



## The Mechanism of Adhesion in Commercial Electronic Contracts

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## The Mechanism of Adhesion in Commercial Electronic Contracts

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### Abstract

The issue of electronic contracts in e-commerce has become recently a fundamental pillar in worldwide economy. Similarly, the classic adhesion theory seems to be incompatible somehow with the new generation of commercial e-contracts particularly in its terms. The classic one has three terms for having adhesion existed, while these three terms are incapable entirely to apply to the abovementioned new generation of contracts. This has amplified the need for a new theory of adhesion for such contracts. As a result, the core question of this research is going to be: Are electronic commercial contracts really adhesive? If so, is the classic adhesion theory applied to it in its old terms and conditions? Or there is a new solution?

Subsequently, in order to reach the answer for such a question it is necessary in this research to make a comparison between the Iraqi provisions with the Egyptian provisions in return in terms of adhesion, whether or not to apply to e-contracts. Consequently, as a result of this comparison and analysis, a new theory of adhesion has emerged for e-contracts that seems familiar to the classic one but not entirely, this is to say that the new theory has shortened the terms of the classic theory into two conditions instead of three ones. **Keywords:** The Mechanism , Commercial , Electronic Contracts

- 1. Introduction** The modern world has witnessed an enormous development in communications to the extent that they became indispensable to modern living. Such tools were originally

confined to the telephone, fax and telex but when the internet appeared it became the easiest medium for transferring and exchanging information, turning the world into an electronic global village.<sup>1</sup> The controversy that has been invoked was mainly of whether an e-contract counts as a bargaining contract, where parties have the right to discuss about the terms and conditions of the contract or whether they should be considered adhesion contracts where parties are not allowed to bargain either to accept the contract as a whole or to refuse it entirely. Since the mechanism of adhesion is firstly located within the stage of negotiation, therefore we shall scrutinise this stage before diving into the abovementioned mechanism to have this study completed.

2. **Definitions** The word ‘internet’ is a combination of two English words, ‘international’ and ‘network’, and means international network communications. In 1969, when the internet was first created, the intention was to use it for military purposes besides of course, benefiting from it as an enormous computer network that would create a transnational communication line throughout the world.<sup>2</sup> During its development in the 1970s, the notion of ‘e-commerce’ arose. Despite the Iraqi E-signature and Transactions Act No.78/2012 does not give a definition for such a notion and neither does the Egyptian E-signature Act no. 15/2004.<sup>3</sup> The scholars have defined it to be any transactions conducted by digital processes through the internet or it is commercial actions conducted by international network connected electronically

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1 Roger Leroy Miller and Gaylord A Gentz, *Law for Electronic Commerce* (Thomson Learning London 2007) 7. David I Bainbridge, *Introduction to Computer Law* (Pitman 1996) 23.

2 In 1969, the American Ministry of Defence asked computer specialists to find a means to liaise with unlimited computers without depending on a single computer to control the traffic as a single computerised unit can be prone to a nuclear attack. See Miller and Gentz, (n 1) 4. See also Clive Gringras, *The Laws of the Internet* (Butterworths 1997) 2.

3 Dr Akram M Hussien and Ikhlas A Rasool ‘Notices in Iraqi Civil Code’ (2002) 14 *Al-Rafidain Journal for Legal Rights* 12.



through computers.<sup>1</sup> Furthermore, e-commerce can be defined as commercial actions where offer and acceptance exchanged, and the consent issued, online except the delivery which shall be performed by offline facilities.<sup>2</sup>

To sum up, it can be said that despite the various attempts to define e-commerce at the international level, no similar trend can be seen from the Iraqi nor the Egyptian legislator, as both did not identify what does the concept mean. This could be seen positively as it allows the inclusion of future e-transactions within the meaning of e-commerce.

As for the definition of contract of sale, the Iraqi Civil Code describes such concept as ‘the sale is exchanging a thing with another and both are financially valuable’.<sup>3</sup> However, it could be argued that this text seems to be defining barter contracts instead of sale contracts as even both are exchanging things from one party, however, the consideration in sales is to be only money while in barter the consideration is to be things that having monetary value. Interestingly, despite that the Egyptian Civil Code does not include a definition for the general term ‘contract’, it defines ‘sale contract’ in a more accurate way than the Iraqi Civil Code does. It states that ‘the sale is a contract through which the seller is committed towards the buyer to transfer the property of a thing or another financial right for a sum of money’.<sup>4</sup>

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1 For the first definition see Charles Trapper, *Electronic Commerce Strategic* (USA, 2000) 5. Whilst the second See Ravi Kalakota & Andrew B Whinston, *Electronic Commerce a Manager's Guide* (Addison Wesley 2002) 3.

2 Ahmed Abdul-Kareem Salama, *Qualitative Private International Law "Electronic- Touristic- Environmental"* (1st edn, Dar Al-Nahda Al-Arabia 2002) 19.

3 Article 506 thereof.

4 Article 418 of that Code, no. 131, issued in 1948. The concept of ‘contract of sale’ has also found an echo in the French Civil Code as well as English law. The former states in article 1582 that ‘the sale is an agreement by which one person is bound to deliver a thing, and another to pay for it and the latter has defined it in Article 2 of the Sale of Goods Act 1979 as ‘a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price’ while the other paragraphs

It is worth mentioning that the latter definition has filled the gaps that exist in the Iraqi text for two reasons. Firstly, it has depicted the sale not only as a contract that transmits the right of ownership to the new owner but also transfers the other rights stemming from the right of ownership such as the intellectual property rights.<sup>1</sup> Secondly, this definition is, in contrast with the Iraqi text and Sharia jurisprudence, has asserted explicitly that the price must be in the form of money and, this, indeed what distinguishes and recognises sales contracts from other forms of contracts such as barter and money exchange contracts.<sup>2</sup> Therefore, it can be argued that the definition mentioned in the Iraqi Civil Code above for the sale is in need for a completion to be inclusive of all elements of the sale process, and of course to be distinguishable from other similar forms of contracts.

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mention that; (2) There may be a contract of sale between one-part owner and another. (3) A contract of sale may be absolute or conditional. (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale. (5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell. (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. While the Consumer Rights Act 2015 has stated a definition for the contract of sale in Chapter 2 Goods; Article (s.5) as ‘the contract through which the trader transfers or agrees to transfer ownership of goods to the consumer, and the consumer pays or agrees to pay the price’. It can be noted that Article 2 of the proposal of the Brussels Regulations 2011 has stated a definition close to the latter definition as paragraph k thereof has mentioned the following; ‘sales contract means any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the goods to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority’.

1 Dr. Omar Mo’min, *Lessons in the Named Contracts: Sale and Barter Contracts* (1st part, Egyptian Universities Libraries Consortium, 2011) 26-27.

2 *Ibid* (n 54) 28.



Having provided different views about the meaning of the term contract, it is important now to conceptualise the notion of ‘e-contract’. Notably, traditional contracts require physical attendance of the parties through negotiations which gives an opportunity for each one to investigate the identity of the other party and to verify his will and consent to the contract.<sup>1</sup> Conversely, such physical attendance may not be envisaged in e-contracts where the parties are at a distance and anonymous.<sup>2</sup>

An e-contract, on the other hand, seems not too different than classic contracts and the mere difference is the medium used in such conclusion as being a distance communication means.<sup>3</sup> The term e-contract is defined explicitly in the Iraqi law, other Arabic laws only referred to it implicitly.<sup>4</sup> In fact, Article 1 of Iraqi E-

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1 Mohammed Mursi Zahra, E-contract, E-vindication, E-consumer (3rd edn, Dar Al-Nahda Al-Arabia no year) 26.

2 Dr. Ibrahim Ubed Ali, ‘E-contract’ (PhD thesis, Law School, Halwan University, Egypt, 2010) 72. See also Mursi Zahra (n 30) 27.

3 Some believe that even the structure, nature and elements of e-contract is no more than a physical contract with an extra element which is the remote linking between offer and acceptance when a consumer tries to contract with a professional companies or persons. Additionally, the means used in such contracting has a crucial role to determining the type of conclusion and the type of contract starting from the negotiations stage till the conclusion of that contract. See dr. Mamdouh M Khairi, Distance Action in Civil Law: Electronic Work from Home- a Comparative Study (Dar al-Nahda al-Arabia, 2004) 93.

4 Among the former category, the Jordanian E-transactions Act no. 85 2001, which has explicitly defined the e-contract as ‘an agreement concluded by electronic means as entirely or partially’. However, the Tunisian E-exchanges and E-commerce Act no. 83 2000 did not define the e-contract explicitly but only tacitly; it has rather explained some concepts regarding e-contracting such as e-exchanges as ‘such exchanges conducted by electronic documentations’ and e-commerce as ‘commercial operations conducted by electronic exchanges’. While the Law of Emirate of Dubai for E-transactions and E-commerce no. 2 2002 has put definitions for e-transactions and e-commerce, when the former defined as ‘any dealing, contract or agreement concluded or implemented fully or partially by electronic correspondences’ whilst the later defined as ‘electronic transactions enrolled by electronic correspondences’. It is seen that both of the Tunisian and Emirate legislators

signature and Transactions Act 2012 not only gives a definition for e-transactions<sup>1</sup> but also expresses the e-contract as ‘the unison of an offer made by a contracting party with the acceptance of another in a manner, which establishes the effect thereof in the object of the contract conducted by electronic means’.<sup>2</sup> It can be observed that this definition adds an important element to the general definition of contract; that is the medium used for the conclusion of the contract.<sup>3</sup> Perhaps more important is the flexibility of the language used in the text as it allows the inclusion of other forms of mediums that might be used in the future technology.<sup>4</sup> Due to the lack of the Iraqi writing in such concern we can say that despite.<sup>5</sup> It can be concluded that Iraqi

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have not created explicit definitions for e-contract but rather their definitions for e-transactions tend to cover and include the e-contract as to be concluded by electronic correspondences. See the comments on these laws: Dr. Shihata Ghareeb, *The Electronic Contracting in Arabic legislations* (Dar Al-Nahda Al-Arabia 2005) 30.

1 Paragraph 6 thereof mentions that ‘E-transactions are requests, documentations and transactions conducted by electronic means’.

2 Paragraph 10 thereof.

3 Ayser Sabri Ibrahim, ‘The Conclusion of Contract by Electronic Way and its Vindication’ (MSc thesis, University of Alexandria, Egypt 2014) 6-7.

4 E-means were defined in paragraph 7 thereof as ‘electric, magnetic, optical or electromagnetic devices, equipment, tools or any other similar means utilised to originate, process, exchange and restore information’. Again, mediums were defined in the United Kingdom by paragraph 1 Article 2 of The Financial Services (Distance Marketing) Regulations 2004 No. 2095 as ‘durable medium means any instrument which enables a consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored’.

5 The Egyptian E-signature Act no. 15 2004 has not defined e-contract but the draft of E-commerce Act defines such a notion as: ‘any contract in which showing the will of one or both parties; or managing the negotiation and exchange of documentations; have been fully or partially conducted by an electronic medium’. This proposal was prepared in 2001 by a committee consisting of many specialists through several different Egyptian ministries. It was also formulated in Ministry of Justice supported by the Information



law not only defined e-contracts but also identified the crucial feature to distinguish them from classic contracts.<sup>1</sup> The questions that should be asked now is which part should be electronic? Is it the offer or the acceptance or both?

There have been two arguments made to answer this question. The first grants the so-called 'electronic' feature to the contract when any part of it is performed electronically under a condition that this electronic part is fundamental to convey the will of the party to the other to fulfil the contract.<sup>2</sup> For instance, if a company has advertised to sell a product where the user can recognise the product description online but the latter then approaches physically another branch of the company to contract with, then this contract is not an e-contract but a paper contract.<sup>3</sup> However, this opinion can be criticized as most contracts are not usually void of electronic elements and subsequently performing a contract by electronic means partially is not enough to brand it as an e-contract. Additionally, this view has omitted the

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Centre Technical Board. However, this proposal is still pending. See Sabri Ibrahim (n 16) 7.

1 See about these Arabic laws Sabri Ibrahim (n 16) 7.

2 This opinion was accepted by the Geneva Roundtable Commission from 2 to 4 September 1999, with the support of University of Geneva, as this commission has split the contracts performed partially by electronic means than the fully electronic ones into separated categories and also to discuss the issued regarding e-commerce and internet. The chairman, Prof. Andreas Bucher, University of Geneva, Prof. Katharine Boele-Woelki, University of Utrecht, assisted by assist. Patrick Wautelet, Catholic University of Louvain and others. See Electronic Data Interchange, Internet and Electronic Commerce, a paper document for Hague Conference on Private International Law, preliminary document no. 7 of April 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the conference, drawn up by Catherine Kessedjian, the Deputy Secretary General, 19. See also Mustafa Ahmed Abu-Amro, *The Session of Contract in Online Contracting Framework: A Comparative Study* (2008) 27.

3 Among the Arabic laws that attempted to put a criterion which recognises electronic contracts is the Jordanian E-transaction Law no. 85 2001 which mentions in defining the e-contract: 'the agreement concluded by electronic means fully or partially'.

determination of the criterion that should be used to identify the ‘fundamental part or action’ that should be undertaken electronically. Admittedly, this might be difficult specifically that contracts vary in their parts and therefore, considering in advance the priorities is certainly a difficult task. The second argument provides that an e-contract may not be called so unless all its parts are performed electronically.<sup>1</sup> This opinion is easy to criticize on the grounds that applying it may portray most e-contracts to be non-electronic because one or two parts have not been performed electronically. In addition, it may be inappropriate to deny the electronic feature in a contract that is mostly concluded by electronic means except for one or two steps concluded physically.<sup>2</sup>

With the balance of possibilities, the best way to solve these arguments is to select the act of acceptance as the determining factor; if that is electronic, then the contract can be deemed to be an e-contract. The rationale behind this is that any contract cannot be concluded without an acceptance to the offer; i.e. the offer alone is insufficient for the conclusion of the contract. The acceptance, therefore, is the main pillar of any contract to which the electronic feature should be attributed. It can be noted that the Iraqi E-signature Law no. 78/ 2012 -mentioned above- addressed this issue indirectly when it defined the e-contract by stating that the contract is the union of an offer with an acceptance.<sup>3</sup>

- 2.1. **Characteristics of E-contracts** E-contracts differ than traditional contracts in several aspects in terms of E-contracts are mostly concluded for commercial purposes and therefore they are called e-commerce contracts where it can be observed that e-contracts of sale represent the majority of such contracts. More significantly, being distanced contracts, the possibility of prejudice is present, hence, e-contracts are regulated mostly under the category of

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1 Dr. Muslih Ahmed Altarawna & Noor Hamad Alhajaya, ‘Electronic Arbitration’ (2005) 2 Journal of Law, Al-Bahrain University 205.

2 Dr. Husam Aldeen Fathi Nasif, *Electronic Arbitration in International Trade Disputes* (Dar Al-Nahda Al-Arabia 2005) 15-16.

3 Paragraph 10, Article 1 thereof.





consumer protection laws.<sup>1</sup> Since goods are at a distance from consumers, it is important to reveal the basic features and fundamental characteristics of the product that consumers wish to purchase.<sup>2</sup> In terms of evidence, traditional contracts are usually verified by paper documentation but writing is not considered a proof unless signed manually. E-contracts, on the other hand, may be evidenced by e-documents<sup>3</sup> and e-signatures.<sup>4</sup> An e-document contains the rights and duties of the parties confining what the parties have committed themselves to while an e-signature has a crucial role in legitimising such a document.<sup>5</sup>

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1 EU Consumer Protection Directive 97/7 and French Consumer Code have imposed that the trader, as the strong party, must perform several duties and obligations towards the consumer, as the weak party, such as Article 111/1 of the latter which mentions that 'all business suppliers of goods or services must, prior to conclusion of the contract, ensure that the consumer is made aware of the essential characteristics of the goods or services'; Article 113/3 has indicated that 'all product vendors or service providers must, by means of marking, labelling, bill-posting or by any other appropriate procedure, inform the consumer of prices, any limitations of contractual liability and special terms of sale, in accordance with the procedures laid down by orders issued by the minister of economy, subsequent to consultation with the National Council of consumption'.

2 See Dr. Mohammed Hussien Mansoor, *Electronic Responsibility* (Dar Al-Jama'a Al-Jadeda 2003) 19; see also Dr. Mustafa Abu-Mandour Mousa, *The Role of Info. Cognizance within the Formation of Contractual Relationship, a Comparative Study* (Dar Al-Nahda Al-Arabia 2000) 290.

3 Article 1/9 of Iraqi E-signature and Transactions Act no. 78 2012 has defined e-documents as 'papers and documents that are initiated, integrated, stored, sent or received whole or in part by electronic means including exchanging data electronically, by email, telegram, telex or copy-telegram that carries an e-signature'.

4 Article 1/9 of Iraqi E-signature and Transactions Act no. 78 2012 has defined e-signature as 'a personal signal undertakes a form of letters, numbers, symbols, signals, sounds or other, having a personal mode so as to be related to the website and certified by the certification commission'.

5 The 'electronic' feature of the document means multiple processes regarding a document in terms of writing, saving, retrieving or transmitting it by a technique containing an electric, digital, magnetic, wireless, optical, electro-magnetic or other similar means. See Dr. Ashraf Tawfeeq

An e-contract, in contrast to a traditional contract, may be concluded and implemented online without the need for its physical, tangible existence. Due to the possibility of contracting online, it has become easy to deliver some products electronically such as PC software, music and e-books. In addition, there are services such as medical consultations where the client photocopies and downloads the software online.<sup>1</sup>

To conclude, it could be said that the e-contract has its own unique features that distinguish it from the traditional forms of contracts. What could be worrisome in the e-contract form of contract is that it does not allow the consumer to check the item before buying it, and therefore, could be highly subject to prejudice. Perhaps it would be preferable to provide him/her with the opportunity to withdraw from online contract.<sup>2</sup>

- 2.2. **The Nature of Negotiations** Generally speaking, it must be clarified that not in all scenarios, negotiation is required or necessary. A contract can be initiated by issuing an offer directly. Consequently, bargaining sales is not a condition of legitimacy. For instance, if A means to contract with B and then says: 'I will sell this for a thousand dinar', and B accepted, then this is a valid and irrefutable sale because such words are explicit and depend on neither presumptions nor pre-events.<sup>3</sup> Most importantly, although negotiations play a crucial role in the scope of contracts, Iraqi Civil Code does not offer any text on the legal provisions

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Shamsadeen, 'Criminal Protection for E-document' (Research submitted to the Conference of E-banking Actions between Sharia and Law, Dubai, 10-12 May) 484.

1 See Sabri Ibrahim (n 16) 19-20.

2 As mentioned in Article 121/26 of the French Consumer Code, the e-contract is correlated with the right of withdrawal, which means the right to retreat back, with or without a reason, from the contract within a period of time which varies between the laws with some other conditions about the sold items and the costs of sending them back. See Bernard D Reams, *The Law of Electronic Contracts* (2nd edn, Lexis 2002) 105.

3 Muhiyaddin Sh Alnawawi, *al-Majmu: Sharh al-Mohathab* (1st edn, Dar al-Fiqr Press 1996) 162.



concerning the period of negotiation.<sup>1</sup> Negotiations therefore mean compromising proposals between the parties regarding the offer to reach an agreement<sup>2</sup> or the exchange of views regarding the conditions and terms of a contract, and the discussion of potential offers and counter-offers made by negotiators.<sup>3</sup> Furthermore, it is also described as the exchange of proposals, correspondences, technical reports, studies and legal consultations exchanged by the parties to be aware of the best legal forms that meet their interests. Finally, it is an opportunity to learn about the outcome of the agreement in terms of the parties' rights and obligations. As a result, there is no final obligatory offer in such a stage that must be linked with an acceptance to conclude the contract – rather just offers and counter-offers.<sup>4</sup> Most importantly, negotiations may be preceded by a stage called the invitation to treat, i.e. when the other party is invited to engage and negotiate on a contract.<sup>5</sup> An invitation to treat does not constitute a legal offer<sup>6</sup> but instead it aims to bring the parties to inter into a dialogue, exchange and negotiation of views before

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1 The Egyptian Civil Code has also lacked to mention such provisions unlike the Italian and Greek legislations that have given attention to negotiations period. *ibid* 728.

2 Mohammed A Al-Razi, *Mukhtar Alsihah*, (Dar Alkitab Alarabi) 215.

3 Awaz S Dizai', 'The Obligation of Transparency in Contracts' (PhD thesis, Baghdad University, Iraq 2000) 14.

4 For a similar meaning, see Dr. Mohammed W Sewar, *Formalism in Islamic Jurisprudence* (2nd edn, Dar al-Thaqafa 1998) 141.

5 This usually happens in significant contracts of higher economic values, and that invitation may be forwarded to the public, or the party or his representative to the other party or his representative whether one person or many of the public on certain transaction without involving the full description of the contract. See Dr. Mohammed S Abdullah, 'Meeting of Contract' (MSc thesis, University of Mosul, 2005) 27.

6 Mere supply does not mean a legal offer because supplies might be in several forms; it might be an invitation to treat or may be an optional offer or an offer under seal or may even be an acceptance if in the case of counter-offer. *ibid* 27.

contracting.<sup>1</sup> The negotiation stage gives the opportunity for the parties involved to express their proposals. Therefore, it could be said this stage paves the way for a latter agreement between the parties.

Having showed the importance of the negotiation stage, it is necessary now to identify which acts are considered as 'negotiations' and which are not. The stage of negotiations may also expand to the initial proposals expressed by the parties when declaring their willingness to contract, which do not count as an offer, and any counter-proposals that may be suggested by the other party, and the discussions electronically or on-paper, directly or indirectly are not considered offers as well.<sup>2</sup> Consequently, negotiations may be shown through the statements of proposals between parties.<sup>3</sup> Besides, if the mission of negotiations is to reach an offer, it is important to consider what poses an offer in case of disputes.<sup>4</sup> Some contracts, for instance, may not be concluded but after long negotiations which may end up with an offer contributed by the both parties, offer in this case is an expression of the common will of the parties, which is called the common offer due to being issued by the two negotiating parties jointly. According to this sense, an offer in such contracts is resulted via negotiations, the parties otherwise may not reach an offer.<sup>5</sup>

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1 Negotiation usually opens the way for thinking about the limits of the contract legally and economically before carrying out legal effects arising from contracting. See Dr. Sabri H Khatir, 'Halting the Contractual Negotiations' (1997) 1 Journal of Al-Nahrain University 120.

2 Sabir M Ammar, 'Negotiation in Electronic Commercial Contracts' (2002)

3 <[www.mohamoon.com/montada/messagedetails.asp?p\\_messageid=333-51k](http://www.mohamoon.com/montada/messagedetails.asp?p_messageid=333-51k)> accessed 23 June 2016.

3 ibid 5.

4 The Egyptian Cassation Court upheld that 'it is unnecessarily for offer and acceptance to be proved through one document, rather it may be utilised to prove the contract according to the exchange of serial facsimiles between parties'. See Egyptian Cassation Court, Civil, Appeal session 11 January 1966, 17.

5 The common offer is usually formulated in big financial value contracts that require wide-ranging negotiations. See Henry Hoskins, 'Contractual



In Sharia, negotiation period is known as ‘*al-Musawama*’, which means the period of bargaining.<sup>1</sup> The concept of negotiations in Islamic jurisprudence with its different doctrines is not different than its conception in legal jurisprudence. Negotiations in both mean that the parties’ attempts to reach a mutual understanding of willingness to comprehend their clauses, as an attempt to reach an agreement directed to the other party as an offer.<sup>2</sup> It should be noted that the negotiators do not adhere to a certain way to negotiate and bargaining may be conducted by words as direct negotiations or by correspondence by sending letters or emails between the parties. In addition, the negotiators can use any tense to negotiate, whether that is past, present or future, or even frame their language as a question.<sup>3</sup> Finally, it might be preferable to suggest the inclusion of the negotiation documents (if any) to the contract. This will have the benefit of helping solving any dispute that might occur between the parties because of the contract.<sup>4</sup>

2.3. **E-contracts and adhesion theory** As has been seen above, e-contracts have most of the features of paper contracts. However, the nature of these types of contracts has been strongly debated. The controversy that has been invoked was mainly of whether an e-contract counts as a bargaining contract (where parties have the right to discuss and haggle over the terms and conditions of the

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Obligations to Negotiate in Good Faith: Faithfulness to the Agreed Common Purpose’ (2014) *Journal of Law Quarterly Review* 1. See also: Jean-Marc Loncle & Jean-Yves Trochon, *The Negotiating Phase of International Contracts* (1997) IBLG 1.

1 Ala’a Addin M Alkasani, *Badaa al-Sanaya fi tarteeb al-sharaia* (2nd edn, Dar Alkitab Alarabi 1982) 134. Mohammed A Alhattab, *Mawahib aljalil* (Dar al-Fikr 1978) 230.

2 Zaki (n 107) 77.

3 Order future sentence is a form of Arabic linguistic verbs besides the past and present tenses, however, it is a part of the future tense because it is for future events, but at the same time it means an order from someone to another to do something while the simple future tense is when somebody obliges himself to do something. Hussein (n 105) 727.

4 See Nazar H Aldamlouji, ‘Contracting by Internet’ (MSc thesis, Mosul University, Iraq, 2002) 49.

contract) or whether they should be considered adhesion contracts (where parties are not allowed to bargain either to accept the contract as a whole or to refuse it entirely).<sup>1</sup>

To answer this question, it is important first to identify the meaning of the term ‘adhesion contract’ as there are two conceptualisations of ‘adhesion’; one that is classic, which might suit the traditional forms of contracts, and the other is more compatible with the nature of the e-contracts. The Iraqi Civil Code does not include any definition of such term; however, Article 167 describes adhesion as an acceptance- by the mere admittance- of a pre-drafted contract formulated by the offer. Accordingly, it could be said that it is a non-negotiable contract.<sup>2</sup> As such, the scholars have set three elements or conditions for adhesion contracts to be formed;

- Firstly, the offer is issued to the public in a form that is unnegotiable and pre-printed directed towards the public equally, and the offerees have no choice either to accept or refuse that contract entirely;
- Secondly, the contract is about goods or services which are monopolised practically or legally by the offeror who dominates the sale for these goods or services; and
- Thirdly, the offeror is economically in a position superior to the offeree, which grants him a power to dictate his terms and conditions.<sup>3</sup>

As a result, the above conditions have made the offeree’s acceptance in adhesion contracts seems familiar with coercion than consent as long as the negotiation is absent and the other party (offeror) has a domination over the monopolised goods or

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1 See Sabri Ibrahim (n 16) 83.

2 Egyptian Civil Code gives identical text in Article 100.

3 See Dr. Abdul-Razzaq Al-Sanhori, *Theory of Contract* (Dar Al-Fikr) 80. Dr. Abdul-Majeed Al-Hakeem, *The Mediate in Contract Theory with Comparison and Balance between Western Jurisprudence Theories in Parallel to Islamic Jurisprudence and Iraqi Civil Code* (Al-Ahliyah for Publishing 1967) 154. See also Dr. Hasan Ali Al-Thanon, *Public Theory of Commitment* (Al-Ma’arif Press 1964) 65.



services.<sup>1</sup> However, despite that at the first glance, the consent in these situations might sound closer to coercion, it would be more suitable not to consider them as coercion contracts owing to the fact that the offeree still have the option and opportunity to refuse the concluding the contract in the first place.<sup>2</sup> Consequently, adhesion contracts are standardised contracts where the offer is fixed by the offeror and the offeree has no right to negotiate or bargain; his role is either to adhere to the contract as formulated or refuse it in full.<sup>3</sup> Indeed, this explanation is compatible with the Iraqi legislator's stance from adhesion since it links it to the absence of negotiations by using unnegotiable offer.<sup>4</sup>

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1 Dr. Huda Abdullah, *Lessons in the Civil Law of Contract* (2nd part, al-Halabi Publications 2008) 93. Dr. Abdul-Razzaq Al-Sanhori, *Masadir al-Haqq Fi Alfiqh Alislami* (Part 2, Dar al-Fikr 1955) 80. Dr. Abdul-Majeed Al-Hakeem, *al-Mojez fi Shareh al-Qanoon al-Madany* (Baghdad University Publications 2007) 154.

2 The consent here exists but it is imposed to the offeree and even so, it is not appropriate to portray such acceptance to be called a coercion. For more discussion in this view see Dr. Abdul-Muni'm Farag Al-Sadda, 'Adhesion Contracts in Egyptian Law' (PhD thesis, The First Fuad Press, Cairo, 1946) 24. Dr. Abdul-Razzaq Al-Sanhori, *the Mediate in Explaining the Civil Code: Fraud and Insurance Contracts* (7th part, 2nd book, Dar Ihia' al-Turath al-Arabi Press 1964) 1096. Dr. Hasan Abdulbasit, *the Impact of Imbalance of contractual terms between the Parties* (Dar al-Nahda al-Arabia 1996) 269.

3 See Dr. Ismat Abdul-Majeed, 'Economic Imbalance of Contract and the Role of Judge to Resolve it' (PhD thesis, Law School, Baghdad University, Iraq, 1978) 100. With regard to the overlap and differentiation between contracts' standardisation and customisation, see Margaret Jane Radin, 'Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2006) 104 Mich L Rev 1223.

4 See Sulaiman Barrak Al-Jumaily, 'Unfair Terms in Contracts' (PhD thesis, Law School, Al-Nahrain University, Iraq, 2002) 33. In Egypt, the same situation has been adopted, see Dr. Abdul-Muni'm Farag Al-Sadda, 'Adhesion Contracts in Egyptian Law' (Itihad jamaat alarabia 1946) 137. Also, the Lebanon Act of Commitments has called adhesion contracts the 'contract of consent' due to the absence of negotiations, see Mohammed Labe Shanab, *The Summary of Sources of Obligation* (Dar Al-Nahda Al-Arabia 1970) 38.

Furthermore, as a safeguard to the weak/vulnerable party in adhesion contract, the Iraqi Civil Code provided two protection measures; the first, which is embodied in Article 167/2, provides the judge the power to modify the contract,<sup>1</sup> and the second, as provided by Article 167/3, is to interpret the provisions of the adhesion contracts in favour of the weak party.<sup>2</sup> However, such a classic conception of adhesion contracts appears to be out-of-date.<sup>3</sup> It was based on an unnegotiable offer issued to the public, the monopoly of offeror for goods or services practically or legally, and the understanding that the offeror is economically in a superior position to the offeree.<sup>4</sup> The modern conception, however, tends to dampen the stress of the idea of adhesion by abandoning the condition of monopoly as long as the consumer is

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1 This paragraph mentions that ‘if the contract is adhesive, having arbitrary terms, it is allowed to the court to amend such terms or to exempt the adhered party from them in accordance with the principles of equity. Any agreement otherwise would be null and void’. In practice, the Iraqi courts have adopted this provision in Decision no. 777/ 1st year-civil/ 1978 in May 25th 1978. It is also applied in Judicial Verdicts Group, Vol 2, the 9th year, 1988, 40. Again, the Iraqi Court of Cassation through the decision no. 11013/legal on 3 January 1968, Government Press, Baghdad, 1971, 249.

2 This paragraph mentions that ‘ambiguous terms of contract of adhesion may not be interpreted to the prejudice of the interest of the adhered party even where he is the creditor’. Practically, this provision was applied in Iraq by the decision no. 74/m/75 in May 21st 1975, published in Majalla Al-Ahkam Al-Adliyya, Vol (2), the 6th year, 1975, 20. Decision no. 855/m/75 in January 21st 1976, published in Majalla Al-Ahkam Al-Adliyya, Vol (1), the 7th year, 1976, p10. Also see Appeal no. 749/64k, in January 5th 1983, 26; Appeal no. 388/75k in 12 December 1989, 288. Finally, the decision of Iraqi Cassation Court no. 410/b/1949 in 19 December 1949, Journal of Judgment, year no. 54, Vol (1), (2) and (3), 274. Also, Decision no. 253/b/1949 in 12 November 1949, Journal of Judgment, year no. 54, Vol (1), (2) and (3), 257.

3 Dr. Hasan Abdulbasit Jumai’I (1991), *The Impact of Inefficiency Between the Parties on Contract Terms* (Dar Al-Nahda Al-Arabia) 112.

4 Dr. Muhsin Al-beh, *Two Problems Concerning with Acceptance: Silence and Adhesion* (Dar Al-Nahda Al-Arabia 1985) 147; see also Dr. Sayed Hasan Abdullah, ‘Islamic Perspective for E-consumer Protection Means’ (Research submitted to the Conference of E-banking Actions Between Sharia and Law, Dubai, UAE, 10 May 2003) 823.





still free to navigate into another website to buy such goods or services.<sup>1</sup> In addition, e-contracts are likely to be contracts that are concluded transnationally and so judges will be incapable of reaching producers or companies to protect consumers.<sup>2</sup>

According to the latter concept of adhesion contracts, some say that e-contracts are adhesion contracts only for consumers as they are the weak party and typically in need of protection from the aspects of adhesion represented by all unfair terms or abusive clauses found in e-contracts.<sup>3</sup> This opinion seems to have support in the English law as some have suggested that e-contracts are adhesion contracts because the consumer has no choice but to push buttons to accept or refuse the contract in full according to the offered price and specs, having no authority to bargain or amend it.<sup>4</sup> Therefore, a sophisticated meaning for adhesion seems to be necessary to accommodate new technology contracts and to protect consumers by determining the feature of adhesion depending on the absence of negotiation in e-contracting.<sup>5</sup> Another opinion suggests that e-contracts are not adhesive but based on consent. According to this point of view, as long as the negotiations are prevailed in the e-community and the offeror, the offeree, if not satisfied with such terms, can navigate away from a website to another in which to conclude an e-contract.<sup>6</sup>

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1 Dr. Husam-Addin Kamil al-Ahwani, *Public Theory of Obligation: Sources of Obligation* (2nd edn) 125; Al-beh (n 95) 125.

2 Dr. Tharoat Abdul-Hameed, *Electronic Signature* (Al-Jala' Al-Jadida Library 2001) 67.

3 This opinion seems to be close to Article (L132-1) of the French Consumer Code which has emphasised that 'in contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair'.

4 Reams (n 74) 110. Also, some American writers have tended to have such an opinion, see Leon E Trakman, 'The Boundaries of Contract Law in Cyberspace' (2009) *International Business Law Journal* 2.

5 Abdulbasit Jumai'I (n 94) 102.

6 Mamdoh Ibrahim (n 11) 88.

To determine whether e-contracts are adhesion contracts, it is necessary to consider the medium of concluding such contracts. If the medium is email, chat programs or any audio-visual means, then the contract has no adhesion attribute as the parties can exchange proposals and haggle over them.<sup>1</sup> In contrast, when websites utilise model contracts<sup>2</sup> with pre-typed terms and conditions by which a consumer's choice is either to adhere or refuse it without any atmosphere of bargaining then the e-contract is an adhesion contract.<sup>3</sup>

3. **Conclusion** This chapter aimed to conceptualising the electronic contract of sale from the perspectives of adhesion in Islamic Sharia and Iraq's Legal System' in particular regarding definitions and negotiations' stage. As mentioned, a uniform notion for e-commerce seems difficult to agree upon and e-contracting occurs when the parties conclude a distance contract. Furthermore, e-contracts differ from traditional contracts in terms using e-means which, as a result, have diminished the role of traditional writing. Meanwhile, it was argued whether e-contracts are distance contracts. We have concluded that the former are types of the latter; any e-contract is a distance contract but not any distance

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1 ibid 88-89.

2 Model contracts mean contracts that include patterns formulated and affirmed by companies or public authorities to conclude contracts. See Dr Mohammed Husam Mahmood Lutfi, *The Sources of Obligation* 50. In other cases, the terms and conditions of such model contracts are revealed partially or in full by a third party for the purpose of setting a thorough regulation of rules which control these contracts. The third party has pledged themselves towards the party who has dictated such rules, for example, the condition of fixed price imposed by the wholesaler upon the retailer as not to exceed that price in front of consumers. See Ibrahim Al-Dusoqi Abu-Lail, 'The Conclusion of E-contract in the Light of Emirate Law and Comparative Law' (Research submitted to the First Scientific Conference of Legal and Security Aspects for E-Transactions, School of Dubai Police, 26-28 April 2003) 248.

3 See Dr. Ahmed Abdulrahman Al-Mulhim, 'The Patterns of Contracts and the Means to Face their Unfair Terms' (1992) 16(1-2) *Journal of Rights*, University of Kuwait 278.



contract is an e-contract and likely to be a hypothetical meeting of contract.

It was argued regarding to how to brand an e-contract, we have deduced that acceptance is likely to be the key of any contract to which the electronic feature is attributed, Iraqi E-signature Law no. 78 2012 did tackle this issue indirectly. As for the idea of adhesion, it seems to be out-of-date in the Iraqi code that tended to embrace the classic form of adhesion. In case of email, chat programs and any audio-visual means, the contract is not adhesive as the parties can exchange proposals. In contrast, when websites utilise model contracts with pre-typed terms by which a consumer's choice is either to accept or refuse it, then the e-contract is an adhesive contract.

Regarding negotiations, Iraqi Civil Code offers no legal texts regulating the stage of negotiations as well as the Egyptian Code. Through arguments we have agreed that negotiations end up with the issuance of the offer. Finally, an expression as an offer or an invitation to treat in Iraqi law is a matter of fact, it was recommended for the Iraqi Code to consider it as a matter of law.

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