions of the contract must be available in a way that can be retrieved by the recipient.⁹³ This rule should not affect the consumer protection rules afforded to consumers in other EU laws.⁹⁴ In theory, the criterion in the EU regarding the enforceability of online terms and conditions is assumed to be clear. As for B2B contracts, the standards of Article 10(3) of the E-commerce Directive should apply.⁹⁵ It should be questioned here to what extent the requirements of Article 10(3) are satisfied in websites’ browse-wrap or click-wrap agreements.

First, it should be made clear that website terms and conditions should be made sufficiently available and visible on a website in order that the other contractual party can view them prior to placing his order.⁹⁶ Simply positioning these terms and conditions well is not enough;

⁸⁸ William J Cordon, ‘Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwraps Agreements?’ (2004) 16 Regent University Law Review 435; Ronald J Mann and Travis Sieberneicher, ‘Just One Click: The Reality of Internet Retail Contracting’ (2008) 108 Columbia Law Review 984.

⁸⁹ Shrink-wrap agreements are specific to the computer software and games invented and developed by software companies where the terms of the license agreement are included with the package and become valid against the user by opening the shrink-wrap of the software’s package. See David L Hayes, ‘The Enforceability of Shrink-wrap License Agreements On-Line and Off-Line’ (Fenwick & West LLP, 1 March 1997) <<http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ShrinkwrapFenwick.pdf>> accessed 8 May 2014.

⁹⁰ For a definition of click-wrap agreements see Chapter 3 of this thesis.

⁹¹ For a definition of browse-wrap agreements see Chapter 2 of this thesis.

⁹² In fact, the uncertainty regarding the enforceability of online terms and conditions is not a novel issue, see Samer Qudah, ‘Website Terms and Conditions and UAE Law’ (2003) 18 Arab Law Quarterly 209. However, surprisingly, it could be argued that the uncertainty of such an issue is still a debatable issue; Cordon (n 88).

⁹³ E-commerce Directive, Article 10 (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.’

The same rule has been included in the Proposal of the CESL in the Article 3 under the Section 3: Contracts Concluded by Electronic Means, which provides that: ‘The trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form’.

⁹⁴ Recital 55 of the E-commerce Directive’s Preamble provides that: ‘This Directive does not affect the law applicable to contractual obligation relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.’

⁹⁵ See also Zia Akhtar, ‘Distant Selling, E-Commerce and Company Liability’ (2012) 33 European Competition Law Review 497.

⁹⁶ *ibid.* In the Netherlands, the Supreme Court’s Advocate General in *First Data v Attingo* (LJNBO7108, Rvdw 2011, 252) stressed that mere reference to the general terms and conditions of the contract in a written agreement to a website hyperlink is not sufficient for enforcing them against the other party accepting the offer; Reinout Rinzema, ‘The Netherlands: Dutch Supreme Court Rules on Referring to General Conditions Available on a Website’ (2011) 27 Computer Law & Security Review 316.

they should also be retrievable and downloadable by the accepting party prior to placing his order.⁹⁷ In principle, those terms and conditions in click-wrap and browse-wrap agreements are enforceable but it might be quite difficult to predict to what extent such an enforceability can be extended.⁹⁸ There is also no available EU case law that reveals how the courts in the Member States have dealt with such an issue. In the author's opinion, such a point might be controversial enough to produce different opinions by different courts in EU Member States depending on how the judges interpret their national laws. The criterion of the terms and conditions being retrievable prior to placing the online order may vary from one website to another but, ultimately, the main aim of the courts will certainly be to examine how adequately the vendor notified the buyer and whether he sufficiently brought to his attention the terms and conditions of the website, i.e., the user agreement.

Concerning the B2C contracts, the enforceability of online terms and conditions should not override the basic consumer-friendly rules granted in other EU Directives and Regulations.⁹⁹ In *Content Service Ltd v Bundesarbeitskammer*¹⁰⁰ the ECJ ruled that the clause that was introduced on the website through a hyperlink (browse-wrap agreement) and which deprived consumers of their right to withdraw from the contract, could not be enforced even though the consumers had accepted the online terms and conditions of the website.¹⁰¹ The case was referred to the ECJ by the Austrian High Court of the State of Wien.¹⁰² An English company, Content Service Ltd, offered online services through its website to German consumers. Upon placing their orders consumers had to accept, by ticking a small box, the online terms and conditions of the website, the user agreement, which was available through an attached hyperlink. After the conclusion of the contract, the subscribers (consumers) received a

⁹⁷ Akhtar (n 95).

⁹⁸ Michael Swinson and Carolyn Wong, 'Online Contracting: "Wrapping" Up Terms of Use' (King & Wood, November 2011) <<http://www.mallesons.com/publicationalerts/2011/Information-Technology-Update-November-2011/Pages/Online-contracting-wrapping-up-your-terms-of-use.aspx>> accessed 20 August 2013.

⁹⁹ A near identical approach was upheld in Australia in *Evagon v eBay Australia & New Zealand Pty Ltd* [2001] VCAT 49, where the court did not enforce the eBay User Agreement against a consumer who failed to read them while placing an order, pursuant to Australian law, which is in favour of consumers (Fair Trading Act 1999); Chris Connolly, 'Hot Topics 70: Legal Issues in Plain Language - Cyber Law' (Sydney, NSW Legal Information Access Centre, 2009) 14 <http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/cyberlaw_70.pdf> accessed 8 May 2014; Guy (n 44); Akhtar (n 95).

¹⁰⁰ Case C-49/11 *Content Service Ltd v Bundesarbeitskammer* [2012] CMLR 34; the official transcript of the verdict is available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0049:EN:HTML>> accessed 8 May 2014.

¹⁰¹ Cătălina Goța, 'Information Duties in the Internet Era: Case Note on *Content Service Ltd v Bundesarbeitskammer*' (2013) 21 *European Review of Private Law* 643; Van Beal Belli 'ECJ Rules that Information Provided via Website or Hyperlink Does Not Meet Requirements of Consumer Distance Contracts' (*Mondaq*, 6 August 2012) <<http://www.mondaq.com/x/190226/Consumer+Law/Van+Bael+Bellis>> accessed 8 May 2014.

¹⁰² Oberlandesgericht Wien.

notification from the service provider stating that the right of to withdraw had been waived according to the website's user agreement to which the subscribers had agreed. A class action on behalf of a group of consumers brought by a German organisation, *Bundesarbeitskammer*, against the English company argued that it had breached the European rules on consumer distance contracts which require that such a clause be brought to the attention of the consumer in a 'durable medium' prior to concluding the contract.¹⁰³ Having examined the case, the Austrian Court found that it had not ascertained enough whether the interpretation of 'durable medium' could apply to the website's hyperlink; consequently, the question was referred to the ECJ for ruling.

Interestingly, what can be inferred from this verdict is that the online terms and conditions of the website can be enforced against the consumer if the method by which those terms and conditions are displayed on the website satisfies the requirement of 'durable medium'.¹⁰⁴ The court found that using a hyperlink 'browse-wrap' was not a durable medium and did not sufficiently notify the buyer and make him aware enough of some crucial clauses inside the website's user agreement.

In the author's view, such a conclusion by the ECJ may give the impression that it will tend to favour distinguishing between browse-wrap and click-wrap agreements as some US courts have done. Consequently, the findings behind the opinion of the ECJ could be that the consumer might not be immune from the enforceability of online terms and conditions if the vendor of goods and services has structured its website in a way that those terms and conditions are sufficiently presented to the buyer. More likely, 'durable medium' will meet the prerequisites of the consumer protection laws if the method used by the website is a click-wrap agreement. This would mean that the terms and conditions are printed digitally onto the computer screen, and can be sent by email if the buyer requests this option, or they can be printed out directly using 'print the terms and conditions' option provided by the website operator.

¹⁰³ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, Article 5(1), provides that: 'The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4(1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him.'

¹⁰⁴ The Consumer Rights Directive defines 'durable medium' as 'any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of information and which allows the unchanged reproduction of the information stored.'

It is necessary to repeat that consumer protection laws in the EU might restrict the application of the online terms and conditions in some circumstances, and this cannot be overridden by an agreement between the consumer and the business, such as through choice of law and choice of court agreements.¹⁰⁵ Even for some clauses other than choice of law and court, it could be argued that the enforceability of many online terms and conditions in online B2C contracts might be much narrower than their application in online B2B contracts pursuant to the Unfair Terms in Consumer Contracts Directive (Unfair Terms Directive).¹⁰⁶ In *Spreadex Ltd v Cochrane*¹⁰⁷ the English High Court refused to issue a summary judgment on the plaintiff's claim to enforce the terms and conditions of the website against a consumer on the ground that those terms and conditions were not 'individually negotiated' and pursuant to the Unfair Terms in Consumer Contracts Regulations 1999. Interestingly, Judge David Donaldson stressed in the reasoning behind the judgment that it would be impossible for the consumer to have read and understood entirely the 'Customer Agreement', which consisted of 49 pages, when signing up to the website betting account. He stated that:

As I described earlier, the potential customer was told that four documents, including the Customer Agreement, could be viewed elsewhere on-line by clicking "View". Many, one might suspect most, would have passed up on that invitation and proceeded directly to click on "Agree", even though it was suggested that they should do so only when they had read and understood the documents. Even if, exceptionally, the defendant in fact chose to look at the documents, he would have been faced in the Customer Agreement alone with 49 pages containing the same number of closely printed and complex paragraphs. It would have come close to a miracle if he had read the second sentence of Clause 10(3), let alone appreciated its purport or implications, and it would have been quite irrational for the claimant to assume that he had. This was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise, and is a further factor rendering the second sentence of Clause 10(3) an unfair term.¹⁰⁸

¹⁰⁵ The choice of court and choice of law agreements will be analysed and discussed in separate chapters in a much more detailed manner. See Chapters 5 and 6 of this thesis.

¹⁰⁶ Article 3 of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29 (Unfair Terms Directive) provides that: '1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.' In favour of the same argument see Hill (n 6) 201-205; see also Robert L Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts' (2006) 42 *Houston Law Review* 1041.

¹⁰⁷ *Spreadex Ltd v Cochrane* [EWHC] 1290 (Comm).

¹⁰⁸ *Spreadex Ltd v Cochrane* [EWHC] 1290 (Comm), [21]; Bray (n 84).

In the US, courts have had a long history of considering the question of enforceability of online terms and conditions. A leading case was *ProCD Inc v Zeidenberg*¹⁰⁹ in 1996 where the United States Court of Appeals, Seventh Circuit, enforced the terms and conditions of a software license agreement that was split between shrink-wrap and click-wrap agreements against an individual consumer.¹¹⁰ In fact, although this case did not have anything to do with the website's click-wrap or browse-wrap terms and conditions, it has frequently been cited by scholars as the leading case where the courts in the US first addressed the question of enforceability of shrink-wrap and click-wrap agreements.¹¹¹ The first real and direct consideration of the question of enforceability of a website's terms and conditions began in 2001 in *Specht v Netscape Communications Corporation*.¹¹² The United States Court of Appeals for the Second Circuit did not enforce the alleged click-wrap agreement against a number of consumers, instead stressing that no click-wrap agreement had been presented, only a rather inconspicuous browse-wrap agreement was made.¹¹³

In fact, unlike the situation in the EU, the survey of the case law on the enforceability of website terms and conditions¹¹⁴ shows that the focus of the American courts when examining the enforceability of these terms and conditions was not based mainly upon the distinction between the consumer and business.¹¹⁵ By contrast, courts in the US have been in favour of applying a more objective criterion when dealing with such an issue.¹¹⁶ That is to say, how

¹⁰⁹ *ProCD Inc v Zeidenberg* 86 F3rd 1447 (7th Cir 1996); Jennett M Hill, 'The State of Copyright Protection for Electronic Database Beyond ProCD v Zeidenberg: Are Shrinkwrap Licenses a Viable Alternative For Database Protection?' (1998) 31 Indiana Law Review 143; Cordon (n 88).

¹¹⁰ Oakley (n 106).

¹¹¹ Amelia Boss H, 'Electronic Contracting: Legal Problem or Legal Solution?' in *Harmonized Development of Legal and Regulatory Systems for E-Commerce in Asia and the Pacific: Current Challenges and Capacity Building Needs in Trade and Investment* (United Nations - Economic and Social Commission for Asia and the Pacific 2004).

¹¹² *Specht v Netscape Communications Corporation* 22 Ill306 F3d 17, 11 ILRD 832, 2002 ILRC 2017 (2d Cir 2002); Sieberneicher (n 88); Ruth Orpwood, 'Electronic Contracts: Where We've Come From, Where We Are, and Where We Should Be Going' (2008) 1 International In-house Counsel Journal 455.

¹¹³ This case can be considered the landmark case where the United States Court of Appeal made a distinction between the click-wrap agreement and browse-wrap agreement in terms of the enforceability of their terms and conditions; Manwaring (n 87) 1.

¹¹⁴ For example, see the table of cases that have been heard by US courts in the period between 2002-2007, classified by the author (Kayleen Manwaring) into two types: click-wrap cases and browse-wrap cases; Manwaring (n 87). See also the whole series of the Survey of the Law of Cyberspace: Electronic Contracting Cases (2004-2010) written by Juliet M Moringiello and William L Reynolds <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 8 May 2014.

¹¹⁵ Juliet M Moringiello and William L Reynolds, 'From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting' (2013) 72 Maryland Law Review 452. However, some states, such as California, have been keener to maintain higher consumer protection policies, especially when dealing with the enforceability of choice of court, arbitration, or law clauses in online consumer contracts. This point will be made very clear in Chapter 5 and 6 of this thesis.

¹¹⁶ However, courts in some states have been keener to consider the protection of consumers against enforceability of the non-negotiable terms and conditions, especially in browse-wrap agreements, see Nishanth

conspicuous enough the terms and conditions of the website (user agreement) have been presented on the website and whether that is in a way that attracts the website visitor's attention prior to using the website or carrying out any transaction over it.¹¹⁷ In general, it appears that the likelihood of giving enforceability to the online terms and conditions by US courts was more obvious in click-wrap agreements than browse-wrap agreements.¹¹⁸ For instance, in the *Scherillo v Dun & Bradstreet*¹¹⁹ case the court enforced the website click-wrap user agreement against a consumer by affirming that the buyer clicking on the 'I agree' icon suffices to indicate his consent to the terms and conditions included in the agreement, regardless of whether or not he had read the entire terms and conditions of the user agreement.¹²⁰ On the other hand, in *Hines v Overstock.com Inc*¹²¹ the same court (District Court of New York City) took a different view on the enforceability of an arbitration clause against a consumer in a website browse-wrap agreement. The court pointed out that the website operator failed to sufficiently bring to the customer's attention the terms and conditions of using the website prior to placing her order.¹²² Not surprisingly, other US courts have applied nearly the same test where the dispute was between businesses in online B2B contracts.¹²³

V Chari, 'Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study' (2010) 85 New York University Law Review 101.

¹¹⁷ See Paul J Morrow, 'Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Click-Wrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight' (2011) 11 Pittsburg Journal of Technology Law and Policy 1.

¹¹⁸ Jeffrey M Jensen, 'Personal Jurisdiction in Federal Courts over International E-Commerce Cases' (2007) 40 Loyola of Los Angeles Law Review 1507; Deveci (n 4). For example, in *Defontes v Dell Computers Corporation* No Civ A PC 03-2636, 2004 WL 253560 (RI 6 Jan 2004), Justice Williams of the Supreme Court of Rhode Island did not enforce a browse-wrap agreement against a group of consumers where the terms and conditions were available through a hyperlink, stressing that the user agreement could not bind the purchasers of computers over Dell's website because such a hyperlink was 'inconspicuously located at the bottom of the webpage' <<http://caselaw.findlaw.com/ri-supreme-court/1499707.html>> accessed 8 May 2014. See also Juliet M Moringiello and William L Reynolds, 'Survey of the Law of Cyberspace: Internet Contracting Cases 2004 – 2005' (2005) 61 Business Lawyer 433.

¹¹⁹ *Scherillo v Dun & Bradstreet* 684 F Supp 2d 313 (EDNY 2010).

¹²⁰ The District Court of New York City made an interesting analogy between a website click-wrap agreement and a traditional paper contract by stating that: '[A] person who checks the box agreeing to the terms and conditions of purchase on an internet site without scrolling down to read all of the terms and conditions is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms namely ... the clause is still valid.' Moringiello and Reynolds (n 3).

¹²¹ *Hines v Overstock.com Inc* 668 F Supp 2d 362 (EDNY 2009).

¹²² The court stressed that: 'Hines therefore lacked notice of the Terms and Conditions because the website did not prompt her to review the Terms and Conditions and because the link to the Terms and Conditions was not prominently displayed so as to provide reasonable notice of the Terms and Conditions. Very little is required to form a contract nowadays—but this alone does not suffice.'

¹²³ For example, see *Appliance Zone, LLC v NextTag, Inc* Case 4:09-cv-00089-SEB-WGH, 2009 US Dist LEXIS 120049 (SD Ind, 22 Dec 2009); *PDC Laboratories, Inc v Hach Co* No 09-1110, 2009 US Dist LEXIS 75378 (CD III Aug 25, 2009).

Under Iraqi law, it might be difficult to assert whether or not the website's terms and conditions are enforceable as the IESTA only provides legal certainty for the validity of electronic documents and electronic contracts. No provisions can be found regarding the enforceability of online contracting terms and conditions on websites.¹²⁴ At the same time, no provision can be found in Iraqi law which prohibits such an enforceability. In the author's opinion, the question of enforceability of website terms and conditions under Iraqi law would mainly be reliant on a procedural basis rather than substantive law. However, unfortunately, under the civil law system, Iraqi judges may not have the discretion to interpret the law as much as their counterparts in the US have practised in cases that involve such an issue. Accordingly, the author argues that the IESTA should have addressed this issue, and a legal criterion should have been included in the Act in order for courts to apply and interpret it. A possible solution would be that the Iraqi legislature could add a provision to the IESTA that is similar to the one found in the E-commerce Directive.

Apart from the question of enforceability of website click-wrap and browse-wrap agreements, analysis of website user agreements brings to mind another interesting point of discussion; namely, which terms and conditions should people agree to when accessing different websites for buying or selling goods or becoming involved in activities organised by such websites? Do they agree to the terms and conditions of using or accessing the website (user agreement)? Or should they agree to the terms and conditions of the online contracts or the transactions that they pursue over such websites?

In the EU, in *Ryanair Ltd v Billigfluege.de GmbH*,¹²⁵ the Irish airline sued a German website operator for breaching its website terms and conditions by infringing the information on it and displaying it on its website. The defendant argued that no binding agreement existed between them, and it had not breached any contract as the information on the plaintiff's

المادة ١٣- من قانون التوقيع الإلكتروني والمعاملات الإلكترونية: "أولاً- تكون للمستندات الإلكترونية والكتابة الإلكترونية والعقود الإلكترونية ذات الحجية القانونية لمثيلتها الورقية إذا توافرت فيها الشروط الآتية: (أ) ان تكون المعلومات الواردة فيها قابلة للحفظ والتخزين بحيث يمكن أسترجاعها في أي وقتز (ب) امكانية الاحتفاظ بها بالشكل الذي تم انشاؤها او ارسالها او تسلمها به او بأي شكل يسهل به اثبات دقة المعلومات التي وردت فيها عند انشائها او ارسالها او تسلمها بما لا يقبل التعديل بالاضافة او الحذف. (ج) ان تكون المعلومات الواردة فيها دالة على من ينشأها أو يتسلمها وتاريخ ووقت ارسالها وتسلمها

[Article 13(1) of the Iraqi Electronic Signature and Transaction Act "Any agreement by electronic communication or by exchange of electronic documents, shall be equivalent to the paper contract if the following requirements have been met: (a) the message of information should be storable on the information system and can be retrieved at any time. (b) The message of information should be possible to be stored exactly in the same form on the date of forming, sending, and receipting it. (c) The message of information should include a definite indication of the parties who sent and received it and the date and time of dispatch and receipt."]

¹²⁵ *Ryanair Ltd v Billigfluege.de GmbH* [2010] IEHC 47, [2010] IL [22]. This case will also be discussed in Chapter 5 of this thesis when analysing the choice of court agreement.

website was freely available to all of the website's users. When examining such an argument, the court found that the website's terms and conditions was available and visibly accessible through a hyperlink on the website, and the defendant should have read them before using the website. The court denied the defendant's argument that no contract had existed.¹²⁶

Similarly, the English High Court affirmed in *Midasplayer.com Limited v Watkins*¹²⁷ that the user of a website should be bound by its terms and conditions of use even though the user had not become a registered member on the website.¹²⁸ The court granted a summary judgment on the claimant's argument of the breach of contract claim. The claimant, an operator of online skill games, sought a summary judgment against the defendant who designed and sold cheater software which interacts as a human player and assists the user to win and solved questions faster than the human brain when competing with other players using the claimant's online game. The claimant argued that designing and selling the cheater software breached Clause 9 of the website's user agreement which prohibits using or deploying any technique other than human skill in the games or the tournaments organised by the website. When examining the facts submitted before it, the court found that there was no evidence that the defendant could challenge the plea of the claimant because it was a well-established claim in law and there was no point in going ahead with proceedings.¹²⁹

In the US, verdicts have not been very dissimilar to the legal findings reached by the Irish and English courts in the two cases illustrated above. Nearly the same conclusion was reached by the District Court of Virginia State in *Cvent Inc v Eventbrite Inc*.¹³⁰ An online event planning business sued a business competitor, alleging that the latter had breached the terms and conditions of its website by illegally copying information from it and displaying it on the defendant's website without any bilateral agreement or authorization. In its plea, the

¹²⁶ See: Anie Matthews, 'Terms and Conditions May Protect Websites from Infringing Screen Scrapers' (*LK Shields*, March 2010) <<http://www.lkshields.ie/publications/terms-and-conditions-may-protect-websites-from-infringing-screen-scrapers>> accessed 8 May 2014.

¹²⁷ *Midasplayer.com Limited v John Watkins* [2006] EWHC 1551 (Ch).

¹²⁸ Judge Norris QC pointed out in para 22 that: 'Every person seeking access to the King.com site is only afforded access on the footing that they observe the terms and conditions even if they do not become registered participants'. This provision was also clearly stated in the user agreement of the website, which provided that: 'By registering for the King.com Service, you agree to the terms of this Agreement, and you re-affirm that agreement every time you use it. Visitors to the King.com Service who do not register to become a Member ... similarly affirm that they are bound by this Agreement each time they access the King.com Service.'

¹²⁹ In paragraph 20, the Court stressed that: 'These three claims are well founded in law and are supported by evidence which Mr Watkins has not challenged. I do not consider that there is any reasonable prospect that if afforded the opportunity of a trial Mr Watkins could challenge these conclusions'.

¹³⁰ *Cvent, Inc v Eventbrite, Inc* 739 F Supp 2d 927 (2010).

defendant moved to dismiss such a plea by arguing that no breach of any contract had occurred because there was no contract concluded between them. The court agreed with the plaintiff's argument that there was a breach of the website's user agreement; however, it was not convinced by the way that the terms and conditions were displayed on the website. The court found that the plaintiff had failed in bringing the defendant's attention sufficiently to the terms and conditions of the website, which were incorporated into the website by a hyperlink 'browse wrap'; accordingly, it held that the defendant would not be bound by these terms and conditions. Remarkably, the court did not deny the plaintiff's argument of the existence of a 'contract' by the mere act of accessing the website; however, it was not satisfied by the website itself, where the terms and conditions were incorporated.¹³¹

The conclusion that simply accessing a website might constitute a binding online contract even though no online sale contract has been concluded over the website itself is an important one for website users. In other words, the user of the website is bound by the terms and conditions of the website and an online contract is assumed concluded between the user and the website owner at the time when the user starts visiting the website and receives the benefits of the information provided on it.¹³² Individual consumers or any non-experts should always be aware of this point and should think twice and spend time carefully reading the terms and conditions of websites prior to copying data, photos or any exclusive information from them. Most of these terms and conditions have been drafted by legal professionals. Therefore, it might be considered a legally binding agreement even though no transaction of any value has been concluded on the website.

¹³¹ In *Pollstar v Gigmania Ltd* (n 86), the United States District Court for Eastern District of California upheld the same notion of contract formation when accessing any website. The court emphasized that: 'Moreover, unlike the shrink-wrap license held enforceable in *ProCD v Zeidenberg* 86 F3d 1447 (7th Cir 1996), the license agreement at issue is a browse-wrap license. A shrink-wrap license appears on the screen when the CD or diskette is inserted and does not let the consumer proceed without indicating acceptance. By contrast, a browse wrap license is part of the website and the user assents to the contract when the user visits the web site.'

¹³² Without doubt, the conclusion of this online contract should rely upon the procedural and substantive visibility and clarity of the website terms and condition regardless of whether the click-wrap or browse-wrap method has been used by the website owner to notify the user prior to starting to use the website.

4.4 IDENTITY OF CONTRACTUAL PARTIES¹³³

In 1993, the American cartoonist Peter Steiner published a cartoon in *The New Yorker*. It was a picture of a dog sitting behind a desktop computer and talking to another dog standing by him. The text read: ‘On the Internet Nobody Knows You’re a Dog’.¹³⁴ Indeed, nobody would have expected that this fact would become one of the most distinctive features of the internet.¹³⁵ Without doubt, the main idea of this cartoon is manifested in the ‘anonymity’ of the internet users.¹³⁶ This anonymity poses a number of interesting legal issues in different areas of law.¹³⁷ As far as the theme of this thesis is concerned, the anonymity of internet users will be analysed from two main points of view: the sort of legal challenges that such anonymity of contractual parties poses; and the extent that the difficulty in identifying the location of the parties in an international online contract affects the issue of determining the jurisdiction and applicable law. The second part will be analysed separately in Chapters 5 and 6 when examining the jurisdiction and applicable law matters; this section will focus on the first issue.

When analysing the legal implications of the anonymity of the parties involved in online contracts, the first thing that comes to mind is the high possibility of unknowingly making a

¹³³ In fact, this section will address how the infancy doctrine may be regarded problematic in the online contracting context; however, no any historical or well-established concepts of the infancy doctrine will be carried out in this section. Moreover, this thesis will not also address the jurisdiction and applicable law on disputes relating to the legal capacity of contractual parties as both issues are beyond the ambit of this thesis.

¹³⁴ Peter Steiner, ‘On the Internet, Nobody Knows You’re a Dog’ (*The New Yorker*, May 1993) <<https://cartoonbank.licensestream.com/LicenseStream/Store/Content?Filter.SearchString=dog#/Filter.SearchString=nobody%20knows%20you're%20a%20dog&search=>> accessed 26 August 2013.

¹³⁵ Michael Cavanaugh, ‘“NOBODY KNOWS YOU’RE A DOG”: As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Joke Rings as Relevant As Ever’ (*The Washington Post*, 31 July 2013) <http://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html> accessed 8 May 2014; Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Ashgate 2008) 36.

¹³⁶ Christopher R Jones, ‘Nobody Knows You’re a Dog: What Amounts to Context in Network Learning?’ in Ray Land and Sian Byne (eds), *Education in Cyberspace* (Routledge 2005) 106; Chris Reed, *Internet Law: Text and Materials* (2nd edn, Cambridge University Press 2004) 141.

¹³⁷ For example, one of the most negative impacts of internet users’ anonymity is the increased number of online fraud activities on websites; Yaniv Varkat, Ediel J Pinker and Abraham Seidmann, ‘Managing Online Auctions: Current Business and Research Issues’ (2003) 49 *Management Science* 1484. See also: Todd Evan Lerner, ‘Playing the Blame Game, Online: Who Is Liable When Counterfeit Goods Are Sold Through Online Auction Houses?’ (2010) 22 *Pace International Law Review* 241.. For instance, over the period 1990-2000, courts in the United States have convicted many internet users for criminal activities, specifically, for selling items on internet auction websites under fictitious names and accepting payment but without delivering the sold items. See *Alabama v White* 496 US 325 (1990). Another area of law where the anonymity becomes an interesting point to review is in freedom of expression, see William H Dutton and others, ‘Freedom of Connection-Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet’ (Oxford Internet Institution, Report prepared for UNESCO’s Division for Freedom of Expression, Democracy and Peace, November 2010).

contract with a minor.¹³⁸ Recently, it is a fact that minors have become more familiar, more interested and probably more expert in using technology.¹³⁹ Studies report that minors comprise around 48% of online marketplace users, such as eBay and Amazon.¹⁴⁰ In the US alone, Facebook has reached fourteen million registered minor members.¹⁴¹ Accordingly, the involvement of minors in different sorts of online activities raises considerable questions about the legality of the transactions that they carry out over websites and platforms and whether such transactions can be considered legally binding contracts.¹⁴² In general, determining the validity of online contracts made by minors falls within the scope of the traditional infancy doctrine. According to this doctrine, in both common law and civil law, minors cannot be obliged to perform obligations which result from any contracts that they may conclude¹⁴³ except in some specific circumstances where the law allows them to enter into valid agreements.¹⁴⁴ Arguably, this rule could be very problematic when it comes to the application in the online environment.¹⁴⁵

¹³⁸ However, according to Preston, most online marketplaces or retailers are aware of the point that minors are heavily involved in online purchase transactions; nevertheless, online retailers take a risk of contract disaffirmance when contracting with buyers online when they do not verify user age. This may be attributed to the profits from such transactions, persuading online sellers to take such risks. Accordingly, sellers of online goods and services might become less interested in applying some age verifications methods before entering into contracts with online buyers; Cheryl B Preston, 'CyberInfants' (2012) 39 *Pepperdine Law Review* 225.

¹³⁹ Karen A Shiffman, 'Replacing the Infancy Doctrine Within the Context of Online Adhesion Contracts' (2012) 34 *Whittier Law Review* 141; Juanda Lowder Daniel, 'Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope' (2008) 43 *Gonzaga Law Review* 239; Preston (n 138).

¹⁴⁰ *ibid*

¹⁴¹ See the court's review of the case background in *EKD Ex Rel Dawes v Facebook, Inc* 885 F Supp 2d <http://0-uk.westlaw.com.unicat.bangor.ac.uk/find/default.wl?cite=885+F.Supp.2d+894+&rs=WLUK13.07&utid=1&vr=2.0&rp=%2ffind%2fdefault.wl&sp=ukmigrat-000&fn=top&findjuris=00001&mt=WestlawInternational09&sv=Split>

¹⁴² Sarabdeen Jawahitha and Emna Chikhaoui, 'The Adequacy of Malaysian Law on E-Contracting' (2007) 13 *Computer and Telecommunications Law Review* 121. However, such an issue may have raised equal concerns for both online service providers on the one hand, and parents or guardians of minors on the other. From the perspective of doing business online, the consequences of unknowingly contracting with minors might be a major concern. For parents, unauthorised transactions or the involvement in unwanted online activities is a problematic issue. For example, see *Spreadex Ltd v Cochrane* [2012] EWHC 1290 (Comm) where a five year old boy used his mother's boyfriend's account to make bets which caused substantial debits to the boyfriend's online betting account. In fact, though neither the court in this case nor the plaintiff raised or pleaded avoidance of online transactions made under the infancy doctrine, the case is a good example from two other points of view: first, it demonstrates how minors have become very familiar with technology; second, it also shows how the negligence of the parents of their online accounts may lead to unwanted outcomes. See Tom Russell, 'A Cautionary Tale For Online Operators' (2012) 23 *Entertainment Law Review* 219.

¹⁴³ James Fawcett and Janeen M Carruthers, *Cheshire, North and Fawcett: Private International Law* (Sir Peter North (ed), 14th edn, Oxford University Press 2008) 751. See also Karen Mills, 'Effective Formation of Contracts by Electronic Means' [2005] *World Summit on Information Technology*; Sizwe Snail, 'Electronic Contracts in South Africa - A Comparative Analysis' (2009) 2 *Journal of Information, Law & Technology* 44. For example, under Iraqi law, the age of full legal capacity is 18 years (Article 109 of the ICLC). The legal acts of minors (aged 8-17) shall be considered null if it causes a financial loss to them otherwise the validation of such acts shall be reliant on the approval of their parents or guardians (Article 98 of the ICLC).

¹⁴⁴ For instance, under the Iraqi law, any person who finished school at the age 15 and got married with the permission of the court shall be regarded an adult with a full legal capacity (Article 98 of the ICLC). See the

First, it is well-acknowledged that any potential disputes or legal issues regarding the validity of contracts concluded by minors fall within the scope of the legal contractual capacity. Under the EU regime, these sorts of disputes are excluded from the application of the Brussels¹⁴⁶ and the Rome I Regulations.¹⁴⁷ Where the EU Regulations exclude such disputes from its application, it would be up to the national courts of each Member State to decide on the validity of the legal activities of minors.¹⁴⁸ The extent of the applicability of the infancy doctrine to minors that agree to online terms and conditions of websites still needs to be debated here. Generally speaking, there should be no difference in the application of the infancy doctrine to online contracting cases.¹⁴⁹ A few interesting cases can be found in the US jurisdiction which reveal how the claim of protection by the infancy doctrine may not always succeed in online contracting scenarios.

verdict of Iraqi Supreme Court No. 588/ Civil Division 2010 on 25 August 2010 <<http://www.iraqja.iq/uploaded/nashra18.pdf>> accessed 8 May 2014. In the traditional common law, the contract concluded by a minor may be regarded valid and enforceable where the minor enters into an employment contract, which is in his benefit or the contract of buying some life necessities such as food or clothes; Peel (n 4) 567-572.

¹⁴⁵ Martha L Arias, 'Internet Law-Can Children Enter into Legally Binding Online Contracts Using their Parents' Credit Cards?' (*Internet Business Law Services*, 2013) <http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2548> accessed 8 May 2014.

¹⁴⁶ Article 1(a): 'The Regulation shall not apply to: a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession'.

¹⁴⁷ Article 1(2)(a): 'The following shall be excluded from the scope of this Regulation: a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13'.

¹⁴⁸ Fawcett and Carruthers (n 143) 750; however, the determination of the substantial law by which the legal capacity of the contracting party and the validity of the activity is to be assessed is one of the controversial issues in the conflict of laws' regime and there is a substantial difference between the common law and civil law systems regarding it. In the civil law system, the nationality is the factor by which the legal capacity of persons should be determined. See 750-753; غالب علي الداودي وحسن محمد الهداوي، القانون الدولي الخاص: تنازع القوانين- تنازع الأختصاص القضائي- تنفيذ الأحكام الأجنبية (الطبعة الثالثة، دار العاتك للنشر ٢٠٠٩) ص ٩٢-٩٥

[Ghalib Ali AL-Dawoodi and Hassan Mohammed AL-Haddawi, *Private International Law: Conflict of Laws, Conflict of Jurisdiction and Enforcement of Foreign Judgments* (3rd edn, AL-Attick Publishers 2009) 92-95.]

In the common law, the basis by which the legal capacity of contractual parties is determined ranges between the issue of domicile, the law governing the contract itself or the proper objective law; Fawcett and Carruthers (n 143) 750.

¹⁴⁹ Cheryl B Preston and Brandon T Crowther, 'Infancy Doctrine Inquiries' (2012) 52 Santa Clara Law Review 47. Most recently, the giant electronics company Apple has reached a class action settlement with the parents of millions of children and minors who had used their parents' devices (iPad, iPod and iPhones) to make in-apps purchases exceeding billions of US Dollars; Apple In-App Purchase Litigation, 855 F Supp 2d 1030, 1035-36 (ND Cal 2012) <<http://www.leagle.com/decision/In%20FDCO%2020120404908>> accessed 8 May 2014. According to the settlement, Apple agreed to pay compensation to the parents of minors who made the unauthorized purchased from the iTunes store through their parents' iPhones and iPads. See BBC News, 'Apple offers compensation for kids' in-app purchases' (*BBC News/Technology*, 26 February 2013) <<http://www.bbc.co.uk/news/technology-21585378>> accessed 8 May 2014; Shawn Knight, 'Parents to receive iTunes credit, cash payments to settle Apple in-app purchase lawsuit' (*Tech Spot*, 24 June 2013) <<http://www.techspot.com/news/53011-parents-to-receive-itunes-credit-cash-payments-to-settle-apple-in-app-purchase-lawsuit.html>> accessed on 8 May 2014.

In *AV v iParadigms LLC*¹⁵⁰, the District Court of Virginia State tacitly made an interesting distinction between the sale of goods and sale of services when tackling a dispute regarding a contract concluded by minors over a website. In this case, a group of high-school students accessed an online plagiarism service, www.iparadigms.com, in order to view a percentage of their assignment's similarity in comparison with other written materials on the same subject before submitting it to their school for marking. Prior to being able to submit their assignment, the website obliged them to create a user account and this required them to accept the website's click-wrap agreement. Upon completing the registration of the user account, the students were able to submit their work for plagiarism detection. The students were unwilling for their papers to be archived on the website's database so they added a statement to the front of their document stating this. The operation of the plagiarism detection software is fully automated and unmonitored by a human; accordingly, it was impossible for the software to recognize such a statement. When the students discovered later that their work had been archived by the website's anti-plagiarism software, they sued the website claiming the infringement of their intellectual property rights. Initially, the students argued their non-consent to the archiving of their work; however, the court did not uphold this argument and affirmed that the click-wrap agreement was enforceable as it clearly stated that any document submitted to the website would be archived in the database for comparison purposes with other papers in the future. Thereafter, the students moved to void the online contract pursuant to the doctrine of infancy as they were, or one of them was at least, under the age of eighteen. Surprisingly, the court rejected such an argument affirming that once the minors received the benefit of the services provided by the website, they could no longer claim protection under the infancy doctrine. In other words, it is unjust to retain two benefits and claim damages at the same time. The court stressed this by saying that 'the infancy defense cannot function as a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong'.¹⁵¹

Without doubt, the judgment in this case seems surprising, and it has been criticised for disregarding the doctrine of infancy.¹⁵² It appears that the court arrived at this decision very narrowly, according to the circumstances and facts involved in this specific case.

¹⁵⁰ *AV v iParadigms, LLC* 544 F Supp 2d 473 (ED Va 2008); Moringiello and Reynolds (n 3).

¹⁵¹ *ibid.*

¹⁵² See Stephen Sharon, 'Do Students Turn Over Their Rights When They Turn Their Papers? A Case Study of TURNITIN.Com' (2011) 26 *Touro Law Review* 207.

In the author's opinion, the verdict would not have been the same if the consideration of the online contract was tangible goods. In such a case, the court would have asked the claimant to return the goods to the seller in order to nullify the contract under the infancy doctrine. In this case, the consideration was intangible and it was impossible to return it after its benefit had been taken by the minors. In other words, there is a difference between the sale of some sort of service or intangible good and the sale of tangible goods in terms of getting the benefits of the contract's consideration for which both parties have bargained. An example of this is where a minor places an order on eBay for an Xbox gaming console and, after using it a few times, discovers that it does not suit his age or abilities. The benefit that the minor gets will come to an end as soon as he returns the item to the seller even though he might have benefited from it a couple of times. As for the consideration in other types of contract such as some kinds of intangible goods or services, it is impossible to return the benefit of the contract. This occurred in the case above where the four school children, after discovering the similarity of their work from the plagiarism software (the consideration of the contract), argued for the disaffirmance of the contract. It was impossible to ask them to return any benefits that they received from the contract.

The same analysis applies to similar cases, for example, in *IB v Facebook Inc.*¹⁵³ Facebook argued the same plea and this was upheld by the court in the trial. In this case, the parents of two minors filed a complaint against Facebook for taking unauthorised payments from their bank credit cards.¹⁵⁴ The two minors, on separate occasions, used their parents' credit card to purchase Facebook's game credit *Ninja Saga*. The payments exceeded several hundred US Dollars. Facebook stored the details of the bank account from the first time the minors used it to make a purchase and the bank account was automatically debited each time the game credits were about to run out. Having discovered the payments, the parents contacted Facebook for a refund under the unauthorized payment claim but this request was denied. A class action on behalf of other minors who had made the same purchase was brought before the District Court of California State.¹⁵⁵ The plaintiffs relied on the age of the minors and argued that the online purchase contract between them and Facebook was void or voidable under the infancy doctrine in California (California Family Code). Further, that the payments which Facebook had taken from their account amounted to a 'delegation of power' as stated

¹⁵³ *IB v Facebook* 905 F Supp 2d 989 (2012); Arias (n 145).

¹⁵⁴ Arias (n 145).

¹⁵⁵ *ibid*

in § 6500 of the California Family Code.¹⁵⁶ In a similar way to the court's findings in *AV v iParadigms LLC*, Facebook's counter claim was that the disaffirmance of the online purchase contract under the infancy doctrine could not be upheld after the minors had already benefited from the game's credit.¹⁵⁷ In order to uphold such a claim, Facebook further referred to the maxim which the court in *EKD Ex Rel Dawes v Facebook Inc*¹⁵⁸ had cited: 'Minors must either accept or repudiate the entire contract, and they cannot retain the contract's fruits and at the same time deny its obligations'.

By upholding Facebook's contention, the court decided to grant Facebook's motion to dismiss the plaintiffs' argument on the online purchase contract under the infancy doctrine by stressing that once the minor had consumed the benefit of the contract, no voidance claim could be made. Again, the similar reasoning made by the court here affirms the complexity and non-predictability of the outcomes of cases that involve the validity of online contracts made by minors. Indeed, one should respect the notion that an injustice may be done when the law considers both seven year old boys and seventeen year old youths as 'infants'.¹⁵⁹ The author would accept the fact that youths may have more technological experience than many adults do, and their mental ability to take the right decisions is much higher than 'child' infants.¹⁶⁰ Therefore, it might be equally important for the courts, when dealing with cases

¹⁵⁶ *ibid*

¹⁵⁷ *ibid*

¹⁵⁸ *EKD Ex Rel Dawes v Facebook, Inc*, 885 F Supp 2d 894 (2012). In this interesting case, two Illinois-resident minors sued Facebook before the District Court of Illinois for breaching their right to privacy by misappropriating their names for commercial purposes without their consent. However, when Facebook moved to transfer the litigation before the District Court of California pursuant to the forum selection clause included in Facebook's browse-wrap agreement, the minors moved to disaffirm such a clause under the infancy doctrine. The court found that the infancy doctrine was a basic right of any minor to void a contract he had made. However, such a right cannot be used to split the contract by accepting a part of it and disaffirming the other part; it should be affirmed entirely or disaffirmed entirely. The court stressed that the plaintiffs in this case have used and continue to use Facebook; however, at the same time, they are denying the forum selection clause in the user agreement to which they both agreed. The court stated that: 'minors may not accept the benefits of a contract and then seek to disaffirm the contract in an attempt to escape the consequences of a clause that does not suit them.' Accordingly, the court accepted the Facebook motion to transfer the litigation into the District Court of California in order to examine the enforceability of Facebook's browse-wrap agreement.

¹⁵⁹ Daniel (n 139). For example, according to the ICLC, children under the age of seven do not have any legal capacity (Article 97/2); AL-Hakeem (n 50). However, between the age of seven until the age of seventeen the same infancy doctrines rules apply:

المادة ٩٧ من القانون المدني العراقي: "١. يعتبر تصرف الصغير المميز اذا كان في حقه نفعاً محضاً وان لم يأذن به الوالي ولم يجزه, ولا يعتبر تصرفه الذي هو في حقه ضرر محض وان اذن بذلك وليه او اجازته, اما التصرفات الدائرة في ذاتها بين النفع والضرر فتتعقد موقوفة على اجازة الوالي في الحدود التي يجوز فيها لهذا التصرف ابتداءً. ٢. وسن التمييز سبع سنوات كاملة"

[Article 97 of the ICLC: '1. any advantageous legal transaction carried out by a minor shall be deemed valid even though the minor's guardian does not approve of it. While the invalidity shall be given to any disadvantageous legal action done by a minor even though the minor's guardian has affirmed it. As for the validity of any bargaining transactions that could bear the loss or profit as well, these shall be reliant on the guardians' affirmance. 2. The age of infancy shall start from seven years old'.]

¹⁶⁰ Shiffman (n 139); Daniel (n 139).

involving technology and youths in relation to online contracting, to take into consideration the factors explained above.

In any event, it appears that the application of the infancy doctrine in the online contracting sphere is problematic. The infancy doctrine may not aid, in some circumstances, the parents or the guardian of minors to disaffirm the contract. On the other hand, businesses should also be aware of the consequences of not verifying the ages of anonymous people with whom they are contracting.¹⁶¹ The point that will be stressed in the next section is that such negligence may sometimes lead to unwelcome consequences.¹⁶² When analysing the implications of the anonymity of the contractual parties in online contracting activities, the focus will mainly target the businesses or adults who take the risk of contracting with anonymous parties without carrying out any age verification. This is because minors are, in most cases, well-protected by the infancy doctrine or other child protection laws.¹⁶³ In this respect, the author would agree with the notion that performing some sort of age verification in online contracting processes may not render businesses and adults immune from minors denying online terms and conditions of contracts. Further, it would not deprive the minors from the protection afforded to them by the infancy doctrine.¹⁶⁴ The implementation of online age verification should only be used as a precautionary measure to avoid contracting with minors but not as a disclaimer of liability or a plea for enforcing a contract against a minor.

4.5 SIGNATURE IN ONLINE CONTRACTS

Historically, the signature has been found to be a suitable method for the expression of the intention to be bound by an agreement, and a proof of the authenticity of a document or the identity of the signatory.¹⁶⁵ With the advent of electronic contracts the meaning and function

¹⁶¹ Patrikios (n 56) 134.

¹⁶² For example, in *Doe v SexSearch.com*, 502 F Supp 2d 719 (ND Ohio 2007), an adult was charged with a criminal act of sexual misconduct with a minor. The adult met the girl over an online dating website www.SexSearch.com, and she alleged on her profile that she was over 18. However, after having sex with her, the man was brought before the court and learned that the woman was only fourteen years old. The court charged him with a felony for having illegal sex with a minor and he was jailed for that. This case has been mentioned also in Chapter three of this thesis in the analysis of online service providers' liability.

¹⁶³ Preston (n 138); Larry Cunningham, 'A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law' (2006) 10 UC Davis Journal of Juvenile Law & Policy 275; Daniel (n 139).

¹⁶⁴ See *ibid*; Jawahitha and Chikhaoui (n 142).

¹⁶⁵ The BusinessDictionary.Com <<http://www.businessdictionary.com/definition/signature.html>> accessed 8 May 2014; Carolina M Laborde, *Electronic Signature in International Contracts* (Peter Lang 2008) 22. Jennifer

of signatures remains the same.¹⁶⁶ Legislatures in many countries have sought to propose laws giving equivalent validity to electronic means of signing as to traditional handwritten signatures. The EU drafted Directive 1999/93/EC on Electronic Signatures,¹⁶⁷ which provides a standardisation of the rules governing the requirements of the electronic signature. In the same way, in 2000, the United States Congress passed the Federal Law of the Electronic Signatures in Global and National Commerce Act 2000 (Electronic Signatures Law). As a response to the increase in electronic commerce and the use of electronic format documents in international trade, the United Nations Commission on International Trade Law (UNCITRAL) drafted its Model Law on Electronic Signatures in 2001. Recently, the Iraqi Parliament also enacted the law of the IESTA.¹⁶⁸

It is clear that the laws of electronic signatures provide legal certainty and validity.¹⁶⁹ At this point it is suitable to pose the following question: are the requirements and functionality of the traditional signature within its meaning covered by the statutory provisions satisfied in the online contracting process over websites? As it was said at the very start of this section, the signature in the traditional context serves two main purposes: as a way of confirming the authenticity and identity of a document; and as a way of expressing the consent by the signatory when entering into a binding agreement. In order to answer the above question it should be necessary then to differentiate between the role of the signature as an expression of the consent to enter into a binding legal agreement, and its function as proof of the identity of the signatory person.

Regarding the first functionality of the electronic signature, the question that arises is whether clicking 'I agree' to the terms and conditions of a website, or 'buy now' when purchasing goods or services over a website amounts to an electronic signature included in the electronic signature statutory provisions. A further question is whether such behaviour by the website user constitutes a sufficient indication of the acceptance of the terms and conditions of the

L Koger, 'You Sign, E-Sign, We All Fall Down: Why the United States Should Not Crown the Marketplace as Primary Legislator of Electronic Signature' (2001) 11 *Transnational Law & Contemporary Problems* 491.

¹⁶⁶ Rowland, Kohl and Charlesworth (n 17) 274.

¹⁶⁷ European Parliament and Council Directive 1999/93/EC of 13 December 1999 on a Community Framework for Electronic Signature [1999] OJ L013/19 (Electronic Signature Directive).

¹⁶⁸ The new law was enacted by the Iraqi Parliament on 25 September 2012. The Act formally entered into force on 5 November 2012 and was published in the official journal of Iraqi legislation (Waqaa-Al_Iraqia الوقائع العراقية); OJ No 4256 < <http://www.moj.gov.iq/view.205/> > accessed 8 May 2014.

¹⁶⁹ Imtinan Ahmad, Hong Sik Kim, Laurance Leff and Daniel Greenwood, 'XML for Click-through Contracts' (2009) 17 *International Journal of Law & Information Technology* 206; Rowland, Kohl and Charlesworth (n 17) 274.

agreement. The answer requires a brief review of the definition of electronic signatures in the EU, the US and Iraq.

In EU law, three types of electronic signature are covered by the provisions of the Electronic Signature Directive: the simplest electronic signature could be any sign, symbol, PIN or an image of a handwritten signature attached to an email message; an advanced electronic signature (PKI); and finally, a qualified electronic signature.¹⁷⁰ In the US, the Electronic Signatures Law defines an ‘electronic signature’ as: ‘An electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with intent to sign the record’.¹⁷¹

Nearly the same definition has been adopted in the IESTA.¹⁷² It is clear from these statutory definitions of electronic signature that none of them strictly appear to be compatible with the way that a website agreement is agreed or an online contract over a website is accepted. In other words, clicking on ‘I agree’ or ‘buy now’ does not seem to be a kind of sign, symbol, PIN, etc. Does this mean that the desired purpose behind stipulating the signature as a method of consent is not satisfied in such instances?

Certainly, the answer is no. The functional equivalent and technological neutrality approaches¹⁷³ can greatly assist to show consent to a website user agreement or an online

¹⁷⁰ See the Report from the Commission to the European Parliament and the Council COM (2006) 120 final, Report on the Operation of Directive 1999/93/EC on Community Framework for Electronic Signatures, para 2.3.2 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0120:FIN:EN:PDF>> accessed 4 September 2013; Richard Jones and Dalal Tahri, ‘Online Selling and Contracting: An Overview of EU Rules’ (2011) 27 Computer Law & Security Review 402 <<http://dx.doi.org/10.1016/j.clsr.2011.05.001>> accessed 8 May 2014.

¹⁷¹ §106(5) of the Act.

¹⁷² المادة ١ (رابعاً) من قانون التوقيع الإلكتروني و المعاملات الإلكترونية: " التوقيع الإلكتروني: علامة شخصية تتخذ شكل حروف أو أرقام أو رموز أو إشارات أو أصوات أو غيرها وله طابع متفرد يدل على نسبته الى موقع ويكون معتمداً من جهة التصديق" [Article 1 (4) of the Iraqi Electronic Signature and Transactions Act: “ ‘electronic signature’ means any personalised sign in the form of a letters, numbers, symbols, sounds, or any other distinctive thing, which refers to the signatory person”.]

¹⁷³ The meaning of technological neutrality approach is best defined in the Recital 18 of the EU Directive 2002/20 on common regulatory framework for electronic communications network and services [2002] OJ L198/33 (Framework Directive) which reads as follows: ‘The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technological neutral, that is to say that it neither imposes nor discriminates in favour of the use of particular type of technology, does and preclude the taking of proportionate steps to promote certain specific service when this is justified, for example digital television as means for increasing spectrum efficiency.’ See also Ulrich Kamecke and Körber Törsten, ‘Technological Neutrality in the EC Regulatory for Electronic Commerce Communications: A Good Principle Widely Misunderstood’ [2008] European Competition Law Review 330. As for the functional-equivalent approach, the UNCITRAL Model Law on Electronic Commerce provides extensive explanation about this legal concept in its enactment guide. Briefly, the aim behind such an approach is to ensure that any legal requirement is satisfied regardless of the technical method that is used to meet the legal stipulation or standards of any particular case. See Paragraph (E) of the guidance of enactment of the UNCITRAL’s Model Law on Electronic Commerce (1996).

purchase contract even though such a behaviour may not technically correspond with the framework of electronic signatures covered by statutory rules.¹⁷⁴ It is important to bear in mind that the general rules of contract law state that writing and formality in the formation of contracts are only exceptionally required, and it is not necessary for the offer and acceptance to be performed with a signature from the accepting party.¹⁷⁵ This has also been affirmed in many cases in the EU and US. Some of these have already been analysed and others will be analysed throughout the chapters of this thesis. These show that courts have enforced website terms and conditions by affirming that clicking on ‘I accept’ amounts to showing consent, and without considering whether the requirement of electronic signature has been satisfied or not.¹⁷⁶ Moreover, in the UK, it has been held that clicking on ‘I agree’ or ‘place order’ when viewing website terms and conditions or buying an item over the website should satisfy the requirement of a traditional signature for the purpose of expressing acceptance.¹⁷⁷

On the other hand, when it comes to the analysis of the function of an electronic signature as proof of the identity of the signatory party, the findings might be different. In fact, the requirement of the electronic signature as an indication of the signatory’s identity has been stipulated in the UNCITRAL Model Law on Electronic Commerce.¹⁷⁸ The author would argue that this role has not yet been sufficiently addressed in electronic signature

¹⁷⁴ See also Christine Riefa and Julia Hörnle, ‘The Changing Face of Electronic Consumer in the Twenty-First Century: Fit for Purpose?’ in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 110; Rowland, Kohl and Charlesworth (n 17) 274; OA Orifowomo and JO Agbana, ‘Manual Signature and Electronic Signature: Significance of Forging a Functional Equivalence in Electronic Transactions’ (2013) 24 *International Company and Commercial Law Review* 357.

¹⁷⁵ Graham JH Smith (ed), *Internet Law and Regulation* (Sweet & Maxwell 2007) 828; Andy Harris, ‘Dealing with Online Contracts and Electronic Signatures’ (*MBM Commercial*, April 2012) <<http://mbmcommercial.co.uk/news/article/dealing-with-online-contracts-and-electronic-signatures.html>> accessed 10 September 2013 ; AL-Haddawi (n 148) 167.

¹⁷⁶ See Robert Lee Dickens, ‘Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases’ (2007) 11 *Marquette Intellectual Property Law Review* 379.

¹⁷⁷ Paragraph 3.36 of the Law Commission’s advice on the Electronic Commerce: Formal Requirements in Commercial Transactions, 2001 provides that: ‘We do not believe that there is any doubt that clicking on a website button to confirm an order demonstrates the intent to enter into that contract. That will satisfy the principal function of a signature: namely, demonstrating an authenticating intention. We suggest that the click can reasonably be regarded as the technological equivalent of a manuscript ‘X’ signature. In our view, clicking is therefore capable of satisfying a statutory signature requirement (in those rare cases in which such a requirement is imposed in the contract formation context.’ <[http://lawcommission.justice.govuk/docs/Electronic Commerce Advice Paper.pdf](http://lawcommission.justice.govuk/docs/Electronic_Commerce_Advice_Paper.pdf)> accessed 8 May 2014. See also Rowland, Kohl and Charlesworth (n 17) 246.

¹⁷⁸ Article 7 of the Model Law provides that: ‘Where the law requires a signature of a person, that requirement is met in relation to a data message if; a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message.’ A similar provision regarding the functionality of the electronic signature as method of signatory person’s identity has been included in the electronic signature’s definition in the Iraqi law; in both the Electronic Signature and Transactions Act, and the Bill of Cyber Crimes [2010].

legislation¹⁷⁹ and, more particularly, it is submitted that electronic signature stipulation is not completely satisfied in the contracting process on websites.¹⁸⁰ As it has been demonstrated in the previous section, the anonymous identity of the online contractual parties has brought to the fore considerable problematic issues, not just in the online contracting practices but also in different kinds of online activities on websites. One main reason could be attributed to the lack or the absence of the electronic signature's role as an identity and authenticity verifier.¹⁸¹ In other words, where clicking on 'I accept' or 'place order' satisfies the first function of the signature as an expression of consent to be bound by the contract, it does not indicate the identity or the authenticity of the accepting party, which is the other function of a signature.¹⁸²

The inability of electronic signatures to perform this role has created some considerable legal issues.¹⁸³ It has been shown previously that minors have become one of the main participants in online activities on websites, and it has been pointed out how problematic this issue could be in some cases.¹⁸⁴ In *Spreadex Ltd v Cochrane*,¹⁸⁵ a five year old boy accessed his mother's

¹⁷⁹ The emphasis on this point has been also highlighted by the Commission of the European Communities in its 'Action Plan COM(2008) 798 final on E-Signature and E-Identification to Facilitate the Provision of Cross border Public Service in the Single Market'; See also Stephen Mason, 'Revising the EU E-Signature Directive' (2012) 17 Communications Law 56; Jones and Tahri (n 170). See also The European Commission Study, 'Feasibility study on an electronic identification, authentication and signature policy (IAS)' (SMART 2010/0008) <<http://ec.europa.eu/digital-agenda/en/news/feasibility-study-electronic-identification-authentication-and-signature-policy-ias>> accessed 8 May 2014. In favour of this argument, see also Watchara Neitivanich, 'Mechanisms for the Protection of Online Consumers: A Comparative Analysis of the US E-Sign Act and Thai E-Transactions Act' (2004) 10 Annual Survey of International & Comparative Law 103 <<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1083&context=annlsurvey>> accessed 8 May 2014.

¹⁸⁰ In Germany, courts acknowledged this fact in three similar cases where email accounts had been used to place bids on items offered by online auction platforms. In these cases, defendants denied the formation of online contract made over the internet auction on the ground that bids sent through their email accounts were made by unauthorised persons. The plaintiffs' argument in all three cases was that email accounts which were used to place the bids were password-protected and accordingly; the assumption should have been made that the conclusion of the online contract was valid and enforceable. The Courts denied such an argument made by the plaintiffs and stressed that as long as no qualified electronic signature had been included with the emails through which the bids had been placed, it would be unjustifiable to build the assumption that such bids were placed by email accounts' holders. Courts have also relied upon §292a of the German Civil Procedure Code, which stipulates a qualified electronic signature in order to give a legal validity to any transaction made over electronic communications. See *AG Erfurt* 28 C 2354/01 (Court of First Instance verdict); *LG Konstanz* 2 O 141/01 A (District Court verdict); *OLG Köln* 19 U 16/02 (Court of Appeal verdict) <<http://journals.sas.ac.uk/deeslr/article/viewFile/1760/1697>> accessed 9 Jun 2014. See also Stephen Mason, *Electronic Signature in Law* (3rd edn, Cambridge University Press 2012) 218.

¹⁸¹ Neitivanich (n 179).

¹⁸² See also Rowland, Kohl and Charlesworth (n 17) 246.

¹⁸³ Francoise Gilbert, 'Age Verification as A Shield for Minors on the Internet: A Quixotic Search?' (2008) 5 *Shidler JL Com & Tech* 6.

¹⁸⁴ For example, see the story of the 13-year-old boy who made \$1.2 million US Dollars' worth bids on merchandise over eBay's online auction website: '13-Year Old Boy Bids Millions Online' (*The Nevada Daily Mail*, April 30, 1999) <http://news.google.com/newspapers?nid=1908&dat=19990429&id=h_MfAAAAIBAJ&sjid=vdkEAAAIBAJ>

boyfriend's online betting account, which was left open mistakenly and made many bets because he thought it was a guessing game as he had been informed previously by his mother's boyfriend.¹⁸⁶ This led to the account being debited by around £50,000.

This case demonstrates how crucial it is to require a password for an account each time the account activity becomes idle for a specific period.¹⁸⁷ Requiring the confirmation of the password is a good implementation of the electronic signature for the purpose of identity and authenticity. Indeed, this is already in use by almost all websites, which require its users to open accounts before allowing them to get involved in activities; however, this does not provide a solution to the whole problem. Identity verification should be implemented in advance to prohibit minors and unauthorised users from becoming account holders in online buying and selling marketplaces, online dating websites and some online social network websites. In *IB v Facebook Inc*¹⁸⁸, the problem did not occur as a result of the misuse of an account by an unauthorized minor as it happened in *Spreadex Ltd v Cochrane*. Rather, it happened as a consequence of Facebook's policy of allowing minors to become registered users.¹⁸⁹ In some cases, implementing proper age verification should be the strict responsibility of the website operators as a safeguard for minors from being harmed by unlawful misconduct by adults, especially in online dating websites where minors have become victims of serious sexual assaults.¹⁹⁰ The problem is manifested in the fact that the majority of retail websites sell goods and services with no need to become an account holder.

The law may require in certain cases that the online sellers should confirm the age of the buyers of products, such as alcohol and tobacco.¹⁹¹ There are no general statutory obligations

[&pg=4064,2269236>](#) accessed 8 May 2014. Most recently, a Portuguese teenager used his father's eBay account to make bids on the famous WikiLeaks server that had been offered for sale on eBay. The 17 year old bid eight times on the item and was the winning bidder at \$33,000 <http://gizmodo.com/the-wikileaks-server-that-hosted-cablegate-is-for-sale-1245720862/1308604205@ace?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+gizmodo%2Ffull+%28Gizmodo%29> accessed 8 2013.

¹⁸⁵ [107]; [EWHC] 1290 (Comm).

¹⁸⁶ See also (n 142).

¹⁸⁷ For example, HSBC offers a mobile online banking app that works on smart phones (both iOS and Android). The App requires re-entering the password each time of running the App after the mobile phone wakes up from the sleep mode. The same mechanism exists in the PayPal mobile App as well.

¹⁸⁸ *IB v Facebook* 905 F Supp 2d 989 (2012).

¹⁸⁹ See the Background of the case in its official transcript.

¹⁹⁰ See *Doe v MySpace* 528 3d 413(5th Cir 2008); *Doe v SexSearch.com* 502 F Supp 2d (ND Ohio 2007).

¹⁹¹ Ben Allott, 'Age Verification of Online Alcohol Purchase' (*Internet Retailing*, 28 September 2012) <<http://internetretailing.net/2012/09/guest-comment-age-verification-of-online-alcohol-purchases/>> accessed 9 May 2014.

imposed on online services providers and online sellers requiring an electronic signature as proof of contractual identity during the online contractual process.¹⁹²

The framework of the electronic signature as proof of identity may vary from specific online activity to another. As far as the minors are concerned, this could be referred to as the online age verification method. Online verification is a method by which the website operator can control the access of its website or make its content available only to users who are over the legal age for the purposes of privacy and safety of minors.¹⁹³ It can be implemented using different technological methods such as self-verification, peer verification, or semantic verification.¹⁹⁴ This thesis will not allocate space to explaining how these methods work and the pros and cons of each method as it is beyond its scope. The author argues that online age verification methods should be legally considered as a type of electronic signature for the purposes of verifying the identity and authenticity of the contracting party. Further, such a technique should be recognised under the laws of electronic signature with taking into account the functional equivalent and technological neutrality principles. Some online service providers have already been implementing such a technique on their websites. For example, Yahoo! requires users when signing up to a new Yahoo! account to type out a string of characters and tick a box indicating consent to its terms and conditions. The symbol usually consists of a combination of letters and numbers and is written in quite a stylised way to make it difficult to understand by a person who is under a certain age. Therefore, this can probably be considered a kind of semantic age verification method. The system automatically refuses to complete the registration of the account if one of these steps is left blank. By doing so Yahoo! does not just require agreement to its user agreement by ticking a small box beside the 'I agree' button but it also aims to ensure that the person doing this is above a 'perceptive' age.

Before examining the legality of online age verification, it should first be questioned whether online retailers and service providers are seriously willing to require a type of electronic signature as a method of verifying identity before entering into a contract with an anonymous people. There might be no simple answer to this question; nevertheless, it is also true that most giant electronic marketplaces are aware that minors are increasingly involved in buying

¹⁹² Jacob Boersma and Nick Smaling, 'Solving Online Age Verification Today' (*Innopay*, 22 March 2013) <<http://www.innopay.com/content/solving-online-age-verification-today>> accessed 9 May 2014.

¹⁹³ Jules Polonetsky, 'Online Age Verification for Our Children' (2009) 31 International Conference of Data Protection and Privacy Commission in Madrid <<http://www.futureofprivacy.org/wp-content/uploads/2009/11/madrid-presentation-online-verification1.pdf>> accessed 9 May 2014.

¹⁹⁴ *ibid*

over websites. The profitable financial income from such transactions might be the main reason why online retailers are less interested in prohibiting minors from signing up to new accounts.¹⁹⁵

As for the legality of online age verification, it should be stressed first that age verification methods discussed here should not contradict with privacy laws that prohibit the collection of personal data from the website user in order to enquire their age, the matter that might be considered contradicting with the privacy laws.¹⁹⁶ The argument simply is to give legal validity to some technical steps that should be implemented by the website operators and make a sufficient legal assumption of the necessary steps prior to making the contract and irrespective of whether such methods are accurate enough or not. Probably, most online age verification methods, such as asking users to confirm their age, are not effective enough to prohibit underage users from becoming involved in website activities.¹⁹⁷ The aim is to show that the online service providers have taken proper steps that expressly show that their service is only specific to those over a certain age.

This section has argued that electronic signature laws have not yet paid enough attention to the issue of online identity and authenticity of users involved in different kinds of internet transactions. Arguably, the law of electronic signatures should be reconsidered, taking into account the emerging concerns about the anonymity that the internet may provide.¹⁹⁸ The internet should not be used as a veil. It would be important enough to know, at least hypothetically, the persons who are sitting behind the computer buying and selling that are the victims of unlawful misconduct, and probably using the infancy doctrine as a shield against the enforcement of reasonably made contracts.

¹⁹⁵ See Preston (n 138); see further about Preston's argument in (n 138) of this chapter. However, in the United States, the Children Online Privacy Protection Act (COPPA) has been imposed on some kinds of websites which sell children and minors product to carry out some age investigation before entering into a sale contract with any user; see Gilbert (n 183).

¹⁹⁶ Berin Michael Szoka and Adam Thierer, 'COPPA 2.0: The New Battle Over Privacy, Age Verification, Online Safety & Free Speech' (Progress & Freedom Foundation Progress on Point Paper No 16.11, 21 May 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408204> accessed 9 May 2014.

¹⁹⁷ Boersma and Smaling (n 192); Nicole Perloth, 'Verifying Ages Online is a Daunting Task, Even for Experts' (*The New York Times*, 17 June 2012) <http://www.nytimes.com/2012/06/18/technology/verifying-ages-online-is-a-daunting-task-even-for-experts.html?pagewanted=all&_r=0> accessed 9 May 2014.

¹⁹⁸ In this context, Professor Chris Reed provides a good definition for the electronic signature that can achieve such an objective. He defines the electronic signature: 'An electronic signature is any process applied to an electronic communication which evidences the identity of the signatory, the signatory's assent to the content of message and the integrity of the message'. See Chris Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010) 73 *The Modern Law Review* 903.

4.6 CONCLUSION

This chapter has aimed to highlight some selected issues that are problematic during the online contracting process. Prior to starting the analysis of the jurisdiction and applicable law matters on online contracting disputes and the complexity of its dispute resolution, it was necessary to identify first the most common reasons for online contracting disputes. Arguably, as far as the traditional paper contracting is concerned, most of the selected legal issues examined in this chapter, namely, the invitation to treat and offer, terms and conditions of the contract, the identity of the contractual parties, and the electronic signature might have become well-established concepts in law. This chapter has demonstrated that the special characteristics of online contracts on websites has changed some of these traditional legal norms and created a sort of uncertainty regarding the application of others. As for the legal norms that have been changed, the internet custom and practice have played a vital role in influencing courts to disregard traditional rules and apply these customary laws instead. This has been noted in cases regarding the distinction between an offer and an invitation to treat in online contracting cases over online auction websites and electronic marketplaces.

The analysis has shown that some legal provisions might have become inadequate for providing enough legal predictability of some legal activities that take place on websites. More precisely, one of these areas which has been specifically targeted by this chapter is the increased involvement of minors in different kinds of website activities. The legal implications of this issue may fall within different law subjects. As far as online contracts are concerned, the emphasis has been given to the legal validity of such contracts concluded by underage parties. It has been pointed out that minors cannot always use the doctrine of infancy as a defence to escape their obligations resulting from binding agreements which they have become parties in. In order to pay more attention to the issue of anonymity of internet users and its significant consequences to online contracts, the link has been made to electronic signatures as a method to identify online users. The definition and functionality of the electronic signature have been examined. In this regard, it has been argued that the law of electronic signatures should be reconsidered by taking into account the inability of electronic signatures to identify the authenticity and identity of the parties involved in legally binding agreements on websites.

Finally, and most importantly, the core purpose of this chapter has been to draw special attention to the website user agreements, and the legal terms and conditions of online

contracts concluded over such websites. In general, website click-wrap or browse-wrap agreements have been considered legally binding ones; nevertheless, a vast majority of online contracting disputes have resulted from such terms and conditions as it has been shown from the examined case law and the cases that will be examined in the coming chapters. Internet users should realise that these terms and conditions are binding agreements, and that simply accessing a website may impose a legal obligation on the website visitor even though no transaction has been done over that website. On the other hand, the law should be imposed on website operators to make sure their user agreements are as simple, concise and visible as possible so that the visitor to the website is aware enough before entering into a binding legal agreement.

CHAPTER FIVE

EXISTING JURISDICTION RULES AND THEIR APPLICABILITY TO ONLINE CONTRACTING DISPUTES¹

5.1 INTRODUCTION

In the previous chapter, the problematic issues of contracting on websites were addressed. It was also stressed that such problematic matters could be the main reasons behind the emergence of disputes between the contracting parties at either the stage of concluding the online contract or the stage preceding the conclusion of the contract, that is to say, the stage of performing the online contract. Where online contracts are concluded between parties that belong to different jurisdictions or are performed in more than one country, the rules of private international law will apply to determine the proper court to adjudicate the transnational dispute.² In this context, it has been said that exploring the jurisdictional grounds of internet activities, in general, has become the primary concern of the so-called “techno-legal” contention.³ The supranational peculiarity of the internet coupled with the substantive disparity between national laws worldwide has led to the situation where many jurisdictions either claim to adjudicate over activities that take place over the internet,⁴ or claim that they have no power to do so.⁵ What is more, where the inhabitants of cyberspace

¹ The term “traditional” should not be interpreted that the writer is in favour of proposing another set of modern or special jurisdiction rules for online activity. However, the distinction between traditionalism and modernism is already existed within the context of contracts since the advent of new contracting mean such as telephone, telex, fax, and the recent and the novel phenomena the Internet beside the traditional paper contract. From that point, the term “traditional jurisdiction rules” has been used to emphasize the controversy, which might occur when applying jurisdictional rules to novel online contracts. It also should be noticed that many approaches have been proposed about how the law can or should regulate cyberspace (see chapter 2 of this thesis). However, in fact, many legal regimes have been hesitated of introducing new set legislations and therefore, reacted to this issue only by two different ways; applying the existing norms or harmonising them.

² Graham JH Smith (ed), *Internet Law and Regulation* (Sweet & Maxwell 2007) 806.

³ Mohammad Osiur Rahman, Nour Mohammad and Mohammad Mahabubur Rahman, ‘Towards Understanding Personal Jurisdiction in Cyberspace: An Overview of American Try-out for Internet Cases’ (2008) 50 *International Journal of Law and Management* 105.

⁴ Trevor C Hartley, *International Commercial Litigation Text, Cases and Materials on Private International Law* (Cambridge University Press 2009) 205; See also Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices EU, US and China* (Cambridge University Press 2010) 17.

⁵ Under *forum non-conveniens* approach in common law, the court might reject its jurisdiction if it finds that it is not the appropriate forum for adjudicating the dispute due to the lack of connection between the activity and the forum state. See Wang (n 4) 18. Nevertheless, the Hague Convention on Choice of Court Agreement (Hague Convention) limits the court from exercising such a right, in case there is an exclusive court agreement between contractual parties. Article 5 (2) provides that: ‘A court has jurisdiction under paragraph 1 shall not decline to

are spread across different jurisdictions with distinct legal regimes, a consideration of different jurisdictional grounds and conflicting interests cannot be ignored;⁶ interests such as that of the claimant and his right to litigate against the defendant in his home country, and that of the defendant and his right not to be the subject of litigation in unexpected jurisdictions.⁷ From a technical perspective, in most circumstances, internet surfers, especially consumers, are neither aware of nor care about the geographical location of the websites which they access and the jurisdictions of those websites.⁸ This is compounded by the fact that most website addresses do not include any geographical indication about the country from which the website is operated, and even if geographical names are incorporated into the web address they might not reflect the true state of affairs.⁹ As a result, courts have often had difficulties trying to assert a jurisdiction and apply laws to internet related cases.¹⁰

exercise jurisdiction on the ground that the dispute should be decided in a court of another State'. Meanwhile, it might be true to conclude that a similar approach also exists in the civil law system. For example, under the Iraqi Civil Procedure Rules No (83) of 1969 the court may refuse to assert a jurisdiction if it finds that it is not the appropriate forum to assert jurisdiction and shall notify the claimant to bring proceedings against the defendant in another forum. More specifically, Article 75 of the Iraqi Civil Procedure Act lays down that the court may refuse to adjudicate the litigation if it finds that there is a close connection between the lawsuit and another forum where it might be more convenient to hear the dispute. See the verdict of *Iraqi Supreme Court, No. 96/ the Civil Division* on [2010] on 26 May 2010 <<http://www.iraqja.iq/uploaded/nash16.pdf> > accessed 9 May 2014. However, Article 75 does not determine any specific circumstances where the court can follow the application of this rule, so that it will be left to the courts' discretionary powers. Nevertheless, this rule applies when the courts in Iraq deal with national disputes; therefore, the question of whether courts can use the same rule in international disputes may remain unanswered. However, the writer would argue that there is no limitation in the Iraqi law and this may prohibit the court from applying the same rule to international contract disputes. In addition, Article 30 of the Iraqi Civil Code which is about private international law provides that the commonly accepted principles of private international law may apply in case of absence of explicit provisions in the Iraqi law and without doubt *forum-conveniens* and *forum non-conveniens* are two of these principles.

⁶ Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 393; See also Karen Mills, 'Effective Formation of Contracts by Electronic Means: Do We Need a Uniform Regulatory Regime?' (World Summit on Information Technology, Tunis, 15-18 November 2005). Cited by: Ruth Orpwood, 'Electronic Contracts: Where We've Come From, Where We Are, and Where We Should Be Going' (2008) 1 International In-house Counsel Journal 455.

⁷ Faye Fangfei Wang, 'Regulation of Internet Jurisdiction for B2B Commercial Transactions: EU and US Compared' in Paulius Jurčys, Poul F Kjaer, and Ren Yatsunami (eds), *Regulatory Hybridization Sphere* (Martin Nijhoff Publishers/ Brill Academic Publishing 2013) 99; Amit M Sachdeva, 'International jurisdiction in cyberspace: a comparative perspective' [2007] Computer and Telecommunications Law Review 9. See also Wang (n 4) 19.

⁸ Raymond SR Ku and Jacqueline Lipton, *Cyberspace Law: Cases and Materials* (3rd edn, Aspen Publisher 2010) 77; Julia Hörnle, *Cross-Border Internet Dispute Resloution* (Cambridge University Press 2009) 22. See also the summary report of the European e-Business Legal Conference, 'E-Business without Frontiers: The Legal Challenges Ahead (Dublin, 27-28 April 2004) <http://ec.europa.eu/enterprise/sectors/ict/files/legal_barriers_conf_sum_rep.pdf> accessed 9 May 2014.

⁹ Some website addresses include the so-called top-level domain name or country code such as: www.iraqona.co.iq or www.buyonline.co.uk. However, such country indications do not reflect the real geographical location of the website operator because under ICANN's regulations it is not necessary to have a physical presence in a specific state in order to register its country top-level code domain name. See Ian Lloyd, *Information Technology Law* (6th edn, Oxford University Press 2011) 23.

¹⁰ Ku and Lipton (n 8) 34; Joel R Reidenberg, D Stanley, Nikki Waxberg, and Megan Bright, 'Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law' (Centre of Law

As far as this chapter and the next chapter are concerned, the core thesis concentrates on finding out or rather evaluating the competent court and applicable law that has governance over online activity, i.e., online contractual disputes. This might seem to some people a rather outdated debate in the era of harmonisation, namely, the EU's successful harmonisation of private international law.¹¹ Three points should be clarified here in order to demonstrate that the questions posed above are still valid and controversial. First, the claim in this thesis, as it has been stated previously, is that almost all developing countries, including Iraq, are still far behind the kinds of reforms that have been achieved in some developed countries. Second, in the US, the leading country for cyberspace case law, the personal jurisdiction rules still raise many discussions when they come to be applied to online activities.¹² Third, in the EU certain harmonised rules of private international law still contain arguable grounds when it comes to applying online activities, such as Article 15(i)(c) of the Brussels Regulation and the cases of disputes between litigants from EU Member States and non-EU states.¹³ Finally, having outlined that the approach of this thesis is a comparative one, all possible jurisdictional bases should be examined in order to reach an acceptable approach for law reforms which might be suggested for Iraqi law as a conclusion.

and Information Policy, June 2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309526> accessed 9 May 2014.

¹¹ European private international law governing contractual matters is formulated in two main instruments; Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and enforcement of judgments in Civil and Commercial Matters (Brussels Regulation)' and 'Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June on the Law Applicable to Contractual Obligations (Rome I).

¹² Ku and Lipton (n 8) 36; Faye Fangfei Wang, 'Obstacles and Solutions to Internet Jurisdiction: A Comparative Analysis of the EU and US Laws' (2008) 3 Journal of International Commercial Law and Technology 233. In addition, most US case law on cyberspace law is not about online contracts. In this respect, Hill says that many studies that dealt with or are dealing with jurisdiction and applicable law issues over online contracts refer to very famous case law and approaches towards how to deal with such cases which have been developed by US courts, such as sliding-scale, targeting and effective tests. However, almost all such cases and court practice were not about online contracts disputes but rather about other areas of cyberlaw, such as infringement of intellectual property or online defamation. See Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 138. For example one of the most commonly cited cases when addressing personal jurisdiction over the internet activities, and particularly contractual obligations is *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 (WD Pa 1997). However, this case was not about contractual disputes but rather about a trade mark dispute. See Reidenberg, Stanley, Waxberg, and Bright (n 10)11. The same statement may apply to England and EU countries; very limited case law dealing with internet related issues can be found. Most relates to cybercrimes or intellectual infringement but not electronic contracts. See Sachdeva (n 7). Where the writer is an Iraqi national, it could be confirmed that neither the legislative provisions, nor judicial proceedings in Iraq have adequately dealt with such kinds of disputes.

¹³ See the 'Green Paper from the Commission of the European Communities COM (2009) 175 final on The Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters (Brussels Regulation)' <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>> accessed 9 May 2013.

The roadmap of this chapter will not be different from the main approach that was drawn up at the beginning of this thesis. Each country has the right to regulate the framework of its jurisdictional grounds within its sovereign territory. Therefore, it might be necessary first to survey the basis of international jurisdiction before analysing their application in the context of online contracts. More comparative analysis, based on national legislations, international conventions and available case laws will be carried out in the following sections to examine the appropriateness of existing jurisdiction rules for governing online contracts on websites. Considering the approach of harmonisation that distinguishes between businesses and consumers and the new face of contracting by electronic marketplaces which has led to the emergence of a third category of online contract, a distinction between three types of online contract (B2B, B2C and C2C) will be made as each category is governed by different provisions.

5.2 THE BASES OF CROSS-BORDER JURISDICTION OF NATIONAL COURTS¹⁴

The word 'jurisdiction' has been used in three different ways.¹⁵ Firstly, it has been used to refer to the state judiciary authorities and its classifications according to the law.¹⁶ Secondly, it also means the political and geographical boundaries of any state.¹⁷ Thirdly, it is more often used in a specific way by private international law writers to refer to national courts' competence to claim jurisdiction over disputes involving a foreign element.¹⁸ It is obvious

¹⁴ It appears from the title of the section that it will survey the general basis of international jurisdiction of national courts. However, as these rules are national nature and differ from a country to another and from legal action to another, it is impossible and beyond the scope of this chapter to examine all this broad area of law. Therefore, as far as possible, the focus will be only on these rules concerning the contractual liability with the notice that some of these rules are applicable to contract disputes as well as other aspects of the legal liability.

¹⁵ Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity* (Cambridge University Press 2007) 14.

¹⁶ Wang (n 4) 17. For example, in Iraq, the Judicial System Act No (160) of 1977 categorises the courts and their adjudicative powers in respect of hearing national disputes. In general, civil matters courts in Iraq are classified at three levels: courts of first instance which hear disputes in civil law, commercial law, and family law issues; courts of appeal (one in each province); and thirdly, the Iraqi Supreme Court in the capital Baghdad.

¹⁷ Kohl (n 15) 14; Svantesson (n 6) 7.

¹⁸ David McClean and Kisch Beavers, *The Conflict of Laws* (17th edn, Thomson Reuters Limited 2009) 65. It is submitted that the foreign element, when it involves a legal relationship between natural or legal persons, the nature of the dispute arising out of such a kind of activity will be described as an 'international dispute'. Nevertheless, it is not commonly consensual enough which elements can constitute the foreign characteristic of the legal activity and consequently; the action can be referred as international nature; see: Ivonnely Colon-Fun, 'Protecting The New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transaction' (2007) 112 *Fordham Journal of Corporate & Financial Law* 233. Recently, the European Court of Justice has defined the concept of 'International Character of Consumer Contracts' in *C-478/12 Armin Maletic and Marianne Maletic v Lastminute.com GmbH and TUI Österreich GmbH* [2013] WLR 260, para 26. In its ruling, the ECJ stressed that the international character of any legal

that the latter meaning of the word jurisdiction will be the centre of gravity of the upcoming discussion.

It is commonly agreed that the rules governing the international jurisdiction of courts are a part of national laws in each country.¹⁹ Every sovereign state sets out the occasions where its courts have the competence to assert a jurisdiction on private multi-state disputes.²⁰ These rules are very likely to vary from one country to another and this dissimilarity might be one of the main reasons for conflict between jurisdictions.²¹ At the same time, it could be stated that the general basis of international jurisdiction has nearly become one of the commonly accepted principles of private and public international law.²² In most cases, both common law

activity would not merely rely on the subject matter of the legal activity or the domicile of the parties involved in it but rather the overall link of one party to the international element should be taken into consideration as well; Gilles Cuniberti, 'ECJ Defines Concept of International Character of Consumer Contracts' (*Conflict of Laws.Net*, 28 November 2013) <<http://conflictflaws.net/2013/ecj-defines-concept-of-international-character-of-consumer-contracts/>> accessed 9 May 2014. However, in general, there are three elements which constitute the main pillars for any legal relationship. In case that one of these elements interacts with a foreign party rather than a national, any dispute that arises out of such an activity will be called 'international'. First, the causal action of the legal activity such as; contract, marriage, will, divorce, tort, etc. For instance, the contract will be an international one when it is concluded between parties from the same nationality in a third country; according to the latter is a contract law requirement. Second, the parties of the legal activity, when a contract concluded between parties from different nationalities or having different places of residence, the contract will also be an international. For example, Article 1(2) of the Hague Convention defines the international dispute as follows: '[A] case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State'. Third, the subject matter of the legal activity, when a contract concluded between two parties regarding a tangible or intangible property exists in another country; the international feature will also be designated to such a kind of contract. See also Wang (n 4) 18.

¹⁹ Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer in the Twenty-First Century: Fit for Purpose?' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 123.

²⁰ Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press 2009) 184.

²¹ Under the civil law system, there is a substantial inherent difference between the rules governing competent courts and the rules of applicable law. The legal norms which determine the applicable law (connecting factors) are dual directional rules because the law that the court will apply according to the connecting factor might be a national law (law of the forum) or a foreign law. However, the touchstone of jurisdiction rules is based on its unidirectional foundation. Every state can regulate its own courts' jurisdictional grounds and no such authority can be exercised to enforce a jurisdiction of another country to have a power over an activity. For instance, the national court in Iraq might have the competence over the international private dispute in accordance with the personal jurisdiction basis laid down in Iraqi law. However, it is not necessary for it to apply the Iraqi law to the dispute as well. The relevant connecting factor will direct the court to apply the appropriate applicable law, and that could be a foreign law or national law (the law of the forum). See

غالب علي الداوودي وحسن محمد الهداوي، القانون الدولي الخاص: تنازع القوانين- تنازع الاختصاص القضائي- تنفيذ الأحكام الأجنبية (الطبعة الثالثة، دار العاتك للنشر، ٢٠٠٩) ص ١٣

[Ghalib Ali AL-Dawoodi and Hassan Mohammed AL-Haddawi, *Private International Law: Conflict of Laws, Conflict of Jurisdiction and Enforcement of Foreign Judgments* (3rd edn, AL-Attick Publishers 2009) 13.] See also Hartley and Wang (n 4).

²² Samuel F Miller, 'Prescriptive Jurisdiction over Internet Activity: The Need to Define and Establish the Boundaries of Cyberliberty' (2003) 10 *Indiana Journal of Global Legal Studies* 254 <http://muse.jhu.edu/content/crossref/journals/indiana_journal_of_global_legal_studies/v010/10.2miller.pdf> accessed 9 May 2014. See also John O'Brien, *Conflict of Laws* (2nd edn, Cavendish Publishing Limited 1999) 18. However, that does not mean that the application and interpretation of these rules in the context of

and civil law acknowledge many bases of the principle of international jurisdiction.²³ As far as its relevance to this thesis, two basic jurisdictional grounds can raise debatable issues: personal jurisdiction and prescriptive jurisdiction.²⁴

Personal jurisdiction permits the court to assert jurisdiction over persons based on their nationality,²⁵ their domicile or their habitual residence.²⁶ Prescriptive jurisdiction is mainly based on the judicial and legislative right of courts to assert jurisdiction over activities that take place in its territory,²⁷ or activities that take place outside its territory but directly affect issues within it.²⁸ An example of personal jurisdiction based on a defendant's nationality can be found in Article 14 of the ICLC which sets up the general rules of personal jurisdiction of Iraqi courts.²⁹ Under this rule, it is satisfactory for Iraqi courts to assert jurisdiction when the defendant is an Iraqi national,³⁰ regardless of the place of his residence and the place of the causal action of liability, such as a contract or wrongful act, whether in Iraq or abroad.³¹

transnational online private activities are also commonly accepted matter. Furthermore, this does not ignore the historical dissimilarity between common law and civil law systems in recognizing the rules of international jurisdiction doctrine. For more historical and analytical background about this point, see Arthur T von Mehren, *Adjudicatory Authority in Private International Law A Comparative Study* (Martinus Nijhoff Publishers - The Hague Academy of International Law 2007) 413.

²³ In addition to personal and prescriptive jurisdiction rules, there are also protective and universal jurisdiction rules but they are beyond the scope of this thesis. For more details about this point see O'Brien (n 22) 18.

²⁴ There is a structural difference in the jurisdictional basis between common law and civil law and it is beyond the scope of this section to explain it. For more details about this point see Mehren (n 22). However, as much as possible, an attempt will be made to highlight this point when explaining the general personal and prescriptive rules in common law and civil law.

²⁵ Under a civil law regime, nationality is the key factor of jurisdiction and applicable law rules, see Mehren (n 22) 22; See also CMV Clarkson and Jonathan Hill, *Jaffey on The Conflict of Laws* (2nd edn, Butterworths 2002) 49. Most Arab countries' legislation, including Iraqi law, have been considerably influenced by the basic principles of French law in adopting nationality as a connecting factor of jurisdiction and applicable law. See بولين انطونيوس أيوب, تحديات شبكة الانترنت على صعيد القانون الدولي الخاص-دراسة مقارنة- (منشورات الحلبي الحقوقية- بيروت ٢٠٠٦) ص ٨٢

[Poleen Antonios Ayoob, *The Challenges of Internet and Private International Law- A Comparative Approach*. (1st edn, AL-Halaby Legal Publications 2006)] 82. The principle of sovereignty in a civil law system is the rationale behind extending the power of national courts over its non-resident citizens. Under this principle, the sovereign of the state is not only guaranteed over its territory but also extends to those of its nationals who reside in other countries. AL-Haddawi (n 21) 243.

²⁶ Under the common law, domicile or habitual residence is the basic connecting factor in conflict of laws rules. However, under a civil Law regime such a type of jurisdiction is also called a 'General Jurisdiction'; Andrej Savin, *EU Internet Law* (Edward Elgar 2013) 54.

²⁷ Also known as 'Subjective Territoriality'; See (n 3).

²⁸ Also known as 'Objective Territoriality'; *ibid*.

²⁹ Article 14 of the ICLC provides that: 'Any litigation against Iraqi defendants, even those arising out of due obligations outside Iraq, shall be adjudicated by the Iraqi Courts.' This article has been quoted from Article 14 of the French Civil Code; See Ayoob (n 25) 82.

³⁰ AL-Haddawi (n 21) 243.

³¹ *ibid* 243; See also

نافع بحر سلطان, 'الأختصاص القضائي الإلكتروني للمحاكم العراقية' (٢٠٠٩) ٢ مجلة جامعة تكريت للعلوم القانونية والسياسية ٢٠٠
[Nafi Baher Sultan, 'The Electronic Jurisdiction of Iraqi Courts' (2009) 2 University of Tikrit Journal in Legal & Political Studies 200.]

Nevertheless, it is assumed that this statutory provision is not absolute.³² In other words, Iraqi defendants can be litigated against before a foreign court if the latter is regarded as the most appropriate place to adjudicate the litigation by a provision of special jurisdiction rules laid down in Iraqi law.³³

As for prescriptive jurisdiction in Iraqi law, Article 15(c) of the ICLC permits the courts to hear litigation against a non-resident foreign defendant if the dispute arises out of a contract concluded or performed in Iraq.³⁴ In the author's view, the principles of prescriptive jurisdiction rules might be the most problematic in the online contract and the most challenging to the Iraqi court in the future. It could be discordant with the jurisdictional approach in the Brussels Regulation, as it will be analysed in this chapter later.

Under the common law system, personal jurisdiction can be interpreted in a broader way. Besides the domicile or place of residence which is the preferable basis for asserting the personal jurisdiction in the traditional common law,³⁵ the rules of jurisdiction *in personam* allow the court to adjudicate the litigation not only in case there is a reasonable connection between the defendants and the forum state but also if the activities take place outside the forum state.³⁶ In other words, the principle of personal jurisdiction under common law extends to include persons and activities, even those which happen in another jurisdiction. For instance, American courts may assert personal jurisdiction over out-of-state defendants if the statutory and constitutional measures are satisfied.³⁷ The statutory prerequisite can be found in the Federal Rules of Civil Procedure (FRCP) while the constitutional ground can be implied from the Due Process Clause of the Constitution.³⁸ The latter jurisdictional rule in the

³² *ibid* 244.

³³ The special statutory jurisdiction rule that upholds this assumption is Article 7 of the Enforcement of Foreign Judgments Act in Iraq No. 30 of 1928 (EFJA) which provides a list of cases where the foreign judgment may gain enforceability in Iraq regardless of the nationality of the defendant. One of these cases is the foreign judgment in respect to a dispute about a contract concluded in the country of the foreign forum.

³⁴ Sultan (n 31).

³⁵ The traditional common law distinguishes between two basic jurisdictional norms: jurisdiction *in personam* and jurisdiction *in rem*. See Richard Kidner, Paul Dobson, Nigel Cravells and Phillip Kenny, *Principles of Conflict of Laws* (3rd edn, Cavendish Publishing Limited 1999) 45. Under a jurisdiction *in personam* rule, the defendant's mere presence when served with a writ is enough to assert jurisdiction by an English court. This rule has been criticised by some scholars, as it might be unreasonable, the suggestion was to adopt the residence instead of mere presence. See JG Collier, *Conflict of Laws* (3rd edn, Cambridge University Press 2001) 73. See also McClean and Beevers (n 18) 114. However, this basis might not have significance in the context of online contracts; see Svantesson (n 6) 135.

³⁶ Hartley (n 4) 87.

³⁷ Sachdeva (n 6).

³⁸ In any event, under both statutory and constitutional tests, US courts can confer personal jurisdiction over an out-of-state defendant when the 'minimum contact' between the action and the forum state exist. See Gary B Born and Peter Rutledge, *International Civil Litigation in United States Courts* (5th edn, Wolters Kluwer 2011) 81-112; Svantesson (n 6) 188. Historically, the root of the debate about personal jurisdiction applicability to

US is known as the long-arm jurisdiction.³⁹ As explained above, the same basis exists in Iraqi law but only under the prescriptive jurisdiction rule, not the personal one.⁴⁰

In the EU, despite 25 of the EU's Member States being civil law countries, the approach adopted to regulate the jurisdictional issues over multi-state disputes is a common law one.⁴¹ According to the general jurisdiction rule in the Brussels Regulation, the domicile is the main basis for asserting jurisdiction over persons notwithstanding their nationality.⁴² It could be said that the meaning of 'domicile' under the Brussels Regulation is purposely different from its meaning in the common law.⁴³ After a concise survey of the norms of international jurisdiction of national courts, the following sections will seek to evaluate the effectiveness of these rules to govern online contract disputes.

non-resident defendants goes back to even before the prevalence of electronic commerce. More accurately, in 1987 in *Asahi Metal Industry Co v Superior Court of California*, where the Supreme Court first addressed the issue of whether a foreign corporation's awareness that its products might reach the forum state through the stream of commerce can establish a minimum contact for asserting personal jurisdiction. Although the plurality opinion, which represented eight justices, stressed that minimum contact requires conduct more than the mere awareness, such as directing commercial activities to the forum state or advertising in it. A different opinion was given by Justice Brennan. He said that the stream of commerce is enough of a factor to let the manufacturer predict that his or her products may reach any jurisdiction even if no purposeful action has been taken and that, per se, is a sufficient reason to assume the minimum contact. For more details see Ku and Lipton (n 8) 36.

³⁹ Burke T Ward and Janice C Sipior, 'The Internet is the Place to Be, But Where is Legal Jurisdiction: A United States Perspective' (2008) 2008 European and Mediterranean Conference on Information System. See also *J. McIntyre Machinery Ltd v Nicastro and Goodyear Dunlop Tires* 131 S. Ct. 2780 (2011).

⁴⁰ المادة (١٥) من القانون المدني العراقي تنص على: "يقاضى الأجنبي امام محاكم العراق في الاحوال الاتية: (أ) اذا وجد في العراق. (ب) اذا كانت المقاضاة في حق متعلق بعقار موجود في العراق أو بمنقول موجود فيه وقت رفع الدعوى. (ج) اذا كان موضوع التقاضي عقدا تم ابرامه في العراق أو كان واجب التنفيذ فيه أو كان التقاضي عن حادثة وقعت في العراق."

[Article 15 of the Iraqi Civil Code states: "Any foreigner shall be sued before the Iraqi courts in the following cases: (a) If he/ she presents in Iraq. (b) The subject matter of the litigation is about a right in immovable property exists in Iraq or movable property exists in Iraq on the time of bringing proceedings against the defendant. (c) The litigation about liability in a contract concluded or performed in Iraq or litigation on an incident occurred in Iraq.]

⁴¹ This approach might be attributed to the European Union's policy of harmonisation of laws in order to give more certainty and predictability to the rules of private international law in Europe. However, for the most part, the general EU law can be described as it is based on the civil law system. See Hartley (n 4) 237.

⁴² Article 2 of Brussels Regulation: '1. Subject to this Regulation, a person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state.'

⁴³ Clarkson and Hill (n 25) 69. In this regards, Clarkson and Hill say that: 'For the purpose of the Brussels regime, 'domicile' is given a special meaning, which is different from its meaning at Common Law and closer to the continental usage of this. For the purpose of the Regulation, an individual is domiciled in the United Kingdom if he is resident in the United Kingdom and the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom, which will be presumed to be so (unless the contrary is provided) if he has been resident in the United Kingdom for the last three months or more. If an individual is not domiciled in the forum state according to its law, then a court of that state must decide the question whether he is domiciled in another Member State by applying the law of the latter state.'

5.3 TRADITIONAL JURISDICTIONAL RULES AND TRANSNATIONAL ONLINE CONTRACTS

In the traditional context, the rules governing jurisdictional issues in contractual disputes prioritise the choice of the contractual parties' themselves.⁴⁴ The latter rule is commonly recognised in private international law terminology as the autonomy of the parties.⁴⁵ In cross-border private disputes, it is often the claimant's duty to bring proceedings against the defendant in the court that he/she considers the most convenient for him/her.⁴⁶ In case there is no competent court clause in the contract, it is highly expected that the claimant will prefer to seek redress in his home country.⁴⁷ On that assumption, the court will examine whether the contract has a sufficient connection to the forum in order to adjudicate the litigation.⁴⁸ In private transnational contract disputes generally, and in the online application specifically, the scenario could be much more problematic and controversial.⁴⁹ Even though the harmonisation of rules in some jurisdictions distinguishes between business contracts and consumer contracts,⁵⁰ such a distinction is still not recognised, at least statutorily, under the traditional approach in some jurisdictions⁵¹ and is debatable in others.⁵² This issue will be taken up in the upcoming sections.

5.3.1 Online Choice-of- Court Agreement

It has been suggested that the best approach to reconcile the geographic-based rules of private international law with the borderless internet is to uphold the online choice of the contractual

⁴⁴ Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in Jan Van Heine, Eckart Gottschalk, Ralf Michaels, and Giesela Rühl (eds), *Conflict of Laws in a Globalized World* (2007) 153.

⁴⁵ Svantesson (n 6) 323; Reinhard Schu, 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?' (1997) 5 *International Journal of Law & Information Technology* 192.

⁴⁶ The legal proceedings in civil and commercial matters are entirely different from criminal legal actions. In cases that involve serious criminal activities, such as murder, domestic violence, extortion, robbery, kidnapping, or rape crimes, the perpetrator will be prosecuted by the attorney general even if the victim himself did not bring an action against the criminal.

⁴⁷ Svantesson (n 6) 9.

⁴⁸ The principle of closest connection is the supplementary jurisdictional rules when the contract lacks the clause of competent court.

⁴⁹ Savin (n 26) 54.

⁵⁰ For example, EU's approach in the Brussels Regulation, and the Hague Convention.

⁵¹ Such as the situation under Iraqi Law.

⁵² Such as the situation under US law.

parties.⁵³ The benefits of this on practical grounds cannot be ignored. The statutory limitations could be the main obstacle to the application of this notion in some jurisdictions, especially under Iraqi law which does not acknowledge, in some circumstances, the parties' choice of court agreement.⁵⁴ This point will be analysed thoroughly in the sections below.

5.3.1.1 Online Business-to-Business Contracts

It is worth emphasising that despite being one of the conflict of laws' widely acknowledged principles in the legal systems of many countries,⁵⁵ the validity and enforceability of jurisdiction clauses in both traditional and online contracts is a controversial point in Iraqi law.⁵⁶ Before starting to analyse this point, first it will be helpful to appraise the state of affairs under the Hague Convention on Choice of Court Agreement (Hague Convention), EU law and US law.

Article 3 (a) of The Hague Convention defines the contractual court agreement as:

[A]n agreement concluded by two or more parties that meets the requirements of paragraph (c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of jurisdiction of any other court.

It seems clear that paragraph (c) of the Convention has been drafted in an irrefutable and technologically neutral way, in order to assert that exclusive court agreement could be

⁵³ Faye Fangfei Wang proposes that: '[I]n practice, the most effective way to resolve internet private international law problems is to use choice of jurisdiction and choice of law clauses in electronic contracts as a mean of agreeing to a common jurisdiction and choice of law, rather than leaving it to the uncertainties of geographically-oriented conflict-of-laws regimes. However, most of the cases are not so straightforward.'

Wang (n 4) 48; See also Ku and Lipton (n 8) 63.

⁵⁴ See

حسنين ضياء نوري الموسوي, 'الأرادة و دورها في تحديد الأختصاص القضائي الدولي العراقي- دراسة مقارنة في القانون العراقي والمصري' (٢٠١٢) ١٦ مجلة ميسان للأبحاث ٣٩٢

[Hassanain Thiaa Noory Al-Musawi, 'The Parties Autonomy and Its Role in Determining the International Jurisdiction of Iraqi Courts - A Comparative Study on the Iraqi Law and Egyptian Law' (2012) 16 Missan Reserach Journal 392.]

⁵⁵ Svantesson (n 6) 323.

⁵⁶ The validity of choice-of-law agreement under Iraqi law is a questionable matter. This point will be discussed in-depth in this chapter.

reached offline as well as online,⁵⁷ by stating that ‘an exclusive choice of court agreement must be concluded or documented; (i) in writing or (ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference’.

A similar provision can be found in Article 23(2) of the Brussels Regulation, which validates the online choice of court clause by providing that: ‘Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing’.⁵⁸

Undoubtedly, it can be submitted that the well-harmonised rules explained above provide a good ground of certainty and enforceability for the choice of court clause agreed by online communication means. As for typical online B2B contracts concluded by fax or emails or even by website contracts, such a rule with such a clause might correspond very well. When taking into consideration another kind of setting the analysis could be different.⁵⁹ Arguably, electronic marketplaces, such as eBay or Amazon, which provide a wide range of globally-available online shopping alternatives for both businesses and consumers alike, may constitute a challenge to the role of law.

A contract concluded over Amazon, for instance, between a single person acting in his profession or a small business and a large corporation is a B2B contract.⁶⁰ Consequently, the competent court clause will be enforced in the same way as a similar clause in a contract which is between two large firms.⁶¹ Arguably, the practical challenges of the online choice of

⁵⁷ Christian Thiele, ‘The Hague Convention on Choice-of-Court Agreement: Was It Worth the Effort?’ in Jan Van Hein, Eckart Gottschalk, Ralf Michaels and Giesela Rühl (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press 2007) 63.

⁵⁸ It is worth noting that there is a substantial difference between Hague Convention and Brussels Regulation in the requirements of choice of court agreement. Whereas the Hague Convention requires that the chosen court should have a nexus to the disputed contract by stipulating that the court of one contracting state can be chosen to have jurisdiction over any dispute that may arise out of a contract (Article 3), the same provision has not been included in Article 23 of the Brussels Regulation. Accordingly, parties relying on the Brussels Regulation can choose the court of any Member State to settle any potential disputes of their contractual relation even though the court of the chosen country does not have a connection to the dispute, except in cases where neither of them are domiciled in the Member States. See Thiele (n 57).

⁵⁹ See also Wang (n 7).

⁶⁰ The challenges of consumer definition and the new contracting methods over websites will be discussed in the section about online consumer contracts.

⁶¹ A similar argument in favour can be found in Svantesson (n 6) 326. The working group on European contract law suggested that the small businesses should be, in some circumstances, treated as consumers; however, this suggestion has been rejected by ECJ. See Immaculada Barral, ‘E-Consumers and Effective Protection: The Online Dispute Resolution System’ in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012). More specifically, the ECJ stressed such a notion in the joined cases C-541/99 and C-542/99 *Cape Snc v Idealservice and MN RE Sas v OMAI Srl* [2001], ECR I-9049, para. 16 by saying that: ‘It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision’. See also Christain Twigg-Flesher (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010) 110-113.

court agreements comes into being when most of the individuals or small-sized businesses who are acting in a personal capacity for the provision of their businesses do not care about, or pay attention to, such clauses when contracting electronically.⁶² Such a prediction may greatly affect a fundamental requirement of the choice of courts agreement, which is the existence of the ‘mutual consent’ between the parties.⁶³ In this context, *Feldman v Google, Inc*⁶⁴, is a good example that supports such an argument. In this trial, the plaintiff was a lawyer who acted personally for his business.⁶⁵ He entered into an online contract with Google to subscribe to Google’s *AdWords* advertising services.⁶⁶ Prior to subscribing to the service, the plaintiff did not read Google’s terms and conditions which contained a selection of forum clause. After the dispute arose, the plaintiff challenged the choice of court agreement by contending that the forum selection clause was not valid because he would not have observed such a clause when contracting nor would he have agreed to it if he had noticed it before concluding the online contract. The US District Court rejected the plaintiff’s argument and enforced the jurisdiction clause against him by stressing that once the defendant had adequately brought such a clause to the attention of the other party, before processing the subscription, it would be irrational to doubt its enforceability after the contract had been concluded.⁶⁷

Thus, it is arguable that the choice of court agreement might be one good solution that acts as a compromise between the uncertainty of internet transactions and the geographic-based rules of private international law; however, the effectiveness of such a solution cannot be guaranteed against the challenges of a new type of contracting over the internet.⁶⁸

⁶² Wang (n 4) 42. Professor Svantesson proposes either that the reason behind that could be the feeling of those people that such clauses are not enforceable or the online contract is not negotiable. See Svantesson (n 6) 324. Hill shares the same idea, see Hill (n 12) 190. Interestingly, there are several cases that show that even businesses that contract electronically with other businesses (B2B contract) do not read the online terms and conditions of the contract. These cases will be analysed shortly when talking about US law.

⁶³ Wang (n 7) 101.

⁶⁴ *Feldman v Google, Inc*. Civil Action No. 06-2540 (2007) US Dist; Reynolds, ‘Survey of the Law of Cyberspace: Electronic Contracting Cases 2006-2007’ (2007) 63 *Business Lawyer* 219.

⁶⁵ *ibid*

⁶⁶ AdWords is an online advertisement service run by Google and offers the opportunity for businesses to advertise their products and services in the world’s most popular search engine. For more details, see <<http://www.google.co.uk/ads/adwords-2/?sourceid=aw&subid=uk-en-ha-aw-bk-21&medium=ha&term=adwords#tab=benefits>> accessed 9 May 2014.> accessed 23 May 2014.

⁶⁷ For more details about this case see Moringiello and Reynolds (n 64).

⁶⁸ It has been argued in the early chapter of this thesis that the special nature of internet transactions has changed and has challenged many legal concepts theoretically as well as practically. From a business-to business transaction perspective, the predominant meaning of electronic B2B transaction involving a supply of good or service agreement via electronic means between two entities or businesses has not remained the only form of business transaction. The narrow concept of consumer definitions in some countries, or the absence of such a definition in others, and the new electronic marketplaces, have made it conceivable that an online contract

Unfortunately, there is little EU case law on the validity of jurisdiction clauses in online B2B contracts in order to discern how the courts, when applying the Brussels Regulation, will validate the online agreement of forum selection. A few interesting cases can be found. One of these cases is *Ryanair Ltd v Billigfluege.de Gmbh*.⁶⁹ In this case, the dispute was between the plaintiff, an Irish airlines and the defendant a German company-owned website offering flight fares comparison.⁷⁰ The plaintiff brought proceedings against the defendant before the High Court of Ireland contending a breach of its website's terms and conditions by the user, the German company,⁷¹ which also contained an exclusive jurisdiction clause in favour of the Irish courts.⁷² The defendant challenged such an argument by claiming that the website's jurisdiction clause was void because there was no contract between the two parties, and it did not consent to any bilateral agreement. The defendant's argument was that proceedings should be brought in the country of its domicile instead, pursuant to Article 2 of the Brussels Regulation. In an interesting ruling, the court noted that the terms of use of the plaintiff's website were accessible through a hyperlink which was visibly situated on the website. Furthermore, the systematic use of the website by the defendant for business purposes should convince the court to validate the jurisdiction clause and reject the defendant's argument.

The court's conclusion in this case can be viewed from three different angles. First, the comparable analysis between the Irish High Court's attitude and its counterparts in the US in terms of the degree of the visibility of online terms and conditions and its impact on the enforceability of these terms themselves.⁷³ Second, the distinction between the systematic and occasional use of the website should always be made, and this could be another way of

between a natural person and an electronic marketplace, such as eBay or Amazon, could be categorised under different types of contract. As shown in the following scenarios: (a) a contract between a well-known computer accessories' manufacturer and small or medium-size business to supply desktop keyboards for the office use is B2B contract. (b) The same contract between the large company and small individual retailer is also B2B contract. (c) The same contract between the company and professional individual trader acting personally to buy a limited number of keyboards for his household use is B2C contract. (d) The same contract between the company and individual person is B2C contract. In scenario (c), when the individual professional trader who bought the keyboards for his household use, sells them again over eBay to another consumer, the contract will be categorised under C2C contract. In scenario (d), when the consumer who bought the keyboard and after a period of using it, decided to sell it over eBay to another consumer, the contract will be also C2C contract. Accordingly, the special nature of the electronic marketplace on one hand, and the narrow approach of the consumer's definition, on the other hand, has doubted somewhat the effectiveness of private international law's harmonised rules. This issue has also been analysed in Chapter 2 of this thesis.

⁶⁹ *Ryanair Ltd v Billigfluege.de Gmbh* [2010] IEHC [47], [2010] IL [22].

⁷⁰ <http://www.fluege.de>.

⁷¹ The plaintiff in this case brought proceedings against the defendant on the ground that the latter infringed the copyright of his company by using a service obtained from its website for business use without the plaintiff's permission. This constituted a breach of the terms and conditions of using the website.

⁷² The plaintiff's argument was based on Article 23 of Brussels Regulation.

⁷³ There are several US cases where the courts have reached the same conclusion. See the discussion following the reference of this footnote.

distinguishing between businesses and consumers in some circumstances.⁷⁴ Finally and most importantly, there is a clear difference between the online contract's terms and conditions and the online terms and conditions for using the website. In other words, a user may be bound by a contract for using a website for a service which is free of charge even though the user has not been involved in an online transaction with the same website.

Unlike the European courts which have not had much experience in examining jurisdiction in online contract disputes,⁷⁵ courts in the US have been challenged by numerous online contracting cases.⁷⁶ Not surprisingly, a considerable number of such cases, and probably the most complex ones,⁷⁷ have questioned the validity and enforceability of choice of court and arbitration clauses incorporated into a website contracting process between B2B and B2C alike.⁷⁸ Whereas in most of the cases where the plaintiffs sought to void such a clause, due to invalidity of the online contract itself,⁷⁹ have been rejected by courts; the other cases have challenged the enforceability of such clauses in view of being 'procedurally unconscionable'.⁸⁰ When examining the latter test, US courts have applied one general rule: the sufficient pre-notice of online forum selection clause. More specifically, if the seller has made the design of his website and the way by which the terms and conditions are shown in a very clear manner and in a way which does not intend to mislead the buyer, then the clause would be enforceable regardless of whether the contract is a click-wrap or browse-wrap agreement.⁸¹

⁷⁴ Some courts in the US followed this criterion as the basis of minimum contact requirements of the personal jurisdiction rule. See *Boschetto v Hansing*, in (n 302) of this chapter.

⁷⁵ Andrej Savin, 'Jurisdiction in Electronic Contracts and Torts - the Development of the European Court's Case Law' [2011] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919651> accessed 9 May 2014.

⁷⁶ Disputes arising out of the validity of online forum clauses in US case law examined under the validity of online terms and conditions of the contract in general, the section that has been included in chapter 4 of this thesis. However, inasmuch as there is a close nexus to Chapter 5, cases where plaintiffs doubted the validity of choice of forum in online contracts have been discussed and analysed separately in this section.

⁷⁷ Juliet M Moringiello and William L Reynolds, 'Survey of the Law of Cyberspace : Electronic Contracting Cases 2005-2006' (2006) 62 Business Lawyer 195.

⁷⁸ Juliet M Moringiello and William L Reynolds, 'Electronic Contracting Cases 2008-2009' (2009) 65 Business Lawyer 317.

⁷⁹ Moringiello and Reynolds (n 77).

⁸⁰ *ibid*; Paul J Morrow, 'Cyberlaw: The Unconscionability / Unenforceability of Contracts (Shrink-Wrap, Click-Wrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight' (2011) 11 Pittsburg Journal of Technology Law and Policy 1.

⁸¹ For instance, in both *Appliance Zone, LLC v NexTag, Inc* and *Scherillo v Dun & Bradstreet*, the online contracts were between two businesses (B2B), and the key parts of the disputes were quite similar in terms of their nature. The plaintiffs in these two cases doubted the enforceability of the choice of court clause in click-wrap and browse-wrap agreements on the ground of the unconscionable clauses. The courts in the two cases rejected the plaintiffs' argument and stressed that making the terms and conditions of the contract fairly visible

In the author's view, this criterion is fair-minded and gives the courts the appropriate discretionary powers to apply the rule of law. It seems that it relies on both personal and procedural factors. Indeed, the technical design and the way in which the terms and conditions are shown on the seller's website is crucial.⁸² At the same time, the differences of personal awareness between buyers from developed and developing countries should be taken into account. On this specific point, the author should draw the attention of Iraqi businesses which pursue online commercial transactions with American business, to be aware of jurisdiction clauses in the terms and conditions of websites of US traders. As it has been noted from previous cases, US courts normally enforce such clauses and consider them valid. In addition, it can also be said that most of the cases relevant to the validity of internet choice of court have shown that the most of the legal debate is about contract law issues rather than conflict of laws ones.

In Iraq, at the time of drafting this chapter, the Iraqi Parliament had approved the new IESTA.⁸³ Remarkably, the new statute has made it very clear that electronic contracts and documents will have the same degree of validity and enforceability as traditional or paper contracts.⁸⁴ This means that an online choice of court agreement would be given the same legal recognition as a traditional choice. The validity of the choice of court agreement as a recognised principle of private international law is still questionable under Iraqi law. There is

on the website is satisfactory for the court to enforce it even though the plaintiff might not have read them. For more details about the these two cases and the courts' opinion, see Moringiello and Reynolds (n 78).

⁸² For example, in 2001 the American Bar Association established a working group called 'Working Group on Electronic Contracting Practices' to address the significance of the technical design of websites of businesses and its implication on the enforcement of website terms and conditions in click-wrap and browse-wrap agreements. The working group suggested a number of technical steps in its final report that businesses can implement on their websites which may make the enforcement of their websites' terms and conditions more predictable by the courts; see Christina L Kunz and others, 'Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent' (2001) 57 *The Business Lawyer* 401. In favour of this notion see also Nancy S Kim, 'The Duty to Draft Reasonably and Online Contracts' in Severine Saintier, Keith Rowley Larry A. Dimatteo and Qi Zhou (eds), *Commercial Contract Law: Transnational Perspective* (Cambridge University Press 2013) 181.

⁸³ The new law was enacted by Iraqi Parliament on 25 September 2012. The Act formally entered into force on 5 November 2012 and was published in the official journal of Iraqi legislation (Waqaa- Al_Iraqia العراقية); OJ No 4256 <<http://www.moj.goviq/view.205/>> accessed 6 May 2014.

⁸⁴ المادة-١٣-أولاً- تكون للمستندات الإلكترونية والكتابة الإلكترونية والعقود الإلكترونية ذات الحجية القانونية لمثيلتها الورقية إذا توافرت فيها الشروط الآتية (أ) ان تكون المعلومات التي وردت فيها قابلة للحفظ والتخزين بحيث يمكن أسترجاعها في أي وقت. (ب) امكانية الاحتفاظ بها بالشكل الذي تم انشاؤها أو إرسالها أو تسليمها به أو بأي شكل يسهل به اثبات دقة المعلومات التي وردت فيها عند انشائها أو إرسالها أو تسليمها بما لايقبل التعديل بالأضافة أو الحذف. (ج) أن تكون المعلومات الواردة فيها دالة على من ينشأها أو يتسلمها وتاريخ ووقت إرسالها وتسلمها.

[Article 13 of the new Act states that "Any agreement by electronic communication or by exchange of electronic documents, shall be equivalent to the paper contract if the following requirements have been met: (a) the message of information should be storable on the information system and can be retrieved at any time. (b) The message of information should be possible to be stored exactly in the same form on the date of forming, sending, and receiving it. (c) The message of information should include a definite indication of the parties who sent and received it and the date and time of dispatch and receipt."]

no statutory rule in Iraq which upholds the parties' autonomy of choice of court agreement.⁸⁵ In addition, some have argued that the Iraqi courts may assert jurisdiction according to the general rules of the submission principle.⁸⁶ Others have said that although there is no statutory provision which gives the validity to the choice of court agreement, there is also no explicit statutory norm which rules out the parties' choice of court under Iraqi law.⁸⁷ In the final analysis, both points of views have relied upon Article 30 of the Iraqi Private International Law⁸⁸ which states that the generally acknowledged rules of private international rules will be applicable in case of the absence of statutory regulating rules.⁸⁹

The above analysis is not particularly convincing and it is possible that drawing a distinction between two kinds of court agreements might be more accurate for carrying out a proper analysis on such a point: the choice which assigns a jurisdiction in favour of the Iraqi courts and the choice which excludes the jurisdiction from the Iraqi courts. While it appears sensible that the courts in Iraq might accept their responsibility to assert jurisdiction if the parties have chosen it in their contract and submitted their dispute to a court in Iraq willingly, it is doubtful whether the same choice will be enforced if it excludes the jurisdiction of Iraqi courts that has been guaranteed by statutory rules. This is due to the simple reason that the rules of national and international jurisdiction of Iraqi courts are a part of territorial sovereignty⁹⁰ and, therefore, it cannot be derogated from by a private choice of parties unless exceptional statutory rules permit it.⁹¹ Accordingly, owing to the fact that there are no special

⁸⁵ Sultan (n 31); AL-Musawi (n 54).

⁸⁶ See AL-Haddawi (n 21) 240; See (n 54).

⁸⁷ See عبدالرسول عبدالرضا، تطويع قواعد الأختصاص القضائي الدولي في تسوية المنازعات الألكترونية، مجلة جامعة بابل للعلوم الإنسانية [Abul-Rasool Abdul-Radha, 'The harmonisation of International Jurisdiction Rules in Settling International Electronic Commerce Disputes' [2011] University of Bebel Journal in Humanities 1].

⁸⁸ In Iraq, there is no private international law codification, the rules regulating applicable law and jurisdiction issues have been allocated in the ICLC No 40 on 1951, Articles 17-33.

⁸⁹ المادة (٣٠) من القانون المدني العراقي: "يتبع فيما لم يرد بشأنه نص في المواد السابقة من أحوال تنازع القوانين مبادئ القانون الدولي الخاص الأكثر شيوعاً"

Article (30) of the ICLC provides that: ["The most acknowledged principles of conflict of laws shall be applied to any case where the provisions of this Act are not applicable"].

⁹⁰ For arguments in favour of this see

هشام علي صادق، تنازع الأختصاص القضائي الدولي (دار المطبوعات الجامعية ٢٠٠٧) ١٥٣-١٥٥ [Hisham Ali Sadiq, *The Conflict of International Jurisdiction* (The House of University Publication- Dar Al-Matbuat Al-Jamia 2007) 153-155.] In this regards, Zekos says: 'Jurisdiction is a vital and central element of State sovereignty, for it is an exercise of authority which can alter or create or terminate legal relationships and obligations'; Georgios I. Zekos, 'Personal Jurisdiction and Applicable Law in Cyberspace Transactions' (2000) 3 *The Journal of World Intellectual Property* 977, 979.

⁹¹ المادة ٢٩ من قانون المرافعات المدنية العراقي رقم (١٦٠) لسنة ١٩٧٩ تنص على انه: "تسري ولاية المحاكم المدنية على جميع الأشخاص الطبيعية والمدنية بما في ذلك الحكومة وتختص بالفصل في كافة المنازعات الا ما استثني بنص خاص."

[Article 29 of the Iraqi Civil Procedure Act asserts that the jurisdiction of Iraqi courts shall be imperative and extend to all natural and legal persons that exist in the territory of Iraq and cannot be derogated unless in case of exceptional statutory rules.]

exceptional rules in Iraqi law that authorise the parties to exclude the jurisdiction of Iraqi courts by a special agreement, the forum selection clause will not be recognised. In other words, the validity of the choice of court agreement is restricted by the non-existence of a statutory rule which grants jurisdiction to the Iraqi courts.

In both online and traditional B2B contracts generally, businesses who engage in commercial activities with Iraqi businesses should keep the following fact in mind: any forum selection other than one in Iraq will not be enforced if the contract has been concluded or performed in Iraq.⁹² In online B2B contracts specifically, the likelihood of occurrence of such cases could be greater. This seems to be ever more likely as the number of online sale of goods between Iraqi traders, and foreign business will be greatly extended. In such cases, the defendant might be able to cast doubt on such a claim by relying upon the controversy of the place of concluding an online contract; however, the place of contract performance cannot be doubted in a contract over a website between an Iraqi buyer business and a foreign seller business if the place of delivery of goods is in Iraq.

5.3.1.2 Online Business-to-Consumer Contracts

On 30 January 2012, eBay announced its ‘New International Selling Agreement for Sellers in the UK and Ireland’ which notified those sellers who post items for sale on the international website of eBay that their offers will be internationally available for different buyers, and drawing their attention to the discrepancy of policies and regulations in countries worldwide.⁹³ Arguably, whereas the EU has made considerable steps towards harmonising its laws to protect its consumers regionally, especially in online sales contracts, the problem has

⁹² The Iraqi courts will have the jurisdiction over any contract in two instances: if the contract is concluded in Iraq or if it is performed in Iraq. As it has been stated above, the jurisdiction in these two cases is imperative and cannot be excluded by an agreement. See Article 15 of ICLC in footnote (40).

⁹³ eBay’s New International Selling Agreement for Sellers in the UK and Ireland reads as follows: ‘Selling internationally has become a very important part of selling on eBay, allowing you to reach over 97 million buyers. If you list, your items on the site different from your original site of registration, or select an international delivery option when listing, your items are automatically made available to international buyers. Because some eBay policies differ between countries, in particular, eBay Buyer Protection policies, we will now be asking all sellers to accept our international Selling Agreement when listing on a new site or selecting an international delivery option. Accepting the International Selling Agreement confirms that you are aware of the policy differences between eBay sites and countries. You will only need to accept the agreement once.’ An online view of this announcement is available on the eBay’s website at the following link <<http://www2.ebay.com/aw/uk/201201300937122.html>> accessed 9 May 2014.

not yet been solved internationally.⁹⁴ This means that while consumers in Europe are immune from any enforceability of choice of court agreement when contracting with traders in any part of the EU,⁹⁵ there is no guarantee that the same protection can be extended to transnational consumer contracts outside the EU.⁹⁶ This point would not merit such special attention if the analysis were about traditional cross-border consumer contracts. In the internet era, websites have paved the way for consumers to conclude transnational contracts with just a few clicks,⁹⁷ and it is now possible for hundreds of thousands of businesses and consumers worldwide to buy and sell online on a daily basis.⁹⁸

To formulate it in an imaginable way, how would the enforceability of choice of court clause be treated in respect of an online contract, for instance, between English consumers and American traders over eBay's international website, www.ebay.com?⁹⁹ It has been argued that although the Brussels Regulation does not address this issue directly, consumers in Europe will probably not be deprived from the protection according to the Unfair Terms

⁹⁴ At the international level, the Hague Convention does not deal with B2C contracts.

⁹⁵ According to Article 17 of the Brussels Regulation, the consumer cannot be deprived of the protection afforded to him under any other agreement unless in particular circumstances which should also be in favour of the consumer.

⁹⁶ This matter has been addressed in the 'Green Paper of the Commission of the European Communities COM (2009) 175 final, On the Review of Council Regulation (EC) No 44/2001 On Jurisdiction and the Recognition Enforcement of Judgments in Civil and Commercial Matters' under a separate provision 'The Operation of the Regulation in the International Legal Order.' The main question addressed in the review is whether additional 'subsidiary jurisdiction rules' are required to extend the application of the Regulation to cases which involve defendants domiciled in a third non-Member State. In the writer's opinion, the review has left the door open to the discretionary powers of the courts of each Member State by proposing some flexible standards rather than definite solutions. In this regard, the Commission's review has been worded as follows: '[A] balance should be found between ensuring access to justice on the one hand and international courtesy on the other hand. Three grounds might be considered in this respect: jurisdiction based on the carrying out of activities, provided that the dispute relates to such activities; the location of assets, provided that the claim relates to such assets; and a forum necessitates, which would allow proceeding to be brought when there would otherwise be no access to justice.' A copy of the Green Paper can be downloaded from the following link <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>> accessed 9 May 2014.

⁹⁷ Hill (n 12) 12. In this respect, Hill says: '[T]he Internet greatly extends the opportunities for consumers to engage in cross-border shopping on a regular basis (as opposed to only occasionally, such as while on holiday or during a business trip.'

⁹⁸ D Roger, 'Online Auctions: A Study of Bidder Satisfaction' (2009) 16 ASBBS 14. For instance, in 2009, 40% of the people aged 16-74 in Europe used the internet for online shopping on a daily basis. Not surprisingly, the highest rate was in the United Kingdom, nearly 66%. See the statistical report from the European Commission's office 'Eurostat' on 8 December 2009/176 on Internet Access and Use in 2009 <http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/4-08122009-BP/EN/4-08122009-BP-EN.PDF> accessed 9 May 2012.

⁹⁹ For example, the international website of eBay, www.ebay.com, contains an arbitration clause rather than jurisdiction. It sets out that: 'Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.' Consequently, some still consider that legal unconformity might be viewed as the main point when the discussion comes about the online transaction between American and European contractual parties. See Ward and Sipior (n 39).

Directive.¹⁰⁰ The author would mostly agree with the above argument because it seems consistent with the applied principle in the Unfair Terms Directive which invalidates any clause in a consumer contract if it has not been discussed and negotiated in a fair manner.¹⁰¹ To a large extent, this state of affairs could apply to online contract terms and conditions, including of course the choice of court clause. Even though, definite protection cannot be guaranteed for two reasons. Firstly, consumer protection in contract law in each Member State is not at the same level and, accordingly, the incorporated choice of court in the online consumer contract which might be seen as unfair by UK courts, for instance, might not be necessarily viewed in the same way by another Member State. Secondly and perhaps most importantly, owing to the fact that the Unfair Terms Directive is a European instrument and is not binding on states outside Europe, the enforcement of the judgment in the defendant's country will remain uncertain if the latter claims that the jurisdiction clause is reasonably justifiable according to the law of his country.¹⁰²

¹⁰⁰ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29 (Unfair Terms Directive). See Jane K Winn and Mark Webber, 'The Impact of EU Unfair Contract Terms Law on US Business-to-Consumer Internet Merchants' (2006) 29 *The Business Lawyer* 20. The European Court of Justice also affirmed this fact in the joined Cases *Océano Grupo Editorial SA v Rocío Murciano* C-240/98 and *Salvat Editors SA v José M Sánchez Alcón Prades and Others* C-244/98 by stressing that any jurisdiction clause incorporated without being discussed and negotiated with the consumer will be considered an unfair contract term pursuant to Article 3 of the Unfair Terms Directive; Tim Corthaut, 'Case Law: Case C-240/98 *Océano Grupo Editorial SA v Rocío Murciano* 27 June 2000 [2000] ECR I-4941, Case C- 215/97 *Barbara Bellona v Yokohama SPA*, 29 January 1998, [1998] ECR-12191, Case C-456/98 *Centrostell SRL v Adipol GmbH*, 13 July 2000 [2000] ECR I-6007' (2002) 8 *The Columbia Journal of European Law* 239 <http://www.cjel.net/print/8_2-corthaut/> accessed 1 April 2014. See also <<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45388&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=367404>> accessed 9 May 2014.

¹⁰¹ Article 3 of the Unfair Terms Directive lays down that: '(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties right and obligations arising under contract, to the detriment of the consumer. (2) A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of pre-formulated standard contracts.'

¹⁰² For example, in the famous case law *UEJF et LIGRA v Yahoo! Inc et Yahoo! France* (*Yahoo! Inc. v La Ligue Contre Le Racisme et L'Antisemitisme, et al*) 145 F Supp 2d 1168, Case No C-00-21275JF (ND Ca, 24 September 2001) the US District Court in California rejected enforcing the judgment of the French court which compelled Yahoo! to remove Nazi memorabilia from its auction site and deny its access in France. The US court emphasized that such an act would violate the right to free speech, thought and expression guaranteed in the First Amendment. See Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 4. For more details and analysis about this interesting case law see also Ralf Michaels, 'Some Fundamental Jurisdictional Conception as Applied in Judgment Conventions' in Giesela Ruhl, Jan Von Hein, Eckart Gottschalk and Ralf Michaels (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press 2007); GI Zekos, 'State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction' (2006) 15 *International Journal of Law and Information Technology* 37. According to Svantesson, the enforceability is very common problem in internet jurisdiction cases. Svantesson describes the enforceability's dilemma in transnational internet case as "Achilles's heel". For more details see Dan Svantesson, 'A Jurisprudential Justification for Extraterritoriality in Private International Law' (2015) 13 *Santa Clara Journal of International Law* (forthcoming); available at SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475760> accessed on 6 August 2014.

In the final analysis, it can be stated that consumer laws in Europe might not guarantee an adequate protection for its consumers in respect of transactions with non-resident businesses that do not have branches or agencies in the Member States. This might be more applicable and predictable in an online transaction especially because most scholars do not regard the foreign website as a branch.¹⁰³ American businesses that make their websites accessible in EU countries should also be aware that choice of law and court clause might not be enforceable against European consumers.¹⁰⁴

In the US, in general, there are no special rules for the transnational consumer contracts. Traditional jurisdiction and choice of law rules in contractual and non-contractual liability are applicable to cross-border consumer contracts.¹⁰⁵ On the other hand, although the statutory norms have not paid special attention to distinguishing between business and consumer contracts, some courts have tended to be more in favour of the consumer when examining the validity of dispute resolution clauses incorporated in online consumer contracts.¹⁰⁶ In general, it seems clear from available case law that some states have been very stringent in validating the jurisdiction or arbitration clauses in online consumer contracts,¹⁰⁷ while others have adopted the UCITA,¹⁰⁸ and this has been a subject for controversy because it validates the choice of court agreement in click-wrap agreements in consumer contracts.¹⁰⁹ Taking the

¹⁰³ See Hill (n 12) 149. In this regard, Hill says that: ‘It is widely assumed that ‘branch’ should bear the same meaning in both article 15 (2) and article 5 (5) and it must be doubtful whether a website could, in itself, satisfy the criteria laid down by the Court of Justice (in the context of article 5(5) in the cases of *De Bloos*, *Somafer*, and *Blankaert*. Since, in these cases, the Court of Justice emphasized the tangible nature of a ‘branch’, it seems clear that a ‘virtual office’ cannot be a branch for the purpose of article 5(5).’

¹⁰⁴ Winn and Webber (n 100); Juliet M Moringiello and William L Reynolds, ‘Survey of the Law of Cyberspace: Internet Contracting Cases 2004 – 2005’ (2005) 61 *Business Lawyer* 433.

¹⁰⁵ Jacques Delisle and Elizabeth Trujillo, ‘Consumer Protection in Transnational Contexts’ (2010) 58 *The American Journal of Comparative Law* 135; Spencer Weber and others, ‘Consumer Protection in the United States: An Overview’ [2011] *European Journal of Consumer Law* 1. For more general information about the consumer protection rules in the US see Mark E Budnitz, ‘The Federalization and Privatization of Public Consumer Protection Law in the United States: The Effect on Litigation and Enforcement’ (2007) 24 *Georgia State University Law Review* 663.

¹⁰⁶ Moringiello and Reynolds (n 77). This tendency is widely upheld by the Courts of the State of California which maintain a strong policy of consumer protection. See Juliet M Moringiello and William L Reynolds, ‘Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008’ (2008) 64 *Business Lawyer* 1. See the case analysis in the chapter 4 of this thesis.

¹⁰⁷ For example, in both *Mazur v eBay, Inc* and *Brazil v Dell, Inc*, the online contracts were B2C and both were about the validity of arbitration clauses against consumers. The District Court of California relied upon the proposition that inequality of bargaining power exists as long as the contract is non-negotiable, and that applies quite fairly to the terms and conditions agreed by the consumer over a website contract. Therefore, such a clause will not have any enforceability against the consumer regardless of the point that these terms have been presented in conspicuous enough manner for the consumer. See Moringiello and Reynolds (n 106).

¹⁰⁸ For example, Maryland and Virginia were two of the few States which adopted the UCITA. See Ku and Lipton (n 8) 70.

¹⁰⁹ *ibid* 71. Article 110 of UCITA states that: ‘(a) the parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust. (b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly to provide.’

middle ground, the general tendency of US courts has been in favour of applying the rule of ‘reasonable person’.¹¹⁰ According to that rule, the jurisdiction or arbitration clauses set out by a business seller on his website will be binding on the consumer if a standard person,¹¹¹ under ordinary circumstances, would have noticed it while concluding the contract.¹¹² Not surprisingly, the interpretation of this rule in some cases has been broadened to enforce the clause against the consumer, even if the person has not read it. This occurred in *Druyan v Jagger*¹¹³, and was done irrespective of whether the online contract was click-wrap or browse-wrap.¹¹⁴

In *Hines v Overstock.com, Inc.*,¹¹⁵ the plaintiff was a consumer who bought a vacuum cleaner on an online marketplace, www.overstock.com. The online terms and conditions of the seller’s contract included an arbitration clause in favour of the seller.¹¹⁶ After the dispute had arisen, the plaintiff argued that she had never paid enough attention to the terms and conditions for using the website and those for the contract. The court, in examining the

¹¹⁰ Juliet M Moringiello and William L Reynolds, ‘Electronic Contracting Cases 2009-2010’ (2010) 66 Business Lawyer 1; Sherman Kahn and David Kiferbaum, ‘Browsewrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service’ (2012) 5 New York Dispute Resolution Lawyer 33.

¹¹¹ There is no legal definition of what constitutes a reasonable or standard person; however, in the author’s opinion, it means here neither an assiduous person nor one who is unaware, but rather a standard mindful person.

¹¹² *Hoffman v Supplements Togo Mgt, LLC* 419 NJ Supper 598, 18 A3d 210 (2011), see also *Jerez v Closeouts, LLC* 36 Misc 3d 161 (2012); Steven A Meyerowitz, ‘Court Rejects E-Commerce Seller’s Forum Selection Clause’ (*Commercial Law Web Advisor*, 27 March 2012) <<http://commerciallawwebadvisor.com/blog/article/court-rejects-e-commerce-seller-s-forum-selection-clause>> accessed 9 May 2014. The original verdict is available at <http://scholar.google.co.uk/scholar_case?case=1155851008502608813&q=jerez+v+jd+closeouts&hl=en&as_dt=2.5&as_vis=1> accessed 9 May 2014.

¹¹³ *Druyan v Jagger* 508 F Supp 2d 228, 232 (SDNY 2007). The dispute in this case law was not about the enforceability of a jurisdiction or arbitration clause. The plaintiff was a consumer who sued an online ticket seller, ‘Ticketmaster’, arguing the invalidation of the seller’s online conditions and terms which contained a disclaimer clause. The court held that as long as the seller had made the way it presented the web terms and conditions to the consumer very clear and conspicuous, the consumer would be bound by them, even if he did not read them. See Moringiello and Reynolds (n 106).

¹¹⁴ In *PDC Laboratories, Inc v Hach Co* although the online contract was B2B, the court held that the rationale behind validating or invalidating the arbitration clause was the way that the defendant, by designing and structuring his website, had taken adequate steps to draw the plaintiff’s attention to such a clause regardless of the contract being click-wrap or browse-wrap. See Moringiello and Reynolds (n 110). See also *Fteja v Facebook, Inc* 2012 US Dist LEXIS 12991 (SDNY 24 Jan 2012); Kahn and Kiferbaum (n 110).

¹¹⁵ *Hines v Overstock.com, Inc* 668 F Supp 2d 2009.

¹¹⁶ Owing to the fact that online contract terms and conditions, including applicable law and jurisdiction clause, are usually formulated and provided by the seller, it is highly predictable that the seller will govern and submit the contract to the law and jurisdiction that is preferable to him. Accordingly, the reason behind invalidating the jurisdiction clause against the consumer will be baseless if the latter stipulates the jurisdiction clause in his favour as being the weaker party on the contract other than the ‘business’ benefit. Article 17 of the Brussels Regulation adopted this principle and stated that choice of court agreement will be enforceable against the consumer in only three exceptional occasions; one of these cases is the jurisdiction clause being chosen by the consumer itself. Article 17 of Brussels Regulation provides that: ‘The provision of this Section may be departed from only by an agreement: ... (2) which allows the consumer to bring proceeding in courts other than those indicated in this Section’.

degree to which they were visible, noticed that they were located in small print at the bottom of the webpage and not easily noticeable by a reasonable person. As a result, the court rejected the enforcement of the clause against the consumer.¹¹⁷ In contrast, in *Hubbert v Dell Corp*¹¹⁸, the court enforced an arbitration clause against the consumer. This clause was incorporated into the terms and conditions of sale which were available through a hyperlink.¹¹⁹ The plaintiff argued that he had not clicked any ‘accept’ button while contracting and, therefore, he was not bound by such a clause.¹²⁰ The court rejected such an argument and stated that regardless of the method of agreement, the plaintiff had received enough notification before entering into an online contract and so the arbitration clause was binding on him.¹²¹

Another interesting court analysis can be found in *Caspi v The Microsoft Network, LLC*.¹²² In that case, the court validated a forum selection clause included in an online click-wrap agreement in a B2C contract.¹²³ The court stated that the forum selection clause can be invalidated only in three circumstances: if it is incorporated into the contract as a result of fraudulent activity or unfair bargaining powers; if its enforcement interferes with state public policy; and if its enforcement results in inappropriate judicial proceedings.¹²⁴ Moreover, from a consumer protection point of view, the court underlined that effectuating such a clause in a web contract would not constitute a reasonable ground for excessive contractual bargaining power between the online good or service seller on the one hand, and the consumer on the other.¹²⁵ The reason behind such a conclusion by the court is that the realm of electronic commerce is very competitive and the nature of online shopping forums provides the consumer with a wide range of alternatives.¹²⁶ This enables the consumer not to be under an adherence contract and, consequently, not to be a weaker party in a contract with imbalanced bargaining powers.¹²⁷

¹¹⁷ See Moringiello and Reynolds (n 110). There are several online B2C case laws in US where the courts rejected validate the choice of law or arbitration clause against the consumer for the same reason. For example *Scherillo v Dun & Bradstreet*, see *ibid*.

¹¹⁸ *Hubbert v Dell Corp* 835 NE 2d 113 (III App Ct 2005).

¹¹⁹ Moringiello and Reynolds (n 77).

¹²⁰ *ibid*

¹²¹ *ibid*

¹²² *Caspi v The Microsoft Network, LLC* 323 NJ Super 118, 732 A2d 528 (NJ App Div 1999).

¹²³ See Ku and Lipton (n 8) 69; Leon E Trakman, ‘The Boundaries of Contract Law in Cyberspace’ (2009) 2 *International Business Law Journal* 159.

¹²⁴ Ku and Lipton (n 8) 69.

¹²⁵ *ibid* 70.

¹²⁶ *ibid* 70.

¹²⁷ *ibid* 70.

Indeed, the court's analysis in *Hines v Overstock.com, Inc.*, regarding the degree of visibility of the online terms and conditions on the website might, to some extent, apply to the structural design of some popular online marketplaces.¹²⁸ Most online shopping marketplaces have now implemented a registration system which requires the user to read the terms and conditions of website use just once during the registration process. Upon completion of registration, the registered member will no longer be directed by the seller to read the terms of the contract each time he uses the website to buy items online.¹²⁹ The question that needs to be determined is whether the court's analysis in *Hines v Overstock.com, Inc* applies to such websites. There might not be a definitive answer to this question. It seems that the regular use of a website to buy items online after becoming a registered member will give the court reasonable justification to conclude that the consumer has been aware enough of the terms and conditions of sale of that website given that he deals with it so routinely.¹³⁰

In short, the Court's analysis in *Specht v NetScape Communications*,¹³¹ in distinguishing between click-wrap and browse wrap agreements, has been widely used when discussing the validity of jurisdiction or arbitration clauses in consumer contracts.¹³² Several cases discussed above have confirmed the significance of online terms and conditions being conspicuously presented on the seller's website rather than giving special attention to whether the agreement is click-wrap or browse wrap.¹³³ Accordingly, when the terms and conditions of the contract are well incorporated into the seller's website in such a form that brings the reasonable

¹²⁸ For example, the terms and conditions of the eBay's international website, www.eBay.com, can be reached through a small hyperlink at the lower bottom on the main page, under the title 'Policies'. By clicking on the hyperlink the user will be guided to another page, at the lower left side of the new page, there is a small hyperlink, which is 'A-Z index'. By clicking on the hyperlink, the terms and condition can be found under the letter (T). As for Amazon's international website, the terms and conditions can be found through a small written hyperlink entitled 'Conditions of Use', which is located at the very lower bottom of the website. In fact, if I consider myself a 'standard person' who is fairly careful and, using the computer and web surfing, I have found it quite confusing to find the terms and conditions for using the marketplace in both cases although Amazon was perhaps a little easier.

¹²⁹ For example, the consumer cannot complete the online purchase process over Amazon or eBay marketplaces, unless he or she becomes a registered member.

¹³⁰ Such a notion was upheld by the Supreme Court of New South Wales in Australia in *Peter Smythe v Vincent Thomas* [2007] NSWSC 844 (3 August 2007); see (n 44) in Chapter 4.

¹³¹ *Specht v Netscape Communications Corp* 150 Supp 2d 585 (SDNY 2001).

¹³² Kayleen Manwaring, 'Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK' (2011) 5 *Studies in Ethics, Law and Technology* 1 <<http://www.bepress.com/selt/vol5/iss1/art4>> accessed 11 May 2014.

¹³³ In *Hotels.com v Canales*, the court did not focus on the way which the agreement was done, the key point which arose from the justice was whether the sufficient and proper procedures had been followed to bring it to the consumers' attention prior to concluding the online contract.

consumer's attention to them before contracting, the likelihood of validating the jurisdiction clause can be considered very likely.¹³⁴

Under Iraqi law, there is no distinction between business and consumer contracts in terms of jurisdiction and applicable law issues. Moreover, the Iraqi Consumer Protection Act¹³⁵ does not include any provisions about protecting the consumer in respect of distance contracts.¹³⁶ Therefore, a choice of court clause in a consumer contract will be treated in the same way as a business contract. It is worth noting that the 'reasonable person' criterion applied by the US courts seems very similar indeed to the 'normative person' standard which is laid down in the ICLC.¹³⁷ This means that Iraqi courts can find a good basis for applying this criterion for the same purpose as US courts do. Once again, there is not much to say here about the validity of a jurisdiction clause in the consumer contract. As has been discussed previously,¹³⁸ the Iraqi law does not recognise the choice of court clause, whether the contract is B2B or B2C, when that choice excludes the Iraqi court from its jurisdiction as this jurisdiction has been guaranteed by statute. From a consumer protection point of view this appears very advantageous for Iraqi consumers indeed. More specifically, according to Article 15 of the ICLC the consumer in Iraq will be protected from the validation of a jurisdiction clause which allocates a competent court other than an Iraqi one in the following cases: if the online contract is concluded in Iraq; or if it is deemed to have been performed in Iraq.¹³⁹ While it is clear how such a rule can be applied if the goods are delivered in Iraq, it might be a quite challenging to determine the place of conclusion of the online contract if the place of

¹³⁴ Ward and Sipior (n 39).

¹³⁵ The Consumer Protection Act No (1) of 2010. An online copy of the Act (Arabic version only) is available through the following link <<http://www.iraq-ig-law.org/en/node/452>> accessed 11 May 2014.

¹³⁶ علي مطشر عبدالصاحب, "حماية المستهلك في التعاقد الإلكتروني" (٢٠١٤) ٢٧ مجلة العلوم القانونية ١٩٣. [Ali Mutashar Abdul Sahib, 'Consumer Protection in Electronic Contracts' (2012) 27 The Journal of Legal Science 193.]

¹³⁷ The ICLC adopts this criterion in more than one case. However, the case in point, which might be the most relevant to this instance, is Article (559) of the Code. More specifically, in the sale contract, the seller according to the Iraqi law shall guarantee any imperfection, which might occur in the good(s) after delivering it to the buyer. On the other side, as a statutory duty on the buyer, in order for the latter to be able to claim his right, he should check and examine the item within a reasonable period after receiving it physically and inform the seller if any fault has been found. To that end, Iraqi law assumes that the buyer's obligation of checking the item should be according to the degree of a 'normative person', which means the reasonable degree of checking for the basic and proper functioning of the purchased item(s). Indeed, this statutory duty in the Iraqi law appears very similar to the US courts' approach which requires the online seller to make the sale's conditions and terms in his website visible in order to attract the attention of a consumer with reasonable awareness.

المادة ٥٥٩ من القانون المدني العراقي تنص على انه: " لا يضمن البائع عيبا قديما كان للمشتري يعرفه او كان يستطيع ان يتبينه لو انه فحص المبيع بما ينبغي من العناية, الا اذا اثبت ان البائع قد اكد له خلو المبيع من هذا العيب او اخفى العيب غشا منه."

[Article 559 of the ICLC states: "The seller shall be not liable for any imprecation, which the buyer would have noticed it by a reasonable examine; unless the buyer proves that the seller, when contracting, has asserted that the item is intact or in perfect working order".]

¹³⁸ See the analysis about the Iraqi law in the previous section.

¹³⁹ See the analysis about this Article in the page 138 of this thesis.

performance is in a country other than Iraq or if it has been performed instantaneously, such as software downloading to a consumer's laptop.¹⁴⁰

A further point can be noted regarding the application of choice of court agreements in international online consumer contracts. As part of its involvement in the Inter-American Specialized Conference on Private International Law,¹⁴¹ Canada proposed 'A Model Law on Jurisdiction and Choice of Law to Consumer Contracts'.¹⁴² According to the Canadian approach, a distinction between two types of consumers should be made in order to give validity to a choice of court agreement: passive consumers and active consumers.¹⁴³ The jurisdiction clause will not apply to passive consumers who transact with businesses while they are in their home country.¹⁴⁴ In other words, a business, without having a real presence in the consumer's country, solicits his commercial activities in the consumer country.¹⁴⁵ In contrast, for active consumers who transact with businesses while they are out of their countries of domicile, validating the jurisdiction clause will rely upon the discretionary powers of the chosen court.¹⁴⁶

To some extent, this notion seems rather suitable to the online context. For the purpose of this analysis, passive consumers in online transactions are those who conclude contracts over a website which is originally designed to pursue commercial activities in their countries of domicile.¹⁴⁷ On the other hand, consumers who access a website which is not originally directed to his country but which welcomes making transactions with consumers worldwide, can be regarded as an active consumer.¹⁴⁸ The rationale behind this argument is that the

¹⁴⁰ Identifying the place of the performance on contracts in terms of intangible products such as downloadable software, music stream and e-book purchase is one of the controversial topics of the private international law in general not just under the application of Iraqi law. See Fernando Gava Verzoni, 'Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG)' (2008) 2 *Nordic Journal of Commercial Law* 1.

¹⁴¹ Inter-American Specialized Conference on Private International Law (CIDIP) is a part of Organization of American States (OAS), which carries out substantial efforts to harmonise the law of international consumer contracts. For more details about this Organization; its member, objective and agreed conventions, and instrument see <<http://www.oas.org/dil/PrivateIntLaw-HistDevPriLaw-Eng.htm>> accessed 11 May 2014.

¹⁴² Besides Canada, Brazil proposed a 'Draft Convention on the Law Applicable to International Consumer Contracts' and the USA proposed a 'Draft of Legislative Guidelines on Availability of Consumer Dispute Resolution'. For more details see Diego P Fernández Arroyo, 'Current Approaches Towards Harmonization of Consumer Private International Law in the Americas' (2009) 58 *International and Comparative Law Quarterly* 411 <http://www.journals.cambridge.org/abstract_S0020589309001055> accessed 11 May 2014. Reference to the Brazilian and USA proposals will be made when discussing the applicable law issues in Chapter 6 of this thesis.

¹⁴³ *ibid*

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ For example, the British consumer who uses the UK website of eBay www.ebay.co.uk

¹⁴⁸ For example, the British consumer who uses the international website of eBay www.ebay.com.

consumer needs to be better protected when the business directs its commercial activities at the consumer's home state, while the logical reason will diminish if the consumer takes the risk of going across borders to conclude a contract with non-resident businesses.¹⁴⁹ At the same time, a controversy about a similar approach in the European Union has arisen in many scholarly debates recently.¹⁵⁰ This point will be discussed in the forthcoming section of this chapter when an analysis will be made of consumer protection when there is an absence of court agreement.

5.3.1.3 Online Consumer-to-Consumer Contracts

Arguably, an inconsistent aspect that has emerged in technology and law is that the dividing line between small-sized businesses and consumers has become blurred.¹⁵¹ Most of the people who find themselves involved in commercial and profit-making activities in online selling and buying forums did not plan or think of carrying out commercial activities.¹⁵² There might be nothing novel in this type of contract from a choice of court agreement perspective in US law and Iraqi law.¹⁵³ Under the EU's harmonised rules of private international law,¹⁵⁴ this category of online contracts are ones that have not yet been regulated by EU laws.¹⁵⁵

¹⁴⁹ Arroyo (n 142)

¹⁵⁰ There have been some scholarly and judiciary debates about the application of Article 15(1)(C) of the Brussels Regulation in online consumer contracts. Reference to this issue will not be made here as it will be discussed in depth in a separate section.

¹⁵¹ Riefa and Hörnle (n 19) 95; Barral (n 61) 83; Ewoud Hondius, 'The Notion of Consumers: European Union versus Member States' (2006) 28 Sydney Law Review 89. Many writers though do not distinguish between B2C and C2C contracts when examining online consumer contracts. See Colon-Fun (n 18). It is worth noting that the working group on European contract law suggested that small businesses should be, in some circumstances, treated as consumers. However, this suggestion has been rejected by the ECJ. See Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-Commerce and New Contracting Practices in the Internet' (2009) 27 Penn St Int'l L Rev 609; Bastian Schüller, 'The Definition of Consumers in EU Consumer Law' in James Devenny and Mel Kenny (eds), *European Consumer Protection- Theory and Practice* (Cambridge University Press 2012) 125. Indeed, this notion seems to be very influential if it applies to online transactions.

¹⁵² Some academics refer to this category of internet users as 'hybrid consumers'; see Riefa and Hörnle (n 19) 95. Whereas other refer to them as 'merchant consumers'; see Colon-Fun (n 18).

¹⁵³ As it has been mentioned previously, the law in the US and Iraq does not distinguish between business contracts and consumer contracts when dealing with choice of court agreements; this may not even be the accurate analysis of the courts' practice. From this standpoint, the validity of a jurisdiction clause in an online consumer-to-consumer contract will be examined according to the same rule which is used in B2C contracts.

¹⁵⁴ The intended rules here are the Brussels Regulation and the Rome I Regulation.

¹⁵⁵ Kohl (n 15) 68.

The legislative norms of the EU relating to contracts¹⁵⁶ generally regulate the legal framework of transactions between businesses or between businesses and consumers. When the consumer concludes a contract with another consumer, such a contract is presumably excluded from the scope of consumer protection rules in the Brussels Regulation¹⁵⁷ and other consumer protection rules.¹⁵⁸ Under those circumstances, it is important to understand how the courts will deal with a jurisdiction clause in a contract between two consumers. The answer to this question hinges on whether the description of unequal bargaining powers between the parties is applicable or not to such a category of contracts within the meaning of a consumer protection criterion in EU law. Indeed, such determination might not be a clear enough and leads to a very critical point of analysis; that is to say, the EU's approach to the definition of consumer and its applicability to transactions in the online environment.

As a rule, it is commonly agreed that the consumer is the weaker party in the contractual bargain and he should be afforded the appropriate protection because of this.¹⁵⁹ There is no common consensus about the criterion that should be used to interpret or rather to determine the framework of the term *weaker party* and, consequently, to recognise the consumer contracts and distinguish them from other types of contracts.¹⁶⁰ Generally speaking, there are two main approaches in determining this. The first is the 'non-professionalism approach'¹⁶¹ which relies on the assumption that the consumer is any person who concludes a contract which is not related to his profession or business.¹⁶² This approach is widely adopted in EU instruments.¹⁶³ In *Gruber v Bay Wa AG*,¹⁶⁴ the ECJ affirmed that the consumer is any person

¹⁵⁶ Namely: Unfair Terms Directive, E-commerce Directive, Consumer Rights Directive, Brussels Regulation, Rome I Regulation.

¹⁵⁷ Riefa and Hörnle (n 19).

¹⁵⁸ Barral (n 61).

¹⁵⁹ Evelyne Terryn, Hans-W Micklitz and Jules Stuyck (eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 29.

¹⁶⁰ Schu (n 45).

¹⁶¹ Barral (n 151). The notion of the consumer according to this approach is also referred to as 'functional-occupational related'; Peter Rott, Hans-W Micklitz and Norbert Reich, *Understanding EU Consumer Law* (Intersentia 2009) 47.

¹⁶² Hill (n 12) 3. The same meaning is prevalent among American scholars, who define the consumer contract as 'transaction undertaken by natural person for goods or services for personal, family, or household use', see the definition of the consumer in the US Electronic Signatures in Global and National Commerce Act, 2000 §106 (5). However, it could be said that this criterion has not been widely adopted by US courts and the consumer protection policy in the US is significantly different from the EU. See Winn and Webber (n 100).

¹⁶³ For example, Article 2 of the Consumer Rights Directive 2011/83/EU defines the consumer: '[A]ny natural person who, in contracts covered by this directive, is acting for purposes which are outside his trade, business, craft or profession.'

¹⁶⁴ Case C-464/01 *Gruber v Bay Wa AG* [2005] ECR I-439, [12]; Terryn, Micklitz and Stuyck (n 160) 51; Peter Stone, *EU Private International Law* (2nd edn, Edward Elgar 2010) 131, 132.

involved in an act which falls outside his business or profession.¹⁶⁵ This can be regarded as a key element of current consumer protection law.¹⁶⁶

The second approach is the ‘superiority approach’.¹⁶⁷ According to this approach, the consumer will be regarded as the weaker party in the contract due to his lack of experience in the subject matter of the intended contract regardless of his profession or job.¹⁶⁸ In addition, the consumer in such circumstances will be any person who might suffer loss or detriment because of the other party in the contract due to a lack of experience in the field within which the contract falls.¹⁶⁹ In that case, courts will exercise discretionary powers to examine the inequality in each case.¹⁷⁰ It can be noted that the second approach can be seen as quite utopian and a very perfect way to counter the imbalance in bargaining powers between the parties. EU legislation does not uphold this approach and thus cannot currently be legally enforced.

¹⁶⁵ In this case, an Austrian farmer bought tiles from a German seller in order to roof his farm, which also was used as a private dwelling for his family. After the dispute arose, the claimant (farmer) sued the German seller before the Austrian court pursuant to the Brussels Convention arguing that he had been acting as a consumer not a business. However, the defendant made a counterclaim by arguing that the contract was a business contract because the tiles were used for roofing a farm that was used for commercial purposes. Accordingly, German courts should have the competence to hear the dispute. The German Supreme Court (Oberster Gerichtshof) referred the case to the ECJ, asking whether such an act was a consumer or a business transaction. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0464:EN:HTML> accessed 11 May 2014.

¹⁶⁶ At the same time, the ECJ tacitly stressed also that only being a private individual does not justify giving that person the appropriate protection afforded to the typical consumers by ruling that: ‘a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect’. There have been many suggestions and studies by the European Commission on how to expand the consumer protection to natural persons who purchased goods for the purposes which fall within their business very narrowly, or outside their intended business such as the individual purchase of a personal car which can also be used for work delivery or buying a fire alarm system for the work office. However, the most-recent EU Directive on Consumer Rights adopted the same narrow definition of consumer, which entails only natural persons who buy for purposes that fall outside their provision or business. See Martijn W Hesselink, ‘Towards Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive’ (Centre for the Study of European Contract Law, Working Paper Series No 2009/06).

¹⁶⁷ The writer has quoted this designation from Hill’s words, which describe the inequality as one party having superior bargaining power over another irrespective of his profession or job characteristics while contracting. See Hill (n 12) 3.

¹⁶⁸ Barral (n 151); Hondius (n 151). Some American scholars define the consumer in the same way; however, others define the consumer in a much broader way: ‘Any natural person who may be reasonably expected to use, consume, or be affected by the goods, or any person injured by the seller’s breach of warranty.’ See Delisle and Trujillo (n 105).

¹⁶⁹ Hondius (n 151); Barral (n 61). Some have argued that the interpretation of the term consumer in the EU, and for the purpose of Article 15 of the Brussels Regulation more specifically, should be in favour of this approach. See Youseph Farah, ‘Allocation of Jurisdiction and the Internet in EU Law’ (2008) 33 *European Law Review* 257. The ECJ has also inclined towards this approach in Case C-269/ 95 *Benincasa v Dentalkit* [1997] ECR I-03767.

¹⁷⁰ Hill (n 12) 4.

Arguably, this debate would be considered irrelevant if the focus was on the offline environment and traditional consumer contracts. In the online scenario, the situation is different. New means of contracting have generated new challenges that have cast doubt on the role of legal norms in various aspects. The issue that needs to be addressed is therefore the extent to which the internet has changed the meaning of the consumer.

On this issue, Barral states that:

[The] European Union's approach to defining the consumer is very narrow, because the criterion of 'weaker party' according to EU is based on non-professionalism, in contrast, this term should be formulated more broadly, and therefore, the non-expert must be used instead. Consequently, under the current legal definition for the consumer in the EU, certain types of transaction over some marketplaces can be considered as C2C contracts, where both of the parties can be regarded as consumers, they can rely upon the consumer protection afforded in EU instruments. Nevertheless, such types of contracts are outside the scope of EU directives on consumer protection.¹⁷¹

In relation to the subject of this thesis, online marketplaces, such as eBay and Amazon, enable consumers and traders alike to sell their items online to other individuals or businesses. In such instances, the meaning of bargaining power will take on a different dimension. This is because a natural person may post an item for sale on Amazon or eBay and it will satisfy another natural person's interest so that the contract of sale will be concluded between these website users. Undoubtedly, both parties are natural persons, and let us to say that neither is acting in a professional or occupational capacity. Certainly, at least theoretically, both can be regarded as consumers from a statutory point of view as the definition of the consumer applies to both of them. From a factual point of view both parties cannot hold the same bargaining position. This is exactly the same as when people buy and sell at a car boot sale for instance. This is a place where individuals offer their second-hand belongings for sale at cheap prices. Almost of those people have their own jobs and are simply taking advantage of the weekend to make some extra money as a second source of income.

What makes the matter more problematic is the ambiguity of the seller's profile on such websites. There are no specific indications on the websites revealing whether the user is

¹⁷¹ Barral (n 151).

acting as a consumer or a trader.¹⁷² Nevertheless, it is not a very complicated matter to conclude whether the user is acting as a consumer or a business. There are many factors that could remove this ambiguity, such as whether the item offered by the seller is brand-new or second-hand; or whether the seller's storefront includes a variety of goods offered for sale or just a handful of items.¹⁷³ Under such circumstances, all types of contract are possible - the contract could be B2C, C2C, and even B2B.

It might be inaccurate, practically even though not theoretically, to conclude that both parties are consumers, that they are in the same bargaining position and, consequently, that there is no need for one of them to be protected as the weaker party in the contract. Certainly, there is a difference between a consumer who uses the online forums occasionally and a consumer who uses online marketplaces systematically, as a secondary source of income.¹⁷⁴ This is the case even though, under the current approach, the latter type of consumer cannot be treated as a small business as long as his transactions fall within purposes which are outside his profession.

It is now possible to return to the question of whether an online jurisdiction clause between two consumers has any validity. The answer to this question may vary depending on the analysis of the dispute itself. An online contract over eBay, for instance, encompasses two agreements at the same time:¹⁷⁵ one between direct contractual parties (seller and buyer), and another agreement between each party and eBay itself concerning the use of the website, the eBay user agreement.¹⁷⁶ For example, the user agreement of eBay UK states that: 'If any dispute arises between you and eBay...'.¹⁷⁷ It is possible to conclude from such a legally-formulated term that it regulates the potential disputes between eBay and its users but not disputes between the users themselves.¹⁷⁸ In *Sayeedi v Walser*¹⁷⁹ the court stressed this fact

¹⁷² For example, in www.amazon.com when clicking on 'About Seller' icon, the result will just show the feedback history and previous buyers rating about the seller, and other items that are offered by the same seller under 'Seller's Storefront' icon. The full address is not provided and there is not enough information about the seller's trade store.

¹⁷³ See also Kate Tokeley, 'Towards a New Regulatory Regime for New Zealand Online Auction' (2011) *New Zealand Law Review* 91.

¹⁷⁴ Riefa and Hörnle (n 19).

¹⁷⁵ Christine Riefa, 'To Be or Not to Be an Auctioneer?' *Some Thoughts on the Legal Nature of Online 'eBay' Auctions and the Protection of Consumers* (2008) 31 *Journal of Consumer Policy* 167.

¹⁷⁶ *ibid*

¹⁷⁷ See <<http://pages.ebay.co.uk/help/policies/user-agreement.html>> accessed 11 May 2014. A similar term has been formulated by eBay in its international website www.ebay.com, which sets out 'You and eBay agree that any claim or dispute at law or equity that has arisen or may arise between us will be resolved...'. See <<http://pages.ebay.com/help/policies/user-agreement.html?rt=nc>> accessed 11 May 2014.

¹⁷⁸ *Evans v Matlock* Tenn Ct App 23 Dec 2002 <<http://www.tncourts.gov/sites/default/files/OPINIONS/TCA/PDF/024/EvansD.pdf>> accessed 11 May 2014.

by saying that eBay's 'Resolution of Disputes' only governs the disputes between eBay and its users but not between the users themselves.¹⁸⁰ An opposite opinion might argue that such a clause in the website terms and conditions is a comprehensive governing rule for all expected disputes resulting from using eBay's website. If the first assumption is the case, such contracts are out of the scope of the Brussels Regulation and other consumer protection laws and, consequently, the enforceability of choice of court/arbitration agreements will rely upon the courts' analysis of its fairness according to the national governing law in each Member State.

In the author's view, if such a clause is included in online C2C contracts in some specific electronic marketplaces, such as eBay or Amazon, it might not be enforceable against the buyer (consumer) for three reasons. First, although the contract is between two consumers, the jurisdiction clause is set by the online marketplace which, in this case, is a business. Second, as long as it seems to the hearing court that one of the contractual parties is a consumer, it is highly likely that such a clause will not be enforced against the buyer assuming that he/she is the party that adhered to the contract. Third, there is a general rule in the Unfair Terms Directive¹⁸¹ which invalidates any contractual clause that has not been negotiated with the consumer. From all the above-mentioned points of view, it can be argued that the contract will be regarded as B2C even though the direct sale contract is between two consumers.¹⁸²

¹⁷⁹ *Sayeedi v Walser* 15 Misc 3d 621, 835 NYS 2d 480 NY 2007.

¹⁸⁰ More specifically, the court stressed that: 'Although this agreement contains a section entitled "Resolution of Disputes," said section only governs disputes brought directly against eBay, itself, and not disputes between users. Although dispute resolution options are provided, and albeit encouraged by eBay, the user agreement does not explicitly limit a user's traditional common-law rights to seek redress for tortious activity. Therefore, an action in Civil Court is available remedy.' In this case, the court did not enforce the jurisdiction clause between two of eBay's individual users and instead it applied the test of minimum contact. This case law will be discussed in more detail in the coming section of this chapter.

¹⁸¹ Council Directive 93/13/EEC of April 1993 on Unfair Terms in Consumer Contracts [1993] OJ 95/29.

¹⁸² Article 3 of the Directive provides that: '1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. 2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.'

5.3.2 The Absence of Online Choice-of-Court Agreement

In both traditional and online practice, a well-formulated contract normally includes a dispute resolution clause.¹⁸³ For a number of reasons, such a choice cannot always be made.¹⁸⁴ In case of international contracts,¹⁸⁵ when the contract lacks the exclusive agreement of the parties about the competent jurisdiction, courts usually start looking for a reasonable ground for asserting jurisdiction to the contractual dispute.¹⁸⁶ The reasonable jurisdictional ground relies upon the degree of the nexus between the submitted court and disputed contract. Private international law experts usually refer to these as ‘connecting factors’.¹⁸⁷

Connecting factors have great importance in private international law because of their role in identifying the applicable law and appropriate forum issues.¹⁸⁸ As far as the jurisdiction rules are concerned, a number of connecting factors might play a crucial role in establishing an acceptable ground for asserting a jurisdiction over transnational contractual disputes, including the place of contract conclusion (*lex loci contractus*), the place of its performance (*lex loci solutionis*) or the place of the parties’ residence (*lex domicilii*).¹⁸⁹ While these connecting factors are suitable for traditional contract disputes, they may be quite problematic when it comes to the online context.¹⁹⁰ More specifically, it is debatable the extent to which such connecting factors can aid national courts in any country to claim an

¹⁸³ Faye Fangfei Wang, *Law of Electronic Commercial Transaction: Contemporary Issues in the EU, US and China* (Routledge 2010) 127. Contractual dispute resolution clause usually encompasses the governing law and competent court issues.

¹⁸⁴ Sometimes, the parties may overlook including such a clause in the belief that they will never come to a dispute or they may forget to mention it with the contract terms and conditions.

¹⁸⁵ By this, the writer means a cross-border or transnational sale contract. However, the term ‘international contract’ has been used to emphasize the nexus between the contract and multiple jurisdictions. The nature of international private legal activity has been discussed elsewhere in this thesis. See (n 18).

¹⁸⁶ Julia Hörnle, ‘The Jurisdictional Challenges of the Internet’ in Lillian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 125.

¹⁸⁷ McClean and Beevers (n 18) 9. It is worth noting that according to some Iraqi private international law scholars, connecting factors are used for the purposes of determining the applicable law only. However, such bases which are usually used to establish a ground for asserting a jurisdiction over a private international dispute cannot be called connecting factors. See AL-Haddawi (n 21) 230. This may be attributed to some conceptual differences between the civil law system and the common law system. This point has been clarified previously in this chapter, see (n 21). However, in the writer’s view, the discrepancy here might be terminological more than just substantive because in both jurisdiction and applicable law matters, when courts attempt to confer a jurisdiction or apply their own law to the dispute they start looking for a number of factors which connect the subject matter of the disputed case to its jurisdiction. However, under civil law, the term ‘connecting factor’ is more common when referring to applicable law issues, while the term ‘jurisdiction basis’ is usually used in competent forum matters. See AL-Haddawi (n 21) 230.

¹⁸⁸ Clarkson and Hill (n 25) 23.

¹⁸⁹ See Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 33, 34.

¹⁹⁰ Hörnle (n 186) 126.

international jurisdiction to a contract concluded on a website which is accessible from within its territory.

The approach adopted by each of the regimes under discussion in this thesis is quite different. With the EU's harmonised approach, a distinction is made between business and consumer contracts, and both common law and civil law principles are used.¹⁹¹ The US follows a distinct approach based on common law tradition with extensive judicial discretionary powers to apply personal jurisdiction rules to website activities.¹⁹² As for Iraq, it follows a traditional civil law approach, and it distinguishes between national defendants and foreign defendants. By following this sequence, the analysis will be in the following order: B2B, B2C and C2C online contracts.

5.3.2.1 Online Business-to-Business Contracts

Under the common meaning of the term, electronic B2B transactions include a wide range of commercial activities, such as sale and exchange of goods, services, the transfer of technology and many complex financial transactions between large firms.¹⁹³ When looking at such a meaning of B2B transactions, the first thing to consider is the professionalism of the parties which assumes that a jurisdiction clause is most likely to be incorporated into such kinds of transactions. Indeed, this might seem a quite sensible proposition as it is always expected that such large commercial entities should have a group of expert lawyers who advise them on such an issue. That is not always the case, as it has been argued previously. Online B2B transactions have not remained limited to large corporations. Nowadays, a normal sale contract between two individuals or between a website operator and a natural person might also be categorised under business-to-business transaction.¹⁹⁴ Therefore, the analysis in this section might typically apply to B2B disputes in two instances. The first is

¹⁹¹ See Aude Fiorini, 'The Codification of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?' (2008) 12 *Electronic Journal of Comparative Law* 1 <www.ejcl.org> accessed 11 May 2014.

¹⁹² US courts have adopted different approaches when asserting personal jurisdiction for activities that have taken place on websites.

¹⁹³ David Lucking-Reiley and Daniel F Spulber, 'Business-to-Business Electronic Commerce' (2001) 15 *Journal of Economic Perspectives* 55.

¹⁹⁴ The writer has speculated on all possibilities that might occur when contracting over the websites. See footnote (68) of this chapter.

small and medium-sized transaction disputes¹⁹⁵ which arise out of a transaction made over a website that does not include a jurisdiction and applicable law clause.¹⁹⁶ The second is a dispute over a website which includes a jurisdiction clause. Such a clause is not considered enforceable by a court because it is an unfair contract term.¹⁹⁷ Under those circumstances, any dispute that arises out of such types of transactions should be heard in accordance with the degree of connectivity between the forum and the dispute.

In the EU, the Brussels Regulation differentiates between two possibilities: proceedings brought against defendants domiciled in one of the Member States, and proceedings against defendants resident in non-Member States.¹⁹⁸ While the first case represents the harmonised EU jurisdiction rules for B2B disputes, the second rule might be regarded as a gap filler. The focal thesis question arises again: how appropriate are these rules for settling online transaction disputes? Considering the continental application of the Brussels Regulation, this jurisdictional basis could be regarded as a less controversial issue in comparison with online

¹⁹⁵ This does not mean that sophisticated and large-sized business transactions are excluded from this section. However, as it has been mentioned in the body text above, it is very likely that such kinds of transactions will include a dispute resolution clause.

¹⁹⁶ Although most websites that offer items for sale have included a dispute-resolution clause in their sale terms and conditions in favour of the courts in their place of residence, not all websites include the same clause in their terms and conditions of sale. For instance, Sony Europe's website does not include such a clause in spite of their business activities across Europe. See these terms and conditions at the following link <http://www.sony.co.uk/pages/terms/TandC_odw_en_GB.html#OPERATOR-OF-WEBSITE-AND-DEFINITIONS> accessed 11 May 2014. There are other examples of websites which do not include a jurisdiction clause: <http://www.toshiba.eu>, <http://www.nokia.com/gb-en/>, <http://www.next.co.uk> (Next's website only includes an applicable law clause but not a jurisdiction). As mentioned above, these are just a few examples and there are many websites that do not address such a clause. On the other hand, there are also some websites which work as virtual or online marketplaces that do not incorporate a clear dispute resolution clause in their terms of use for the website. For example, the UK Yahoo Shopping website only contains a very general clause about jurisdiction and applicable law and this states that: 'Your use of the service is subject to all applicable local, state, national and international laws and regulations. Your conduct is subject to Internet regulations, policies, and procedures.' See clause (c) under section 8 (Acceptable Use of the Websites) of Yahoo's shopping website <http://uk.shopping.yahoo.net/serv/yahoouk/buyer/service_agreement.jsp> accessed 11 May 2014.

¹⁹⁷ There are many cases in the US where the courts have not accepted the validity of online contractual jurisdiction clauses because they were not introduced in a fair manner. See the series of electronic contracting cases (from 2004 to 2010) by Juliet M Moringiello and William L Reynolds <http://works.bepress.com/juliet_moringiello/subject_areas.html> accessed 11 May 2014. In EU law, this probability is also very likely to occur. It can be noted that in *Ryanair Ltd v Billigfluege.de GmbH* the defendant challenged the validity of an online jurisdiction clause in a click-wrap agreement and argued that the general jurisdiction rules of the Brussels Regulation should be applied instead. Moreover, under the Hague Convention, the jurisdiction clause is regarded as invalid in five cases: '(1) The law of the chosen court does not recognise such an agreement. (2) There is a lack of the contractual capacity under the law of the chosen court. (3) If giving validity to the court agreement may form an explicit iniquity or contradict the public policy in the country of the chosen forum. (4) There is exceptional reasons effect to the parties control to choose the court. (5) The chosen court decides to dismiss a jurisdiction.' See Article 6 of the Hague Convention.

¹⁹⁸ However, considering all online contracting possibilities, three scenarios can be imagined in respect of the application of Brussels Regulation rules: first, disputes between two business parties resident in Member States; second, disputes between EU resident defendants and non-EU resident claimants; and, third, disputes between a claimant domiciled in one of EU Member States and a defendant from a non-EU country.

B2C and C2C contracts. It is still argued that some debatable points might remain uncertain, especially those relating to the application of Articles 4 and 5 of the Brussels Regulation.

Under the general jurisdiction rules of the Brussels Regulation, disputes between businesses should be settled before the courts of the Member State where the defendant is domiciled and regardless of whether or not he holds the nationality of that state.¹⁹⁹ Where a contract has a closer nexus to another state other than the defendant's place of residence, Article 5 sets out special jurisdiction rules for such cases. To that end, the place of contract performance will prevail over the place of the defendant's domicile.²⁰⁰ Furthermore, the statutory presumption has been made that the place of the performance of the contract will be the place where the goods have been delivered or the services have been provided.²⁰¹

As for purely European B2B disputes,²⁰² the application of general jurisdiction rules to online contract disputes might not raise many controversial grounds.²⁰³ When it comes to the special jurisdiction rules of contractual disputes, there might be a little more space for discussion. In this regard, it has been argued that the place of the performance of the contract might be problematic in the online context, especially in the case of online service sales²⁰⁴ or intangible products.²⁰⁵

In fact, this issue has been the subject of controversy not just in its online application but also in traditional practice. In *Color Drack GmbH v LEXX International Vertriebs GmbH*²⁰⁶, the question over multiple places of delivery was referred to the ECJ by the Austrian Supreme Court. The plaintiff, an Australian company, brought proceedings against a German company in the court where the plaintiff's headquarters was situated,²⁰⁷ relying upon Article 5(1) (b) of

¹⁹⁹ Brussels Regulation, art 2. This is the general jurisdiction rule of the Brussels Regulation for any dispute governed by its scope and is a basic common law rule.

²⁰⁰ Brussels Regulation, art 5 (1)(a).

²⁰¹ Brussels Regulation, art 5 (1)(b).

²⁰² Disputes between defendants and claimants who are both resident within Member States, have their principal administrative branch there, or a dispute arises out of the branch agency in the Member States.

²⁰³ Svantesson (n 6) 319. However, some have argued that the determination of the place where contractual parties are domiciled may become a complex factor regarding the instantaneous transactions over the internet. See James Fawcett, Jonathan Harris, and Michael Bridge, *International Sale of Goods* (Oxford University Press 2005); Wang (n 7).

²⁰⁴ *ibid* 266.

²⁰⁵ See Hörnle (n 186) 126.

²⁰⁶ Case C-386/05 *Color Drack GmbH v LEXX International Vertriebs GmbH* [2007] ECR I-3699.

²⁰⁷ The District Court of St Johan (Austria). The court accepted the plaintiff's action and ruled that it had a jurisdiction to hear the dispute.

the Brussels Regulation.²⁰⁸ The dispute was about the sale of goods that were delivered by the seller (defendant) to different places of the purchaser's (plaintiff) country. The German company was not convinced by the decision of the Austrian District Court in claiming a jurisdiction and, consequently, took an appeal to the Regional Court of Salzburg. The defendant's argument, which was upheld by the court, was that Article 5(1)(b) would have been applied if there was one place of delivery within a single Member State connected with the claims resulting from performing the sale contract, whereas such a place was difficult to determine for the purpose of Article 5 (1) (b) in that case. The Regional Court of Salzburg ruled that the District Court in the plaintiff's place of domicile lacked the territorial jurisdiction, and so the case should have been brought in Germany instead, pursuant to subparagraph (a) of Article 5. The plaintiff was not convinced by this and so appealed against the judgment to the Austrian Supreme Court, which decided to refer the question to the ECJ, i.e., whether Article 5 (1) (b) would apply if the dispute related to several places of delivery within one single Member State.

Unanimously, both the Advocate General²⁰⁹ and the ECJ²¹⁰ delivered their opinions in the affirmative by stating that Article 5 (1) (b) was applicable where there were several places of delivery within one single Member State. The ECJ did not follow the Advocate General's Opinion regarding the plaintiff's option of choosing the court where the proceedings would have been brought. Instead, it stated that the claim should have been heard by the district court which was most connected to the subject matter of the dispute within a single state.

This case shows how the interpretation of a basic rule of private international law (*place of contract performance*) could be problematic and might lead to more than one finding. Taking into account the characteristics of online transactions leads to suggest that the application of the regulatory norms could be more controversial.²¹¹ One possible justification for such an

²⁰⁸ Subparagraph (b) of Brussels Regulation provides that: 'for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: In case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered.'

²⁰⁹ Case C-386/05 *Color Drack GmbH v LEXX International Vertriebs GmbH* [2007] ECR I-3699, Opinion of Advocate General Bot. However, the representatives of the German and Italian governments were against the Advocate General's opinion and instead were in favour of upholding the Austrian Supreme Court's ruling regarding the inapplicability of Article 5(1)(b) of the Brussels Regulation to the cases which involve several places of delivery. See Veronika Gaertner, 'ECJ: AG Opinion on Article 5(1)(b) Brussels I Regulation' (*Conflict of Laws.Net*, 19 February 2007) <<http://conflictoflaws.net/2007/ecj-ag-opinion-on-article-5-1-b-brussels-i-regulation/>> accessed 11 May 2012.

²¹⁰ See (n 206).

²¹¹ Wang (n 7). According to Wang, the most difficult situation when applying Article 5(1)(b) to transactions over the internet may be when identifying the place of the performance in cases regarding intangible or digitized products.

argument can be deduced from the Advocate General and ECJ analysis of this case. More specifically, according to the ECJ reasoning in its judgment in the above case, the rationale behind affirming the applicability of Article 5 (1) (b) to the cases where there are several places of delivery within one Member State is the absence of the probability of irreconcilable judgments in different Member States.²¹² In contrast, considering the opposite interpretation of the above court's analysis, Article 5 (1) (b) would not have been applied if the multiple places of delivery had been in different Member States.

This means that in such an event, Article 5 (1) (b) will not apply. Alternatively, subparagraph (a) will be applicable according to subparagraph (c) of the Regulation.²¹³ Arguably, when applying such rules to online sale contracts which are very likely to involve a delivery of goods or services in different Member States, the application of Article 5 will be problematic in both instances. On the one hand, if the application of subparagraph (b) were being sought, the question of which Member State courts have the jurisdiction would be the foremost debatable matter. In this regard, Wang proposes that the logical application of Article 5(1)(b) of the Brussels Regulation leads to the conclusion that the place of performance in contracts for the sale of digitized goods should be assumed the place where the purchaser has downloaded them to his computer.²¹⁴ According to Wang, the place of downloading the intangible product to the computer is not a good connecting factor to assert jurisdiction.²¹⁵ On the other hand, applying subparagraph (a) also raises the question of the Member State territory where the contract was performed. Is it the place of concluding the contract, which is difficult to determine in the online context?²¹⁶ Is it in the Member State where the defendant is domiciled? Or is it the country where the website is operated (the location of the server)?²¹⁷

²¹² See Gaertner (n 209)

²¹³ Subparagraph (c) states that 'if subparagraph (b) does not apply then subparagraph (a) applies'.

²¹⁴ Wang (n 7).

²¹⁵ The present author agrees with such a notion.

²¹⁶ Hill (n 12) 23.

²¹⁷ The location of the server is not regarded by scholars as a good basis or connecting factor for determining the jurisdiction and applicable law of international online contract disputes. See Hill (n 12) 136. However, in an interesting case, *Football Dataco Ltd v Sportradar GmbH* [2007] EWHC 2911, the UK High Court of Justice Chancery Division refused to assert jurisdiction on an online copyright infringement claim brought by English defendants over a German website. The court's judgment was based on the reasoning that the server location where the online data was transmitted was located in Germany and no infringement activity could be said to have occurred under UK law. See Conall O'Reilly, 'Finding jurisdiction to regulate Google and the Internet' (2011) 2 European Journal of Law and Technology 1. However, this ruling has been preliminarily reversed by the Court of Appeals in its judgment, which approved that the English Court had a jurisdiction, see *Football Dataco Ltd v Sportradar GmbH* [2011] EWCA Civ 330. Nevertheless, the Court of Appeal decided to refer the following question to the ECJ: Does data transmission over a website server located in country A and available to access by users in the country B occur in country A or B or in both of countries? In its judgment, the ECJ ruled that: 'Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on

It is interesting to note that the ECJ affirmed later in *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA*²¹⁸ that the second indent of Article 5(1) of the Brussels Regulation will also be applicable to cases where the ‘provision of services’ occurred in different Member States. In this case, the Austrian Supreme Court asked the ECJ to give its interpretation of the second indent of Article 5 (1) of the Brussels Regulation, and whether it applied to cases where the services have been provided in different Member States. In its ruling, the ECJ answered in the affirmative that the second indent of Article 5(1) would also be applicable where different Member States were involved in the performance of the obligation (provision of services). To that end, the Court stressed that the courts of the Member States where the main provision of the service occurred should have the jurisdiction to adjudicate the dispute.²¹⁹ It still seems that such an interpretation by the ECJ does not provide a definitive jurisdictional basis for cases where the services have been provided in different Member States. More specifically, the decision did not include a further interpretation in order to determine the main place where the service provision occurred. Presumably, the situation could become more problematic in case of performing service provision on websites.

In the author’s view, this seems to create an uncertain legal situation but not necessarily a one that could result in very ambiguous outcomes. In other words, although the application of Article 5 might be problematic in certain circumstances, such as in a dispute over an online contract where the goods have been delivered in different Member States, the case is not so

the legal protection of databases must be interpreted as meaning that the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the sui generis right under that directive to the computer of another person located in Member State B, at that person’s request, for the purpose of storage in that computer’s memory and display on its screen, constitutes an act of ‘re-utilisation’ of the data by the person sending it. That act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.’ See Case 173/11 *Football Dataco Ltd v Sportradar GmbH* [2013] CMLR 36.

²¹⁸ Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] WLR 1900.

²¹⁹ The ECJ ruled that: ‘1. The second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that that provision is applicable in the case where services are provided in several Member States. 2. The second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.’ However, the court did not follow the Advocate General’s opinion in relying on the ‘closest linking factor’ to determine the country where its court will have the jurisdiction to hear the dispute. See Veronika Gaertner, ‘AG Opinion on Art. 5 No.1 (b) Brussels I’ (*Conflict of Laws.Net*, 16 January 2010) <<http://conflictoflaws.net/2010/ag-opinion-on-art-5-no-1-b-brussels-i/>> accessed 11 May 2014.

complex to conclude that the jurisdiction rules are insufficient as far as the continental application of Brussels Regulation is concerned. Accordingly, Article 5 (1) (a) will apply to a contract that involves different places of delivery in different Member States, and the contract will be performed in the country which is most closely connected provided that such a determination is evident enough for the court to conclude.²²⁰ If the determination of the Member State where the contract is most closely connected is vague and leads to the possibility of giving irreconcilable judgments in more than one country, the contractual dispute is most likely to have been submitted to the general jurisdiction rules and, accordingly, heard by the courts of the defendant's country of domicile.²²¹

In contrast, such a question might raise more concerns where online cross-European transactions are involved, i.e., B2B disputes which involve non-EU resident defendants. Article 4 (1) sets out a general rule by which the dispute will be settled according to the jurisdictional rules in each Member State.²²² In the author's opinion, these sorts of transactions and their disputes might be regarded as the most challenging ones for the application of the Brussels Regulation and most problematic from an online transaction point of view. While the European Union has taken considerable steps in dealing with the choice of court agreement in transactions involving non-EU resident parties,²²³ the matter remains uncertain regarding B2B transactions in case of the absence of choice of court agreement. This has also been addressed by the EU Commission.²²⁴ On 20 November 2012, the

²²⁰ This notion is confirmed by the ECJ's analysis in *Color Drack GmbH v LEXX International Vertriebs GmbH*, where it confirmed that the dispute over a contract with different places of delivery within one Member State should be settled in the court of a district where the contract itself is most closely connected and not the court which the claimant chooses.

²²¹ Brussels Regulation, art 2. This notion is also based on fact that special jurisdiction rules set out in the Brussels Regulation are not mandatory rules and, therefore, they can be derogated from if their application becomes difficult or raises uncertainty, such as in the case discussed above.

²²² Paul Cachia, 'Recent Development in the Sphere of Jurisdiction in Civil and Commercial Matters' (2011) 1 *Elsa Malta Law Review* 69.

²²³ In 2009, the European Union signed the Hague Convention as a governing instrument for cases between EU residents and parties outside the EU, although it has not yet ratified it. For more details about the status of the Hague Convention, the signatories and those that have ratified it see <http://www.hcch.net/index_en.php?act=conventions.status&cid=98#mem> accessed 11 May 2013. More recently, on 30 January 2014, the European Commission approved a proposal to join and ratify the Hague Convention. The European Union will become a contracting party to the Convention as soon as the proposal is approved by the European Council. The Convention will prevail over the Brussels Regulation in case one of the contractual parties is domiciled in non-EU contracting countries to the Convention. See Gilles Cuniberti and Pietro Franzina, 'The EU Prepares to Become a Party to the Hague Convention on Choice of Court Agreement' (*Conflict of Laws.Net*, 11 February 2014) <<http://conflictflaws.net/2014/the-eu-prepares-to-become-a-party-to-the-hague-convention-on-choice-of-court-agreements/>> accessed 11 May 2014.

²²⁴ See the 'Report from European Commission to the European Parliament, the Council, and the European Economic and Social Committee on the Review of Brussels Regulation.' <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0174:FIN:EN:PDF>> accessed 11 May 2014. See also the 'European Commission's Green Paper on the Review of Council Regulation (EC) No 44/2001 on

European Parliament voted to amend the Brussels Regulation in favour of new harmonised jurisdiction rules for non-EU domiciled defendants.²²⁵ It can be questioned what guarantees there are that non-EU domiciled defendants will submit to such subsidiary jurisdiction rules. This question probably requires more attention from EU lawmakers. Interestingly, despite the emphasis by the Commission on the need for such kinds of subsidiary rules in its proposal,²²⁶ the final recast of the Regulation did not include provisions regarding the extension of the Brussels Regulation to non-European resident defendants.²²⁷

It can be argued that applying Article 4 (1) of the Brussels Regulation means that the dispute brought against non-EU domiciled defendants will be governed by the jurisdiction rules of each Member State involved in the contract.²²⁸ The application of this rule in the online scenario could be problematic and poses both uncertainty and unpredictability. For instance, the English court might find it quite difficult to claim jurisdiction over a B2B contract between an English plaintiff and an American defendant concluded through a website which is run by a server located in a different country and performed in France. Furthermore, the risk of irreconcilable judgments and failure of enforcement will be very high. This crucial part of analysis should be done in conjunction with the status quo in other jurisdictions to explore how they contradict with the EU's approach. It is beyond the scope of this thesis to survey the jurisdiction rules of most countries. Therefore, the analysis will focus on the situation under US and Iraqi law.

Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (Brussels Regulation) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>> accessed 11 May 2014.

²²⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter (Recast) [2012] OJ L351/1. See Andrew Dickinson, 'European Parliament Votes to Recast the Brussels I Regulation' (*Conflict of Laws.Net*, 21 November 2012) <<http://conflictolaws.net/2012/european-parliament-votes-to-recast-the-brussels-i-regulation/#comments>> accessed 11 May 2014. See also Christelle Coslin, 'The Position of the Council of the European Union on the Recast of the Regulation "Brussels I": A new Step Forward or Backward?' (2012) 4 *Paris International Litigation Bulletin* 16.

²²⁶ The Commission stressed the need for such provisions in the explanatory memorandum of its proposal for the Brussels Regulation recast, paragraph 3.1.2, which reads as follows: 'The proposal extends the Regulation's jurisdiction rules to third country defendants. This amendment will generally extend the possibilities of companies and citizens to sue third country defendants in the EU because the special rules of jurisdiction, which e.g. establish jurisdiction at the place of contractual performance, become available in these cases. More specifically, the amendment will ensure the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU.'

²²⁷ The recommendations regarding such provisions have been rejected by the European Parliament. Accordingly, the same wording of Article 4 of the Brussels Regulation has been copied to the amended version of the Regulation (recast) in its Article 6.

²²⁸ Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart Publishing 2009)74.

In the US, the root of the debate about the applicability of personal jurisdiction over non-resident defendants goes back to before the prevalence of electronic commerce. More accurately to 1987, in *Asahi Metal Industry Co v Superior Court of California*,²²⁹ where the US Supreme Court first addressed the issue of whether the awareness by foreign corporations that their products might reach the forum state through the stream of commerce can establish a minimum contact for asserting personal jurisdiction.²³⁰ More than two decades after this case, the concept of ‘stream of commerce’ has broadened considerably. Consequently, courts’ approaches to asserting jurisdiction over web merchants have also changed considerably.²³¹ As a general approach, foreign defendants doing business with their American counterparts can be litigated in the US under the long-arm jurisdiction rule²³² which applies in case of minimum contact existence between the defendant and the forum state. Although some have argued that the doctrine of personal jurisdiction has very successfully been applied by courts to online activities,²³³ the parameters of the criterion for minimum contact by which personal jurisdiction can be asserted has remained the subject of debate, not just in online B2B transactions but also in the traditional Supreme Court’s concept of ‘stream of commerce’.²³⁴

To revert again to the court's analysis in *Asahi* in relation to the minimum contact requirement, the stream of commerce in the offline world is necessarily different from the virtual world. Placing products on a website for sale or to advertise them is not the same as marketing in the traditional marketplace. At the time when the Supreme Court emphasised that mere marketing without intentionally directing commercial activities to the forum state did not constitute minimum contact, electronic commerce had not yet emerged as a main player in the global market. Nowadays, almost all web merchants are aware that offering or

²²⁹ 480 US 102,112 (1987).

²³⁰ In this case, the plurality opinion, which represented the opinion of eight justices, stressed that minimum contact requires conduct more than is more than mere awareness, such as directing commercial activities to the forum state or advertising on it. Another opinion, represented by Justice Brennan, was that the stream of commerce is a sufficient factor to let the manufacturer predict that his or her products may reach any jurisdiction even though no purposeful action has been taken and that per se is a sufficient reason to assume the minimum contact. See *Ku and Lipton* (n 8) 36.

²³¹ There are many journal articles and textbooks that illustrate the historical development of the approach of US courts in dealing with jurisdiction issues over cyberspace activities such as the slide-scale, targeting, and effect test; therefore, the writer has purposely not referred to them here. For more details about these approaches see Michael Geist, ‘The Shift Toward ‘Targeting’ for Internet Jurisdiction’ in Adam Thierer and Clyde Wayne (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (Cato Institute 2003) 91.

²³² This jurisdictional ground is constitutionally guaranteed in the USA; therefore, it is applied by the law of all American states as well as the federal courts.

²³³ *Sachdeva* (n 7).

²³⁴ Todd David Peterson, ‘The Timing of Minimum Contacts After *Goodyear* and *McIntyre*’ (2011) 80 *The George Washington Law Review* 202. See *Goodyear Dunlop Tires Operations, SA v Brown* 131 S Ct 2846 (2011). See also *Ku and Lipton* (n 7) 32.

advertising their products online means that they become available globally by virtue of the borderless nature of electronic commerce. By applying the Supreme Court's analysis or standard to this fact, the findings are that the minimum contact requirements for asserting personal jurisdiction over non-resident defendants are satisfied regardless of being an active or passive website unless some technological methods have been implemented intentionally by the seller itself.²³⁵

Accordingly, any business anywhere in the world which offers goods or advertises them on websites might be litigated in the US for any dispute that arises out of such commercial activities according to its long-arm jurisdiction.²³⁶ This issue is linked to the EU's approach of country-of-destination, which is the key rule for consumer protection in the transnational context. Many American commentators have criticised this approach as it easily exposes the online seller's business to the possibility of a lawsuit in every Member State where its website is accessible.²³⁷ The same criticism can be directed at the US long-arm jurisdiction rule as it applies to American and non-American out-of-state defendants. This means that defendants from anywhere in the world might be subject to the US long-arm jurisdiction merely because their websites are accessible in the United States. In any event, the long-arm jurisdiction rule in the US may prove to be yet another unsuitable traditional jurisdictional norm for the online environment.

Under Iraqi law, the statutory rule²³⁸ grants a jurisdiction over non-resident foreign defendants in contractual disputes in two instances: if the contract was concluded in Iraq, or if its performance was in Iraq.²³⁹ Unlike the general and special jurisdiction approach of the EU and the minimum contact rule in the US, the Iraqi law relies in equal part on two basic

²³⁵ Such as blocking or drop-down menu technologies. This issue has been discussed in-depth in Chapter 2 of this thesis. In favour of a similar argument see: Zheng Sophia Tang, 'Cross-Border Online Gambling Law: A Comparative Study' SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197232> accessed 23 May 2014.

²³⁶ See Ryan T Holte, 'What is Really Fair: Internet Sales and the Georgia Long-Arm Statute' (2009) 10 Minnesota Journal of Law, Science & Technology 567.

²³⁷ See Winn and Webber (n 100).

²³⁸ Article 15(c) of the ICLC. See (n 40) of this chapter.

²³⁹ At the same time, Article 7 (b) of The Enforcement of Foreign Judgments Act in Iraq states that the foreign judgment may gain enforceability in Iraq if it has been ruled by a competent court according to the jurisdictional basis in Iraqi law. As for foreign judgments on contractual disputes, it shall be enforceable in Iraq if the contract has been concluded in the country of the forum or performed in it.

الفقره (ب) من المادة (٧) من قانون تنفيذ أحكام المحاكم الأجنبية في العراق رقم (٣٠) لسنة ١٩٢٨: كون الدعوى ناشئة عن عقد وقع في البلاد الأجنبية أو كان يقصد تنفيذه هناك كله أو قسم منه يتعلق به الحكم.

connecting factors: the place of concluding the contract and the place of its performance.²⁴⁰ Accordingly, foreign defendants can be litigated before Iraqi courts in both circumstances regardless of the place of the contract conclusion, whether it was in Iraq or not.²⁴¹ It is clear that the rationale of such a provision is to maximise the jurisdiction of Iraqi courts by stipulating two connecting factors at the same time.

Assuredly, when applying these statutory norms to online cross-border business contracts on websites, Iraqi courts will encounter real challenges. Analysis of this can be done on two levels. First, the extent to which the jurisdictional bases in Iraqi law, namely, place of contract formation and place of contract performance, are suitable connecting factors in online contracting on websites. Second and most importantly, to determine the degree to which the Iraqi approach is harmonious with other approaches in other jurisdictions.

Regarding the first part of the analysis, when determining the place of online contract formation, it is most likely that the postal rule will apply. In this event, Iraqi law follows the rule that the contract would have been concluded at the place where the offeror receives the offeree's acceptance.²⁴² Owing to the uncertainty that such a rule might cause when applying it to online contract formation, provisions were introduced in the recent IESTA to obviate such difficulties that may occur when applying the above-mentioned rule. Article 21 of the new Act makes a presumption that electronic documents will be sent from the place where the principal business place of the dispatcher is located, and will be received in the recipient's place of business.²⁴³ If the dispatcher or the recipient has more than one business place, the

²⁴⁰ See (n 238).

²⁴¹ AL-Haddawi (n 21).

²⁴² المادة (٨٧) من القانون المدني العراقي: "١. يعتبر التعاقد ما بين غائبين قد تم ف المكان والزمان اللذين يعلم فيهما الموجب بالقبول مالم يوجد اتفاق صريح أو ضمني أو نص قانوني يقضي بغير ذلك. ٢. ويكون مفروضاً أن الموجب قد علم بالقبول في المكان والزمان اللذين وصل اليه فيهما."

[Article 87 of ICLC: '1. A contract between parties at distance shall be concluded at the time, and in the place where the offeror gets informed with offeree's acceptance unless stated by agreement any other provision. 2. Such a determination supposed to have been done at the time, and in the place where the acceptance has been received.']

²⁴³ المادة (٢١) من قانون التوقيع الإلكتروني والمعاملات الإلكترونية العراقي: "أولاً- تعد المستندات الإلكترونية قد أرسلت من المكان الذي يقع فيه مقر عمل الموقع و انها أستلمت في المكان الذي يقع فيه مقر عمل المرسل اليه و اذا لم يكن لأي منهما مقر عمل يعد محل الإقامة مقراً للعمل ما لم يكن الموقع والمرسل اليه قد اتفقا على غير ذلك. ثانياً- اذا كان للموقع او المرسل اليه اكثر من مقر عمل فيعد المقر الأقرب صلة بالمعاملة هو مكان الأرسال او التسلم وعند تعذر التحديد يعد مقر العمل الرئيسي هو مكان الأرسال والتسليم."

[Article 21 of the IESTA states that: '1. Electronic documents will be considered sent from the place where the signer has its principal place of business and will be received in the place where the recipient has its principal place of business. If the determination of the place of their business is impossible, the place of their residence will be relied upon instead unless the parties have agreed to different provision. 2. If the parties have more than one place of business, the place that is most closely connected to the transaction, will be applied. If the determination of the most closely connected place is impossible, the business headquarter of the parties will be regarded the assumed place of dispatch and receipt.']

place which is most closely connected to the transaction will be relied upon.²⁴⁴ Nevertheless, if it is difficult to determine the place which is most closely connected, the place where the party's headquarters are located will be used.

Thus, when Iraqi courts deal with such an issue, Articles 87 of ICLC and Article 21 of IESTA will be applied together. For instance, an online contract between an Iraqi resident business seller and an American business buyer will be concluded in the place of business where the seller receives the buyer's acceptance. If this is in Iraq, the Iraqi courts will have the competence to hear the dispute. Similarly, if an online B2B contract is performed in Iraq between an Iraqi buyer and an American seller, but is actually concluded in the US, Iraqi courts can still assert jurisdiction according to the place of performance but not the place of contract formation. Unlike the place of contract conclusion, IESTA does not include any provision to determine or give a general interpretation for the place of online contract performance. Furthermore, the matter could be more ambiguous in case of sale of service or intangible products in click-wrap and browse-wrap contracts. Hence, it is not clear enough whether the place of the online contract performance can be the place where the payment has been made, the goods have been delivered, or the service has been provided. Indeed, this point can be seen as a problem that the new Act should have addressed.

As for the second part of the analysis of the Iraqi law, at first glance, it seems that both jurisdictional grounds applied by Iraqi law fit well with online contracting disputes. When considering the jurisdictional basis of the other sides of the potential contractual parties' countries, the contradiction appears more obvious. In other words, the US minimum contact approach cannot be reconciled with the Iraqi territory-based connecting factor when settling online contracting disputes. The EU's approach in Article 4 of the Brussels Regulation may also appear vague in the context of online application. Overall, the three comparative approaches may also prove to conflict with each other in terms of their involvement in online contract disputes. This will mean a number of irreconcilable judgments in different countries, a failure to enforce judgments and disproportionate litigious rights between the parties. For the sake of clarity, it will be easier to conceptualise these through two scenarios.

²⁴⁴ In the author's opinion, this is a good jurisdictional ground as it gives the courts the discretion to find out the most closely connected place to the transaction.

Scenario A

If a dispute arises between an Iraqi (buyer) business and American (seller) business about a breach of online contractual obligation, the US's long-arm jurisdiction may allow for the Iraqi defendant to be litigated in the US on the ground of minimum contact existence. At the same time, this rule may collide with Article 14 of the ICLC which states that Iraqi defendants should be sued in an Iraqi court.²⁴⁵ This rule can be asserted particularly when the online contract can be regarded as concluded in Iraq, as discussed above.²⁴⁶ For the same reason (the place of contract formation), the Iraqi (seller) business can sue the American (buyer) business in Iraq by virtue of Article 15 of the ICLC. This rule might also conflict with US personal jurisdiction rules which allow the courts to claim jurisdiction over states-resident defendants, especially in online contracting cases.²⁴⁷

Scenario B

There are two possibilities in a dispute between an Iraqi business and an English business about the performance of an online contractual obligation. The first assumes that there is an Iraqi business which is the buyer and defendant and an English trader, the seller and claimant. According to Article 4 of the Brussels Regulation, the jurisdiction over non-EU domiciled defendants will be determined according to the law of each Member State. In this case it is the Civil Procedure Rules of England and Wales.²⁴⁸ Consequently, if the latter brings proceedings against the Iraqi defendant in the English courts, the first issue that the court will challenge is to determine the place of conclusion of the online contract.²⁴⁹ If the common law postal rule applies, the contract would be concluded in England²⁵⁰ and therefore the English court will hear the dispute.²⁵¹ Iraqi courts will also assume jurisdiction over the same dispute based on Articles 14 of the ICLC and Article 7 of the Enforcement of Foreign Judgment Act

²⁴⁵ See (n 29).

²⁴⁶ This can be imagined if the seller's website only makes invitations to treat and the internet order over such a website will be considered an offer.

²⁴⁷ Wang (n 4). See also Frederic Debussere, 'International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?' (2002) 10 *International Journal of Law and Information Technology* 344.

²⁴⁸ 'If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State'.

²⁴⁹ Hörnle (n 186) 125.

²⁵⁰ According to the postal rule in the common law, the contract would have been concluded in the place from where the party's acceptance was sent. See Hill (n 12) 125. In this example, the place of the party's acceptance is England. This topic has also been analysed in-depth in previous chapters of this thesis. See Chapters 2 and 4.

²⁵¹ *ibid* 125.

(EFJA) if the contract is deemed to have been performed in Iraq. In the second possibility, Article 15 of the ICLC upholds that the Iraqi buyer can litigate the English seller in Iraq in case it has been performed in Iraq; however, the English court might also assert jurisdiction because the place of online contract formation is England.²⁵²

In conclusion, there might not be a solid ground to appraise the suitability of private international law rules in online contracting cases. Furthermore, the interpretation of 'effective rules' may also vary from one situation to another, and no definite rule can be relied upon to indicate otherwise. It is clear that, to some extent, the inter-states and regional application of private international law have proven themselves to be adequate to be applied to online contracting cases. The international application of these rules over the internet has remained uncertain. There are two possible suggestions for this: the first one is nearly achievable but possibly not perfect; the second one is more idealistic but probably not yet feasible. The latter would aim to alter contract law in order to make the choice of court and arbitration clauses mandatory requirements of international sale contracts. In this regard, the Hague Convention might be a good solution if its ratification could be expanded more. The former would create an international binding instrument for electronic commerce contracts. This would be the best approach to grapple with the uncertainty of the borderless internet.²⁵³

5.3.2.2 Online Business-to-Consumer Contracts

Broadly speaking, consumer contracts are a more debatable topic than B2B contracts.²⁵⁴ A considerable part of these debates have arisen over the protection of consumers in terms of new contracting methods, particularly consumer transactions on websites and electronic marketplaces.²⁵⁵ More specifically, the ease of cross-border transactions on the one hand, and

²⁵² Such a type of jurisdiction can be asserted by virtue of Rule 6.20(5) of the Civil Procedure Rules. See Lord Collins of Mapesbury and others (n 189); Ruth Hayward, *Conflict of Laws* (4th edn, Cavendish Publishing Limited 2006) 17.

²⁵³ However, it should be noted that the international regulation of internet activities is not the main argument of this thesis. Such a notion is beyond the parameters of this research and it may need a separate study to be entirely covered.

²⁵⁴ Denise Estrella Tellini, 'Applicable Law and Electronic Consumer Contracts: a European Perspective' (2005) 16 *International Company & Commercial Law Review* 1.

²⁵⁵ See Lorna E Gillies, *Electronic Commerce and International Private Law* (Ashgate 2008) 34-39.

the complexity of dispute resolution on the other, has created a challenging issue for conflict of laws rules.²⁵⁶

In the EU, consumer protection has been allotted significant priority in legislation.²⁵⁷ With regard to private international law, the prevalence of website sales has forced the EU legislatures to carry out a process of harmonisation in order to tackle the differences in applying certain rules to online consumer transactions.²⁵⁸ One targeted area of EU law was Article 13 of the Brussels Convention²⁵⁹ which has been criticised as not being suitable enough to accommodate the new contracting methods in consumer contracts.²⁶⁰ Accordingly, when the Brussels Convention was amended by the Council Regulation,²⁶¹ Article 13 was replaced by Article 15 of the new Regulation. It is clear that the EU legislatures sought to formulate the new relevant subparagraph 1 (c) of Article 15 in such a way that would apply to online consumer contracts and accommodate any means of distance contracting.²⁶² In other words, the harmonisation of Article 15 (1)(c) has been viewed as being of particular

²⁵⁶ Dan Jerker B Svantesson, 'The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know about the Internet' (2005) 13 *International Journal of Law & Information Technology* 39.

²⁵⁷ The most recent EU instrument on consumer protection is the Consumer Rights Directive.

²⁵⁸ Zheng Sophia Tang, 'Private International Law in Consumer Contracts: A European Perspective' (2010) 6 *Journal of Private International Law* 225. In this context, Tang says: 'When e-commerce involved more and more consumers in cross-border transactions, conflict academics became aware of the increasing number of cross-border consumer contracts. Following this trend, the European Community reformed the consumer jurisdiction rules when converting the Brussels Convention into the Brussels I Regulation, with clear intention of making the new rules compatible with e-commerce. In the conversion of the Rome Convention into the Rome I Regulation, again, the influence of e-commerce in consumer contracts was vigorously debated. E-commerce has an inevitable influence on the current European conflicts rules.'

²⁵⁹ Article 13 of Brussels Convention: 'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this section, without prejudice to the provisions of Articles 4 and 5 (5), if it is: 1. A contract for the sale of goods on instalment credit terms; or 2. A contract for a loan repayable by instalment, or for any other form of credit, made to finance the sale of goods; or 3. Any other contract for the supply of goods or a contract for the supply of service, and: a) In the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and b) The consumer took in that State the steps necessary for the conclusion of the contract'. See Ksenija Vasiljeva, '1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online' (2004) 10 *European Law Journal* 123.

²⁶⁰ Gillies (n 255) 69-72.

²⁶¹ (EC) No 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters.

²⁶² Lorna Gillies, 'Clarifying the "Philosophy of Article 15" in the Brussels I Regulation: Pammer v Reederei Karl Schluter GmbH & Co KG (C-585/08) and Hotel Alpenhof v Oliver Heller' (2011) 60 *International & Comparative Law Quarterly* 557; Paul Cachia, 'Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations' (2009) 34 *European Law Review* 476.

significance for online consumer contracts but not for the aim of establishing a special rule for it.²⁶³ To this end, the new provision was worded as follows:

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the Consumer's domicile or, by any means directs such activities to that Member State or to several States including that Member State, and the Contract falls within the scope of such activities.²⁶⁴

Article 15 has been the subject of considerable debate among academics and courts.²⁶⁵ More precisely, owing to the absence of the statutory definition, the interpretation of the phrase 'by any means directs such activities' in the sphere of website activities has been widely discussed.²⁶⁶ The core debate that has arisen is whether the mere accessibility of the trader's website in the consumer's country of domicile is enough for the criterion of 'directing activities' to be satisfied.²⁶⁷ There have been different arguments about this issue. Some have argued that the 'directing' criterion will only apply to those traders who run active or interactive websites but not passive ones,²⁶⁸ whereas others have suggested that businesses can be sued in any Member State where their websites are accessible, irrespective of whether their websites are interactive or passive.²⁶⁹

In fact, reference to this point has been brought to the attention of the EU legislatures at the time of proposing the Rome I Regulation. As a result, a joint declaration by the European Council and Commission stressed that simply being accessible in another Member State does

²⁶³ Indira Carr, Peter Stone (contributor), *International Trade Law* (4th edn, Routledge-Cavendish 2010) 552; Farah (n 169).

²⁶⁴ Brussels Regulation, art 15(1)(c).

²⁶⁵ Maebh Harding, *Conflict of Laws* (5th edn, Routledge 2014); August Hrovath, John Villafranco and Stephen Calkins, *Consumer Protection Law Development* (American Bar Association 2009) 275.

²⁶⁶ See Hill (n 12) 143-149.

²⁶⁷ See *ibid* 143-149.

²⁶⁸ See Gillies (n 255) 92, 93.

²⁶⁹ Hill (n 12) 150. According to Hill, the trader may be immune from being litigated in any Member State where his website is accessible only in one instance: if a clear clause on the website states that the website is not directed at consumers from certain jurisdictions. The present author agrees with this notion. In favour of the same argument see also Tang (n 228) 53. However, according to Tang, accessibility of the website should not constitute a ground for establishing a jurisdiction in the consumer's country of domicile. Four other factors should be taken into account when examining a trader's website interactivity within the meaning of Article 15(1)(c) of the Brussels I Regulation: 'profitability, the existence of country-specific approach, activity and ring-fencing'. See *ibid* 53-60.

not constitute a solid ground to establish that a website's activities have been directed at those states.²⁷⁰

In the author's view, the criterion of a 'website's mere accessibility' in itself might not constitute a definitive interpretation for the meaning of directing activities. Therefore, it can be argued that the interpretation of Article 15 (1)(c) and its applicability to website sales remains controversial. To that end, the analysis of four interesting EU cases, which were referred to the ECJ, will demonstrate that uncertainty of a 'website directing activities' within the meaning of Article 15 (1)(c) still exists. The cases that will be analysed are: *Peter Pammer v Reederi Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* (joint cases),²⁷¹ *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*,²⁷² and *Lokman Emrek v Vlado Sabranovic*.²⁷³

In *Pammer v Reederi Karl Schlüter GmbH & Co KG*, a consumer resident in Austria (Peter Pammer) concluded an online contract over a website for a cruise with a German tourism company (Reederi Karl Schlüter). Mr Pammer did not see the vessel but he relied on its description on the website regarding the facilities that it included. However, on the day the voyage was due to start, Mr Pammer refused to go on board and brought a payment action against the German company before the Austrian Court of First Instance,²⁷⁴ contending a misleading advertisement and false description of the vessel on the company's website. The defendant claimed that the Austrian court lacked jurisdiction because it did not direct its commercial activities to the consumer's country of domicile. The defendant's plea was accepted by the appellate Austrian Regional Court, and it ruled that the requirement of Article 15 was not met. Consequently, the Court of First Instance lacked jurisdiction to hear the dispute. Having not been convinced by this, Mr Pammer decided to appeal against the

²⁷⁰ The Council and the Commission, 'Statement on Articles 15 and 73' (Joint Declaration) <http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf> accessed 11 May 2014. As a result, the reference to this joint declaration has been incorporated into Recital 24 of Rome I Regulation.

²⁷¹ Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederi Schlüter & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527.

²⁷² Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* [2012] CEC 923, para 46; Kyom Bae, 'Case: Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi' (2013) 13 Chicago-Kent Journal of International and Comparative Law 1 <http://studentorgs.kentlaw.iit.edu/jicl/?attachment_id=176> accessed 12 May 2014.

²⁷³ Case C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013] Bus LR 104; Van Bael Bellis, 'Court of Justice of European Union Rules on Jurisdiction for Disputes Relating to Cross-Border Consumer Contracts' [2013] Mondaq Electronic Journal <<http://www.mondaq.com/x/276052/Consumer+Law/Court+of+Justice+of+European+Union+Rules+on+Jurisdiction+for+Disputes+Relating+to+Crossborder+Consumer+Contracts>> accessed 4 April 2014.

²⁷⁴ Bezirksgericht Krems an der Donau (District Court).

verdict to the Austrian Supreme Court.²⁷⁵ It stressed that there should be a criterion by which a decision could be made on whether the website activities were under the meaning of Article 15 or not. Owing to the absence of such a criterion, the Supreme Court decided to stay proceedings and refer the following question to the ECJ:

[I]s the fact that an intermediary's website can be consulted on the internet sufficient to justify a finding that activities are being "directed" [to the Member State of the consumer's domicile] within the meaning of Article 15 (1) (c) of Regulation No 44/2001?

While the Austrian Supreme Court was waiting for the opinion from the ECJ, another case, *Hotel Alpenhof GesmbH v Oliver Heller*, was brought before it on a similar topic.

In that case, the defendant (Peter Heller) a consumer resident in Germany, made an online reservation of hotel rooms via the plaintiff's website (Hotel Alpenhof), which was a company registered in Austria and which pursued its commercial activities there. After checking in at the hotel, Mr Heller was not satisfied with the hotel's services and facilities. Accordingly, he left the hotel after a short period without paying his bills. Hotel Alpenhof sued Mr Heller in Austria for a payment action. Heller refused to appear before the Austrian court claiming that the proceedings should have been brought in his country of domicile (Germany) instead, as the dispute was about a consumer contract pursuant to Article 16 and 15 of the Brussels Regulation. The plea of Mr Heller was upheld by both the Austrian Court of First Instance and the Regional Court of Salzburg which dismissed the jurisdiction on the ground that directing activities within the meaning of Article 15 should be satisfied irrespective of whether the website was active or passive. Hotel Alpenhof decided to appeal against the verdict to the Austrian Supreme Court asserting its previous claim that it did not direct activities to the consumer's country of domicile that would justify the application of Article 15.

Considering that its question about the first case had not yet been answered by the ECJ, and owing to the similarity of the subject matters, the Austrian Supreme Court decided to join the two cases and refer the following similar question to the ECJ:

Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being "directed" within the meaning of Article 15 (1) (c) of Regulation No 44/2001?

²⁷⁵ Oberster Gerichtshof.

In response to these questions, the ECJ drew up guidance for the criterion of directing online commercial activities in website transactions and its interpretation within the meaning of Article 15 (1) (c) of the Brussels Regulation. First, the court emphasized that a website simply being available in another Member State does not represent in itself a satisfactory ground to decide that the criterion of ‘directing activities’ has been achieved.²⁷⁶ At the same time, in order to conclude that the trader’s intention was to solicit commercial activities in the consumer’s country of domicile, courts have the discretion to decide whether factors, such as top-level country code, international telephone code and language, can be regarded as enough evidence that the trader’s activities have been directed at the consumer’s country.²⁷⁷ Furthermore, the ECJ insightfully stated that the language and currency might be regarded as solid evidence if the website offers the consumer the option to use different languages and currencies during the online contracting process.²⁷⁸ Overall and according to the facts above, the court found that there might be enough evidence to conclude that the intentions of the traders in both cases envisaged and directed commercial activities at the consumers’ countries of domicile.²⁷⁹ The court did not deliver a definitive opinion and left it up to the discretion of the Austrian Supreme Court to decide.²⁸⁰

This opinion of the ECJ and the Joint Declaration of the European Council and Commission²⁸¹ gives rise to the following question: what are the factors that can be relied upon to decide that a website is ‘merely accessible’? In other words, what is the difference between a ‘passive website’ and a website which is ‘merely accessible’?

In *Hotel Alpenhof GesmbH v Oliver Heller* both the Austrian Court of First Instance and the District Court of Salzburg dismissed jurisdiction over the consumer contract on the ground that ‘directing activities’ would encompass all types of websites, regardless of whether it was an active, interactive or passive website. This conclusion was also implicitly affirmed later by

²⁷⁶ See Marta Requejo, ‘ECJ on Pammer and Hotel Alpenhof’ (*Conflict of Laws.Net*, 11 December 2010) <<http://conflictoflaws.net/2010/ecj-on-pammer-and-hotel-alpenhof/>> accessed 11 May 2014; Marta Requejo, ‘AG Opinion on Pammer and Hotel Alpenhof’ (*Conflict of Laws.Net*, 22 May 2010) <<http://conflictoflaws.net/2010/ecj-on-pammer-and-hotel-alpenhof/>> accessed 11 May 2014.

²⁷⁷ See also Gillies (n 262).

²⁷⁸ Indeed, this option is very common in most airline company websites and this allows the user to choose the preferred language and currency while processing a ticket purchase.

²⁷⁹ Tomas Pavelka, ‘The Concept of “Directing Website” - A Jurisdictional Phenomenon Clarified? Cross-Border Consumer and Tort Victim Protection in Light of Recent ECJ Jurisprudence’ (2011) 1 *Elsa Malta Law Review* 166.

²⁸⁰ The last sentence of the ECJ’s judgment is as follows: ‘It is for the national court to ascertain whether such evidence exists’.

²⁸¹ See Joint Declaration (n 270).

the ECJ.²⁸² Arguably, there are two findings behind this. First, the criterion of a ‘website’s mere accessibility’ is vague and has not been adequately clarified. Leaving this to the discretion of national courts in each Member State will result in irreconcilable judgments. Second, ‘mere accessibility’ of a website is a just theoretical approach, and the real practice and inclination of the courts are that any website, simply by being accessible in different Member States is enough to assert jurisdiction.²⁸³ Based on the above, it seems that the second finding might be more realistic. Moreover, the recent ECJ rulings in *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* and *Lokman Emrek v Vlado Sabranovic* demonstrate that Article 15 (1) (c) might apply even in cases where a website is just accessible in the consumer country of domicile, or maybe something less than the mere accessibility where the consumer travels to the business’s premises without even visiting the latter’s website.

In *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*, an Austrian resident consumer (Ms Mühlleitner) used the German-based search engine, www.mobile.de, to look for a car to buy. Based on her preferences, the website directed her to the contact details of a car dealership belonging to Ahmad and Wadat Yusufi which contained their address and telephone number with an international code. Ms Mühlleitner contacted the seller by telephone to get more information about the car and its specifications. Having reached an agreement by telephone, Ms Mühlleitner travelled to Germany and signed a contract of car purchase. On her way back to Austria, Ms Mühlleitner found that the car was faulty. The German sellers refused to repair the car so Ms Mühlleitner brought a payment action against the sellers to void the contract before the Court of First Instance in her place of domicile (Austria). As expected, the defendants’ plea was that they did not direct their commercial activities to Austria and, therefore, the proceedings should have been brought in Germany instead. The defendants’ claim was accepted by the Austrian Court of First Instance and later by the Austrian Higher Regional Court of Linz, which both dismissed jurisdiction on the ground that no activities had been directed to the claimant’s country of residence because the defendants were running a passive website.²⁸⁴ Ms Mühlleitner appealed against the judgment to the Austrian Supreme Court which took a different view. It stated that because the website of Ahmad and Wadat Yusufi was able to be consulted in Austria and because their contact

²⁸² Paragraph 79 of the ECJ judgment in Joined Cases C-585/08 and C-144/09.

²⁸³ In fact, such a notion was also upheld by the Advocate General’s Opinion in *Pammer v Reederei Karl Schulte GmbH & Co KG* (C-585/08) and *Hotel Alpenhof v Heller* (C-144/09). See (n 262).

²⁸⁴ The reasoning of the Austrian Higher Regional Court relied upon the Joint Declaration of the European Council and Commission.

details were included on the website was enough to conclude that they directed their commercial activities towards the consumer's country. The point which the Austrian Supreme Court was not certain about was whether the application of Article 15 (1) (c) required that the consumer contract be concluded at a distance or not. Hence, it decided to stay proceedings and refer the following question to the ECJ:

Does the application of Article 15 (1) (c) of Council Regulation (EC) No 44/2001 of 22 December on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters presuppose that the contract between the consumer and the undertaking has been concluded at a distance?

By affirming its previous opinion in *Peter Pammer v Reederi Karl Schlüter GmbH & Co KG* and *Hotel Alpenhof GesmbH v Oliver Heller*,²⁸⁵ the ECJ ruled that in order to apply Article 15 (1) (c), it is not necessary for the contract to be concluded at a distance.

More recently, the ECJ handed down its ruling in *Lokman Emrek v Vlado Sabranovic*, which affirmed its previous ruling in *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*. Surprisingly, the court was more determined to apply Article 15 (1) (c) of the Brussels Regulation in favour of the consumer by holding that the criterion of 'directing activities' would be satisfied even though there was no causal link between the method by which the commercial activity was directed and the conclusion of the contract.²⁸⁶ In this case, the claimant, Lokman Emrek, a German consumer, heard from a friend about a French business run by Vlado Sabranovic which sold second-hand cars in France. Although Mr Sabranovic's website was accessible in German, the consumer had never used it nor had he been informed about the defendant's business through this website. Having heard about the business from a friend, Lokman travelled to France and bought a car from the French business. After the dispute arose, the claimant brought proceedings against the defendant in Germany on the ground that the latter had directed his commercial activities to the consumer's country through his website and pursuant to Article 15 (1) (c) of the Brussels Regulation. For his part, the defendant argued that Article 15 (1) (c) of the Brussels Regulation was not applicable

²⁸⁵ In paragraph 79 of its judgment, the ECJ tackled this point by stating that as long as the trader reveals his geographical address and other contact details in its website, "directing" commercial activities might be regarded as achieved and it does not matter whether the website is active or passive or whether the contract is at a distance or not.

²⁸⁶ Giesela Ruhel, 'CJEU Rules on Art. 15 (1) lit. C) Brussels I-Regulation' (*Conflict of Laws.Net*, 19 October 2013) <<http://conflictoflaws.net/2013/cjeu-rules-on-art-15-1-lit-c-brussels-i-regulation/>> accessed 11 May 2014. The official format of the ECJ's decision is available at <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=143184&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=111952>> accessed 11 May 2014.

because the contract was not concluded as a result of an advertisement on the website. Further, he stated that the claimant had never known about the website and accordingly the ‘directing activities’ test was not satisfied. In a surprising ruling, the ECJ stressed that the wording of Article 15 does not require there to be a causal link between the disputed contract and the means that is used to direct commercial activities of the subject matter of the contract.²⁸⁷

In this context, the author agrees with the argument that the ruling of the ECJ in this case did not consider the real rationale behind Article 15 (1) (c) which requires a causal link, that can be understood from the phrase: ‘contract falls within the scope of such activities’ in Article 15 (1) (c).²⁸⁸

Again, this brings us to the question about what the difference is between the website being passive and the website merely being accessible. In *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* it seems that the defendants did not direct their commercial activities because they did not run an active website but rather they offered their cars on a German search forum, www.mobile.de. Furthermore, the contract had not been concluded over that website, which only made the contact details of the sellers available to the consumer. Accordingly, when the Austrian Court of First Instance and Regional Court dismissed jurisdiction over the dispute, they clearly had a reasonable justification for believing that the commercial activities had not been directed at Austria. Similarly, it seems that the ECJ was more determined in effectuating Article 15 (1) (c) in *Lokman Emrek v Vlado Sabranovic* where the defendant’s website did not play any role in persuading the consumer to travel to the business’s premises and conclude the contract.²⁸⁹

The same analysis could be applied to *Hotel Alpenhof GesmbH v Oliver Heller*. This should be done from a particular perspective. First, the fact that the website of a hotel is accessible globally does not mean that it directs its activities to all these places. Second, the nature of the business itself might be another factor to deduce whether or not the activities have been directed. With regard to hotel businesses, an online hotel booking is not like buying an item over a website. It is a logical conclusion that in countries which attract tourists, consumer demand for hotel reservations is usually done without any directing of activities by the businesses. In this context, this might be a useful criterion to distinguish between passive

²⁸⁷ *ibid*

²⁸⁸ *ibid*

²⁸⁹ The notion of passive consumers and active consumers, which has been discussed elsewhere in this thesis, might be a very relevant argument here. See pages 156 of this thesis.

consumers and active consumers.²⁹⁰ Third, it would be very important at this point to distinguish between active, interactive and passive websites. It seems clear that a hotel with an active website which also allows for online reservation and payments is the only form of website that may be used to direct commercial activities. In contrast, websites that only make information available for consumers or allow reservations without a conclusion of a contract and payment process, may not meet the requirements of Article 15 (1) (c). In *Hotel Alpenhof GesmbH v Oliver Heller*, the consumer did not conclude a contract and make a payment, but only made an online reservation. Such an argument is confirmed by the judgment of the District Court of New Jersey in a very similar hotel reservation dispute between a New Jersey resident consumer and an Italian owned corporation.²⁹¹ In *Weber v Jolly*²⁹² the District Court of New Jersey refused to assert personal jurisdiction over the defendant who operated a passive website on the ground that only informational content was provided by the website and no hotel reservation or payment facility was available through the website. Having regard to what has been discussed, it can be said that legal uncertainty still surrounds the interpretation of Article 15 (1)(c) of the Brussels Regulation in its application to online consumer contracts.²⁹³ Hence, further actions from EU legislatures might be required to remove such an uncertainty.²⁹⁴

In the US, consumers might have fewer chances of gaining protection than their counterparts in Europe.²⁹⁵ Firstly, the ability to enforce the choice of court agreement against the consumer might be the main reason for such a conclusion.²⁹⁶ Secondly, courts in the US have been much more restricted in applying the minimum contact test to defendants (businesses) when their websites are only accessible in the US.²⁹⁷ In a comparatively similar approach to

²⁹⁰ This point has been discussed previously in this chapter. See page (156). See also Debussere (n 247).

²⁹¹ Thomas A Dickerson, 'Travel Law: Jurisdiction and the Internet' (*e TN Global Travel Industry News*, 14 January 2014) <<http://www.eturbonews.com/41719/travel-law-jurisdiction-and-internet>> accessed 11 May 2014.

²⁹² *Weber v Jolly* 977 F Supp 327 (1997).

²⁹³ See also Julia Hörnle and Brigitte Zammit, *Cross-border Online Gambling Law and Policy* (Edward Elgar 2010) 197.

²⁹⁴ In favour of a similar argument, see Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate 2006) 392. In this regard, Howells and Weatherill state that: 'Yet there are still many debates to be had as to whether a trader is directing activities at a particular state. For instance, use of Greek on a website, might suggest a trader is targeting consumers in Greece, but does that mean he is not also directing such activities at Greeks in London? What exactly does directing activities mean?'

²⁹⁵ The reason behind this can be attributed to the differences in the policies of the EU and the US for regulating consumer legislation. For further details about this point see Winn and Webber (n 100).

²⁹⁶ This point has been discussed in detail in the previous section of this chapter: *online choice of court agreement in online B2C contracts*.

²⁹⁷ *Boschetto v Hansing* 539 F 3d 1011 (9th Cir 2008); *Sayeedi v Walser* 2007 NY Slip Op 27081; *Dedvukaj v Maloney* F Supp 2d 813 (ED Mich 2006); *Jones v Munroe* 2 Misc 3d 24 [2003] and *Buckland v Hobbs* No COA05-698, 2006 WL 695665 (NC Ct App 2006). See 'Personal Jurisdiction - Minimum Contacts Analysis -

the EU, US courts have asserted personal jurisdiction over non-resident defendants if they ‘purposefully target or direct’ their activities to the forum state.²⁹⁸ The meaning and the interpretation of ‘directing or targeting activities’ in the US is much narrower than its interpretation in EU law. In other words, the fact of website accessibility is not enough of a factor;²⁹⁹ there should be evidence that a defendant has an electronic minimum contact with the forum state, and this contact should entail the defendant’s intention to solicit business with consumers in the forum state.³⁰⁰ This approach has been widely adopted by courts in US cyberspace cases related to intellectual property infringements and tortious activities.³⁰¹ The cases that have challenged the personal jurisdiction issue in online consumer contracts have been comparatively few.

One of these is *Boschetto v Hansing*.³⁰² The dispute in this case was about a typical online B2C contract concluded over eBay’s website. A resident of California, Paul Boschetto, was the highest bidder on a car listed on eBay’s auction site by Jeffery Hansing, a Wisconsin resident. After receiving the car, Mr Boschetto noticed some defects which he was unhappy about and this led him to contact the seller and ask him to cancel the purchase. When Mr Hansing refused to cancel the contract, Mr Boschetto sued the defendant in the District Court of California, but this refused to hear the dispute because of a lack of personal jurisdiction. In its judgment, the court stressed that the minimum contact requirement for personal jurisdiction may only be justified if the defendant intentionally tried to do business with persons in the forum state. Consequently, this statement can be applied if there are systematic

Ninth Circuit Holds That Single Sale On eBay Does Not Provide Sufficient Minimum Contacts With Buyer’s State’ (2009) 122 Harvard Law Review 1014. However, there have been a few cases where the courts in some states have applied the long-Arm jurisdiction more broadly against defendants who sold items over eBay’s auction website. For example, in *Aero Toy Store, LLC v Grieves* 631 SE 2d 734 (Ga Ct App 2006), both the District and Court of Appeal of Georgia found that using eBay’s website to sell items to consumers in the forum’s state should be a sufficient factor to satisfy the minimum contacts requirement and apply the state’s long-Arm jurisdiction to the out-of-state defendant. The same conclusion was reached by the Louisiana Court of Appeals in *Crummey v Morgan* 965 So 2d 497, 503-05 (La Ct App 2007); see Holte (n 236).

²⁹⁸ It has been submitted that the US courts have abandoned the slide-scale case and applied a different test when dealing with internet jurisdiction cases. This is the ‘targeting activities’ test in order to find out whether or not the defendant has intentionally availed himself of the jurisdiction of the forum state. However, it might be true to say that the slide-scale test also relies on the defendant’s intention. In other words, it should be assumed that when the seller designs its website in a way that enables making transactions directly over the website, its intention is to pursue commercial activities with consumers in every state where its website is accessible.

²⁹⁹ Ku and Lipton (n 8) 40.

³⁰⁰ *Illinois v Hemi Group LLC* 266 F3d 745 (2010); PC Much Shelist, ‘Doing Business without Borders: Selling Products Online Could Land You in Another State’ (*The National Law Review*, 23 December 2010) <<http://www.natlawreview.com/article/doing-business-without-borders-selling-products-online-could-land-you-court-another-state>> accessed 11 May 2014. See also Mohammad Mahabubur Rahman, ‘Settlement of Cyber Disputes Through Terrestrial Provisions: Law and Technology Converge in the US Practice’ (2011) 10 Journal of International Trade Law & Policy 9.

³⁰¹ *ibid.* See also Harvard article (n 297).

³⁰² See (n 300).

and continuous business practices between the defendant and the forum state, not just one single transaction.³⁰³

The same conclusion was reached by the Civil Court of New York in *Sayeedi v Walser*³⁰⁴ where the court dismissed personal jurisdiction over a non-resident defendant in proceedings brought by a New York resident. The plaintiff bought a car engine from the defendant using eBay's online auction. The engine was labelled and advertised by the seller as 'new'. After the purchase was completed, the buyer found that the engine was faulty. The plaintiff argued that the defendant purposefully targeted his commercial activity at the forum state and, therefore, it should be subject to the personal jurisdiction of New York State. This plea was not accepted by the court which ruled that the shipment of the item by the seller to the buyer's forum state was not enough reason to conclude that the minimum contact had been satisfied. Accordingly, the court ruled that it lacked personal jurisdiction.

More recently, the Supreme Court of Kentucky reached the same conclusion in *Hinners v Robey*.³⁰⁵ The Supreme Court reversed the District Court's judgment in asserting personal jurisdiction over an out-of-state defendant who was an eBay seller by affirming that listing items on an online auction website was not enough of a factor to satisfy the minimum contact requirement.³⁰⁶ Interestingly, courts in other states have applied the same analysis and refused to assert personal jurisdiction over an eBay seller in typical online B2C contracts.³⁰⁷

It is evident that courts in the US have applied the Supreme Court's approach in *Asahi Metal Industry Co v Superior Court of California*³⁰⁸ without distinguishing between B2B and B2C contracts in terms of inter-state cases.³⁰⁹ This has probably not been the case with international cases.³¹⁰ As it has been argued previously, the meaning of the US Supreme Court's 'stream of commerce' approach in *Metal Industry Co v Superior Court of California* has been applied to traditional commerce and electronic commerce alike, whereas it is arguable that the 'stream' of electronic commerce is remarkably different from its notion in

³⁰³ *ibid.*

³⁰⁴ *ibid.* See also (n 6).

³⁰⁵ *Hinners v Robey* 336 SW3d 891 (2011); Price (n 35) Ch 4.

³⁰⁶ David Kramer, 'The Long Arm of the Law Has Gotten a Little Shorter; SCOKY Approach to Personal Jurisdiction Over Out-of-State Defendants' (*DBL Law*, 2011) <<http://civilprocedure.dbllaw.com/2012/03/the-long-arm-of-the-law/>> accessed 11 May 2014; Dara Chevlin, 'Schemes and Scams: Auction Fraud and the Culpability of Host Auction Web Sites' (2005) 18 *Loyola Consumer Law Review* 223.

³⁰⁷ *Foley v Yacht Management Group, Inc* Civil Action No 09-11280-DJC September 9, 2011; *Meatcalf v Lawson* 148 NH 35 (2002); *MacNeil v Trambert* 932 NE 2d 441 (2010); *Winfield Collection Ltd v McCaulley* 105 F Supp 2d 746 (ED Mich 2000).

³⁰⁸ See Ku and Lipton (n 8) 36.

³⁰⁹ Rahman (n 300). See also (n 105).

³¹⁰ See also Debussere (n 247).

traditional commerce.³¹¹ Moreover, it is interesting that the courts in the cases discussed above did not distinguish between the ordinary trader's website and electronic marketplace websites such as eBay. eBay's popularity and reach has been an established fact for a very long time. A person who registers as an eBay seller and then offers an item for sale is most likely aware that a wide range of users from different jurisdictions might show an interest in his offer. Accordingly, while the systematic and continuous involvement in commercial transactions with the plaintiff's forum state might be applicable and justifiable in general, it might not necessarily be a suitable criterion for websites such as eBay.

In conclusion, a comparison between *Hotel Alpenhof GesmbH v Oliver Heller* in the EU and *Boschetto v Hansing* in the US simply shows two different approaches to dealing with online consumer contracts: the EU's consumer-friendly approach that is unfavourable to business on the one hand; and the US open market approach that offers much less consumer protection on the other. Furthermore, from a jurisdiction point of view but not from a consumer protection perspective, it can be demonstrated that neither EU harmonised rules nor the US traditional approach have been completely successful in online consumer disputes. It seems difficult to find common ground between these two different approaches in such a way as to satisfy the proper aim behind conflict of laws rules.

Under Iraqi law, the distinction between business contracts and consumer contracts does not exist.³¹² Iraqi legislatures should have addressed this obvious gap by now. Due to the fact that the rules of jurisdiction applicable to B2B and B2C are the same in Iraq, there seems little need to elaborate further on this.³¹³ The matter that requires more attention is the lack of consumer protection that results from applying these existing rules. The online contract between an Iraqi consumer and a foreign business might not be heard by the Iraqi courts and, therefore, the Iraqi consumer will be deprived of the right to litigate in Iraq. Nevertheless, the question that could arise is that as long as the Iraqi law grants a jurisdiction for the Iraqi courts in case the place of the contract performance was in Iraq, consumers will not be deprived of such protection. Without doubt, this contention is true; however, Iraqi law does not define or interpret the place of contract performance. Furthermore, the IESTA does not provide any interpretation to determine the place of the online contract performance.

³¹¹ See the writer's argument in the previous section: *online business-to-business contracts*.

³¹² The analysis here concerns the jurisdiction and applicable law issues. Despite the enactment of a consumer protection law in recent years, no rules regarding the protection of consumers in terms of jurisdiction and applicable law have been included in the aforementioned act.

³¹³ See page 174 of this chapter about the jurisdiction rules applicable to online B2B contracts in Iraq in case of the absence of a choice of court agreement.

Accordingly, it is crucial for the Iraqi legislature to pay enough attention to this point and the special jurisdiction rules for consumer contracts should have been a required action.

Finally, as far as the analysis about the Iraqi law is concerned, it might be necessary to have a brief look at the League of Arab States' proposal on the Electronic Commerce and Transactions Directive regarding consumer protection in terms of jurisdiction and applicable law matters.³¹⁴ The reason behind referring to this Directive is the possibility of gaining benefit from its provision to reform the consumer protection rules in Iraqi law. According to Article 41 of the proposal, disputes that arise out of electronic transactions between businesses and consumers should be settled and governed by the courts and laws of the country wherein the consumer habitually resides.³¹⁵ In the author's opinion, there are two main shortcomings to such a provision. First, the proposed Directive does not impose any limits on the application of the consumer protection rules regarding the jurisdiction and applicable law issues. More specifically, it appears that businesses could be litigated against in any Arabic country where their website is accessible even though no website advertisement has been aimed by the trader to target consumers in specific countries. Second, the Directive permits the contractual parties' choice of court and law agreement even though such a choice may confer jurisdiction to courts other than those in the consumer's country. The consequences of such a provision could mainly be detrimental to the consumer where most of the website click-wrap and browse-wrap agreements are non-negotiable. Accordingly, this could lead the consumer to be deprived of the protection afforded to him by the laws and courts of his country.

5.3.2.3 Online Consumer-to-Consumer Contracts

These types of online contracts have been discussed in a previous section dealing with online choice of court agreements. The conclusion was reached that there are no significant issues in

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القانون العربي الأسترشادي للمعاملات والتجارة الإلكترونية رقم ٨١٢ / ٢٥٥ في ٢٠٠٩/١١/١٩

<<http://www.carji.org/node/1232>> accessed 26 April 2014.

³¹⁵ المادة ٤١ من مشروع القانون العربي الأسترشادي " في حالة النزاع بشأن العقود الإلكترونية المبرمة بين المهنيين والمستهلكين فان قانون الدولة التي يوجد بها محل إقامة المستهلك يكون هو الواجب التطبيق على موضوع النزاع. كما تكون المحكمة المختصر بنظر النزاع في هذه الحالة هي المحكمة الكائن بها محل إقامة المستهلك مالم يتفق طرفي النزاع على خلاف ذلك"

Article 41 of the League of Arab States' proposal on the Electronic Commerce and Transactions Directive provides that: 'Disputes resulting from the conclusion of electronic contracts between businesses and consumers shall be heard by the courts of the consumer's country of domicile and governed by the law of latter country as well unless otherwise the parties have agreed to the competence the courts and laws of another country.'

the US and Iraqi jurisdictions. The situation under EU law is very different. The same statement can be made regarding the analysis in case of the absence of choice of court agreement.

It has been noted that the approach of US courts when asserting personal jurisdiction over online contracting cases is to examine the online activity itself rather than the parties that were involved in it. In other words, the distinction between B2C and C2C contracts is not considered as important by US courts. An example of this can be seen in both *Boschetto v Hansing* and *Sayeedi v Walser*. The dispute in these two cases was about online auction sales made over eBay's website between two individuals. The court did not scrutinize the nature of the contractual characteristics of the parties and whether they were acting as consumers or businesses but instead looked at the seller's intention behind the online activity to conclude whether the minimum contact requirement between such an activity and the forum state was satisfied.

The same conclusion can be drawn regarding the status quo under Iraqi law but this is due to a different reasoning. More specifically, there might be a possibility that US judges take the position of the weaker party (consumer) in consideration, and this assumption has been applied in several cases regarding the enforceability of choice of court clause.³¹⁶ Under the civil law system judges in Iraq do not have the same discretion to broaden the application of statutory legal norms. The lack of a comprehensive definition³¹⁷ and the absence of statutory distinguishing rules between business and consumer contracts in Iraqi private international law³¹⁸ leads to the conclusion that Iraqi jurisdiction rules in case of the absence of contractual parties' choice of agreement will apply to all types of online contracts, including B2B, B2C and C2C.

In EU law, the analysis is entirely different. Despite courts in EU Member States not yet tackling such kinds of cases, the theoretical gaps remain unfilled so far. Almost all EU consumer protection laws have been aimed at protecting the consumer from businesses but

³¹⁶ For example see *Mazur v eBay, Inc* and *Brazil v Dell, Inc; Hines v Overstock.com, Inc*.

³¹⁷ المادة (١/رابعاً) من قانون حماية المستهلك العراقي رقم (١) لسنة ٢٠١٠: "المستهلك: الشخص الطبيعي أو المعنوي الذي يتزود بسلعة أو خدمة بقصد الاستفادة منها."

The Iraqi Consumer Protection Act No (1) of 2010 provides a very narrow definition of a consumer which does not rely upon the basis of a weaker party.

[Article (1\4): "The consumer: any natural or legal person who buys a good or a service for the sake of getting its benefits"]

³¹⁸ ICLC, arts 14 and 15. Analysis of these two Articles has been done in depth elsewhere in this chapter.

not from other consumers who are in better bargaining positions.³¹⁹ The Brussels Regulation does not provide rules for C2C contracts.³²⁰ This can probably be attributed to the indifference towards such kinds of cases and the rareness of their application. This statement is true and justifiable in the traditional practice. The point worth noting may arise when the online contracting scenarios come to mind. As it has been submitted previously, there is inconsistency between the consumer definition approach in EU law and the application of some kinds of online contracts, namely, contracts over some electronic marketplaces such as eBay and Amazon.³²¹ Under those circumstances, specific types of contracts will not be categorised as B2C but as C2C.³²² If that is the case, the Brussels Regulation will not be applied. Alternatively, the substantive jurisdiction rules in each Member State will determine whether courts have jurisdiction over the dispute arising out of such cases. The findings of this argument might be unwelcome because applying substantive conflict of laws over an online contract within an entity which includes 28 Member States with a mix of common law and civil law systems is quite a challenging issue in itself.

In the author's view, there might be a very small number of contracts which can be categorised under online C2C contracts. This is especially the case if we accept that not all eBay registered individual sellers, for instance, are systematically involved in the online selling process. In addition, not all eBay individual buyers are acting for the purposes which are out of their businesses or trade except in occasional cases in a few single transactions. For the most part, most of those individual sellers have been involved in making money and surely they should be categorised as businesses. Even though this is the case, the discussion here will conclude with the same phrase with which it started: 'the gap is still unfilled'. In any event, EU legislative bodies should take some action to tackle this issue.

5.4 CONCLUSION

This chapter has tackled the question of how to apply the existing jurisdiction rules to online contracting disputes within three jurisdictions: the EU, the US and Iraq. A comparative analysis has been carried out relying mainly on case law, statutes and scholarly views. It has been concluded that the law in each of these jurisdictions has dealt differently with cases

³¹⁹ Riefa and Hörnle (n 19) 96.

³²⁰ *ibid* 96.

³²¹ See page 157 of this thesis.

³²² See also Colon-Fun (n 18).

involving electronic contracting disputes. In Iraq, although courts have not yet been challenged by private international law cases resulting from online contracting disputes, the outcome of these can be predicted.

In general, the findings can be categorised under two headings: notional and factual. The notional findings represent the challenges which exist in the theory and correspond very well with sensible justifications that are based on the nature of conflict of laws rules. They may not appear to relate to the real practice of daily life. For instance, in online B2B contracts, the complexity of dispute resolution is obvious, where some basic rules of private international law become vague and are probably inapplicable, such as the place of contract formation, place of performance and the place where the contract is most closely connected. The real practice proves that such kinds of contracts usually involve professional parties that obviate such uncertainty by including a choice of court clause in their contract, or by allocating other jurisdictional grounds such as the EU's approach in Brussels Regulation. The same proposition can be said regarding online C2C contracts, which most often involve

small value contracts that are usually settled by out of court means, such as arbitration, mediation or online dispute resolution (ODR). Nevertheless, this does not mean that this assumption is conclusive; the probability of notional challenges coming into being will remain possible.

On the other hand, there are some factual findings and these might represent real challenging issues for jurisdiction rules. The tendency to guarantee consumers a strong degree of protection has led somehow to disadvantageous results for businesses, in particular, in online B2C contracts. In this regard, an interesting conclusion can be drawn. The EU's approach has been widely criticised by American scholars and business policy-makers. The application of US minimum contact and long-arm jurisdiction rules may have resulted, in certain circumstances, in the same outcomes of country-of-destination approach in the EU. On the other hand, consumers still need to be better protected in respect of some kind of cross-border online transactions, especially in Iraq where the distinction between business and consumer contracts does still not exist. In any event, more attention should be paid to consumer protection at the international level. Although this thesis does not discuss such a notion, the need for international harmonised rules for consumer protection has become a pressing issue.

CHAPTER SIX

EXISTING APPLICABLE LAW RULES AND THEIR APPLICABILITY TO ONLINE CONTRACTING DISPUTES

6.1 INTRODUCTION

In addition to the problem of whose courts may exercise personal jurisdiction over a defendant, the internet raises the larger question of whose laws, if any, should apply to activities that occur in cyberspace. When can a particular government regulate activities that occur in cyberspace, especially when the person engagement in the activity is located in another nation.¹

The question of applicable law over international contracts has been widely addressed by scholars. Over the last decade, there has been much debate about the suitability of applicable law rules to new types of international online contracts, namely, contracts made on websites, the so-called click-wrap and browse-wrap agreements.² The following sections will address the issue of whether the national laws in Iraq and the US, and the law of the European Union, have specifically aimed to deal effectively with international online contracting disputes. Furthermore, reference to the recent draft of the Hague Convention will also be made.³

From a general perspective, when courts tackle private international law cases they start by looking for a reasonable basis for hearing the dispute.⁴ After the court determines whether it has the jurisdiction to adjudicate the case, it then decides on the appropriate law that must be applied to the subject matter of the disputed case.⁵ The latter issue is commonly referred to in private international law as the applicable law matters, which is the second central point in this thesis. In general, the rationale behind regulating the jurisdiction rules might fundamentally differ from the aim of applicable law rules. While the principle of state

¹ JA Kestin, 'Caspi v The Microsoft Network, L.L.C.' in Raymond S R Ku and Jacqueline Lipton (eds), *Cyberspace Law: Cases and Materials* (Wolters Kluwer 2010) 72.

² Graham JH Smith (ed), *Internet Law and Regulation* (Sweet & Maxwell 2007) 808.

³ The draft Convention was approved by the Hague Commission in its special meeting in November 2012, and the draft has been opened for commentary and more discussions in the future. An online copy of the draft Convention is available on the website of the Hague Conference on Private International Law (HCCH) through the following link <http://www.hcch.net/upload/wop/contracts2012principles_e.pdf> accessed on 11 May 2014.

⁴ James Fawcett and Janeen M Carruthers, *Cheshire, North and Fawcett: Private International Law* (Sir Peter North (ed), 14th edn, Oxford University Press 2008) 41.

⁵ *ibid* 42.

sovereignty over its territory and nationals is probably the main basis for the jurisdiction rules, the cornerstone of applicable law rules is different. Effective justice and legal appropriateness may be the most important objective of applicable law rules.⁶

Similar to the jurisdiction rules, parties may include a clause in their contract which determines the law that will govern any dispute that may arise out of the contract's implementation. This choice can be made expressly or deduced by the court from some tacit facts in the contract.⁷ If an explicit or implicit choice of the parties is absent, courts will apply the law that can be determined by special rules called 'connecting factors'.⁸ Under normal circumstances, the rules of jurisdiction are different from the rules of applicable law. Therefore, it is not the case that the applicable law will be the law of the chosen court or the competent court.⁹ The court may hear the dispute but may not necessarily apply its law to the dispute.¹⁰ There might be some circumstances where the applicable law will be deemed the law of the forum,¹¹ or the court finds itself to be the forum of convenience because the parties have chosen the forum's law as the applicable law to hear their disputes.¹² A concise overview of the bases of applicable law rules will be made in the following section before starting an analysis of the applicability of these rules to the online context.

⁶ See Ruth Hayward, *Conflict of Laws* (4th edn, Cavendish Publishing Limited 2006) 5.

⁷ Alan Davidson, *The Law of Electronic Commerce* (Cambridge University Press 2009)184.

⁸ *ibid* 184.

⁹ غالب علي الداوودي وحسن محمد الهداوي, القانون الدولي الخاص: تنازع القوانين, تنازع الأختصاص القضائي وتنفيذ الاحكام الأجنبية (الطبعة الثالثة, العاتك للنشر 232

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[Ghalib Ali AL-Dawoodi and Hassan Mohammed AL-Haddawi, *Private International Law: Conflict of Laws, Conflict of Jurisdiction and Enforcement of Foreign Judgments* (3rd edn, AL-Attick Publishers 2009) 232.]

¹⁰ *ibid* 232.

¹¹ Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Hart Publishing 2010) 495; see also

بولين انطونيوس أيوب, تحديات شبكة الأنترنت على صعيد القانون الدولي الخاص-دراسة مقارنة- (منشورات الحلبي الحقوقية-بيروت ١٩(٢٠٠٦

[Poleen Antonios Ayoob, *The Challenges of Internet and Private International Law- A Comparative Approach*. (1st edn, AL-Halaby Legal Publications 2006) 19.]

¹² *Novus Aviation v Onur Air Tasimacilik AS* [2009] EWCA Civ 122 [2009] Lloyd's Reports 576; Pippa Rogerson, 'Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case' (2013) 9 *Journal of Private International Law* 387 <<http://openurl.ingenta.com/content/xref?genre=article&issn=1744-1048&volume=9&issue=3&page=387> > accessed 11 May 2014.

6.2 THE BASES OF APPLICABLE LAW IN NATIONAL LAWS¹³

Since the late 19th century, the law chosen by the parties has been regarded as the best governing law of the contract,¹⁴ and this notion has been upheld in both common law and civil law traditions.¹⁵ In the case of the absence of a choice of contractual parties, courts will rely on some factors to find a connection between the activity and a legal system in order to find the most appropriate law and apply it to the dispute.¹⁶ The process of linking the subject matter of the dispute and the possible applicable law has not had international agreement, and is probably one of the main reasons for the uncertainty surrounding their applicability to online contract disputes.¹⁷

¹³ It is certainly beyond the ambit of this thesis to survey the general rules of applicable law; how it has historically been evolved, and the different legal activities that it covers such as marriage, divorce, succession, custody, contractual obligations, non-contractual obligations, and property. However, the aim of this section is to give a concise overview about how the traditional conflicts of laws rules have dealt with the contractual obligations in different legal systems. The focus in this section will be on the basic approaches of the Common Law and Civil Law rather than the harmonised rules or the international conventions such as Rome Regulation or Hague draft convention on Choice of Law Agreement.

¹⁴ Hill and Chong (n 11) 496.

¹⁵ Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in Jan Van Heine, Eckart Gottschalk, Ralf Michaels, and Giesela Rühl (eds), *Conflict of Laws in a Globalized World* (2007) 153. However, there is a considerable difference between the English common law and Iraqi civil law system in terms of the parties' autonomy of the chosen law. It appears that English law does not require any connection between the disputed contract and the chosen law; see *ibid* 496; see also *Novus Aviatory v Onur Air Tasiamacilik* [2009] EWCA Civ 122 [2009] I Lloyd's Reports; Rogerson (n 12). The situation under Iraqi law might be different. Although there is no explicit statutory provision stating that the chosen law should have a nexus to the international contract, a scholarly view is in favour of the notion that such a connection between the parties' choice and disputed contract should exist as a condition of upholding such a choice. See AL-Haddawi (n9)151. Furthermore, this notion is also prevalent in most Arab countries and almost all of their legal systems are based on civil law. See

نبيل زيد مقابله، الأطار القانوني لعقود خدمات المعلوماتية الالكترونية في القانون الدولي الخاص: دراسة مقارنة في اطار قانون الانترنت- القانون التجاري الدولي- عقود التجارة الالكترونية-الوساطة والتحكيم الالكتروني في القانون الدولي الخاص (دار الثقافة للنشر والتوزيع- عمان ٢٠٠٩)

[Nabil Zaid Muqabala, *The Legal Framework of The Electronic Information Service Contracts in The Private International Law: A comparative study in the framework of Internent Law, International Commercial Law, The Law of Electronic Contracts and Online Arbitration and Mediation* (House of Culture-Dar Al-Thakafa 2009)]; and Ayoob (n 11) 56. Internationally, the proposed Hague Draft on Choice of Law Agreement does not require any connection between the chosen law and the contractual parties or their contract itself (Article 2 (4)). As for the situation under the Rome I Regulation, parties have the freedom to choose any law to govern the whole or a part of their contract; however, this choice should not affect the application of the law which cannot be derogated by an agreement, of the country where the elements of the contract are located in.

¹⁶ In case of an international contract dispute, it may be possible for courts to apply different laws, namely, the personal law of the seller, the personal law of the buyer, the law of both parties' domicile, the law of the country where the contract has been concluded (*lex loci contractus*), the law of the country where the contract has been performed (*lex loci solutionis*), the law of the forum (*lex Fori*) or the law of the country which the contract is most closely connected to. See Hayward (n 6) 3.

¹⁷ Fawcett and Carruthers (n 4) 42, 43.

Connecting factors are based on three main elements: the designated law, the subject matter, and the linking factor.¹⁸ They are usually dual directional rules.¹⁹ This means that the applicable law could be the law of the forum or any other foreign law.²⁰ For instance, if the general rule states that any transaction on movable property will be governed by the law of the country where the property exists at the time of concluding the contract, the applicable law could be the law of any country, including of course the law of the forum.

From a general perspective, there may still be some inherent dissimilarity between different legal systems in applying such rules. In one aspect, the dissimilarity may appear when the national courts of each country apply the foreign law. For instance, under the common law regime,²¹ the principle of *ex officio* permits the court to apply its own laws to the dispute if none of the parties claims that a foreign law should be applied, or the claim has not been supported by proven evidence.²² Furthermore, if the party succeeds in convincing the court of the applicability of foreign law rather than English law, the question that will be asked is how the English court will consider the foreign law, and who will bear responsibility for the burden of proof of the foreign law. In most cases, it seems that the party claiming the applicability of the foreign law will be responsible for this.²³ In any event, it may appear that the difficulties accompanied with gaining knowledge of the substance of the foreign law by an English court may lead to the fact that its reliance by the court will be less expected.²⁴ On the other hand, the situation under other legal systems is comparatively different. In Iraq, most of the scholarly views are in favour of the notion that applying, proving, and

¹⁸ See Hayward (n 6) 85. According to Briggs, the process of combining these three elements is 'the process of characterisation', which means giving the proper character to the legal activity depending on the main facts that it is linked with in order to designate the most suitable law to govern the activity. See Adrian Briggs, *The Conflict of Laws* (6th edn, Oxford University Press 2010) 4.

¹⁹ محمد إبراهيم أبو الهيجاء, عقود التجارة الإلكترونية: العقود الإلكترونية-المنازعات العقدية وغير العقدية-القانون الواجب التطبيق (دار الثقافة للنشر والتوزيع- عمان ٢٠٠٥) ٨٥

[Mohammed Ibrahim Abo Al-Haijaa, *Electronic Commerce Contracts: Electronic Contracts, Contractual and Non-Contractual Disputes and The Applicable Law* (1st edn, The House of Culture - Dar AL-Thakafa 2005) 85.]

²⁰ Peter Sarcevic, Paul Volken and Andrea Bonomi (eds), *Yearbook of Private International Law*, vol 7 (European Law Publication 2006) 46, 47; Hayward (n 6) 3.

²¹ It might be thought that the role of the traditional English common law rules of conflict of laws have been diminished since the adoption of the EU's unified Regulations (Brussels and Rome); however, the common law and its impact are still felt in many countries. Furthermore, the traditional English conflict of laws rules still govern the private international disputes between English parties and non-EU parties.

²² Briggs (n 18) 4.

²³ Some scholars go further and argue that English courts may apply the English law even if conflict of laws rules state that the foreign law is applicable to the dispute only if the party fails to prove the appropriateness of the foreign law. See Fawcett and Carruthers (n 4) 112.

²⁴ Briggs (n 18) 6. However, there are a few cases where the English courts did not apply the English law, and the foreign law was applied instead. For example, in *Sapporo Breweries Ltd v Lupofresh Ltd* [2012] EWHC 2013 (QB), the contract did not include a choice of court agreement. The court refused the defendant's claim of applying the English law and applied the Japanese law to the breach of the contract.

interpreting the foreign law is the duty of the Iraqi courts and not the litigants.²⁵ As long as the rules of private international law in Iraq provide that the foreign law is applicable to the legal activity in dispute, the court, without being asked by the parties, will start applying the foreign law.²⁶

From a contractual dispute perspective, different legal systems might have responded differently to the law applicable to contractual obligations. In most cases, two different approaches have been applied by private international law rules of different countries. First, the personal law of the contractual parties²⁷ as a primary connecting factor or the law of the country where the contract is made is applied.²⁸ Second, the law of the country to which the contract is most closely connected is applied.²⁹ In fact, these two groups of opinions might represent the inherent difference between common law and civil law systems. In the traditional English common law, if there is no explicit or implicit choice of law by the parties, the contract is governed by the law which seems to the courts to be the most proper law.³⁰ In contrast, under the Iraqi civil law regime, in the case of an absence of party autonomy, the law of the country where the contractual parties reside should be applied if both parties are domiciled in the same country.³¹ Where the contractual parties are domiciled in different countries, the law of the country where the contract was made will be applied instead.³²

²⁵ See AL-Haddawi (n 9) 210

²⁶ *ibid* 210. It is also worth noting that the latter notion has been upheld by courts in Lebanon and France. See: سامي بديع منصور وعكاشة عبدالعال, القانون الدولي الخاص: طرق حل النزاعات الدولية الخاصة-الحلول الوضعية لتنازع القوانين-الجنسية (الدار الجامعية) ١١٣-١٢٩

[Sami Badee' Mansour and Aukasha Abdul Alal, *Private International Law: Private International Dispute Resolution, Conflict of Laws and Nationality*. (The University House- AL-Dar AL-Jamiaia)] 113-129.

²⁷ The personal law intended here is either the law of nationality or the law of domicile.

²⁸ Al-Haijaa (n 19) 85.

²⁹ The applicable law according to this school would be any law that is most closely connected with the contract and without any statutory presumed factors. However, the nationality could also be relied upon according to this approach as one of the factors to identify the most closely connected law to the contract. See Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiary in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) 242-252.

³⁰ *Sapporo Ltd v Lupofresh Ltd* [2012] EWHC 2013 (QB); Rogerson (n 12). The common law, in general, does not require or make any assumptions about the applicable law that would govern any dispute arising out of a contractual activity as other legal systems do. It is up to the discretion of the hearing court to look for the most appropriate law or the legal system which has the most relevant nexus to the contract. See Hayward (n 6) 107.

³¹ ICLC, art 25.

³² الفقرة الأولى من المادة ٢٥ من القانون المدني العراقي : " يسري على الالتزامات التعاقدية قانون الدولة التي وجد فيها الموطن المشترك للمتعاقدین اذا اتحدا موطنا فاذا اختلفا يسري قانون الدولة التي تم فيها العقد هذا مالم يتفق المتعاقدان او تبين الظروف ان قانونا آخر يراد تطبيقه".

[Article 25 (1) of the ICLC: "Contractual obligations shall be governed by the law of the country where the both contractual parties are resided; however, if the place of the residence of each party in a different country, the law of the country where the contract was concluded will be applicable. Unless there is an explicit or tacit choice of the govern law was made by the contractual parties in their agreement."]

6.3 TRADITIONAL APPLICABLE LAW RULES AND TRANSNATIONAL ONLINE CONTRACTS

In traditional practice, determining the appropriate applicable law to govern the contract might be seen as one of the most problematic issues in the field of conflict of laws.³³ The closeness with more than one jurisdiction, which any contract may have, may be one of the main reasons for this.³⁴ In this regard, it has been concluded that, except in continental Europe, the traditional connecting factors such as the place of concluding the contract or the place of its performance, have been applied by many legal regimes. Owing to the fact that most of these factors have been mainly reliant on geographical bases for their functionality, the borderless nature of the internet has led many scholars and law-makers to rethink the suitability of conflict of laws rules to deal with the new generation of online contracting.³⁵ On the other hand, parties' autonomy in choosing the preferable law to govern their contractual relations might also raise some fundamental questions when it comes to the online realm. Consequently, the appropriateness of applicable law rules to provide more certainty for online contractual disputes is not a settled matter yet.³⁶ In the same way as the previous chapter was structured, the online choice of law rules will be examined first and then attention will be paid to the applicable law in case of the absence of online choice of law agreement.

6.3.1 Online Choice-of-Law Agreement

It has been mentioned that the commonly applied approach is that the parties' autonomy in their contract should be upheld by courts, unless there are some reasons which make the application of the chosen law undesirable.³⁷ In theory, the application of this approach should not make any difference in the field of online contracts. In other words, whether the applicable law has been chosen by the parties in a written contract or an online contract

³³ Fawcett and Carruthers (n 4) 665.

³⁴ *ibid* 665.

³⁵ Briggs (n 18) 30.

³⁶ Tamás Dezsó Czigler, 'Choice-of-Law in the Internet Age-US and European Rules' (2012) 53 *Hungarian Journal of Legal Studies* 193 <<http://www.akademiai.com/openurl.asp?genre=article&id=doi:10.1556/AJur.53.2012.3.2>> accessed 12 May 2014.

³⁷ There are circumstances when the courts do not apply the foreign law. One of the biggest reasons for this is the substantial contradiction between the foreign law and the public policy of the forum country. For more details see Fawcett and Carruthers (n 4) 4, 5.

should not cast doubt, under normal circumstances, on the legitimacy of the choice of law agreement in general. The special contracting process over different types of websites and the distinctive structural design of each website might sometimes create doubt over the validity and the enforceability of the online choice of law agreement.³⁸ In other words, the first thing that should be borne in mind when analysing the online choice of law agreement is the validity of such a choice, then its enforceability, and finally, its fairness. There is, in fact, a very fine line between the enforceability of the online choice of law agreement and its fairness. While it seems that the enforceability is something consequent on the validity, even though this is not always the case, the fairness of the online choice of law is the ultimate aim. This thesis will address this at the end of this section.

This situation might uniquely apply to all types of website contracts, including B2B, B2C and C2C. Each of these should be considered separately. At the same time, it also seems that the legal challenges of the internet choice of law are not so different from those in the online choice of court agreement addressed in the previous chapter. To a great extent, this is true. This section will aim to point out some issues that are specifically related to the choice of law agreement and consider the arguments which can be made about the applicability of such a choice when it is made over a website or electronic marketplace in the three types of online contracts.

6.3.1.1 Online Business-to-Business Contracts

To a great extent, these kinds of contracts have been deemed to be the typical model where the parties' autonomy is upheld by international,³⁹ regional,⁴⁰ and national⁴¹ rules of conflict of laws. Critical analysis of the choice of law agreement in online contracts can be carried out from two different perspectives: theoretical and practical. The theoretical aspect of the analysis is more concerned with the role of conflict of laws rules in accomplishing effective

³⁸ Jennifer Femminella, 'Online Terms and Conditions Agreements: Bound by the Web' (2003) 17 *Journal of Civil Rights and Economic Development* 87. The reason behind this could be attributed to different factors, such as the consideration of consumer protection law, the doctrine of adhesion contracts and the general fairness of these terms and conditions according to the ordinary contracting principles. All these issues will be covered throughout this chapter.

³⁹ For example, Article 2 of the Draft Hague Convention provides that the contract should be governed by the law chosen by the contractual parties.

⁴⁰ Preamble 11 of the Rome Regulation provides that: 'The Parties' freedom to choose the applicable law should be one of the one of the cornerstones of the system of conflict of law rules in matters of contractual obligation.'

⁴¹ For instance, Article 25 of the ICLC and Article 187 (1), (2) of the Restatement (Second) of Conflict of Laws in the USA.

justice and legal appropriateness and the extent to which this role is achievable in the online practice. The second part of the analysis will aim to tackle the practical and technical challenges of applying the parties' autonomy to online contracting practices and the extent to which the existing norms have succeeded in overcoming such challenges. As for the first analytical point, three linked issues will be questioned: the validity, the enforceability and the fairness of online choice of law clauses in B2B contracts.

Firstly, regarding the validity of the online choice of law agreement, no significant questions arise over the application of EU law. In other words, although the Rome I Regulation does not contain a provision, as the Brussels Regulation clearly does,⁴² that expressly states that the choice can be made by writing or by any electronic communication means; the validity of the online choice of law agreement should be undeniable.⁴³ The same conclusion can be drawn regarding the situation in US law.⁴⁴ In Iraq, following the enactment of IESTA, the validity of the online choice of law was given an equivalent legal recognition to its traditional counterpart.⁴⁵

When it comes to the enforceability of an online choice of law agreement, it can be argued that the analysis could have a different dimension. It has just been mentioned above that the relation between the enforceability of a contractual clause and its fairness is very crucial; arguably, this relation may need a further consideration when examining website contracts. To be more precise, when the law gives the parties' autonomy priority over other bases of conflict of laws rules in contractual matters, the rationale is that both parties are legally

⁴² Brussels Regulation, art 23 (2).

⁴³ Article 3 (c) of the Hague Convention explicitly provides that such a choice can be made in writing or by any means of communication. The same wording has not been included within the body of text of the Hague's Draft Principles on the Choice of Law in International Contracts. For the same argument see also Faye Fangfei Wang, *Law of Electronic Commercial Transaction: Contemporary Issues in the EU, US and China* (Routledge 2010) 141.

⁴⁴ We have seen and pointed out in the Chapter 5 that US Courts when addressing the validity of the choice of court agreement have treated such a choice as part of the general terms and conditions of the contract. Accordingly, if the terms and conditions were clearly presented on the website; courts in the US usually give an effect to them. The same thing should apply to the choice of law agreement.

⁴⁵ Article 13 of the new Act states that:

المادة-١٣-أولاً- تكون للمستندات الإلكترونية والكتابة الإلكترونية والعقود الإلكترونية ذات الحجية القانونية لمثيلتها الورقية إذا توافرت فيها الشروط الآتية (أ) ان تكون المعلومات التي وردت فيها قابلة للحفظ والتخزين بحيث يمكن أسترجاعها في أي وقت. (ب) امكانية الاحتفاظ بها بالشكل الذي تم انشاؤها أو إرسالها أو تسليمها به أو بأي شكل يسهل به أثبات دقة المعلومات التي وردت فيها عند انشاؤها أو إرسالها أو تسليمها بما لايقبل التعديل بالإضافة أو الحذف. (ج) أن تكون المعلومات الواردة فيها دالة على من ينشأها أو يتسلمها وتاريخ ووقت إرسالها وتسلمها.

[‘Any agreement by electronic communication [or by exchange of electronic documents shall be equivalent to the paper contract if the following requirements have been met: (a) the message of information should be storable on the information system and can be retrieved at any time. (b) The message of information should be possible to be stored exactly in the same form on the date of forming, sending, and receipting it. (c) The message of information should include a definite indication of the parties who sent and received it and the date and time of dispatch and receipt.’]

assumed to be in the same contractual bargaining position.⁴⁶ Nevertheless, if any imbalance in their bargaining powers comes to light, the enforceability of such a choice should be reconsidered. In online B2B contracts that are concluded on websites, the contractual choice of law clause is usually introduced in the form of click-wrap or browse-wrap agreements⁴⁷ and, more often than not, the accepting party does not have the option to discuss and negotiate such a choice with the other party.⁴⁸ This may seem a justifiable factor allowing the court to scrutinise the fairness of such a choice. In this regard, some have argued that such types of online contracts are not so very different from standard adhesion contracts and, consequently, the enforceability of any clause should be under the discretion of the hearing court.⁴⁹ To some extent, the author agrees with such an argument, especially when the analysis concerns the situation under Iraqi law. The analogy between adhesion contracts and online B2B contracts may need a little more attention. This will be given in the forthcoming analysis of Iraqi law.

In the EU, the Rome I Regulation does not address this issue directly. However, Article 10 (1) of the Regulation leaves it up to the law chosen by the parties to determine the enforceability of any contractual clause, including, of course, the choice of law itself.⁵⁰ Accordingly, if the seller stipulates in his website's terms and conditions that any dispute that arises out of using the website will be governed by English law, the English common law will determine whether such a choice is enforceable or not. In *Hillside (New Media) Ltd v Baasland*,⁵¹ the judge granted enforceability to an online choice of law agreement in favour of English law.⁵² In this case, a Norwegian gambler placed many online sport gaming wagers from many countries, including Norway, Germany, Czech Republic and Denmark, on the

⁴⁶ Certainly, this is the core reason behind laying down special protective rules in some jurisdictions for consumer transactions.

⁴⁷ See Chapter 4.

⁴⁸ However, that does not necessarily mean that all types of website contract are non-negotiable. For example, eBay gives the seller three ways to listing their items on the website for sale: buy it now with a fixed price, place a bid, and place a bid with the extra option of 'make offer'. The first and second types do not give the buyer the opportunity to discuss the price with the seller. However, when the seller adds 'make offer', it will be possible for both the parties to negotiate on the price and other issues through eBay's mail communications.

⁴⁹ Mo Zhang, 'Contractual Choice of Law in Contracts of Adhesion and Party Autonomy' (2007) 41 *Akron Law Rev* 10; Leon E Trakman, 'The Boundaries of Contract Law in Cyberspace' (2009) 2 *International Business Law Journal* 159; Philippa Lawson and Cintia Rosa De Lima, "'Browse-Wrap' Contracts and Unfair Terms: What the Supreme Court Missed in *Dell Computer Corporation v Union Des Consommateurs et Dumoulin*' (2007) 37 *Revue General De Droit* 445.

⁵⁰ 'The existence and validity of a contract, or of any terms of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.'

⁵¹ *Hillside (New Media) Limited v (1) Bjarte Bassland, (2) BET356 International NV and (3) Hillside (Gibraltar)* [2010] EWHC 3336 (Comm).

⁵² *ibid* 10.

online gambling website www.Bet365.com. This was a website owned and operated by Hillside, a business registered and domiciled in England. After losing £1.5 million, Mr Bassland got in contact with the claimant, threatening that he would bring proceedings to the Norwegian courts for tortious liability if they did not reimburse him some of the money he had lost. Hillside did not agree with this and applied for a summary judgment before the Royal Courts of Justice in London. The judge stressed that when the defendant had started using the website, he had been obliged to open an account and agree to the terms and conditions of using the website by ticking the ‘I accept’ box for Bet365’s terms and conditions which were accessible through a hyperlink located below the ‘I accept’ box. The terms and conditions of the website included a special jurisdiction and applicable law clause in favour of English courts and English law; as such, this clause could not be ignored.⁵³

As part of the EU policy to maintain unified jurisdiction rules in Europe and prevent irreconcilable judgments being made in Member States, it might have been better if the Rome I Regulation had laid down a special rule or interpretation about the enforceability of the choice of law clauses made by means of communication other than writing. Unfortunately, neither the ECJ, nor the European Council, nor the Commission have addressed this issue yet.

In the US, courts have been more involved in tackling the question of validity and enforceability of online contractual terms and clauses.⁵⁴ Most of these cases were addressed in Chapter 5 in the discussion about online choice of court agreement. It was concluded that US courts have applied different criteria to address such issues, such as the ‘visibility’ of the online terms and conditions, their ‘reasonableness’ and the principle of the ‘reasonable person’ and the ‘doctrine of unconscionability’.⁵⁵ Surprisingly, very few cases can be found regarding the enforceability of online choice of law clauses.⁵⁶ From a procedural point

⁵³ *Hillside* (n 51) 10. However, in addition to this, the court in this case relied upon article 4 of the Rome II Regulation in choice of law which provides that the applicable law should be the law of the country where the tortious activities occurred. See Zheng Sophia Tang, ‘Cross-Border Enforcement of Gambling Contract: A Comparative Study’ [2013] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197232> accessed 2 July 2014.

⁵⁴ This can be clearly deduced from the abundant number of case laws that American courts have addressed about the validity of websites terms and conditions.

⁵⁵ See Chapter 5 of this thesis. The UCITA also provides that any contractual clause that assigns the applicable law shall not be enforced if it seems to be the court unconscionable. However, the general rule that is set forth in the section 187 (1) of *Restatement (Second) of Conflict of Laws* provides that choice of law clauses in contracts are basically valid and enforceable. See also Gary B Born and Peter Rutledge, *International Civil Litigation in United States Courts* (5th edn, Wolters Kluwer 2011) 759.

⁵⁶ This may be attributed to the fact that US courts applying foreign laws are not very welcome. See Rühl (n 15). In recent years, some states have made constitutional amendments banning the courts from apply any foreign law. See Symeon C Symeonides, ‘Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey’ (2011) 59 *American Journal of Comparative Law* 303

of view, both online applicable law and jurisdiction clauses do not differ greatly and the same criterion can be applied to them.⁵⁷

In Iraq, Article 25 of the ICLC does not provide any further interpretation on this point. If the contractual parties choose Iraqi law in the online contract, courts will examine the enforceability of such a choice under the substantial governing law. According to the ICLC, which is the governing law in civil and commercial matters in Iraq, any contractual clause that does not violate a legal provision, public policy or the common morals of the community will not be denied enforceability.⁵⁸ Therefore, under normal circumstances, the choice of law being agreed through a non-negotiable online contract will not affect its enforceability.⁵⁹ Reverting again to the argument which the author has partially agreed with, the following question seems appropriate: does the Iraqi law provide any legal basis for the contractual party to claim the unenforceability of the choice of law on the ground of its status as an adhesion contract? In fact, Article 167 of the ICLC gives the court discretionary powers to nullify any arbitrary clause in an adhesion contract.⁶⁰

To some extent, it seems that the general requirements of adhesion contracts are met in some types of website contracts (click-wrap and browse-wrap) where the accepting party does not have any option to discuss the terms and conditions of the contract. The narrow application of the concept of adhesion in Iraqi law may not aid the Iraqi courts to apply it to the online contract in private commercial matters. More specifically, the ICLC confines the adhesion contracts to specific types of contracts, such as utility supply contracts (electricity, water, and telecommunications), employment contracts and insurance contracts.⁶¹ Accordingly, it might

<<http://comparativelaw.metapress.com/openurl.asp?genre=article&id=doi:10.5131/AJCL.2011.0001>> accessed 12 May 2014.

⁵⁷ For the same conclusion see Dan Jerker B Svantesson, *Private International Law and the Internet* (2nd edn, Wolters Kluwer 2012) 186.

المادة ١٣١ من القانون المدني العراقي: "١. يجوز ان يقتصر العقد بشرط يؤكد مقتضاه او يلائمه أو يكون جاريا به العرف أو العادة. ٢. كما يجوز ان يقتصر العقد بشرط فيه نفع لأحد العاقدين أو للغير اذا لم يكن الشرط ممنوعا قانونا او مخالفا للنظام العام أو للأداب, والا لعا الشرط وصح العقد مالم يكن الشرط هو الدافع الى التعاقد فيبطل العقد ايضا."

[Article 131 of the ICLC provides that: '1. a contract can be included any clause that interprets its implementation or the rights and the obligations of the parties. 2. The contract can be included any clause in favour of the one parties or other as long as such a clause does not interfere with the law, public policy of the country or the common morals of the community.']

⁵⁹ The IESTA provides electronic documents with the same legal validity as traditional documents.

المادة ١٦٧ الفقرة (٢) من القانون المدني العراقي: "اذا تم العقد بطريق الأذعان وكان قد تضمن شروطا تعسفية, جاز للمحكمة أن تعدل هذه الشروط أو تعفي الطرف المذعن منها وذلك وفقا لما تقتضيه به العدالة. ويقع باطلا كل اتفاق على خلاف ذلك."

[Article 167 (2) of the ICLC provides that: 'Where the contract has been concluded in adhesion, and it involved an overly unfair clause in the favour of one party; the court will have discretionary powers to amend the clause or exempt the obliged party in and any agreement to override such a provision shall be deemed null.']

انظر: عبدالمجيد الحكيم, عبدالباقي البكري و محمد طه البشير, *الوجيز في نظرية الألتزام في القانون المدني العراقي* (الجزء الأول- مصادر ⁶¹ الألتزام ١٩٨٠) مطابع وزارة التعليم العالي والبحث العلمي ٤٢

be sensible to argue that the extension of the adhesion contract to some types of website contracts could be fairer, especially as the Iraqi law gives the courts a wide range of discretionary powers to determine the unfairness of the contractual clauses in the above mentioned adhesion contracts.⁶² In this regard, the author agrees with the argument that special attention should be paid to the choice of law clause over the other terms and conditions of the contract.⁶³ This is because the consequence of agreeing to such a choice without purely consensual agreement could result in unwanted outcomes for the accepting party and applying the adhesion rules could be one acceptable approach.⁶⁴

Regarding the other side of the analysis on the online choice of law agreement, the question arises about the suitability of traditional types of choice of law agreements and the internet (websites) as a medium to practice such clauses. As a recognised rule of private international law in both common law and civil law regimes, courts always look for the express or the implied choice of the parties regarding the governing law of their contract.⁶⁵ In the case of an absence of an explicit choice, courts may need to consider other facts in order to find the parties' implicit choice, such as assigning the jurisdiction of a specific country to hear the dispute, using standard forms of the contract or the place in which the parties agreed that the contract should be performed.⁶⁶ The determination of the latter issue may have some difficulties in some circumstances; however, when it comes to website practices, it can be argued that identifying the implied choice of law could be an ambiguous matter. In other words, the following question could be asked: which kinds of factors can be relied upon by the court to identify the implicit choice of law of the contractual parties in a contract made over a website?

Under EU law, the Rome I Regulation indirectly addresses this issue in Recital 12 but no clear complementary provisions can be found in the Regulation itself.⁶⁷ Recital 12 of the Regulation lays down a general rule that the choice of court clause should be one of the factors to be considered when inferring the tacit choice of law.⁶⁸ The significance of such a

[Abdull Baki AL-Bikry, Mohammed Taha AL-Basheer and Abdull Majeed AL-Hakeem, *The Theory of Civil Obligation in The Iraqi Law* (Ministry of Higher Education and Scientific Research 1980) 42.]

⁶² *ibid* 42.

⁶³ Zhang (n 49).

⁶⁴ *ibid*

⁶⁵ Fawcett and Carruthers (n 4) 702, 703.

⁶⁶ CMV Clarkson and Jonathan Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) 204.

⁶⁷ Hill and Chong (n 11) 509.

⁶⁸ Recital 12 of the Rome Regulation: 'An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.'

provision cannot be denied especially if the online contract encompasses an express choice of court agreement other than a choice of law. The argument can still be made when there is no choice of court agreement in the online contract. More specifically, Recital 12 of the Regulation includes the following phrase: ‘... should be one of the factors to be taken into account in determining ...’. This makes clear that the existence of a choice of court clause in the contract is one of the factors that will be considered when looking for the implied choice of law agreement by the courts. No clear reference has been made regarding the other factors. Hence, in the absence of both choice of court and choice of law agreements in an online contract, the question will be asked regarding the approach by which the implicit choice of law agreement can be deduced.

Factors such as the place of contracting or the place of performance cannot be relied upon to infer the tacit choice due to the uncertainty of such factors themselves in the online environment. Even in the context of traditional contracts, such a conclusion can be drawn from a ruling of the ECJ, which indicates that the tacit choice of law could not be inferred from the place where the contract was made.⁶⁹ Another approach that could function quite well in the online contracts practice is the language of the website and the currency used in the transaction.⁷⁰ In fact, the language of the contract and the currency of the transaction have been suggested as complementary factors for determining the implicit choice of the parties in traditional contracts.⁷¹ Furthermore, such a notion has also been tacitly upheld by the ECJ.⁷²

In *Sapporo Breweries Ltd v Lupofresh Ltd*⁷³, the High Court of Justice/Queen’s Bench Division rejected the claimant’s argument that English law should have been applied because the contract was written in English and included some terms which referred to the application of English law, such as CIV and UK Port. The Court stressed that the English language of the

⁶⁹ Case C-318/81 *Commission v CO.DE.MI* [1985] ECR I-3639; See Stefania Baritatti, *Cases and Materials on EU Private International Law* (Hart Publishing 2011) 599.

⁷⁰ However, the general scholarly view is in favour of not relying upon the language and currency as connecting factors in online contracting cases. See Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contract* (Ashgate 2008) 38, 92, 225; Conall O’Reilly, ‘Finding Jurisdiction to Regulate Google and the Internet’ (2011) 2 *European Journal of Law and Technology* 1.

⁷¹ Fawcett and Carruthers (n 4) 703.

⁷² See Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederi Schlüter & Co KG and Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527. More details and analysis about these cases can be found in Chapter 5 of this thesis. Paragraph 93 of the ECJ’s judgment reads as follows: ‘The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader’s activity is directed to the Member State of the consumer’s domicile, namely ... [U]se of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language ...’

⁷³ *Sapporo Ltd v Lupofresh Ltd* [2012] EWHC 2013.

contract did not constitute enough of a factor to apply English law as it had been used because the claimant could not speak or write Japanese. The Court also pointed out that such terms were widely used in the international carriage of goods by sea and, therefore, it was not implicit agreement to the application of English law.⁷⁴ Therefore, if the place of contracting, the place of performance, the language, or the currency of the transaction are not very reliable factors for identifying the tacit choice of law in website contracts, what other factors could be used instead to infer the chosen law? This may lead to the conclusion that deducing the implicit choice of law in online contracts could be more challenging than a traditional contract and this might apply to the situation in all three jurisdictions being compared.

Among these three legal regimes, the most challenging situation may appear under Iraqi law as there is neither clear statutory provisions about the complementary factors of the implied choice of law, as the Rome I Regulation includes, nor abundant online contracting case laws, as the US courts have dealt with. In any event, if it seems to the court that the implied choice of law is not manifest, the online contract will be considered not to involve a choice of law agreement. In that case, other rules will be applied. Even if the online choice of law agreement has been validated and given enforceability by the court, the biggest question of the fairness of such agreements might remain doubtful from some points of view.

6.3.1.2 Online Business-to-Consumer Contracts

This section can be started with the question which the previous section ended on: how fair can a non-negotiable choice of law clause be in an online contract? The considerations that should be taken into account when addressing such an issue in B2C contracts should be different from those in B2B contracts. In general, debates regarding the enforceability of the choice of law agreement in consumer contracts mainly fall into two approaches: procedural and substantive.⁷⁵ According to the first approach, the dispute resolution clause will be enforceable as long as the business has taken prompt steps to draw the consumer's attention to it prior to concluding the contract.⁷⁶ In the previous chapter, it has been shown that courts in the US have been keener to apply such an approach in online contracting cases when

⁷⁴ The judgment was affirmed on appeal by the Court of Appeal. See *Lupofresh Limited v Sapporo Breweries Limited* [2013] EWCA Civ 948.

⁷⁵ Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford University Press 2008) 193.

⁷⁶ *ibid* 193.

dealing with a jurisdiction or arbitration clause in an online consumer contract.⁷⁷ This means that the choice of law agreement under US law could be regarded as a valid and enforceable clause even if the other contracting party is a consumer.⁷⁸ Furthermore, the UCITA also validates the choice of law agreement in the consumer contracts in certain cases.⁷⁹

On the other hand, the application of this rule may also contradict the high standard of consumer protection policy in some states, such as California.⁸⁰ In *Omstead v Dell, Inc*⁸¹, California resident consumers purchased notebook computers from the defendant's website. Having found that they were defective, a number of consumers brought a manufacturer's warranty claim. Upon refusal of the claim by the company, a putative class action was filed in the Northern District Court of California pursuant to the California Consumer Legal Remedies Act. The District Court found that the online terms and conditions of the website included an arbitration clause and choice of law clause in favour of the state of Texas and, accordingly, it denied the class action certification on the ground of the enforceability of the choice of law and arbitration clauses. This judgment was reversed by the United States Court of Appeals in California which found that the arbitration and choice of law clauses were unconscionable under the consumer protection laws of California. Nevertheless, it should be noted that according to the Restatement (Second),⁸² the chosen law should have a minimum contact to the dispute and should not violate the public policy in the state of the forum in order for it to be applied by the court.⁸³ Interestingly, at times, the criterion of 'fundamental public policy' has been very broadly interpreted by the courts of some states to include the

⁷⁷ *Hines v Overstock.com Inc.* 668 F Supp 2d 2009; *Hubbert v Dell Corp* 835 NE 2d 113 (III App Ct 2005); *Caspi v The Microsoft Network, LLC* 323 NJ Super 118, 732 A 2d 528 (NJ App Div 1999).

⁷⁸ Julia Hörnle, 'The Jurisdictional Challenges of the Internet' in Lillian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 121. However, the UCITA may provide more rules that are favourable for consumers regarding the choice of law agreement. Section 109 of UCITA provides that: 'The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsection (b) and (c) in the absence of the agreement'. See Giesela Rühl, 'Consumer Protection in Choice of Law' (2011) 44 Cornell International Law Journal 1. However, in the writer's opinion, this rule may apply only if the chosen law violates the public policy of the states that maintain a high consumer protection policy. Nevertheless, such a rule has been a subject of controversy and debate because it validates the choice of law and forum clauses in click-wrap consumer contracts. See Kestin (n 1) 71.

⁷⁹ Jacques Delisle and Elizabeth Trujillo, 'Consumer Protection in Transnational Contexts' (2010) 58 The American Journal of Comparative Law 135. However, it should be noted that the UCITA has been widely criticised in the US and has not been implemented by most States. See Kestin (n 1) 71

⁸⁰ Although courts in most US states have adopted a more procedural approach when validating the online choice of law agreement in consumer contracts, some states, such as Oregon and Louisiana, have maintained a high level of consumer protection by invalidating any foreign law other than the law where the consumer resides; Rühl (n 78).

⁸¹ *Omstead v Dell, Inc* 594 F 3d 1081 (9th Cir 2010).

⁸² Restatement Second of Conflict of Laws § 187 (1971).

⁸³ James J Healy, 'Consumer Protection Choice of Law: European Lessons for the United States' (2009) 19 Duke Journal of Comparative & International Law 535.

consumer protection laws.⁸⁴ On the other hand, the same criterion has been very narrowly interpreted by other courts where consumers were not given the proper protection against the validity of choice of law agreements. In conclusion, the application of §187 of the Restatement (Second) has not ensured the proper protection of consumers by the laws of their own jurisdictions.

In contrast, consumers might have much more protection under the substantive approach as it invalidates any contractual choice of law agreement in the consumer contract, regardless of whether the necessary steps have been taken by the seller to make the consumer aware of such a choice.⁸⁵ The typical implementation of such an approach in EU law will probably be done by the Rome I Regulation. According to Article 6 (2) of the Regulation, any contractual agreement to choose the governing law other than the law of the country where the consumer habitually resides will not be denied enforceability in principle.⁸⁶ At the same time, a consumer cannot be deprived of the mandatory protective rules afforded by the law of his country of residence.⁸⁷ Indeed, the level of protection that this Article provides might be the highest level that consumers might have ever been afforded worldwide.⁸⁸ In the author's opinion, the significance and advantageous returns of such a provision could be better reflected in the protection of consumers in online transactions. In other words, there could be some sensible grounds behind the doctrine of the freedom of choice between the parties in traditional face-to-face transactions and how, to some extent, it should not be nullified merely because one party is a consumer. Such a supposition would never be applicable to the choice of law made over a website because consumer choice in most website contracts is practically non-existent. Therefore, it can be argued that the substantive approach of Rome I Regulation could have the most advantageous consequences for consumers who make online purchases.

Article 25 of the ICLC does not provide any special rules for consumer contracts in terms of applicable law matters and neither does the Iraqi Consumer Protection Act. This point was

⁸⁴ For example, in both *Aral v EarthLink* 134 Cal App 4th 544 (Ct App 2005) and *Klussman v Cross Country Bank*, 134 Cal App 4th 1283 (Cal Ct App 2005) the Appellate Court of California denied the application of the choice of law agreement against the consumer on the ground that such an application would violate the State's fundamental policies.

⁸⁵ Hill (n 75) 193.

⁸⁶ Peter Rott, 'Cross-Border Collective Damage Action in the EU' in Fabrizio Cafaggi and Hans-W Micklitz (eds), *New Frontiers of Consumer Protection: The Interplay between Private and Public Enforcement* (Intersentia 2009) 379.

⁸⁷ *ibid* 390.

⁸⁸ The aim of achieving such a level of protection for the consumer in the EU is also confirmed in Recital 3 of the Consumer Rights Directive. See Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar Publishing 2013) 68.

analysed previously in Chapter five where consumer protection in terms of the jurisdiction clause was examined. From a procedural point of view, it is not significant to have different analysis for a jurisdiction agreement and an applicable law agreement. However, from a substantive perspective, it can be argued that the absence of special rules for consumer transactions in Iraqi law may have more unwanted implications for consumer protection from an applicable law point of view. More precisely, the absence of consumer protection rules in Iraqi law may not affect an Iraqi consumer's right to be litigated against before Iraqi courts because any contractual clause agreement which assigns a court to hear the dispute other than an Iraqi court will not be recognised according to Iraqi law.⁸⁹ However, the same analysis could not be applied to the choice of law agreement as different rules govern the applicable law and, unfortunately, these rules are too general. Further, its formulation suggests that its application is mandatory, with no distinction between businesses and consumers.

More specifically, Article 25 of the ICLC provides that the parties in their agreement may choose the applicable law, and such an agreement will be enforced and upheld by the hearing court. No special rules or exclusions are provided regarding the consumer contracts. The potential consequences of such a legislative gap could be very disadvantageous for consumers who use online platforms, such as electronic marketplaces or a manufacturer's website to buy products or services. In such scenarios, it is very likely that unwilling and probably unknowing consent is made to a choice of law clause. In this respect, the author suggests that the Iraqi lawmakers should have paid more attention to this point and prioritised consumer protection in international transactions.

In fact, the point of non-distinguishing between consumer and business transactions can be linked to another crucial point of analysis which might be specifically manifest in the internet environment. As it has been argued earlier, the global reach of the internet poses challenges to legal systems and how they should compromise with each other when dealing with conflict of laws issues. One of these challenges is in online consumer contracts. Similar to Iraqi law, there is no distinction between business and consumer contracts in traditional common law. Therefore, the choice of law clause in a consumer contract will be validated in the same way as B2B contracts.⁹⁰ For instance, in an online contract that was concluded over eBay's international website, www.eBay.com, between an English consumer and an American trader, the consumer, even if he succeeds in bringing proceedings before the English courts,

⁸⁹ See the writer's argument regarding this issue in Chapter 5.

⁹⁰ Hill (n 75) 94.

might not succeed in convincing the court to apply English law.⁹¹ Accordingly, he would not be immune from having the choice of law enforced against him which is usually the law of the seller.⁹² The aim behind reaching this point of analysis is to prove that when some areas of law interact with the internet they generate a unique set of challenges and these have become difficult for national and supranational laws to regulate. Consumer protection in respect of international contracts is one of the areas of law that requires international regulations.⁹³

Having analysed the two different legal approaches governing the consumer protection laws and their applicability to the online practice of consumer contracts, the argument can be made that taking the middle ground will provide the consumer with better protection, especially in the online environment. This argument mainly attempts to keep a balance as much as possible between the consumers' interests and the reinforcement of the parties' autonomy doctrine. It should be kept in mind that the ultimate protection of the consumer is the priority of such a notion.

The focal point of the analysis, that consumers should be litigated in their home country, should not always be extended to the applicable law sphere, and the presumption should not always be made that the best protective law is the law of the country where the consumer habitually resides. More clearly, according to the Rome I Regulation, the mandatory rules in the consumer's country of residence will be applied even if the contract includes the applicable law clause.⁹⁴ Here, one might wonder what the verdict would be if the applicable law clause incorporated in the online contract granted a level of protection for the consumer

⁹¹ Even if the consumer succeeded in convincing the court to nullify the choice of law clause, he might not succeed in his claim to apply English law. According to traditional English common law rules, courts apply the most proper law of the contract. Thus, it is not guaranteed that such a proper law will be the law of England and Wales. See Morris and Cheshire, 'The Proper Law of a Contract in the Conflict of Laws' (1940) 56 *The Law Quarterly Review* 820.

⁹² Hill suggests that in such a situation, the Rome I and Brussels Regulations will not apply because the defendant is not domiciled in any EU country nor does he have a branch agency. According to Hill, this does not mean that the jurisdiction or the applicable law clause will be validated against the consumer. Article 9 of the Unfair Terms in Consumer Contracts Regulation 1999 invalidates any contractual jurisdiction or applicable law clause between consumers resident in England or the EU and a trader from outside the EU if the contract has any close connection with England. Hill proposes that the contract would have a close connection with England if the goods have been delivered in England or any of the EU countries. See *ibid* 192, 201. However, due to the ease of the contracting process that the internet provides and the expansion of international shipping companies' coverage, it has become very expected for consumers to buy goods online and require delivery in different countries than the countries in which they reside. For example, an Iraqi consumer resident in England, enters into a contract with American trader to buy a product which is unreleased in Iraq and requests a shipment to Iraq. In such a scenario, if the dispute has arisen, the question will arise over how the close connection with England can be justified.

⁹³ In favour of the same argument see also Delisle and Trujillo (n 79).

⁹⁴ Rome I Regulation, art 6 (2).

which was higher than the protection afforded to him in his country of domicile or residence.⁹⁵ In fact, although the Preamble of the Rome I Regulation states a general rule that the consumer should always be protected by the rules which are more advantageous to his interest,⁹⁶ the legislatures of the Regulation have interpreted this general rule in a narrow manner in the Regulation's body of text. Therefore, the assumption is always that the best protective law in the consumer's favour is the law of the country where he or she resides.⁹⁷ In other words, it seems that courts would not enforce an applicable law clause in the consumer contract that deprives the consumer from being governed by the country of residence laws even if such a clause might be more advantageous for the consumer.

Arguably, in carefully considering consumer protection rules, especially in the online context, such a protection could be better achieved if the special mandatory consumer rules in jurisdiction and applicable law laid down in Rome I and Brussels Regulations were treated separately. In other words, it could be said that when coming to apply the obligatory consumer protection rules and invalidating any other agreement that contradicts with it, there should be a distinction between choice of court agreement and choice of law agreement. As for choice of court agreement, it is acknowledged that any clause that deprives the consumer from the ability to litigate the defendant in a court other than the courts of his domiciled country will be regarded as an infraction of consumer protection policy. The rationale behind this is that the cost of travelling to another country to litigate the trader might be too expensive for the consumer, who is the weaker party in the contract, especially when the dispute is about a low-value contract and the cost of litigation is more than that value.

The same basis may not hold true in the choice of law context. From that point of analysis, it can be argued that applying the law which would offer the consumer the highest level of protection could be fairer to the consumer, and might be more convenient for the enforcement of the judgment especially when the court applies the defendant's law as the best protective law to the consumer.⁹⁸ In that situation, when tackling an applicable law clause in consumer contract the court should examine first the substance of the chosen law, and if it is found that it grants a better protection to the consumer, the choice should be validated and enforced by

⁹⁵ For example, if the consumer remedies in the chosen law are better than those remedies guaranteed by the law of the consumer's habitual residence place.

⁹⁶ Paragraph 23 of the Preamble states that: 'As regard contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of laws rules that are more favourable to their interests than the general rules.'

⁹⁷ Zheng Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart Publishing 2009) 170.

⁹⁸ In favour of the same argument see Peter Nygh, *Autonomy in International Contracts* (Oxford University Press 1999).

the court. If the chosen law is not in favour of the consumer's interest, the court should apply its own laws. This proposition seems particularly suitable for online contracts where the consumer does not have the choice to negotiate the terms and conditions of the contract. In actual practice, the Court of Appeals in California applied a similar approach in *Kershenbaum v Buy.com Inc*,⁹⁹ where it reversed the District Court's judgment regarding the denial of class action certification due to the impossibility of applying the law of each state where the consumers resided. The Appeals Court stressed that applying California's law to all plaintiffs would be more advantageous to the consumers because it granted a higher standard of protection than their personal laws.¹⁰⁰

6.3.1.3 Online Consumer-to-Consumer Contracts

Choice of law rules for C2C contracts have not yet been legislated on,¹⁰¹ and this may be because they are comparatively of small value and they rarely come before a court. In the physical world, sales contracts between two consumers happen only occasionally and are limited to specific instances.¹⁰² However, in the internet environment, such types of contracts have become more popular and are more prevalent on electronic marketplaces such as eBay.¹⁰³ In addition, the convenience which the online platforms provide may have led many users to find themselves involved in an internet sale at some point. Some users may have found it difficult to contact house clearance services to get rid of their unwanted belongings or may have felt unhappy with the very low prices offered. Online, very little effort is needed to post items, only a few photos and an internet connection.¹⁰⁴ As a result, the framework of

⁹⁹ *Kershenbaum v Buy.com Inc* 2010 WL 3800339 (Cal App 4 Dist)

¹⁰⁰ See also Symeon C Symeonides, 'Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey' (2011) 59 *American Journal of Comparative Law* 303.

¹⁰¹ Uta Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity* (Cambridge University Press 2007) 68.

¹⁰² In the UK, a car-boot sale is a place where consumers buy and sell items to each other. Usually, the sellers there are consumers who want to get rid of personal belongings and they sell these at cheap prices to other consumers. The writer has made an analogy between car-boot sales and eBay sales as an example of traditional C2C contracts and online C2C contracts. See Chapter 5 of this thesis.

¹⁰³ See the Policy Statement of the International Chamber of Commerce, 'Jurisdiction, and Applicable Law in Electronic Commerce' (Document ECP/AH1-100 Final, 6 June 2001) <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2001/Jurisdiction-and-applicable-law-in-electronic-commerce/>> accessed 12 May 2014.

¹⁰⁴ Nowadays, electronic marketplaces such as eBay and Amazon have designed mobile phone apps which offer the possibility of selling items directly from a mobile device without any need to use the website. For example, eBay's working app in Apple branded products (iPhone, iPod, and iPad) provides a wide range of options in order to facilitate the online selling process for the seller. The mobile app enables the sellers to choose the selling format (auction, buy it now with a fixed price, buy it now with the option of 'make offer'), selecting the

the C2C transaction has expanded with this activity. Many problems have emerged because of this, and this has meant that there have been many unsuccessful settlements of disputes.¹⁰⁵

In the EU, much effort has been made to propose consumer-friendly rules in order to protect consumers from arbitrary contractual terms and conditions of businesses. However, not enough attention has been paid to protecting weak consumers from other more professional or experienced consumers.¹⁰⁶ From a conflict of laws point of view, no regulatory legal framework within EU law yet exists regarding the jurisdiction and applicable law issues for C2C transactions.¹⁰⁷ Neither Brussels nor Rome I Regulations provide any rules regarding such a category of sales contracts.¹⁰⁸ As mentioned above, the reason for this is the rareness of the disputes that arise out of such contracts in daily life. The same legislative gap can be

method of shipment, declaring whether return is accepted or not, providing the item's specifications, and space for the seller to include the item's description or any other contractual terms and conditions that the seller would like to add.

¹⁰⁵ See the regular reports from the European Consumer Centre Network about complaints by European consumers about the European online marketplace. These are available at http://ec.europa.eu/consumers/ecc/news_en.htm accessed 12 May 2014. For example in 2011, the Centre received many complaints from online consumers about problems regarding topics such as the delivery, display of prices and description of goods and services. The 2011 report is available to view through the following link http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf accessed 12 May 2014.

¹⁰⁶ This issue was first addressed in 2004 by the European Consumer Centre Network in its report, 'The European Online Marketplace Consumer Complaints'. See page 21 of the report http://ec.europa.eu/consumers/redress/ecc_network/european_online_marketplace2004.pdf last visited in 18-04-2013> accessed 5 December 2013. Most recently, the European Commission also mentioned the legislative gap regarding this category of online contracts. See the 'First Report from the Commission to the European Parliament, the Council and the European Economic and Social' COM (2013) 139 final on the Application of Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practice Directive), an online copy is available for download at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0139:FIN:EN:PDF> accessed 12 May 2014. Those categories of consumers are also called 'hybrid consumers' or 'merchant consumers' See Christine Riefa and Julia Hörnle, 'The Changing Face of Electronic Consumer in the Twenty-First Century: Fit for Purpose?' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (Hart Publishing 2009) 59 ; Ivonnely Colon-Fun, 'Protecting The New Face of Entrepreneurship: Online Appropriate Dispute Resolution and International Consumer-to-Consumer Online Transaction' (2007) 112 *Fordham J Corp & Fin L* 233. According to the existing approach of the consumer definition in the EU instruments, a user who is involved in the process of buying and selling on the internet cannot be categorised as a small or medium-sized business. At the same time, the protection does not also cover those small individual traders against professional large-sized businesses; see Peter Rott, Hans-W Micklitz and Norbert Reich, *Understanding EU Consumer Law* (Intersentia 2009) 47. This point has been analysed in-depth in Chapter 5 of this thesis, see the analysis in the Chapter 5 of this thesis.

¹⁰⁷ Francisco Garcimarbín Alfèrez, 'The Rome I Regulation: Much Ado About Nothing?' (2008) 2 *The European Legal Forum I-61* <http://www.simons-law.com/library/pdf/e/884.pdf> accessed 12 May 2014.

¹⁰⁸ Hörnle (n 78). Generally speaking, the extension of the EU's consumer protection laws to C2C transactions is still an ongoing debate. See COM (2013) 139 final (n 105), para 3.2.1 (Need for extension beyond business-to-consumer transactions). However, in Germany, courts have applied the consumer protection directives to C2C transactions. See Jan M Smits, 'The Complexity of Transnational Law: Coherence and Fragmentation of Private Law' (2010) 14 *Electronic Journal of Comparative Law* 1 <http://www.ejcl.org/143/art143-14.pdf> accessed 12 May 2014; Xandra E Krammer, 'Small Claim, Simple Recovery? The European Small Claims Procedure and its Implementation in the Member States' (2011) 12 *Journal of European Law* 119 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976292 accessed 12 May 2014.

found under US law.¹⁰⁹ In Iraq, Article 25 does not make any clear distinction between business contracts and consumer contracts and this is indeed a considerable legislative gap that Iraqi lawmakers should have addressed. As a result, judges in Iraq apply the same applicable law rules set out in Article 25 of the ICLC.

Arguably, it is possible to say that applicable law in online C2C contracts could be the less significant part of online contracting problems. Indeed, it might seem very rare, in practice, to imagine that an explicit choice of law clause is included in such types of online contracts. Both parties are using a facilitator's website and are given no choice on the applicable law. The question that can be asked is whether online C2C contracts which usually take place over a facilitator website, such as eBay or Amazon, include choice of court and law clauses in their terms and conditions of their user agreement. Accordingly, by agreeing to the website terms and conditions the user will be bound by them and any dispute between the users will be governed by the applicable law and jurisdiction clause incorporated in these terms and conditions. This point has been analysed previously in Chapter 5 and the conclusion that was drawn was that any choice of law or choice of court clause in an electronic marketplace user agreement does not regulate the dispute between the users themselves. Rather, it is intended to govern any dispute between the users and the website itself.¹¹⁰ Under those circumstances, it can be said that online C2C contracts often lack an explicit choice of law agreement and, accordingly, no explicit choice of law rules, from a practical point of view, can apply to such kinds of online contracts.

The point that may be considered relevant here is whether the implicit choice of law can be deduced from the online C2C contract over an electronic marketplace. Different factors can be relied upon to reach the parties' inferred choice of applicable law in an online contract between two consumers; for instance, intentionally using eBay US or eBay France websites while residing in the UK might be a justifiable factor to infer the implicit agreement to US or French law. Another factor could be the applicable law clause in the website's terms and conditions. Although the conclusion has been drawn that these terms and conditions do not

¹⁰⁹ See Delisle and Trujillo (n 79).

¹¹⁰ See also Christine Riefa, 'To Be or Not to Be an Auctioneer?' Some Thoughts on the Legal Nature of Online 'eBay' Auctions and the Protection of Consumers' (2008) 31 *Journal of Consumer Policy* 167. For example, eBay UK's terms and conditions provide that: 'if any dispute arises between you and eBay ...' Therefore, it is clearly stated that the governing law and jurisdiction clause are set forth to regulate any dispute between the user and eBay but not the disputes between the users themselves. A similar formulation is provided by eBay US's terms and conditions about the applicable law, which is worded as following: 'You agree that the laws of the State of Utah, without regard to principles of conflict of laws, will govern the User Agreement and any claim or dispute that has arisen or may arise between you and eBay, except as otherwise stated in the User Agreement.'

govern the transactions between users, however, the fact of agreeing to these terms and conditions individually may be another reason to use the same applicable law clause in the user agreement. In any event, no considerable legal questions may be posed when analysing the online C2C contracts regarding the choice of law agreement, and it might be pointless to go any further in this analysis.

6.3.2 The Absence of Online Choice-of-Law Agreement

In the internet environment, when a contract lacks the explicit or the implicit choice of the parties, determining the governing law of the dispute could be more difficult.¹¹¹ The place and the time of contracting, and the geographical location of the parties can play a vital role in determining the proper law applicable to the contract.¹¹² Identifying the time and the place of the contract can be regarded, in itself, as another controversial point in the online practice, especially if the consideration of the contract is intangible goods that require a delivery in intangible places.¹¹³

Legal norms governing the applicable law in case of the absence of the choice of law agreement vary from one jurisdiction to another.¹¹⁴ This has been demonstrated by this thesis with the EU harmonised rules; the US mixed approach of traditional conflict of laws rules and internet-specific choice of law rules; and the unadulterated traditional private international law approach in Iraq. The method of classifying the sections according to the type of online contracts: B2B, B2C and C2C, might be the better approach to show the application of existing legal rules to online contracting scenarios in diverse legal regimes. At the same time, it could be the most sensible way to demonstrate the legislative gaps that Iraqi law should address.

6.3.2.1 Online Business-to-Business Contracts

In the world of business, when any dispute arises out of an international commercial contract, the applicable law may vary between national laws, rules of international conventions and the

¹¹¹ Wang (n 43) 140.

¹¹² David McClean and Kisch Beevers, *The Conflict of Laws* (17th edn, Thomson Reuters Limited 2009) 354.

¹¹³ Wang (n 43) 139.

¹¹⁴ In fact, common law rules give more flexibility to the courts to find the most proper law applicable to the international contract. Under the Iraqi civil law system, the law applicable to the contract in case of the absence of choice is the law of contracting country.

organisational norms of some international entities such as the International Chamber of Commerce (ICC) and the World Trade Organization (WTO) depending on the contractual parties' choice and the countries to which they belong.¹¹⁵ For example, some have suggested that in case of an absence of a choice of law agreement in most online B2B contracts, the governing law would be the rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and its complementary counterpart the CUECIC.¹¹⁶ Indeed, this notion may apply very typically to traditional B2B contracts and some categories of online B2B contracts.¹¹⁷ It might be less relevant where the website contract is between two individual businesses or between online retailers and individual businesses. In other words, the author agrees with the notion that in the absence of the choice of law agreement, the contract can be governed by the CISG as the default rules in international commercial contracts.¹¹⁸ However, at the same time, attention should be drawn again to a very crucial point that has been mentioned in previous chapters. The traditional meaning of the B2B contract, which always takes place between big corporations and businesses, is not the only format in the online realm, and this is a feature of the internet that sometimes throws doubt on the application of existing legal norms. The contract between a small local retailer and a large firm on a website is also categorised as a B2B contract.¹¹⁹

In such a case, in the absence of choice of law, it becomes more relevant to examine and analyse traditional rules of conflict of laws than international conventional and organisational rules. Hence, it should be stressed that the analysis below will focus on B2B contracts which take place on websites and electronic marketplaces rather than traditional contracts between

¹¹⁵ Wang (n 43) 15. The approach of submitting the international contracts to the international conventional or organisational rules has also been upheld by the European Commission. However, the Commission was in favour of proposing unified rules for European sale contracts. In 2011, the Commission drafted a proposal COM (2011) 635 final for a Regulation of the European Parliament and of the Council on a Common European Sales Law. However, as part of the discussions about the implementation of this Regulation, some difficulties regarding the application of the proposal were pointed out by the European Economic and Social Committee. Among the issues that the Committee pointed out was that more attention should be paid to consumers and small and medium-sized businesses in the proposal. Indeed, in some practices of online contracting, individuals or small businesses are regarded as consumers and this is one of the problematic features of internet contracting cases which should be taken into consideration. The European Economic and Social Committee's discussion regarding the draft proposal is available on the Committee's official website <<http://www.eesc.europa.eu/?i=portal.en.int-opinions.20443>> accessed 12 May 2014.

¹¹⁶ See Wang (n 43) 15. For example: *Forestal Guarani SA v Daros Intern, Inc* 613 F3d 395 (3rd Cir 2010).

¹¹⁷ For instance, contracts concluded between two businesses upon the completion of negotiations and exchange of sale documents by electronic means of communication other than a website, such as email and fax.

¹¹⁸ Wang (n 43) 15.

¹¹⁹ See the author's classification of contracts that take place over the internet and electronic marketplaces in Chapter 5 of this thesis (n 68).

big corporations that could be concluded by another means of online communication, such as emails or faxes.

Generally speaking, the absence of the choice of law agreement in online B2B contracts over a website can be imagined in two ways. First, if the website terms and conditions lack a clause which determines the applicable law in case any dispute arises out of using the website between the user and the website operator. Second, if for any reason, the court considers the applicable law clause as an invalid contractual term. In these situations, the court should find the appropriate law in order to apply to the online contract. Where the contract is concluded over a website with unknown location and performed in an intangible place,¹²⁰ applying the existing norms might be difficult.

In the EU, the Rome I Regulation is the governing instrument of the applicable law matters in civil and commercial cases, and it does not address specifically online contracting cases.¹²¹ The general rule set out in Article 4 (1) of the Regulation seems very applicable to online B2B contracts.¹²² According to Article 4 (1), the applicable law on the contract should be determined according to the law of the country where the seller has its habitual residence. Indeed, identifying the country where the seller habitually resides is not such an ambiguous matter even in website contracting cases. As for businesses that pursue commercial activities within the EU Member States via websites, they are required by the European E-commerce Directive to make the geographic address where they are established available on their websites.¹²³ The same requirement has been implemented by the Consumer Rights Directive.¹²⁴

Even for businesses that use a third party platform for selling products online, such as eBay or Amazon, determining the place of their residence is not such a problematic issue. For example, to start selling and buying on eBay, the user is required to complete a membership registration process and open a PayPal account as this is eBay's principal method of making and receiving payments. eBay's registration prerequisites require the user to reveal his

¹²⁰ The performance of the contract in unknown places can be invoked in case of the delivery of intangible goods. For instance, a contract for buying software which is usually done instantly by downloading the software to the hard disk of the computer.

¹²¹ Wang (n 43) 141.

¹²² This notion was first upheld by experts at the Hague Conference on Private International Law in September 1999 in the 'Geneva Round Table on Electronic Commerce and Private International Law' held at Geneva University. See the released paper from the Round Table (Paragraph 3) <<http://cuiwww.unige.ch/~billard/ipilec/pressre.html>> accessed 12 May 2014.

¹²³ E-commerce Directive, art 5.

¹²⁴ *ibid* art 5 (b).

business address and this should match the user's address in the PayPal account.¹²⁵ Therefore, it seems very useful to apply the place of the seller's habitual residence as a connecting factor for the purposes of determining the applicable law. However, more flexibility is given to the courts by the Rome I Regulation in Article 4 (3), with which they may apply the law of any other country other than the law of the country where the seller habitually resides if it appears to the court that the contract is most closely connected to that country.¹²⁶ In the online environment, the application of this rule might be very appropriate, especially in cases where all the contract's elements are in a country other than the seller's place of residence.

However, arguably, the problematic point regarding the application of the Rome I Regulation to online B2B contracts within EU Member States may appear under Article 4 (g) of the Regulation which deals with the law applicable to the auction sales. Historically, the law of the place where the auction occurs has been applied to the contracts of sale made via an auction process.¹²⁷ The same approach has been implemented in the Rome I Regulation, which provides that the law applicable to auction sales is the law of the country where the auction is held.¹²⁸ Over the last decade, since the prevalence of auction sales on websites such as eBay and Yahoo!,¹²⁹ the question of the applicable law over such kinds of transactions has frequently been made as a matter of private international law.¹³⁰

Nevertheless, as far as online B2B transactions are concerned, it seems that whether the contract takes place over a website directly or by an auction process does not make any meaningful difference from a conflict of laws perspective. In other words, the process by which the online contract is done should not be considered an important factor for the hearing court, whether auction or not, because the key issue for the court is to find a proper connecting factor and apply an appropriate law to the online contract.¹³¹ Accordingly, determining the place where the online contract is made will remain a central issue regardless

¹²⁵ See eBay's rules on business accounts <<http://pages.ebay.co.uk/businesscentre/identification/>> accessed 12 May 2014.

¹²⁶ Recital 15 of the Rome Regulation makes it clear that this rule should apply regardless of whether the contractual parties have incorporated a choice of court agreement into their contract.

¹²⁷ Christina Ramberg, *Internet Marketplaces: The Law of Auction and Exchange Online* (Oxford University Press 2002) 69.

¹²⁸ Article 4 (g) of the Rome Regulation: 'A contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined.'

¹²⁹ Yahoo stopped running its auction services in the US, Canada and the UK. However, the service is still running in Honk Kong, Taiwan and Japan.

¹³⁰ Ramberg (n 127) 69.

¹³¹ The Rome I Regulation does not provide any further interpretation for the reason behind assigning a different connecting factor to govern the law applicable to the sales contract that take place via an auction process. This may require further research; however, it is beyond the scope of this thesis.

of the process by which the contract has been made over a website. Nonetheless, at least theoretically, the question that could still be asked here is how to determine the place of the country in which the auction takes place in case of online auctions such as those on eBay.

Some eBay auction sales can be categorised as typical B2B sales, especially auction sales of high-value items, such as antiques or rare additions of paintings. In these cases, identifying the place of an online auction contract could be very problematic, for instance, if the contract is between a Swedish antiques collector who buys a medieval vase from a French seller over eBay UK. The answer to this question would depend on whether or not the law considers the online auction a traditional auction. Resolving this issue is beyond the scope of this thesis; in any case, it is difficult to decide whether online auctions are the same as traditional auctions because there is no case law that clarifies this.¹³² The European Parliament and the Council included a definition for the term ‘auction’ in the Proposal for a Directive on Consumer Rights.¹³³ Article 2 (15) provides that:

Auction means a method of sale where goods or services are offered by the trader through a competitive bidding procedure, which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the bases of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction.

According to this definition, it is clear that online auctions are considered the same as traditional auctions.¹³⁴ When the Proposal was approved and became a Community directive in October 2011, this definition was removed from the body of the text.¹³⁵ Under those circumstances, the application of Article 4 (g) of the Rome Regulation to the online B2B auction sale remains a problematic issue, and further interpretation may be required by the European Commission regarding this point.

Moreover, where the internet has greatly facilitated the conclusion of international sale contracts, the relation between the Rome I Regulation and non-EU countries has remained a

¹³² See Riefa (n 110); see also Ramberg (n 127) 35-59.

¹³³ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights COM (2008) 614 final.

¹³⁴ Christine Reifa, ‘Recommended Changes to the Definitions of ‘auction’ and ‘public auction’ in the proposal for Directive on Consumer Rights’ in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 378.

¹³⁵ According to Recital 24 of the Consumer Rights Directive, using electronic marketplaces to sell an item through a bidding process will not be considered a public auction. Recital 24 of the Directive reads as follows: ‘[T]he use of online platforms for auction process which are at the disposal of consumers and traders should not be considered as a public auction within the meaning of this Directive’.

major question. Unlike the Brussels Regulation, Rome I Regulation does not provide a clear provision regarding the applicable law in case of conflict between the law of a Member State and the law of a non-Member State.¹³⁶ The position can be concluded tacitly from Article 4 (4) of the Regulation, which provides that the law of the country to which the contract has the closest nexus will be applied if it is determined that the applicable law pursuant to paragraphs 1 and 2 of the Regulation cannot be used.¹³⁷ In all situations, the application of this rule to online B2B contracts may seem problematic. The most closely connected country to the contract will be determined in case of contracts that take place over websites or virtual marketplaces by one of these connecting factors: the place of contracting, the place of contract performance, the place of the parties' domicile, the place of the seller's residence, or the law of the hearing court (law of the forum).¹³⁸

Unlike the Brussels regime, the Rome I Regulation does not leave it to the national law of each Member State to determine the applicable law according to the applied connecting factors in each country. Accordingly, in a case between an EU Member State and a non-Member State, if the court of the EU country hears the dispute, it will look for the law of the country to which the online contract is most closely connected. This is the case even if the national private international rules in the forum's law provide that the contract should, for example, be governed by the law of the country where the contract has been concluded. It appears that the Regulation aims to give the national courts of the Member States the discretion to find the most appropriate law in each case separately rather than restricting it with a connecting factor, such as the place of concluding the contract or its performance. In the author's view, the principle of 'most closely connected' seems justifiable in the online context and is a suitable ground for determining the applicable law. The Regulation does not provide any interpretation for the term 'most closely connected' nor has the ECJ had the occasion to do so. Consequently, it is argued that the Regulation should have provided more interpretation for the term 'most closely connected' like the Brussels Regulation did when it provided an interpretation for the 'place of the contract performance', with the possibility of applying another law if the court finds it is more appropriate than the assumed applicable law.

¹³⁶ See the website of European Consumer Centre about the risks of buying from a non-EU trader, especially on websites and its implication to the application of EU consumer protection law <<http://www.eccireland.ie/popular-consumer-topics/shopping-online/>> accessed 12 May 2014.

¹³⁷ Article 4 (4) of the Rome I Regulation: 'Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country which it most closely connected.'

¹³⁸ Al-Hajjaj (n 19).

The significance of such an argument is clear as it gives more certainty and stability to rules of private international law.

In the US, in case of the absence of a valid choice of law agreement, the constitutional rules of each state have relied upon different connecting factors.¹³⁹ While some States prefer to rely on the place where the contract was made; others deem the place of contract performance as the most proper law.¹⁴⁰ On the other hand, the UCC provides that the law of the State which has the closest connection with the transaction should apply to any disputes arise out of such transactions.¹⁴¹ In short, though different states have applied different connecting factors, the overall statutory rule is not substantively different from the ‘closest connection principle’ adopted in the Rome I Regulation.¹⁴² Under the Restatement Second of Conflict of Laws, which is applied in most of the states,¹⁴³ ‘the law of state/country that has the most significant relationship to the transaction and the parties’¹⁴⁴ will apply to the contract. Under those circumstances, US courts are not confined by a single approach to find the proper applicable law, but rather all the contractual factors, such as the place of contracting, performance, the subject matter of the transaction and the location of the parties can be taken into consideration to apply the most appropriate law.¹⁴⁵ Nevertheless, in all cases and whatever the connecting factor used to determine the applicable law, there should be a reasonable connection between the contract and the state or the country whose law has been applied.¹⁴⁶ In the author’s opinion, the advantages of applying such a flexible approach in online contracting cases are greater than the disadvantages. The special characteristics of online contracts leads to the conclusion that applying one single factor might not always result in successful and effective outcomes. It would be more fruitful to allow the court to find the country to which the online contract is ‘most closely connected’ or which has ‘the most significant relationship’ rather than making a definite legal assumption, such as the place of contracting or the place of performance.

¹³⁹ Born and Rutledge (n 55)777; Czigler (n 36) 193.

¹⁴⁰ Fawcett and Carruthers (n 4) 666; Czigler (n 36) 193-203.

¹⁴¹ Delisle and Trujillo (n 79). The same provision is stated in Statement Second of Conflict of Laws, see Svantesson (n 57) 187.

¹⁴² Alan Reed, ‘The Rome I Regulation and Reapproachment of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism Over Theory’ (2011) 23 Florida Journal of International Law 360; Volker Behr, ‘Rome I Regulation: A –Mostly- Unified Private International Law of Contractual Relationships within – Most- of the European Union’ (2011) 29 Journal of Law and Commerce 233; Wang (n 43) 147.

¹⁴³ Svantesson (n 57) 186.

¹⁴⁴ §188 of the Restatement (Second) of Conflict of Laws (1971).

¹⁴⁵ See Patrick L Stein, ‘Choice of Law: Defining the Place of Performance for General Contract Disputes’ (2011) 64 Oklahoma Law Review 17; Czigler (n 36) 193.

¹⁴⁶ §187 (2) S Restatement (Second) of Conflict of Laws (1971) See Wang (n 43) 145.

In Iraq, Article 25 of the ICLC provides that in case of the absence of a choice of law, the contract will be governed by the law of the country where both parties reside at the time of concluding the contract.¹⁴⁷ If the contractual parties reside in different countries at the time of concluding the contract, the law of the country where the contract is concluded will apply.¹⁴⁸ In international online contracts, contractual parties most likely belong to different countries and accordingly the place of contracting should apply.¹⁴⁹ However, the application of the place of concluding the contract as a connecting factor might not be fruitful in the online context because it is difficult to determine such a place in contracts that take place over websites or electronic marketplaces.¹⁵⁰ To some extent, this notion seems sensible. However, it might be argued that under Iraqi law, after the enactment of the IESTA, such a determination has not remained a controversial issue.¹⁵¹ This is because the new Act drew a clear line for some factors which can act as complementary bases along with Article 87 of the ICLC, in order for the proper determination of the place of online contract conclusion.¹⁵²

Undoubtedly, this conclusion is undeniable for most kinds of online contracts, such as telephone contracts, fax contracts or email contracts. Nevertheless, the question that might be posed and needs consideration is whether these rules can successfully be applied to determine the place of contract done over a website with an unknown location. In order to find an answer to this question, it might be better to scrutinise Article 87 of the ICLC and Article 21 of the IESTA, to see whether they can effectively be applied to website contracts.

Article 87 ICLC provides that:

1. A contract between parties at distance shall be concluded at the time, and in the place where the offeror gets informed with offeree's acceptance unless stated by agreement that any other provisions are applicable.
2. Such a determination supposed to have been done at the time and in the place where the acceptance has been received.¹⁵³

¹⁴⁷ See (n 31).

¹⁴⁸ *ibid*

¹⁴⁹ However, it is not necessary for parties to international contracts to reside in different countries. For example, there may be a contract between two parties from the same country but performed in another country and this would also be categorised as an international contract.

¹⁵⁰ Al-Haijaa (n 19) 120.

¹⁵¹ See the writer's argument in Chapter 5, pages 174,175.

¹⁵² This notion has been discussed in-depth in Chapter 5.

¹⁵³ المادة (٨٧) من القانون المدني العراقي: " ١ . يعتبر التعاقد ما بين غائبين قد تم في المكان والزمان اللذين يعلم فيهما الموجب بالقبول ما لم يوجد اتفاق صريح أو ضمني أو نص قانوني يقضي بغير ذلك. ٢ . ويكون مفروضاً ان الموجب قد علم بالقبول في المكان و الزمان اللذين وصل اليه فيهما".

[Article (87) of Iraqi Civil Code Act: '1. A contract between parties at distance shall be concluded at the time, and in the place where the offeror gets informed with offeree's acceptance unless stated by agreement any other

Accordingly, distance contracts under Iraqi law will be concluded at the place where the offeror receives the offeree's acceptance. Owing to the ambiguity which such a general rule might create in the electronic environment, and in order to provide legal certainty for online contracts, the IESTA laid down new supplementary rules to determine specifically the place of dispatching and the place of receiving electronic documents. Based on Article 21 of the Act, electronic documents will be deemed sent from the place where the dispatcher has its principal business, and will be received in the place where the recipient has its principal business.¹⁵⁴

In order to apply such a statutory rule to determine the place of concluding contracts made over websites or electronic marketplaces, the term 'electronic documents' which has been used in the Act should be examined first to see whether it can be applied to such kinds of online contracts. In other words, are there any electronic documents in website contracts that can correspond to the meaning of Article 21 of IESTA? In addition, assuming that the meaning of 'electronic documents' is inclusive of all types of electronic contracting means, including instant online communication and contracting via websites, it must be determined the extent to which the place of the dispatcher and the place of the recipient are appropriate and relevant for locating the place of business of the operator of the website or electronic marketplace.

Regarding the first issue, Article 1 (8) of the IESTA defines the electronic document in the following way:

provision. 2. Such a determination supposed to have been done at the time and in the place where the acceptance has been received.^{2]}

المادة (٢١) من قانون التوقيع الإلكتروني والمعاملات الإلكترونية العراقي: " أو لاً- تعد المستندات الألكترونية قد أرسلت من المكان الذي يقع فيه مقر عمل الموقع و انها أستلمت في المكان الذي يقع فيه مقر عمل المرسل اليه و اذا لم يكن لأي منهما مقر عمل يعد محل الإقامة مقراً للعمل ما لم يكن الموقع والمرسل اليه قد اتفقا على غير ذلك. ثانياً- اذا كان للموقع او المرسل اليه اكثر من مقر عمل فيعد المقر الأقرب صلة بالمعاملة هو مكان الأرسال او التسلم وعند تعذر التحديد يعد مقر العمل الرئيسي هو مكان الأرسال والتسليم."

[Article (21) of the IESTA: '1. Electronic documents will be considered sent from the place where the signer has its principal place of business and will be received in the place where the recipient has its principal place of business. If the determination of the place of their business is impossible, the place of their residence will be relied upon instead unless the parties have agreed to different provision. 2. If the parties have more than one place of business, the place that is most closely connected to the transaction, will be applied. If the determination of the most closely connected place is impossible, the business headquarter of the parties will be regarded the assumed place of dispatch and receipt.'^{2]}

Any document or script that can be generated, integrated, stored, sent or receipted wholly or partially by electronic means, including the exchange of electronic data by email, telex, or scanner, and should bear an electronic signature.¹⁵⁵

Article 13 of the IESTA requires electronic documents to meet three stipulations in order for them to have the same validity as traditional documents: (a) the message of information should be storable on the information system's database and should be able to be retrieved at any time; (b) the message of information should be able to be stored exactly in the same form on the date of forming, sending, and receiving it; (c) the message of information should include a definite indication to the parties who sent and received it and the date and time of dispatch and receipt.¹⁵⁶

At first glance, it appears that the contracting process over websites or electronic marketplaces may not satisfy the requirements of 'electronic documents' within the meaning of Articles 1 and 13 of the IESTA. Indeed, this may seem true regarding the websites' click-wrap and browse-wrap user agreements. In the previous chapter, it was emphasised that online contracting on a website is much broader than merely placing orders to buy different kinds of products. Online contracting is done instantly only by entering into a website and agreeing to its terms and conditions of use (the user agreement).

It seems difficult to say that there is any kind of electronic document in this type of contracting that may correspond with the requirements of Article 13 of IESTA. Under those circumstances, the determination of the place where the online contract is concluded could be more problematic. As for the online contracting process over electronic marketplaces or websites, which entails that the sale contract is entered into instantly by merely adding the items to the shopping basket, entering the details of payment and placing an order, the analysis could be different. It may also appear that no electronic documents exist to that

المادة ١- ١- تأمناً من قانون التوقيع الإلكتروني والمعاملات الإلكترونية: "المستندات الإلكترونية: المحررات والوثائق التي تنشأ أو تدمج أو تخزن أو ترسل أو تستقبل كلياً أو جزئياً بوسائل الكترونية بما في ذلك تبادل البيانات الكترونياً أو البريد الإلكتروني أو البرق أو التلكس أو النسخ الرقمي ويحمل توقيعاً إلكترونياً".

المادة ١٣- من قانون التوقيع الإلكتروني والمعاملات الإلكترونية: "أولاً- تكون للمستندات الإلكترونية والكتابة الإلكترونية والعقود الإلكترونية ذات الحجية القانونية لمثيلاتها الورقية إذا توافرت فيها الشروط الآتية: (أ) ان تكون المعلومات الواردة فيها قابلة للحفظ والتخزين بحيث يمكن أسترجاعها في أي وقتز (ب) امكانية الاحتفاظ بها بالشكل الذي تم انشاؤها او ارسالها او تسلمها به او بأي شكل يسهل به اثبات دقة المعلومات التي وردت فيها عند انشائها او ارسالها او تسلمها بما لا يقبل التعديل بالاضافة او الحذف. (ج) ان تكون المعلومات الواردة فيها دالة على من ينشأها أو يتسلمها وتاريخ ووقت ارسالها وتسلمها.

[Article 13 (1) of the IESTA 'Any agreement by electronic communication or by exchange of electronic documents, shall be equivalent to the paper contract if the following requirements have been met: (a) the message of information should be storable on the information system and can be retrieved at any time. (b) The message of information should be possible to be stored exactly in the same form on the date of forming, sending, and receipting it. (c) The message of information should include a definite indication of the parties who sent and received it and the date and time of dispatch and receipt.']

match the meaning of Article 13, but in fact there is only encrypted computer-generated language that probably cannot be stored and retrieved when needed. However, it is worth noting that in almost all web sale contracts, when the buyer places his order, he receives a confirmation email from the seller regarding the transaction, including the name of the seller, name of the buyer, the quantity of the purchased item, the price paid and the estimated delivery date.¹⁵⁷ Certainly, in such a case, the email notification which the buyer receives will satisfy the requirements of electronic documents, and will be given the same validity as traditional documents. Consequently, the online contract will be enforceable in the same way as the paper contract. In any event, the application of the place of dispatch and the place of receipt of electronic documents might not raise any controversy for determining the place of concluding online contracts under Iraqi law.

This is not the only point. The larger question that might arise is how the determination of the place of the contractual parties would be relevant to the website over which the transaction has been made. In addition, it needs to be determined the extent to which the law of the country where the offeror receives the offeree's acceptance is pertinent to the online website contract itself. It is submitted that the place of concluding the contract is not a suitable connecting factor for website contracts.¹⁵⁸ This is probably not necessarily true for the other types of online contracts. In order to clarify this argument, it will be useful to provide a scenario.

An online contract is created between an Iraqi importer and an American supplier who has places of business in the US and China, over a website with a domain name ending in.com which is run by marketers resident in the UK, for goods to be shipped to and delivered in Iraq. According to a combination of Article 87 of the ICLC and Article 21 of the IESTA, the contract will be deemed concluded in the country where the US supplier has its business. In this case, the place of concluding the contract will depend on the country where the seller, the US supplier, receives the buyer's web order (the acceptance).

The first point that should be made is that English law will be excluded from the application even though technically the web order was first received in the UK as the website's server

¹⁵⁷ In addition to sending confirmation emails, some websites enable buyers to print out the invoice instantly from the computer screen or save a copy to the buyer's computer. For example, www.apple.com and www.apple.co.uk always send confirmation emails as well as direct invoices with the print out or save option to the computer.

¹⁵⁸ See also Svantesson (n 57) 331.

and marketers are based there.¹⁵⁹ Secondly, the contract has the possibility of being concluded either in the US or in China, depending on the seller's residence at the time of receiving the website order. Thirdly, not surprisingly, the contract might also be concluded in the two countries at the same time because the website order can be viewed in the buyer's online receipt system simultaneously and instantly in the two countries. Article 21 of IESTA provides that, where the recipient has more than one place of business, the place that is most closely connected to the transaction will be relied upon. However, if the latter place is difficult to be determined by the court, the principal place of business will be regarded as the place of concluding the contract.

The general rule provided by Article 21 seems very useful because it provides a good alternative at the final stage, which is the principal place of business (headquarters) and this cannot be considered a debatable matter for the court hearing the dispute.¹⁶⁰ However, some have argued that determining the main place where the website is administrated is not always such an easy task in the realm of electronic commerce.¹⁶¹ More specifically, an electronic marketplace can be owned and run by more than one company and each company might have a presence in different countries. Therefore, the website could be administrated from more than one country.

The crucial point here is to distinguish between the main administration place of the business and the principal business place (headquarters). At first glance, this might appear to be splitting hairs. When it comes to the internet environment, the notion could have some sensible justifications. In the conventional practice of trade, the main place where the administrative decisions controlling the commercial activities are made is usually the same place where the headquarters of the company is located. However, in internet practice, the website being operated and controlled from a particular country does not necessarily mean that the principal place of the business and its assets are located in the same country.

It seems necessary when discussing the place of business in the electronic commerce realm to make a distinction between the place of administrating the business itself, and the place of administrating the website or electronic marketplace. The latter place could be the places

¹⁵⁹ If the new IESTA had not been enacted, the application of English law would have been possible. Indeed, to some extent, the enactment of the new Act has provided good harmonisation of the Iraqi Private International Law. However, no adequate legal certainty and predictability can still be guaranteed by relying upon the place of concluding the contract as a connecting factor. Therefore, the writer is in favour of applying the place of the performance instead. See the writer's justifications supporting such an argument in the main body of text above.

¹⁶⁰ Ramberg (n 127) 68.

¹⁶¹ *ibid* 68.

where the network servers of the website or the hardware devices are located. Undoubtedly, this could be one of the most problematic points, and could be one that challenges the application of certain rules of private international law in relation to online contracting disputes. It has been mentioned elsewhere in this thesis that the location of the website servers can be one suggested connecting factor to determine the jurisdiction and the applicable law of legal activities that take place over websites or electronic marketplaces. Nevertheless, this notion has not been upheld by many scholars.¹⁶² Therefore, the main physical place of the business may seem more relevant than the place where the website is administrated technically,¹⁶³ when the place of the business is invoked as a connecting factor in online contracting disputes.

In any event, the author would put forward the more logical question that relates to the rationale of conflict of laws rules. To what extent is it possible to achieve effective justice and legal appropriateness when applying the place of concluding the contract as a connecting factor to contracts made over websites or electronic marketplaces? In the example above, if the litigation is brought before Iraqi courts, Chinese law or US law will be applied depending upon the location of the principal business place of the seller. The core question that should be asked here is, what is the point of relevance between the law of a country where the contractual parties have never met each other, and a breach of a contractual obligation performed in Iraq? For this, the place of concluding the contract is a good connecting factor for traditional contracts where the parties know each other and there are continuous and

¹⁶² See Chapter 5, pages. For example, in *eBay Canada Limited v Canada (Ministry of National Revenue)*, Justice Hughes, the judge of the Canadian Federal Court, wrote the following relevant words describing the location of the computer servers from a jurisdictional point of view: '[W]hen information, though stored electronically outside Canada, is available to and used by those in Canada, must be approached from the point of view of the realities of today's world. Such information cannot truly be said to "reside" only in one place or be "owned" by only one person. The reality is that the information is readily and instantaneously available to those within the group of eBay entities in a variety of places. It is irrelevant where the electronically stored information is located or who as among those entities, if any, by agreement or otherwise asserts "ownership" of the information. It is "both here and there".' See *eBay Canada Limited v Canada (National Revenue)*, 2007 FC 930 (CanLII) para 23 <<http://www.canlii.org/en/ca/fct/doc/2007/2007fc930/2007fc930.html>> accessed 12 May 2014.

¹⁶³ The place where the hardware devices and the servers of the website are located. However, in a few cases, courts have relied on the location of the servers as a connecting factor to assert a jurisdiction over an online activity. One of these is *Football Dataco Ltd v Sportradar GmbH* which was analysed in the previous chapter (Chapter 5). Another case that was decided in the US is *MacDermid Inc v Jackie Deiter*. In this case, the United States Court of Appeals (Second Circuit) reversed the judgment of the District Court of Connecticut regarding the dismissal of the litigation due to the lack of personal jurisdiction over the non-resident defendant. The Court of Appeals considered that the location of the servers of the company's emails and network systems was enough of a factor to establish a minimum contact between the defendant and the state forum and, accordingly, the long-arm jurisdiction was satisfied in this case and the defendant had to submit to the personal jurisdiction of Connecticut. See *MacDermid Inc v Jackie Deiter* 702 F3rd 725 (2ed Cir 2012).

systematic commercial transactions between them.¹⁶⁴ Furthermore, this might also be true for other means of online contracting, such as telephone or email. However, this solution is probably different for occasional transactions over electronic marketplaces.

The main point is that there is no predictability and stability in website contracts because websites can be accessed from anywhere, especially if the business has more than one place of business in different countries. In such circumstances, applying the law of the country where the contract has been concluded might lead to the application of a law which is not appropriate and is less connected to the contractual obligation from which the dispute arose. There may be another appropriate law which is most closely connected to the transaction. Hence, in the view of the author, it would have been better if the Iraqi legislature had left it to the discretion of the courts to assign the law of the country which has the closest nexus to the contract. At the same time, the assumption would have been made that the most closely connected law is the law of the country where the contract has been performed.

6.3.2.2 Online Business-to-Consumer Contract

Similar to the jurisdiction matters in international consumer contracts, the applicable law issues in transnational consumer transactions have been given more academic and scholarly attentions over the other types of online contracts, such as B2B and C2C contracts.¹⁶⁵ During

¹⁶⁴ See also Svantesson (n 57) 331.

¹⁶⁵ Apart from the scholarly and academic literature on consumer protection laws and approaches and the ongoing debates about how to achieve the best level of protection, there have been several attempts to internationalise the consumer protection laws over the last two decades. While some regional entities have succeeded in legislating and implementing harmonised consumer protection laws at the continental level, such as the European Union, other attempts have failed to implement similar approaches at other regional levels. For example, the 'Organization of American States' and the 'Inter-American Specialized Conference on Private International Law' (CIDIP) have been involved in active discussions and meetings to propose such a type of consumer protection instrument. Brazil drafted a convention called 'A Draft Convention on the Law Applicable to International Consumer Contracts and Transactions. While Canada proposed 'A Model Law on Jurisdiction and Choice of Law to Consumer Contracts'. See Diego P Fernández Arroyo, 'Current Approaches Towards Harmonization of Consumer Private International Law in the Americas' (2009) 58 *International and Comparative Law Quarterly* 411 <http://www.journals.cambridge.org/abstract_S0020589309001055> accessed 12 May 2014. Most interestingly, both of these instruments were not well received by the US because they did not address the consumer protection issues from a private international law point of view in respect of electronic-commerce activities. The view of the US government was that consumer protection in terms of jurisdiction and applicable law matters would not be achieved by applying traditional conflict of laws rules but other dispute resolution mechanism such as ODR could have a better effect on consumer protection schemes. The US delegates submitted 'A Draft Legislative Guidelines on Applicability of Consumer Dispute Resolution and Redress for Consumers'. See 'The United States Response to Proposals for a Convention and Model Law on Jurisdiction and Applicable Law' (CP/CAJP-2837/10, 21 April 2010) <http://www.oas.org/dil/CIDIP-VII_consumer_protection_brazil_joint_proposal_Comments_United_States.pdf> accessed 12 May 2014.

the time that, arguably, the best ever consumer protection rules were being implemented in the EU,¹⁶⁶ no such reforms were taking place in Iraq. Moreover, reforms in Iraq have still not materialised. Apart from the comparative approach of the consumer protection standards in the different legal regimes, which is beyond the scope of this thesis, the internet has posed another question about the application of these rules to the online consumer contracts. More specifically, the way that the internet has facilitated cross-border transactions for both businesses and consumers alike¹⁶⁷ has also threatened the rights of the businesses and consumers at the same time.¹⁶⁸ Businesses have been very concerned about the potential litigations that they might be subject to anywhere their commercial websites reach.¹⁶⁹ In the same way, consumers have begun to suffer more from some internet-specific problems, such as the false description of sale items, delay in delivery, faulty items or payment issues.¹⁷⁰ Therefore, arguably, a balance between the two conflicting interests should have been found in order to make the application of the jurisdiction and applicable law rules more sensible in the online contracting cases. It should have been a kind of balance that found a compromise between the reality of the borderlessness of the world of electronic commerce on the one hand, and the policy of ensuring the protection of consumer rights on the other.

In the EU, the ‘directing activities’ approach has been applied in both the Brussels and Rome I Regulations as a criterion for jurisdiction and applicable law issues.¹⁷¹ In the author’s opinion, this approach has probably been implemented to address issues that consumers

¹⁶⁶ Although such a notion might be considered true in terms of consumer protection laws in the EU generally, consumer protection here should be understood specifically in terms of jurisdiction and applicable law issues. See Tang (n 97) 39.

¹⁶⁷ Salvatore Mancuso, ‘Consumer Protection in E-Commerce Transactions: a First Comparison between European Law and Islamic Law’ (2007) 2 *Journal of International Commercial Law and Technology* 1.

¹⁶⁸ Colin Scott, ‘Regulatory Innovation and the Online Consumer’ (2004) 26 *Law & Policy* 477; Zheng Tang, ‘Jurisdiction and Consumer Contracts in E-Business’ (The Fourth International Conference on Electronic Business, ICEB2004, Beijing, 2004) 1344 <<http://www.informatik.uni-trier.de/~ley/db/conf/iceb/iceb2004.html>> accessed 12 May 2014. See also the Explanatory Memorandum of the European Parliament and Council on Online Dispute Resolution for Consumer Disputes (Regulation on Consumer ODR) which reads as follows: ‘With the development of e-commerce, the scope and size of markets in which businesses and consumers operate have grown significantly and extended beyond national borders. Consumers as well as traders, however, perceive it as risky to engage in cross-border e-commerce transactions because they fear that relevant disputes might not easily be resolved due to the virtual character of the transaction.’

¹⁶⁹ Kevin M Rogers, *The Internet and The Law* (Palgrave MacMillan 2011) 125.

¹⁷⁰ Hill (n 75) 17; Christine Riefa, ‘A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions’ in Geraint Howells and Reinder Schultz (eds) *Modernising and Harmonising Consumer Contract Law* (European Law Publishers 2009) 177-188.

¹⁷¹ See Article 15 of the Brussels Regulation and Article 6 of the Rome I Regulation.

experience when they buy products online from businesses in other Member States.¹⁷² The ‘directing’ standard tries to maintain a middle-ground approach that does not ignore the reality of the borderless reach of websites and retains the high-standards of consumer protection in the EU.¹⁷³ Under this approach, merely being a consumer when buying from a business website is not enough of a factor for applying the law of the habitual residence of the consumer. There should also be evidence that the trader has targeted the consumer in his country of residence.¹⁷⁴

The Rome I Regulation provides that the law applicable to the consumer transactions should be the law of the country where the consumer resides if the business: ‘(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence’¹⁷⁵ or; ‘(b) by any means, directs such activities to that country or several countries including that country’.¹⁷⁶

The phrase in paragraph (b), “‘by any means, directs such activities to that country or several countries including that country’ has been copied from the wording of Article 15 of the Brussels Regulation, which has been the subject of wide debate at the time the Brussels Regulation was proposed and thereafter.¹⁷⁷ When the EU legislatures put this rule forward in the Rome I Regulation, the European Commission along with the Council made a Joint Statement, which was later included in the Rome I Regulation,¹⁷⁸ and which provided an interpretation of the meaning of ‘directing activities’ in website practices. Accordingly, it is clearly demonstrated that the second paragraph has been harmonised specifically for online consumer contracts that take place over the websites of non-resident businesses.¹⁷⁹ Analysis of the ‘directing activities’ approach has been extensively carried out in Chapter 5 of this thesis and, as the same approach is applicable to both jurisdiction and applicable law matters in

¹⁷² See also Lorna Gillies, ‘A Review of the New Jurisdiction Rules for Consumer Contracts within the European Union’ (2001) 1 *The Journal of Information, Law & Technology* 1 <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_1/gillies/> accessed 12 May 2014.

¹⁷³ Lorna Gillies, ‘Clarifying the “Philosophy of Article 15” in the Brussels I Regulation: Pammer v Reederei Karl Schluter GmbH & Co KG (C-585/08) and Hotel Alpenhof v’ (2011) 60 *International & Comparative Law Quarterly* 557.

¹⁷⁴ Paul Cachia, ‘Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations’ (2009) 34 *European Law Review* 476; Marco Berliri, ‘Jurisdiction and the Internet, and European Regulation’ in Susan Woodly and Dennis Campbell (eds), *Comparative Yearbook of International Business: E-Commerce, Law & Jurisdiction*, vol 243 (Kluwer Law International 2003) 11.

¹⁷⁵ Rome Regulation, art 6 (a).

¹⁷⁶ *ibid* art 6 (b).

¹⁷⁷ See Chapter 5 of this thesis.

¹⁷⁸ Rome Regulation, Recital 24.

¹⁷⁹ Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 1953; Cachia (n 174). See also Rogers (n 169) 132.

consumer contracts, there is no need to repeat it here. Nevertheless, briefly, the conclusion that can be drawn from the analysis of the ECJ's rulings in: *Peter Pammer v Reederi Karl Schlüter GmbH & Co KG*; and *Hotel Alpenhof GesmbH v Oliver Heller*;¹⁸⁰ *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi*;¹⁸¹ and *Lokman Emrek v Vlado Sabranovic*¹⁸² is that the interpretation of the term 'directing activities' in website cases is still a debatable matter.¹⁸³

Finally, Article 6 (3) of the Rome Regulation provides complementary rules for cases where the requirements of subparagraphs (a) and (b) of Article 6 (1) are not satisfied. In such situations, the governing law of the B2C contract will be assigned according to Articles 3 and 4 of the Regulation.¹⁸⁴ Certainly, these rules apply to the cases where the business does not have a physical presence in the consumer's country nor does it direct commercial activities to that country by any means.¹⁸⁵ In its application to the online environment, it is assumed that this rule covers passive websites or those which are merely accessible in the consumer's home country. In the author's view and depending on the analysis of the previous cases that have been mentioned above, the applications of this rule in online contracting scenarios may be confined to very limited occasions. However, it can be presumed that these limited cases would not cover the online B2C contract over the electronic marketplaces. This is because it would seem that the criterion of 'directing activities' is fulfilled in most of the online auctions between businesses and consumers. For instance, when businesses use eBay's international website to sell items by auction and include the price for international shipment, by their commercial activities they are mostly intending to target consumers in different countries and they are aware of the global reach of their offers. Under those circumstances, the only cases where the requirements of Article 6 (3) can be imagined to be satisfied would be through manufacturer's or service provider's websites that do not seem to be directing commercial activities to consumers in other countries.¹⁸⁶

¹⁸⁰ Joined cases C-585/08 and C-144/09 *Peter Pammer v Reederi Schlüter & Co KG* and *Hotel Alpenhof GesmbH v Oliver Heller* [2010] ECR I-12527.

¹⁸¹ Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* [2012] CEC 923, para 46.

¹⁸² Case C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013] Bus LR 104.

¹⁸³ See the writer's analysis and arguments about this issue in the Chapter 5 of this thesis.

¹⁸⁴ "If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4"

¹⁸⁵ Rome I Regulation, rec 24; see (n 270), Chapter 5.

¹⁸⁶ See the 'Joint Declaration by the Council and the Commission on Article 15 (1) (c) of the Brussels Regulation'. However, even in such cases, we have seen that the European Court of Justice considered the criterion of 'directing activities' has been fulfilled. See the writer's analysis in the Chapter 5 of this thesis.

In the US, there are no special rules for consumer contracts.¹⁸⁷ Accordingly, the same conflict of laws rules in contractual and non-contractual obligations will apply to inter-state and international consumer contract cases.¹⁸⁸ Generally, in conflict of laws, the Restatement (Second) is the applied rule to determine the governing law in case of the absence of the choice of law agreement.¹⁸⁹ According to the Restatement (Second), the governing law of the contract will be ‘the law of the state/country that has the most significant relationship to the transaction and the parties’.¹⁹⁰ This rule has been analysed previously in this chapter because it is the same rule applicable to the B2B transactions in the US.¹⁹¹ However, from a consumer protection point of view, this rule may result in depriving the consumers of the protection afforded to them by the laws of their countries of residence.¹⁹²

In *Kershenbaum v Buy.com Inc*¹⁹³, the plaintiff brought a class action on behalf of consumers who resided in all fifty American states against the online retailer www.buy.com.¹⁹⁴ One of the defendant’s contentions in this case was that applying the law of the states where the class action members were domiciled would mean the application of the law of all fifty states, and would make the motion to go ahead in the class action inappropriate. This contention was upheld by the Superior Court of Orange County, California. Accordingly, the trial court denied the class action certification. Indeed, although this judgment was later reversed by the Court of Appeals in California, which decided to stay proceedings in the class action and apply the law of California as the most favourable law for the consumers’ interests, consumer protection is not always guaranteed in the US under the application of existing rules of conflict of laws. In the author’s opinion, if this case were brought in a state other than California, the verdict would not have been the same. Because of California’s policy of offering a high level of protection for consumers,¹⁹⁵ the Court of Appeals applied California

¹⁸⁷ Czigler (n 36). Tang refers to this approach as the ‘neutral default law’ which means that the governing law should be determined according to the ‘most significant connection’ factor under which the consumer can be protected by the laws of personal state only if the latter has the closest connection to the disputed contract.

¹⁸⁸ Delisle and Trujillo (n 79).

¹⁸⁹ However, some States follow other connecting factors to determine the applicable law in case of absence of choice of law agreement, such as the place of contracting, the law of the forum, the place of contract performance. See Czigler (n 36).

¹⁹⁰ Second Restatement of Conflict of Laws (1971), art 188; *Specht v Netscape Communications Corporation*, 22 Ill 306 F 3d 17, 11 ILRD 832, 2002 ILRC 2017 (2d Cir 2002).

¹⁹¹ See page 22,223 of this chapter.

¹⁹² See also Zheng Sophia Tang, ‘Private International Law in Consumer Contracts: A European Perspective’ (2010) 6 *Journal of Private International Law* 249.

¹⁹³ *Kershenbaum v Buy.com Inc* [2010] WL 3800339 (Cal App 4 Dist).

¹⁹⁴ See also Symeonides (n 100).

¹⁹⁵ Juliet M Moringiello and William L Reynolds, ‘Survey of the Law of Cyberspace: Electronic Contracting Cases 2007-2008’ (2008) 64 *Business Lawyer* 1.

law to the class action. This was demonstrated previously in *Omstead v Dell, Inc*, which will also be referred to at the end of this section.

As stated earlier, consumer protection rules for private international law matters are absent in Iraqi law. Article 25 of the ICLC lays down a general rule about the applicable law to distance sale contracts without providing any exemptions or special rules for consumer contracts. The ‘place of contracting’ will apply to B2B and B2C alike under Iraqi law. Some analysis about the application of this rule to online contracting has been done in the section on online B2B contracts. As for other analysis on its application, which is related to online B2C contracts, unfortunately, the findings cannot be seen as advantageous for Iraqi consumers. It has been highlighted that in order to determine the place of contracting in online contracts in Iraqi law, Article 87 of the ICLC needs to be applied in conjunction with Article 21 of the IESTA.¹⁹⁶ The joint application of these two Articles shows that the online contract will be deemed concluded at the place where the business receives the consumer’s acceptance or, more accurately, the ‘online order’. This means that the law applicable to the consumer contract is always the law of the place or country where the business is domiciled. In the author’s opinion, this indicates a considerable legislative gap and it should be addressed by the Iraqi legislature in order to secure the best level of protection for Iraqi consumers when buying products online from out-of-country traders. As an alternative approach, the author would suggest that giving the courts the discretionary powers to choose the ‘most favourable’ law for consumers’ interests could be a better statutory ground. In the meantime, if Iraqi lawmakers feel that such a rule is undesirable, the other alternative could be to protect Iraqi consumers by using the law of their nationality or their habitual residence.¹⁹⁷

Arguably, a careful consideration of consumer protection rules from a private international law perspective may lead to the conclusion that the disadvantageous implications of the applicable law issues could be less problematic than the competent court matters. Ordinary consumers would probably find it much more preferable to be given the choice of litigating businesses in their home country with the application of the defendants’ personal law, rather than travelling to a foreign country to sue the defendants according to the consumers’ personal law. In other words, if a consumer were given the right to choose between litigating

¹⁹⁶ This point has been extensively analysed in this chapter.

¹⁹⁷ According to Article 25 of the ICLC, the law of habitual residence is applied if both contractual parties reside in the same country.

in his home country and the application of a foreign law, and litigating in the foreign country and the application of home-country laws, it is more likely that the first option would be preferable. This does not deny the significance of the law of the consumer's home country. One should ask why the assumption should always be made that the best protective law is the law of the country where the consumer habitually resides. One possible logical basis is that it is because it is the law that the consumer knows and is most familiar with. Apart from the basic consumer rights conferred in his home state that it is assumed that every consumer is aware of, it could be wondered how often the individual consumers have knowledge about the provisions of the consumer protection legislations in their home country. Consequently, from this point of view, it can be argued that judges that deal with B2C disputes are the only expert authorities who know about the best protective laws for consumers.

In *Mofo Moko v eBay Canada Ltd*,¹⁹⁸ the court found that the assigned applicable law in favour of the consumers' home country and the jurisdiction clause in favour of the foreign country would dissuade the users from bringing proceedings against the business. The dispute in this case arose out of a typical online B2C auction sale between two Montreal-resident students and eBay Canada's website. The two students sued eBay before the Quebec District Court of Canada for terminating an auction without a known reason, for a pair of Nike sport shoes that they had bid on. In its contention before the court, eBay argued that the court lacked jurisdiction to hear the dispute because its website terms and conditions, which the claimants had agreed to prior to using the website, included a dispute resolution clause in favour of California courts and Canadian law. This read as follows:

This Agreement shall be governed in all respects by the laws of the Province of Ontario and the federal laws of Canada applicable therein. You agree that any claim or dispute you may have against eBay must be resolved by a court located in Santa Clara County, California, except as otherwise agreed by the parties or as described in the Arbitration Option paragraph below. You agree to submit to the personal jurisdiction of the courts located within Santa Clara County, California for the purpose of litigation all such claims or disputes.¹⁹⁹

¹⁹⁸ *Mofo Moko v Ebay Canada Ltd* 2013 QCCS 856 (CanLII) <<http://canlii.ca/fr/qc/qccs/doc/2013/2013qccs856/2013qccs856.html>> accessed 12 May 2014.

¹⁹⁹ Interestingly, after this dispute eBay Canada made a change in its terms and conditions regarding the dispute-resolution clause. The clause, which assigned the jurisdiction in favour of Santa Clara County, California courts, was replaced by a clause that gave the courts of Toronto, Ontario the jurisdiction to hear any dispute between eBay and its users. These terms and conditions can be seen in the following link <<http://pages.ebay.ca/help/policies/user-agreement.html>> accessed 12 May 2014.

The court reached the conclusion that the Californian courts' clause was 'excessive and unreasonable'. Accordingly, it considered it void and granted the two students a stay of proceedings against eBay before the Quebec court.²⁰⁰ In short, it clearly appears from this case that if consumer protection were to be taken into account by the courts, granting consumers the right to litigate foreign businesses in their home country would be the most significant factor in ensuring a good application of such a protection. On the other hand, the claim here is not that the applicable law is a less important factor in the consumer protection scheme, but rather that it is a complementary statement to what has been argued previously about this point of view. Courts in the consumers' home country, when hearing consumer disputes, should be given the discretion to find out the most advantageous law for the consumers. It is possible that the remedies that the foreign law provides for the consumers are better than the provisions in the personal law of the consumers. This was seen in *Omstead v Dell, Inc* where the California Court of Appeals did not apply the choice of law agreement. Instead, it applied the state of California laws because they provided higher protection for consumers.

6.3.2.3 Online Consumer-to-Consumer Contracts

In March 2013, the European Commission released its first report on the application of the Unfair Commercial Practices Directive.²⁰¹ The report investigated the possibility of extending the application of consumer protection rules in Europe to other types of transactions, such as C2B²⁰² and C2C. Interestingly, although the report did not mention anything regarding the jurisdiction and applicable law issues, it touched on the very crucial issue of how the internet has increasingly facilitated the process of buying and selling between consumers, that is to say, online C2C contracts.²⁰³

²⁰⁰ See also Michael Geist, 'Quebec Court Rejects eBay's Online Contract Opening Door to Local Lawsuit' (*Michael Geist*, 4 April 2013) <<http://www.michaelgeist.ca/content/view/6817/135/>> accessed 12 December 2014.

²⁰¹ First Report (n 106).

²⁰² It was mentioned at the beginning of this thesis that this type of consumer transaction will not be covered by this thesis because of its rareness online.

²⁰³ The attention to this important point had been brought previously in 2004 by the European Consumer Centre Network in its report: 'The European Online Marketplace Consumer Complaints'. One of the interesting parts of the report regarding the online C2C contract is the following part: 'This issue is of great importance. Not only because of the difference in legislative rights, but because it's also more difficult for a consumer to seek redress against a private person than a business since the ECC or ADR bodies can't assist in C2C cases. Some private persons make such a large amount of transactions that they could be regarded as businesses even if they don't

Although many C2C transactions are of small value, this is not always the case.²⁰⁴ A search of eBay, for example, shows that there are many high value items listed, such as antiques, jewellery and rare editions of books offered for sale by consumers who do not intend to make a profit. Additionally, it is not difficult to deduce from the sellers' profiles that there are consumers who are looking for a quick sale because they urgently need some money.²⁰⁵ An example of such high-value C2C transactions can be imagined in the following scenario. For example, if a German jeweller buys for his wife an Ottoman hand-made ring from English antique collector over an online auction website, such a transaction is possibly C2C because both parties are individuals acting for a purpose that is beyond their businesses or professions.²⁰⁶

In Europe, such types of transactions are excluded from the scope of the Rome I Regulation.²⁰⁷ Accordingly, if any dispute arises out of a contract that is between two consumers, the traditional conflict of laws in each Member State will apply. Certainly, it is obvious how problematic the findings could be in terms of contracts that take place over online marketplaces. Courts will be required to apply the traditional connecting factors to find out the proper applicable law. While some traditional connecting factors might be difficult to be determined, such as 'the place of contracting', others, such as 'the place of performance', can be considered less problematic. As it has been argued previously, applying the law of the country to which the contract is 'most closely connected' might be the most favourable

have a registered company.' See page 21 of the report <http://ec.europa.eu/consumers/redress/ecc_network/european_online_marketplace2004.pdf> accessed 6 December 2013.

²⁰⁴ The small value of consumer-to-consumer contracts does not mean that no disputes can arise out of its application. In this case, the dispute should be resolved. First, it has been reached previously that most of online consumer-to-consumer contracts lack the explicit choice of law agreements. On the other hand, it has also been concluded that attempting to find out the implicit choice of law agreement might be a possible suggestion to settle any disputes between two consumers. However, from the practical point of view, this would be seen quite unimaginable scenario for different reasons; consumers generally might be reluctant to seek redress through court litigation process. Furthermore, the small value of such a type of contract may make the parties to think very carefully before going to the court litigation. Accordingly, most of the small-value C2C claims might have been settling by online dispute resolution.

²⁰⁵ The writer has discussed elsewhere in this thesis that identifying the seller's and buyer's status and whether they are acting as businesses or consumers is a difficult test in online contracting; however, it is not impossible to do so. For instance, this can be done by clicking on the eBay member's profile and seeing what other items are being offered for sale by him. Most consumer sellers only list a few items for sale in order to get rid of personal belongings and earn some money. Moreover, the user's status can be identified from their received feedbacks. For example, if most of their feedback is received from sellers, this is a good indication that the user is an online consumer. Conversely, if most of the feedback is from buyers, the assumption is that the user is a small or individual business.

²⁰⁶ See also similar examples which are given by Rogers (n 169) 131.

²⁰⁷ In fact, C2C contracts are generally not covered by consumer protection laws in the EU; see Immaculada Barral, 'E-Consumers and Effective Protection: The Online Dispute Resolution System' in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 82.

connecting factor over the other factors when dealing with contracts concluded over websites or electronic marketplaces. More obviously, in order to keep pace with the continuous changing face of technology, more flexible and predictable rules are required. Among the existing traditional connecting factors, the 'closest' criteria could be the only factor where it can be shown that the legal certainty and predictability are satisfied. Instead of giving the courts the difficult task of determining where the online contract is concluded or has been performed, it might be better to give them a little space to exercise some discretion in order to select the most suitable law. According to available facts, courts should be able to find out the most proper law and this could be any of the following: the place of contracting, the place of performance, the law of the forum, the law of the seller or the law of the buyer.

Similarly, the traditional conflict of laws rules are applicable to online C2C contracts in both the US and Iraq. However, the US's approach in the Restatement (Second) seems more predictable for online contracting cases than the Iraqi law's approach. Analysis of the approaches of US and Iraqi laws has been carried out in the previous sections. The same rules apply to online C2C contracts so there is no need to repeat them here.

6.4 CONCLUSION

This chapter has examined the applicability of existing applicable law rules to online contracting practices. The analysis has been carried out by focusing on three legal regimes whose approaches vary between harmonisation, combining conventional conflict of law rules and the internet choice of law, and unadulterated traditional private international law rules. Although the application of these different approaches has resulted in some specific findings, the overall conclusion about applicable law to online contracting cases can be drawn by making a distinction between the choice of law agreement and the absence of such a choice in online contracts.

From the perspective of online choice of law agreement, there might not be considerable differences, from the technical point of view, between the choice of law and choice of court agreements in terms of the legal challenges and uncertainties that have been addressed in the previous chapter. As far as the role of the conflict of laws rules is concerned, there could be a little more to say. The assumption that both contractual parties, in the case of B2B contracts, are in the same bargaining position, which is the rationale behind upholding the parties'

autonomy in the traditional contracts, is not always the true state of affairs in the realm of online contracting. Contracting over websites does not mean that both parties are in the same bargaining position even if both are acting for purposes which are within their business activities. Accordingly, this fact might need to be taken into consideration when dealing with an online choice of law agreement in B2B contracts. As regards B2C contracts, the rule that consumers should always be protected by the law of the country of their domicile may need to be reconsidered as well. In this context, it could be suggested that consumers should always be protected by the law which provides the most advantageous rules to them.

In the case of the absence of a choice of law agreement, it can be argued that the law of the country to which the contract is ‘most closely connected’ or has ‘the most significant contact’ is the most acceptable approach to govern online B2B contracting cases. However, in B2C contracts, courts should find the law that provides the better remedies for the consumers as long as there is a connection between the consumer’s transaction and the country whose laws will apply.

Regarding online C2C contracts, no regulatory rules within the EU govern such a type of transaction, while the same conflict of laws rules are applicable to them in the US and Iraq. This means that the transactions between two consumer parties over an electronic marketplace have the possibility of being small, medium-sized, or large value transactions. Regardless of whether the dispute is over a small or a big value claim, the factual point is that such disputes should be settled. Concerning the small value claims, alternative dispute resolution (ADR) or ODR might be the more reasonable mechanism.²⁰⁸ However, as for the medium and big value claims, the traditional dispute resolution rules will apply. In the EU, further action might be needed to fill the legislative gaps regarding the applicable law for such kinds of contracts which have prevailed considerably over online buying and selling platforms.

In any event, it is submitted that since the law has started tackling the area of new technology, a unique set of challenges has emerged. Some of these challenges have proven difficult to govern with national and supranational laws. Conflict of laws rules in certain

²⁰⁸ In favour of such an argument see ‘The Statement of the European Law Institute on the Proposal for a Regulation on a Consumer European Sales Law COM (2011) 635 final’, Section VIII Alternatives to Court Process, para 80 <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf> accessed 12 May 2014.

aspects of legal activities, such as consumer protection, have become one of the challenges that has emerged from the use of the internet.

CHAPTER SEVEN

CONCLUSION

7.1 INTRODUCTION

The law of online contracting has been examined in this thesis. The scope of the research has been confined to specific types of online contract, those that take place on websites. The thematic structure of the thesis was organised into two main parts: the first examined the problematic aspects of contracting online on websites; and, the second analysed the rules governing the resolution of disputes arising out of the conclusion and implementation of such kinds of contracts in the international context, i.e., jurisdiction and applicable law rules. This study has been motivated by the recent developments in the law of online contracting, and the increasing case law that addresses the application (and applicability) of existing legal rules to online contracting cases. For example, over the last few years, the ECJ has handed down more than one ruling on the application of Article 15 (i) (c) of the Brussels Regulation in online activities on websites.¹ Moreover, courts in the UK, Germany and Austria, have tackled various aspects of online contracting cases. US courts continue to adopt different approaches when applying personal jurisdiction and applicable law rules to internet activities. Most importantly, the lack of a legal framework and judicial experience in Iraq on regulating and dealing with online contracting cases has also had a profound impact on this research.

When tackling such a topic, the thesis has aimed to seek answers to whether some existing norms of contracting in terms of jurisdiction and applicable law remain suitable for governing online contracting cases, and to what extent the different legal regimes have succeeded in applying them within their own jurisdictions. More specifically, the main statement of the thesis is based on the conception that retaining some of the traditional conflict of laws rules to govern online contracts may not seem appropriate and congruent with the special characteristics of online contracting on the internet. This does not mean that the thesis has argued in favour of proposing new or special rules to govern such kinds of transactions.

¹ At the time of drafting this conclusion, the last judgment of ECJ has been just handed down few months ago. See Case C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013] Bus LR 104.

In order to provide a comprehensive answer to the research questions raised, a comparative critical analysis approach has been adopted which offers a clear framework for the subject matter and sensible research outcomes. Three different legal regimes were selected for carrying out the research analysis: EU law, US law and Iraqi law. These three different legal systems were chosen due to the distinctive approach of each regime in dealing with transnational online contracting cases. The EU's legislative bodies have sought to harmonise statutory rules applicable to contractual obligations in all Member States that could accommodate both offline and online activities. In contrast, courts in the US have been keener to extend the application of traditional personal jurisdiction rules and statutory applicable law rules to different kinds of activities that take place over the internet and have been given a wide discretion to adopt the proper test when tackling such types of cases. In Iraq, apart from the IESTA which was enacted recently, the law of online contracting has not yet matured and courts have not been challenged with internet contracting cases. Presumably, traditional jurisdiction and applicable law rules are still applicable to any contractual activity that occurs on the internet.

7.2 RESEARCH FINDINGS

The findings from this research can be categorised under two parts: general findings which are related to the problematic aspects of concluding contracts online on websites; and more specific aspects that highlight the author's findings on the applicability and functionality of conflict of laws rules in the online environment, i.e., contracting practices on the internet. The findings have been reached based upon the analysis of available case law, existing valid legislation and through the review of the written literature.

7.2.1 Part One: General Findings

7.2.1.1 The Purport and Scope of Contracting Over the internet Websites

It is first necessary to stress that online contracting on websites is not novel in terms of ordinary contracting theory. The special characteristics of internet communications may have a profound impact on challenging the functionality of law in certain cases. From the wider perspective, this thesis has attempted to demonstrate that internet communications have some

fundamental, distinctive features that make them different from other means of electronic communication. As a result, such differences have had an impact on the application of some basic legal norms. One point that is of particular significance to those who are frequently engaged in online activities on websites is to understand the moment when the online contract becomes legally formed and binding. In contrast to what most people may think or believe, online contracting over websites becomes valid the moment the website user begins using the website for the purpose of buying goods, or begins gaining the benefits of the service that the website offers. In other words, the scope of online contracting over the internet is much broader than ordering goods, downloading intangible products or streaming paid-for music. The claim that no transaction has occurred over a website has been rejected by courts when dealing with online contracting cases on websites. Consequently, much case law addressed in this thesis has shown that courts in different jurisdictions have validated website user agreements even though no buying or selling transactions have occurred between the website owners and their users. This should be brought before the attention of website users as they should be aware that mere access to a website represents a binding online contract in itself, by which the user is agreeing to the website's user agreement.

7.2.1.2 The Validity and Enforceability of Websites Click-Wrap and Browse-Wrap Agreements

Even though website user agreements have basically been held to be binding, at the same time, the enforceability of these terms and conditions has become a matter of controversy. This thesis has concluded that different approaches have been applied when addressing such an issue. In the EU, apart from the jurisdiction and applicable law clauses, which are statutorily considered invalid against consumers, the enforceability of such terms and conditions against EU consumers has been subject to other consumer protection laws, such as the Consumer Rights Directive and the Unfair Terms Directive. In essence, it can be argued that consumers are immune from the enforcement of most of these website clauses. National laws in each Member State would still have the authority to determine the degree of protection afforded to consumers against the enforceability of website terms and conditions. As for online B2B contracts, the enforceability of such terms and conditions would be mainly reliant on the satisfaction of the requirement of Article 10 (3) of the E-commerce Directive. Whereas the criterion laid down in Article 10 (3) is arguably broad and controversial enough,

the national law of each Member State will determine the extent to which the website terms and conditions will be deemed enforceable or not.

On the other hand, and in contrast to the EU's approach, most US courts have not distinguished between consumers and businesses when tackling the validity and enforceability of website terms and conditions. Instead, a more procedural approach has been applied by courts in the US by focusing on the visibility and conspicuousness of such terms and conditions in the website and regardless of the legal characterisation of the contracting parties and whether they are acting as a business or a consumer. Under Iraqi law the situation is not clear enough. Neither the IESTA nor the Consumer Protection Act includes clear provisions about the validity of such terms and conditions. Under those circumstances, the determination of such a matter will be left to the discretion of the hearing court.

7.2.1.3 The Concept of E-Consumer

One of the most important findings of this thesis is the controversial notion of the consumer in the online world and the need to re-conceptualise its legal definition. Such a problematic point may have a profound implication on EU law where consumers are afforded the highest level of protection of any jurisdiction. The application of the EU's consumer definition to internet buying and selling practices appears problematic from different perspectives. First, confining the parameters of the meaning of consumer to contractual activities which fall outside of businesses or professions can lead to unfair outcomes for specific categories of internet users. A professional trader who buys an item for personal use over an online auction website is considered a consumer and the weaker party of the contract even if the seller is a small retailer who might have less experience in trade and commercial transactions. Meanwhile, the same retailer or small business will be regarded as a business when buying online from a large professional corporation or trader. In such cases, the true meaning of the weaker party or the imbalance of bargaining powers in contractual transactions is unclear.

Second, when individual businesses use online buying, selling and auction platforms for buying from or selling to other consumers for purposes which are outside of their trade or profession, or if the contract occurs between two consumers over an online auction platform, then the contract will be categorised as C2C. However, such kinds of transactions do not fall within the scope of Brussels and Rome Regulations and the other consumer protection rules

in the EU. Consequently, this is a legislative gap that should be addressed by the EU's legislatures. Thus, online C2C transactions are a new emerging category of contract, and represent one of the online environment challenges for existing laws. Although this thesis has addressed such types of online contracts, the focus was only on jurisdiction and applicable law issues. Accordingly, further research on legal characterisation and consumer protection in online C2C contracts might be required. Overall, this is another demonstration that the online environment is different from the offline environment in certain cases and the need to re-conceptualise some of the legal norms might have become a required action.

7.2.1.4 Legal Uncertainties in Online Contracting Over the internet Websites

The first statement made in this chapter was that the contracting process on websites does not change basic contract law theory. This research has also demonstrated that some rules might still seem problematic in their application to contracting processes over the internet. In this regard, the thesis has identified three aspects where contracting over the websites may create legal controversy and uncertainty: invitation to treat and offer, identity and signatures.

1. Invitation to Treat and Offer

The distinction between the valid offer and the invitation to treat has become blurred in terms of the contracting process on websites. This thesis has reached the conclusion that traditional rules of offer and invitation to treat in both common law and civil law have not been very definite when seeking to identify the legal characterisation of displaying goods with their prices on websites and online auction platforms. Moreover, the variety of website displays, such as passive websites, active websites and interactive websites, as well as the different methods of sale over electronic marketplaces have made the issue more problematic and controversial. The research has found that the customary rules of internet buying and selling might have become more relevant for determining whether the display of goods on electronic marketplaces, websites or online auction platforms constitutes a valid offer or only an invitation to treat. Such a fact has also been upheld by some cases addressed in this thesis where the courts have given more priority to internet customary rules over traditional contract law.

2. Identity of Contractual Parties

This thesis has demonstrated that the identity of users can be considered one of the most problematic aspects of contracting over websites. The lack of identity verification in internet communications has allowed minors to become active players in online activities over the internet. Minors have become increasingly involved in buying intangible products over the internet, such as game credits and services. It has been shown that the infancy doctrine has not helped the parents of minors to void the online contracts made by minors on the ground that intangible products cannot be returned after their consumption by minors. Accordingly, the conclusion can be drawn that the application of the infancy doctrine to some types of online contracts has been considered another problematic issue of contracting over websites.

3. Signature in Online Contracts

The research has also concluded that electronic signatures do not fulfil their proper role of ensuring the authenticity of users' identity in the contracting process over a website. Although the requirement of a signature as proof of the identity of contracting parties has been stipulated in UNCITRAL's Model Law on Electronic Commerce, such a requirement has not been included in electronic signature laws in the EU, the US and Iraqi law. The main reason for the identity problems that have been highlighted in the above point is the absence of the role of the signature as a method for verifying the identity of the contractual parties in website activities. One very typical example of such a problem is *Spreadex Ltd v Cochrane*.² In this case, a five-year old boy unknowingly debited his mother's friend's gambling account of £50,000. Accordingly, it is submitted that electronic signature legislation has not paid enough attention to the important role of the signature. The absence of such a requirement may have made website retailers, electronic marketplace operators and online service providers less interested and willing to verify the age of those users who access their websites to buy goods.

² *Spreadex Ltd v Cochrane* [EWHC] 1290 (Comm).

7.2.2 Part Two: Specific Findings

7.2.2.1 Existing Jurisdiction Rules: Online Choice of Court Agreement

In transnational online contracts over websites, the choice of court agreement is usually incorporated into the website terms and conditions (user agreement) under a specific section. This is most commonly referred to as the jurisdiction clause.

1. ONLINE BUSINESS-TO-BUSINESS CONTRACTS

In the EU law, although Article 23 (2) of the Brussels Regulation explicitly validates the choice of court agreement reached between two businesses via an electronic means, no further interpretation or criterion is provided by the Regulation about how the courts in the Member States can deal with such a clause in respect to contracts concluded over the internet. More precisely, Article 23 (2) stipulates that in order for the choice of court agreement to be valid and enforceable, the electronic means that is used to reach such an agreement should provide a durable medium, which should be equivalent to writing. It is not clear enough yet how far such a criterion is satisfied by website terms and conditions and how this can be applied to the contracting process on websites. Additionally, the validity of choice of court agreement might not be fair enough for individuals and small-sized businesses that do not have the right to discuss such a choice when contracting over the internet, due to the distinctive features of contracting in such a way. The point here is not about the inappropriateness of Article 23 (2) of the Brussels Regulation from a general perspective, but rather it questions the legal uncertainty regarding the validity of choice of court agreement in website contracting processes and the extent of its fairness when it is enforced against different categories of online businesses.

Unlike the EU's approach, courts in the US have applied a more objective approach when validating the online choice of court and arbitration agreements. As long as the jurisdiction clause is well-presented and visible on the website, and the other contracting party has been notified about it sufficiently prior to concluding the contract, the clause has been held to be valid and enforceable. It has been argued that such an approach would seem fairer and reasonable because it gives the court the proper discretion to validate the jurisdiction clause based on its procedural fairness.

Under Iraqi law, the validity and enforceability of online choice of court agreement are matters of legal uncertainty. Although the Iraqi law has remained silent regarding such an issue, some have argued that there is nothing to prevent the courts in Iraq from enforcing the choice of court agreements on the ground that such a clause has become a generally acknowledged principle in private international law. In this regard, it has been argued in this thesis that only the choice that brings jurisdiction to Iraqi courts will be validated and enforced. By contrast, any choice that excludes the jurisdiction from Iraqi courts will not be recognised by Iraqi law because the international jurisdiction of the Iraqi courts is considered a part of its territorial sovereignty. Therefore, it cannot be derogated by the agreement of the parties. Such a conclusion is very important for those traders who do business with their Iraqi counterparts, and they should be aware that any choice which affords the jurisdiction to any court other than an Iraqi court might not be enforced. In the author's opinion, the *status quo* under the Iraqi law regarding the validity of choice of court agreements is not certain enough. It is crucial that Iraqi law should have addressed the legal gap regarding this issue. In this context, the general rule which is applied in both EU and the USA law regarding the validity of choice of law agreements should be adopted in the Iraqi law as well. Explicit provisions should be added to the Iraqi laws that validate the parties' autonomy in choosing the competent court to hear their dispute.

2. ONLINE BUSINESS-TO-CONSUMER CONTRACTS

It is undisputed that EU law has provided a high level of protection for its consumers by invalidating any agreement that assigns the jurisdiction to any court other than the courts in the consumer's country of habitual residence. European consumers might not have the same level of protection when contracting with traders outside EU Member States. The claim that such a protection might still be guaranteed pursuant to the Unfair Terms Directive is not certain enough. First, this Directive is not a binding instrument for non-European countries and, accordingly, the enforcement of the judgment in the defendant's country will not be guaranteed. Second, if the Unfair Terms Directive is applied, it is not guaranteed that consumers in all Member States will have the same level of protection regarding the validity of choice of court agreement because this depends on the national law of each Member State.

As for the situation under the USA law, although few states have been in favour of maintaining high standards of consumer protection policy, the majority of American states have not paid attention to the distinction between consumers and businesses when addressing the validity of online choice of court agreements. Instead, US courts have focused on whether the proper procedural steps have been taken by the website operator to make the terms and conditions of the websites, including of course the jurisdiction clause, visible and noticeable enough for the other contracting party and prior to processing the online contract over the website. In a few cases, the jurisdiction clause has been enforced against the consumer even though he has not read it before concluding the online contract. Accordingly, it is clear that consumers in the US have had much less protection than their counterparts in the EU in terms of the validity and enforceability of internet choice of court agreements.

In Iraq, the Iraqi Consumer Protection Act does not include any provisions regarding the validity of choice of court agreement against Iraqi consumers. However, the finding that has been reached and stated in the previous section of this chapter could be very advantageous for Iraqi consumers. More specifically, consumers in Iraq will get the benefit of the finding that any agreement to assign jurisdiction to courts other than Iraqi courts will not be considered valid. Where the online consumer contract is considered, concluded or performed in Iraq, then Iraqi courts will have the statutory authority to assert jurisdiction over the dispute even though there is a clause in the website terms and conditions that determines the jurisdiction in favour of courts of other countries. This should not be understood that Iraqi consumers are well protected against the enforceability of online choice of court agreements. Under the current application of the Iraqi law, it is not guaranteed that consumers in Iraq will have the best protection in terms of jurisdiction clauses on foreign traders' websites. The Iraqi Consumer Protection Act should be reformed to incorporate clear legal rules that provide definite protection for consumers in Iraq regarding the validity of online choice of court agreements against them. The EU's consumer protection approach in Rome I Regulation would seem very suitable to be applied by the Iraqi legislatures.

3. ONLINE CONSUMER-TO-CONSUMER CONTRACTS

Under EU law, this category of online contracts can be considered to fall into a legislative gap. The Brussels Regulation provides rules regarding the enforceability of choice of court agreement in B2B and B2C, however, no provisions can be found regarding the C2C contracts. Accordingly, the validity and enforceability of the choice of court agreement between two consumers over a website are matters of legal uncertainty under the application of EU law. On the other hand, it can be argued that the existence of the choice of court agreement in online C2C contracts could itself be the subject of another controversy. More precisely, online C2C contracts can only occur on one type of internet website, that is to say, electronic marketplaces, such as eBay and Amazon. In most cases, the terms and conditions of such websites provide that jurisdiction clauses that apply to any disputes arise between the website and its users but not the disputes between the users themselves. Under those circumstances, it can be argued that no choice of court agreement exists in terms of the direct online contract between two contracting consumers. Alternatively, it can be submitted that courts will not give effect to such a clause on the ground of it being an unfair term because the consumer has not had the opportunity to discuss and negotiate it with the other party.

No considerable legal issues can emerge under US law because it has been submitted that the objective approach, which is based on the procedural fairness of the online choice of court agreement, is applied by US courts irrespective of whether the parties are businesses or consumers.

The same finding that has just been said above regarding US law can also be applied here regarding Iraqi law. Iraqi courts have not been challenged by online contracting cases as their counterparts in the US have. Once again, any contractual choice that excludes the jurisdiction of Iraqi courts, will not take effect. The analysis here falls within the same legal uncertainty that exists in the Iraqi law regarding the validity of choice of court agreements. In this regard, and under the current situation of the Iraqi law which does not distinguish between business and consumer contracts, the US courts' objective approach would seem very appropriate to be applied by Iraqi courts when addressing the validity of online choice of court clauses between two consumers. Justification for this would be satisfied in that Iraqi judges could use the principle of 'reasonable person' which exists in the Iraqi law as a criterion when examining the validity of jurisdiction clauses in online C2C contracts.

7.2.2.2 Existing Jurisdiction Rules: The Absence of Online Choice of Court Agreement

In the practice of online contracting over websites, the choice of court agreement will be deemed absent in two situations. First, where the terms and conditions of the website (user agreement) do not include a clause about the competent jurisdiction in case of any potential disputes that arise out of using the website. Second, where the court, for whatever reason, invalidates the jurisdiction clause incorporated into the website's terms and conditions.

1. ONLINE BUSINESS-TO-BUSINESS CONTRACTS

Although it has been concluded that no considerable legal doubts may appear when applying the Brussels Regulation in case of the absence of choice of court agreement, there might still be some areas where controversy can emerge. For instance, the place of contract performance laid down in Article 5 (1) (a) could be problematic in the online context. In *Color Drack GmbH v LEXX International Vertriebs GmbH*,³ the ECJ affirmed that subparagraph b of Article 5 will be applicable in case of different places of delivery within one Member State. Based on the court's reasoning in this case, it has been argued that subparagraph b will mostly not apply in case of multiple places of delivery in different Member States. In such a case, subparagraph a of Article 5 should be applied. The determination of the place of performance in different Member States, especially in the sale of services and intangible goods over a website is a controversial and problematic issue which is not addressed by the Brussels Regulation. Indeed, this demonstrates yet again that the application of some rules of conflict of laws to online contracting cases may not be very successful.

The traditional personal jurisdiction rules of US law have been applied to both inter-state and international disputes. It is submitted that the application of the US minimum contact test to online contracts over websites has remained a debatable matter in conjunction with the interpretation of the US Supreme Court's concept of 'stream of commerce'. Foreign and out-of-state businesses could be the subject of litigation in other states based on their websites being accessible in those states. Most interestingly, many US commentators have criticised the EU country-of-destination approach in consumer protection on the ground that businesses

³ Case C-386/05 *Color Drack GmbH v LEXX International Vertriebs GmbH* [2007] ECR I-3699.

outside Europe can be litigated in any 28 Member States merely on the basis of their websites' accessibility in those countries. The same finding has been reached here regarding the US long-arm jurisdiction.

In Iraq, It seems that legislators have sought to maximise the cases where the Iraqi courts can assert a jurisdiction on international contractual disputes by laying down two occasions where the jurisdiction can be conferred: if the contract has been concluded in Iraq or if it has been performed in Iraq. Although determining the place of online contract formation has become more legally certain after the enactment of the IESTA, the latter Act has remained silent about the place of online contract performance. Apart from the last point, no considerable technical challenges may appear regarding the application of these connecting factors to online contract disputes. The finding worth noting is that the application of traditional connecting factors to online contract disputes between litigants from Iraq and the US, or EU countries, may lead to the fact that courts in more than one country can claim to adjudicate the dispute at the same time. In this regard, it would have been better if the IESTA included more definite provisions about the interpretation of the place of contract performance. The EU's approach in the Brussels Regulation regarding the special jurisdiction rules on contractual obligations would be suitable to be adopted by the IESTA. More specifically, the IESTA should provide a legal interpretation to the meaning of place of the contract performance, as the Brussels Regulation does, rather than leaving it to the courts to do so, the matter being as it is could be more problematic in the online contracting cases.

2. ONLINE BUSINESS-TO-CONSUMER CONTRACTS

The law governing online B2C contracts in case of the absence of the choice of court agreement has become one of the most debated and controversial matters in EU law. More specifically, the application of Article 15 (1) (c) of the Brussels Regulation to online consumer contracts over websites has generated a considerable number of scholarly and judicial controversies. In its interpretation of Article 15, a Joint Declaration by the European Commission and the Council affirmed that simply being accessible is not enough of a factor for the satisfaction of the 'directing commercial activities' approach which is set out in Article 15 (1) (c) of the Brussels Regulation. The author argues that the criterion of 'mere

accessibility of the website' which is used in the Joint Declaration to interpret subparagraph (c) is in itself another controversial issue.

Based on the analysis of four cases heard by the ECJ, this thesis has reached the conclusion that the criterion of a website's mere accessibility has been very narrowly applied. It can be said that the actual tendency of some courts and the ECJ have been in favour of even ascribing the 'directing activities' standard to passive websites. Moreover, a recent judgment of the ECJ confirmed that Article 15 (1) (c) would still apply in case there was no causal nexus between the defendant's website and the conclusion of the contract, and even though the consumer had never accessed the defendant's website.⁴

Similar to the EU's 'directing activities' approach, US courts have applied the 'purposefully targeting activities' test when asserting personal jurisdiction over out-of-state defendants for disputes arising out of activities on their websites. However, no distinction has been made between consumers and businesses. It has been concluded that the application of such a test has been much narrower than its application in EU law. In terms of consumer protection, the analysis of some typical online C2B cases has found that courts in the home states of consumers have rejecting asserting personal jurisdiction over website merchants because of the lack of minimum contact between the defendant and the forum state. Overall, it is debatable the extent to which courts in the US can reach a compromise between the minimum contact test and the 'purposefully targeting activities' approach in online consumer contracts.

It has been stated that Iraqi courts can assert jurisdiction over online contracting disputes in two cases: if the contract has been concluded in Iraq or if the place of performance has been in Iraq. The negative implications of such a rule are that Iraqi consumers will be deprived of litigating foreign businesses in Iraq when the place of online contract and its performance were not in Iraq. In the traditional context, such a finding should seem very justifiable. However, it may not sound fair in the practice of instantaneous contracting over the internet. Consumers who permanently reside in Iraq and conclude contracts over websites will not be able to bring proceedings before Iraqi court if the place of online contracting is not deemed concluded in Iraq and if its performance was not in Iraq. Again; the Iraqi Consumer Protection Act should have provided special rules for consumer protection in terms of applicable law matters. Rather than the US approach, which is comparatively less in

⁴ Case C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013] Bus LR 104.

consumers' favour, the EU law's approach seems more preferable to be adopted in Iraq. Legal norms should be formulated and added to the Iraqi law, by which consumers in Iraq can litigate foreign business before Iraqi courts. However, as far as online contracting is concerned, norms should be more definite regarding the criterion of directing activities approach in a way that will not expose business to being litigated in Iraq just because their websites are accessible in Iraq.

3. ONLINE CONSUMER-TO-CONSUMER CONTRACTS

As it has been repeatedly said, this category of online contracts is excluded from the application of the Brussels Regulation. In case of any international disputes between two consumers within Member States, it is very likely that the national law of each Member State will state whether its courts have jurisdiction or not. In online scenarios, such a conclusion could lead to a wide range of legal uncertainty about determining the proper court to adjudicate online contract disputes over the internet.

The same finding reached about online B2C contracts can be applied here to online C2C contracts under the application of US and Iraqi law. Concerning the Iraqi law specifically, this category of online contracts would not raise particular legal issues because of the absence of rules that distinguish between business and consumer contracts. The legal uncertainty here relates to the difficulty of determining the place of contract conclusion and performance in the case of online contracts. This matter has been addressed previously this chapter.

7.2.2.3 Existing Applicable Law Rules: Online Choice-of-Law Agreement

Exactly like the jurisdiction clause, online choice of law agreement is usually incorporated into website terms and conditions. The choice either comes in a separate clause called 'applicable law' or it is sometimes included with the 'jurisdiction clause' under the dispute resolution section.

1. ONLINE BUSINESS-TO-BUSINESS CONTRACTS

No considerable legal issues can be highlighted regarding the validity of online choice of law agreement in the application of the Rome I Regulation. However, the fairness of the online choice of law agreement has been questioned in this thesis. The special characteristics of the contracting process on websites make the fairness of such a choice a questionable matter indeed because the accepting party does not have the option to discuss and negotiate with the website operator about the applicable choice of law. The Rome I Regulation has left it to the discretion of the national laws in each Member State to examine the material enforceability and fairness of such a choice. The question of the fairness of online choice of law can be clearer when considering the choice of court clauses as a tacit agreement to apply the chosen forum's law as it is stated in Recital 12 of the Rome I Regulation.

From a procedural point of view, the same finding that has been reached regarding the online choice of court agreement could be applied here to the choice of law agreement. Interestingly, it has been concluded that US courts have not welcomed the application of foreign laws or the law of other states when asserting personal jurisdiction over out-of-state defendants. As far as online contracts over websites are concerned, such a finding could be seen as disadvantageous for the defendant in the disputes as the courts will apply their own state's law even though the online contract may have the closest connection to the defendant's home country or state.

Under Iraqi law, following the enactment of the IESTA, the online choice of law agreement will be considered valid pursuant to the traditional general rule laid down in Article 25 of the ICLC. The material enforceability of such a choice will be examined by the hearing court, pursuant to the general traditional rules in the ICLC. However, in the same way as EU law, the fairness of such a clause will remain questionable under Iraqi law, especially when the adhesion rules cannot apply to such clauses in Iraq, and even though the agreement about such a choice has been reached without negotiation between the contractual parties. Under those circumstances, it could be said that the principles of 'reasonable person' and 'procedural unconscionable' that are applied by the US courts should be deemed suitable criteria when addressing the validity of choice of law clauses on websites' terms and

conditions. The principle of adhesion in Iraqi law should be extended in certain cases to cover online contracts concluded over the Internet.

2. ONLINE BUSINESS-TO-CONSUMER CONTRACTS

According to Article 6 (2) of the Rome Regulation, any choice that deprives the consumer from being governed by any law other than the law of the country where he habitually resides will not be considered valid if it deprives the consumer from the mandatory rules afforded to him according to his personal laws. Based on the issue of fairness that has been discussed in the previous findings regarding the choice of court agreement, such a rule seems very justifiable in terms of online consumer contracts where the consumer does not have any chance of negotiating with the website trader. However, the present author has argued and reached the finding that making an assumption that the best protective law for the consumer is the law of his home country might not always be true. More clearly, while it seems reasonable that a consumer would be better protected by granting him the right to litigate the business in his own country, the same rationale may not apply to choice of law agreement because applying the chosen law may grant the consumer access to more advantageous rules and more legal remedies. Accordingly, it would have been better if the Rome Regulation had provided that the choice of law agreement would be considered invalid only in case the application of the consumer's home country laws provides more advantageous rules and remedies to him.

Finally, it is submitted that EU consumers are only well protected in terms of transactions with defendants within EU Member States. The same protection might not be secured when the contracts occur with non-EU businesses. Such a finding could be of particular significance in the online contracting context where a considerable number of online contracts over websites and online marketplaces may occur between EU consumers and E-businesses from non-European countries, such as America and China.

Similar to online B2B contracts, the online choice of law agreement in consumer contracts will be considered valid and enforceable against the consumer as long as the website operator has taken the proper technical steps on his website in a way that brings the consumer's attention sufficiently to such a clause prior to concluding the contract.

Under the Iraqi law, Article 25 of the ICLC validates the choice of law agreement regardless of whether one of the contractual parties is a consumer or not. The Iraqi Consumer Protection Act does not include any provision that protects the consumer from the validity of choice of law agreement. However, it is worth noting that such a situation might lead to the finding that Iraqi consumers will be very easily exposed to the application of the law of other countries, which could be less advantageous to them than Iraqi law. Having said that, the reform of the Iraqi Consumer Protection Act should be considered a pressing issue – protective rules should be added to the Act in order to ensure that consumers in Iraq will have the best protection in terms of applicable law matters. In this regard, the EU’s approach in Rome I Regulation is very helpful to learn from; however, the author is in favour of the notion that courts should choose the law of the country that provides the ultimate protection for the consumer, whether this law was the consumer’s national law or any other foreign law.

3. ONLINE CONSUMER-TO-CONSUMER CONTRACTS

Under EU law, this category of online contracts is not legislated upon. The Rome I Regulation does not apply in respect of transactions between consumers. Under those circumstances, the national law of each Member State will determine the validity of choice of law agreement in case of contractual disputes between two consumers. In the online context, such a finding could be expected to be problematic in light of the EU’s harmonized laws. This is a legislative gap which should be handled by the EU law makers.

The same traditional rules in both the US law and Iraqi law apply to online C2C contracts. In this respect, courts in Iraq should learn lessons from the US judges and scrutinize the validity of online choice of law agreements. As previously mentioned, the US courts’ principles of ‘reasonable person’ and ‘procedural unconscionable’ could prove to be useful lessons.

7.2.2.4 Existing Applicable law Rules: The Absence of Online Choice-of-Law Agreement

In case of the absence of explicit or implicit online choice of law agreement, connecting factors such as the place of concluding the contract, place of performing the contract or the

place of contractual parties' residence will be taken into consideration to find the proper law governing the online contracts.

1. ONLINE BUSINESS-TO-BUSINESS CONTRACTS

The rule that is set out in the Article (4) (1) of the Rome I Regulation seems very useful in the context of online contracting over websites. Determining the governing law of the contract by the law of the country where the seller is habitually resident will not raise any legal uncertainties on the online contracting practices and this is what the law should seek to do. It is also submitted that the Rome I Regulation was very successful in giving national courts in each Member State the discretion to apply any other law to which the contract seems most closely connected. The principle of 'most closely connected' sounds more feasible when determining the applicable law for online contracts disputes due to the special characteristics of contracting over websites which could make the contract more connected to another country other than that of the seller's residence.

Under the application of US law, no considerable legal issues may appear. It has been stated in the previous findings that US courts have been inclined to apply state law rather than any other law. However, in theory, the approach that is applied in the Second Restatement of Conflict of Laws has not been far from the concept of 'most closely connected' laid down in the Rome Regulation; that is to say, 'the law of state/country that has the most significant relationship to the transaction and the parties'.⁵

In Iraqi, the law of the country where the contract is concluded is the applicable law in the case of the absence of choice of law agreement. However, it has been concluded that applying such a connecting factor to online contracting cases over the internet may lead to the application of the law of a country which is less relevant to the contract and its parties. Consequently, this could lead to the application of an inappropriate law. The author has argued that neither the place of contract formation nor the place of its performance is a good ground for disputes that arise out of contracts concluded over the internet. Giving the courts the discretion to assert jurisdiction depending on their satisfaction that Iraq is the most closely connected country to the disputed contract would be a more appropriate jurisdictional basis to

⁵ Restatement (Second) of Conflict of Laws (1971), §188.

govern the online environment. In this context, the EU's '*most closely connected*' and the US's '*most significant relationship*' approaches are argued to be more suitable connecting factors to be relied upon by the Iraqi courts than the 'place of contract conclusion', which is problematic in the online practices.

2. ONLINE BUSINESS-TO-CONSUMER CONTRACTS

The same approach that has been used in Article 15 (1) (c) of the Brussels Regulation about the jurisdiction rules in consumer contracts has also been set out in Article 6 (b) of the Rome I Regulation. Accordingly, the same findings that have been reached about the application of this approach to transnational online consumer contracts would also apply here to the applicable law rules in online consumer contracts.

In the US, there is no special federal law about the consumer protection in terms of jurisdiction and applicable law. Under those circumstances, the same findings that have been reached about applicable law rules in the online business-to-business contract would be also applied here to online business-to-consumer contracts. However, this may lead to the conclusion that consumers may have fewer chances to be governed by their own states' laws.

In Iraq, most importantly, the application of the law of the country where the contract is concluded as a connecting factor laid down in Article 25 of the ICLC will deprive Iraqi consumers from being governed by Iraqi law. More specifically, the joint application of Article 25 of the ICLC and Article 21 of IESTA would lead to the conclusion that the online contract over a website is deemed concluded in the place where the seller (business) is resided and, consequently, foreign law would be applied. In this context, the author has argued that the best approach would be to give Iraqi courts the discretion to apply the most favourable law for the consumer. Such a tendency needs proper reform to the Iraqi Consumer Protection Act that gives Iraqi courts the authority to apply the most favourable law for the consumer.

3. ONLINE CONSUMER-TO-CONSUMER CONTRACTS

Owing to the fact that this type of online contract is not subject to the Rome I Regulation in the EU, the national law of each Member State would apply to any dispute between consumers themselves. The findings of this could be very problematic in the online environment where the practice of C2C contracts is more prevalent than in the traditional contracting methods. This gap should be addressed by the EU legislature.

In the US, the courts will mostly apply the law that has the most significant relationship to the contract without considering, in general, whether the contractual parties are consumers or businesses. Once again, the most significant relationship approach would be more suitable to be adopted by Iraqi law; however, Iraqi courts should also seek to find out the weaker contractual party of the contract and grant that party the most favourable law.

7.3 CONCLUSION AND RECOMMENDATIONS

7.3.1 Conclusion

Certain rules and concepts of contract law and private international law have become inappropriate to apply to the online contracting process on websites and for settling disputes resulting from its conclusion and performance in the transnational context. On the other hand, other rules may still be relevant in their application to online contracting on websites. As a result, it may have become necessary for legislative authorities to reconsider some of the existing legal norms, especially in the Iraqi law, in order to take into account the special features of the internet communications.

7.3.2 Recommendations

7.3.2.1 General Recommendations

Firstly, websites and electronic marketplaces operators should be obliged by law to make their website terms and conditions clear, concise and place it in the most noticeable part of the website in such a way that ensures that the website visitor cannot be permitted to use the website before clicking and accepting the user agreement.

Secondly, internet customary rules and practices should be given priority over the traditional rules when characterising the process of displaying and advertising goods on websites and electronic marketplaces and whether this amounts to a valid offer or only an invitation to treat.

Thirdly, More emphasis should be given to the role of the electronic signature as a method for verifying the authenticity of online contracting parties. Such an action should be ensured by reforming the electronic signature laws.

Finally, The meaning of consumer should be re-conceptualised. Confining the criterion to when an individual is acting for purposes that fall outside his business or profession is problematic in online selling and buying activities on websites. The criterion of non-experts should be used instead, at least when categorising consumers in online activities, that is to say, e-consumers.

7.3.2.2 Specific Recommendations

Based on the main findings that have been reached at the end of this research, and considering the legal jurisdictions which have been compared, the following recommendations would be considered the main areas where the Iraqi law should be reformed:

Firstly, the Iraqi Electronic Signature and Transactions Act (IESTA) should be reformed to include provisions about the legal characterisation of displaying goods and services on websites, the validity of website terms and conditions, and the place of online contract performance. The current provisions of the above mentioned Act are very basic and do not overcome most of the problematic aspects of online contracting, as has been demonstrated throughout this thesis. The last two points highlighted above should be of particular significance for jurisdiction and applicable law matters in online contracting practices. First, as far as the website terms and conditions are concerned which most often include the choice of court and law clauses, the US courts' approaches of '*visibility of websites terms and conditions*', '*procedural unconscionable*' and the '*reasonable person*' would be very suitable to learn from by courts in Iraq. Second, regarding the '*place of contract performance*', it

would be helpful for Iraqi law to apply the Brussels Regulation approach and provide that the place of contract performance is the place where the goods were delivered or the services were provided.

Secondly, the Iraqi Consumer Protection Act and articles 14, 15 and 25 of the Iraqi Civil Law Code (ICLC) should be reformed by including new rules about consumer protection in terms of jurisdiction and applicable law issues. As for online choice of law agreement, it would be better to validate it if the chosen law is the most favourable law for the consumer. Whereas the choice of court agreement would not be validated against the consumer in online contracting cases because the consumer does not have the choice to discuss this clause with the website operator. Furthermore, in the same way as the European Consumer Rights Directive, special consumer protection rules should be added with respect to distance consumer contracts, which can apply to consumer purchases over the Internet. Most importantly, in the case of the absence of choice of law and court agreement, Iraqi law should, in the same way as the Brussels and Rome I Regulations, offer the consumer the right to sue businesses in Iraq if the latter purposefully direct their commercial activities to the Iraqi consumers over the website. The same thing should be done regarding the applicable law; however, courts should be given more discretion to apply the most favourable law for the consumer.

Thirdly, new rules should be enacted to provide legal validity and certainty to contractual parties' autonomy over choice of court agreement. Currently, rules regarding the validity of online choice of court agreements are not sufficiently legally certain and the Iraqi law in certain cases may not acknowledge such a choice. In this context, Iraqi law should follow the well-established principle of conflict of laws rules which is applied by the law of the EU and the USA, and gives validity to the parties' choice of the competent court to hear their dispute irrespective whether this choice assigns an Iraqi or foreign court.

Finally, most importantly, article 25 of the ICLC should be reformulated specifically to give Iraqi courts discretionary powers to apply the law of the country to which the contract is most-closely connected instead of the place of contract formation which is problematic in the online environment. The 'place of contract conclusion' is not a suitable connecting factor, especially for online contracts, and its application may lead to the application of a law which is not really related to the disputed contract. It is better to learn from both the EU and the USA law in this regards and apply the law of the country which is most closely connected to

the contract instead. This connecting factor is more suitable to determine the appropriate applicable law in online contracting cases because it gives the courts more flexibility to identify the country, to which the online contract is more closely connected, rather than confining them to certain rigid rules that makes the process of identifying the applicable law more difficult.

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