Conflict of Laws in E-Commerce in the UAE and the Prospect for Harmonization among Gulf Cooperation Council Member States

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ABSTRACT

This thesis argues that the current legal framework regulating electronic commercial transactions, both business-to-business (B2B) and business-to-consumer (B2C), within the United Arab Emirates (UAE), and across member states of the Gulf Cooperation Council (GCC), requires development in the areas of determining the judicial jurisdiction and the law applicable to those transactions. Following analyses focusing on the provisions of the UAE and GCC member states for determining jurisdiction and applicable law, the thesis provides justification for the conclusion that the private international law rules of those states are in need of updating, especially regarding electronic commerial transactions. The thesis provides a particularly original dimension in terms of proposals for legislative reform and suggested draft provisions.

The main underlying factors for the central argument of the thesis for development and updating of the laws of the UAE and GCC member states include the following considerations: First, the current provisions do not adequately reflect the nature of B2B transactions in e-commerce. Second, the current rules do not reflect the particular vulnerability of consumers and do not adequately ensure protection of consumers' rights. Third, there is the need for effective dispute resolution mechanisms to resolve B2C disputes, and consideration of such mechanisms would suit the circumstances of the UAE, and the GCC.

The matters under discussion have not yet been addressed by harmonised legislations between member states of the GCC, whereas the GCC aims to be an organisation for political and economic cooperation in the region. In light of this last consideration, the thesis examines how the concerned matters are addressed within the European Union (EU) framework and considers whether and how the GCC could draw lessons from the EU model. In concluding, legislative provisions are suggested for the UAE and the GCC; and an appropriate dispute resolution mechanism is proposed for e-commerce transactions.

I dedicate this thesis to my parents
to whom I owe an everlasting debt,
to
my devoted wife
and to
my lovely children

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Chapter 1: Introduction

1.1 General Introduction

A significant inspiration for this research is a statement made by Sheikh Mohammed Bin Rashid, who said:

"*The last two decades have seen the emergence of a third economic age, dubbed by some as the information economy. This age consists of a closely-knit global economy that covers most fields and may therefore also be called the 'age of globalization'. Since this age requires extremely fast responses and depends on highly sophisticated technologies, it has also been called the 'age of technology*"[1]

The technological developments, as Sheikh Mohammed Bin Rashid stated, 'will not take place in one or two phases at a time, but rather in leaps and bounds. The new economy ignores geographic and political boundaries, and opens its doors to all those who engage it'. This is one of the major factors that have influenced and changed many aspects of the economy; to create what is called 'the new economy'.[2] The new economy will benefit countries that are able to take advantage of 'the opportunities presented by the new economy which, at the same time, will be ready to master the challenges, changes and problems generated by attempts to adapt to it'.[3]

Following from the observations in the statements highlighted above, adaptation to the new economy is vital in order to take advantage of and benefit maximally from it. To benefit from this economy a country should take necessary steps, which are not limited to establishing necessary infrastructure of information and communication technology (ICT) and enhancing governmental services to merchants and individuals. Necessary steps should also extend to developing the relevant legal instruments in order to adapt, engage and integrate that particular state into the new economy. The Gulf Co-operation Council (GCC) in general and the UAE in particular are real examples of states that have the desire and determination to develop their economies

[1] Mohammed Bin Rashid Al Maktoum, *My Vision: In The Race For Excellence*, (Dubai, Motivate Publishing, 2006), at 25
[2] Ibid.
[3] Ibid, at 26.

and to adapt to the new technologies in commerce as reflected by the initiatives and projects adopted by and in these states.

A recent example is the announcement of an e-commerce venture known as noon.com,[4] which was launched in 2017 with a view to selling 20 million products to consumers. With a capital of one billion US Dollars and massive warehouses in the UAE and the Kingdom of Saudi Arabia, the firm has the prospect of being the leading and largest e-commerce firm in the Arabian Gulf region and in the Middle East and North Africa.

On the other hand, GCC member states require development and enhancement of their legal instruments to make the most of the new-tech economy, and specifically electronic commerce and transactions. Thus, the presented work in this thesis will mainly highlight appropriate steps for the legal adaptations required in the laws of these countries to provide neutral technologies that are compatible with all civil and commercial contracts,[5] and aim to embrace electronic commercial transactions. This research will specifically focus on two main matters concerning private international law – jurisdiction, and the law applicable to electronic commercial transactions, whether between businesses or between businesses and consumers.

Although the principal focus of this thesis is applicable to law and judicial jurisdiction in respect of e-commerce, it is set against the background of the applicability of rules in the two areas in relation to civil and commercial contracts. In this respect, the discussion of the thesis is technology-neutral in its consideration of the wider perspective beyond electronic commerce. Accordingly, the study will examine relevant provisions in the laws of the UAE and other member states of the GCC that are applicable to the determination of judicial jurisdiction and applicable law in contracts generally, and, more specifically, to electronic transactions.

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[4] https://noon.com. In this relation *see* Bloomberg Limited Partnership, available at: https://www.bloomberg.com/news/articles/2016-11-13/alabbar-saudi-pif-to-set-up-1-billion-mideast-e-commerce-firm, and The National, an English newspaper published in Abu Dhabi, available at: http://www.thenational.ae/business/retail/alabbar-amazon-help-uae-e-commerce-gain-traction

[5] In the context of technological neutrality *see* for instance Winston Maxwell and Marc Bourreau, 'Technology neutrality in Internet, Telecoms, and Data Protection Regulation' (2014), *Hogan Lovells Global Media and Communications Quarterly*, pp. 19–23, and Ulrich Kamecke and Torsten Körber, 'Technological Neutrality in the EC Regulatory Framework for Electronic Communications: A Good Principle Widely Misunderstood', (2008), *European Common Law Review*, pp. 330–337.

The current legislative provisions in the UAE and other member states of the GCC on jurisdiction do not provide any, or sufficient, recognition for choice of court agreements, and fail to provide suitable approaches in ascertaining the judicial jurisdiction of contractual disputes arising from e-commerce transactions. Almost all these countries have not included rules aiming to protect consumers' litigation rights in their electronic transactions with businesses.

In relation to the choice of law, the current provision of the GCC member states, except for Saudi Arabia, do recognise the choice of law; however, they do not provide important details concerning the recognition of the express and implied choice of law, nor do they govern properly the question of determining the applicable law to contracts generally or electronic transactions in the absence of a choice of law. Furthermore, most of the GCC member states' current provisions fail to protect consumers from the perspective of the law applicable to e-contracts. In addition, the GCC has not legislated binding instruments for its member states in the fields of determining the jurisdiction and law applicable to international transactions or e-commerce transactions, which has left these matters to be governed by the national laws of each of its member states.

To identify and provide appropriate approaches and solutions for the GCC and the UAE in these matters, the study examines and evaluates relevant rules and approaches adopted in the sphere of the European Union, which govern jurisdiction and applicable law to electronic commercial transactions. The lessons from the outcome will be utilised in presenting harmonised legislative measures and approaches for the GCC that aim to strengthen harmonisation through the GCC, specifically through its objectives of economic and political cooperation. The research will also highlight the importance of harmonising substantive laws under the GCC, to avoid conflicting interpretations of the GCC unified conflict rules, for example, the GCC laws concerning consumer contracts and consumer rights. This measure will facilitate and ensure the effectiveness of the proposed measures in the fields of jurisdiction and applicable law to civil and commercial contracts, and e-commerce transactions.

Certainly, technological advances will continue to pose new challenges and raise questions in the legal environment, and especially in the area of private international law. Thus, this thesis will also provide a glimpse of a solution, through the notion of electronic courts, which aim to facilitate the resolution of current and future disputes arising from electronic commercial transactions.

1.2 Aim of the Thesis

The main aim of the thesis is to analyse the current legislations of the UAE and the other GCC member states, and to provide, through the lessons learned from an examination of the EU legislations and more general considerations, adequate measures and approaches that enhance the legal certainty and judicial predictability in determining the jurisdiction and applicable law to electronic transactions, and to improve consumer protection in the UAE and the GCC.

The proposed legislative provisions for the GCC will also aim at strengthening cooperative ties between its member states, especially in the scope of electronic commerce and consumer protection and in the legal and judicial platforms, in order to establish a closer rapprochement, or rather harmonisation, between these countries. With regard to the recommended provisions and approaches in the UAE sphere, those measures will consider underpinning the UAE's position in international and national commerce through the perspective of enhancing legal clarity and judicial predictability.

The study will highlight the differences between the rules and approaches adopted by the GCC member states, including the UAE, and it will also shed light on the relevant areas, in the context of jurisdiction and choice of law in e-commerce transactions, that may require legislative enhancement or the adoption of a different approach. Furthermore, the thesis will address further areas of harmonization in the substantive laws of the GCC that may influcance positively the effectiveness of the proposed conflict laws of the GCC directly or indirectly, through ensuring coherent interpretation and application of the proposed jurisdiction and applicable law provisions by the national courts of the GCC member states.

1.3 Research Questions

In order to fulfil the aim of the thesis, this research intends to provide answers to a number of questions concerning private international law in electronic transactions in the UAE and the GCC. It also seeks to provide solutions to problems highlighted in connection with the questions examined. Some of the central questions addressed by the thesis include:

* whether current legislative provisions in the UAE and GCC member states appropriately and clearly ascertain and determine jurisdiction in e-commerce transactions;

* whether the provisions governing the determination of applicable law in relation to electronic commercial transactions reflect the nature of e-commerce and the contracting parties' expectations;

* whether the legislative provisions on jurisdiction and applicable law take into account the peculiar vulnerabilities and difficulties of consumers and whether they reflect consumer protection considerations;

* whether the legislative provisions of the UAE and GCC member states enhance consumer confidence in electronic commerce through adequate, affordable and effective rules and processes for consumer redress.

1.4 Methodology

In order to achieve its objectives, this thesis necessarily concentrates on the examination of the current legislative provisions of the UAE and other GCC member states and the analysis of their applicability to ascertain jurisdiction and applicable law to electronic commercial transactions. This approach is inescapable, as the relevant rules and principles are mainly contained in statutory provisions based on relevant civil or commercial codes. In the legal systems concerned, legal codes play a dominating role in the areas of law concerned, i.e. jurisdiction and applicable law, while courts also play an important role in terms of interpretation and application of the rules contained in the relevant codes.

In light of the nature of the legal background of the relevant field and the importance of statutory material, this research for the most part employs the methodology of doctrinal analysis. Although this is typically seen as black letter law analysis, the

research focuses heavily on deeply analysing statutory provisions and additionally their background, context and underlying logic. Beyond analysis of statutory provisions, the research also engages in deep and careful analysis of selected judicial decisions, representative of GCC member states' court decisions, but particularly from the UAE.

In addition to the doctrinal analysis orientation of the research, in making proposals for revision, development and updating of existing statutory provisions, the research is also reform-oriented. Further, there is also a comparative element to the research in that in order to find and provide appropriate approaches and solutions for the UAE and the GCC in relation to jurisdiction and applicable law with respect to electronic commercial transactions, the thesis examines and evaluates the relevant rules and approaches adopted in the context of the European Union with respect to similar transactions.

1.5 Thesis Structure

Considering the focus of this thesis will be on the jurisdiction and choice of law rules that are applicable to e-commerce transactions in the GCC, the second chapter will highlight in general the GCC and development of e-commerce in the GCC member states. It will also include an examination of the current legislations in the GCC and its member states and the provisions that are applicable to issues of private international law in e-commerce. The last part of this chapter will present the significance of harmonising conflict of laws in e-commerce between the GCC countries.

The third chapter will focus on the current measures adopted by the member states of the GCC in relation to jurisdiction in general, and the provisions determining jurisdiction of electronic commercial transactions in particular. The implementation of these provisions by the national courts of the UAE will also be considered in this chapter. This examination will provide a proper foundation in the thesis to build proposals which are required to eliminate difficulties that appear in the application of the current rules to e-commerce disputes in order to determine jurisdiction.

The fourth chapter will examine, firstly, the applicable provisions of the GCC member states in determining the law governing B2B contracts, and secondly, the relevant rules concerning the applicable law to B2C contracts in e-commerce. It is important to draw attention to the fact that none of the member states of the GCC, with the exception of the Kingdom of Bahrain, have promulgated legislation that specifically organises such a matter, although all of these countries have legislated laws that recognise e-commerce.

With a view to identifying appropriate approaches to implement among the GCC member states and in the UAE, the fifth chapter will examine the European Union (EU) legislations regulating jurisdiction and applicable law to e-commerce transactions. Accordingly, this chapter will focus on examining the following EU legislations; Regulation no. 1215/2012[6] on jurisdiction and the recognition, and enforcement in civil and commercial matters (Brussels I Regulation recast), Regulation no 593/2008 on the law applicable to contractual obligations (Rome I Regulation), and Regulation no 524/2013 on online dispute resolution for consumer disputes and amending Regulation no 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR).

The last chapter will provide proposed legislative provisions and approaches in the light of the analysis presented in the earlier chapters of the thesis. Furthermore, this chapter will include other relevant matters worth considering, including the establishment of electronic courts that would facilitate the resolution of disputes arising from electronic commercial transactions, the form in which the GCC proposed rules would be adopted, and the body responsible for the interpretation of the harmonsied laws of the GCC.

[6] OJ L 371 20.12.2012 (recast). Reference will be to the latest version of the Brussels I Regulation, namely the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1215/2012, [2012] OJ L351/1, which has replaced the previous version (Regulation no 44/2001) and became enforceable on 10th January 2015.

Chapter Two: General Background

2.1 Introduction

In order to discuss the main issues that arise under the subject of harmonising the conflict of laws in e-commerce[1] in the UAE and among the member states of the Gulf Cooperation Council (GCC), it seems logical and essential to highlight the emergence of the Council and its main objectives, and also to address how electronic commerce has developed within the GCC member states in general. The subsequent chapters of this thesis will focus on the jurisdiction and applicable law rules concerning e-commerce in the GCC; hence, it is appropriate to draw attention within this chapter to the relevant legislations of the GCC and its member states, and more specifically to those adopted by the UAE.

This chapter will present an overview of the GCC, followed by a discussion of the development of e-commerce in the GCC countries. Then, there will be an examination of the current legislations extant in the GCC and its member states, and the provisions that are applicable to issues of private international law in e-commerce. In addition, there will be a brief discussion of the judicial systems of the member states of the GCC. The summary of this chapter will conclude with a discussion of the

[1] According to the UN definition provided in the United Nations Conference on Trade and Development (UNCTAD) Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries p. 3, available at: http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf, e-commerce is "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and ultimate delivery of goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail". E-Commerce is also defined by Michael Chissick and Alistair Kelman, in *Electronic Commerce: Law and Practice*, (London, Sweet & Maxwell, 2002) in the Glossary of the book, as "a broad term describing business activities with associated technical data that are conducted electronically", and by E. Turban, J. Lee, D. King and M. Chung, *Electronic Commerce: A Managerial Perspective*, (US, Prentice Hall, 2000) as "business transactions that take place by telecommunication network – a process of buying and selling products, services, and information over computer networks". Furthermore, e-commerce is defined as "business activities concluded using electronic data transmission via the Internet and the World Wide Web", according to G. Schneider and J. Perry, *Electronic Commerce* (2nd edition), (Boston, Course Technology, 2001); however, there is no universally accepted definition of e-commerce, according to Dale Pinto, *E-Commerce and Source-Based Income Taxation*, (Amsterdam, International Bureau of Fiscal Documentation, 2003), Volume 6 in the Doctoral Series, p.1. Subhajit Basu, in *Global Perspectives on e-Commerce Taxation Law*, (Aldershot, Ashgate Publishing Group, 2007) p. 14, suggests that the definition of e-commerce "is dynamic and varies with the objective one wants to measure".

significance of harmonising conflict of laws in e-commerce between the GCC countries.

2.2 The Gulf Cooperation Council

The Cooperation Council of the Arab Gulf States was established on 25th May, 1981 following the ratification of its Charter by six member states; namely the Kingdom of Saudi Arabia, the United Arab Emirates (UAE), the State of Kuwait, Kingdom of Bahrain, Sultanate of Oman, and the State of Qatar.[2] The main objectives for establishing the Council according to the fourth Article of its Charter are:

> "To effect coordination, integration and inter-connection between Member States in all fields in order to achieve unity between them.
>
> To deepen and strengthen relations, links and areas of cooperation now prevailing between their peoples in various fields.
>
> To deepen similar regulations in various fields including the following:
>
> 1- Economic and financial affairs
>
> 2- Commerce, customs and communications
>
> 3- Education and culture
>
> To stimulate scientific and technological progress in the fields of industry, mining, agriculture, water, animal resources; to establish scientific research; to establish joint ventures and encourage cooperation by the private sector for the good of their peoples".[3]

After its establishment and in the same year, the Members States of the Council ratified the Unified Economic Agreement,[4] which set the foundation and subsequent stages for economic integration and cooperation among the GCC States. This action by the member states after the ratification of the Charter of the Cooperation Council reflects their common interest toward developing the economic ties between them.

Furthermore, the Cooperation Council has introduced a number of initiatives designed to boost economic integration and economic unity. These initiatives include harmonising economic strategies among the GCC States, customs union,[5] and

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[2] The Charter of the GCC, signed in Abu Dhabi, UAE, the GCC Secretariat General, available at: http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx

[3] *Ibid*.

[4] The Unified Economic Agreement, available at: http://www.gcc-sg.org/ar-sa/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/الاقتصاد/1111318748548.pdf

[5] Customs union among States of the GCC was introduced in 2002 by the Economic Agreement of 2001, which replaced the Free Trade Area that was established by the Economic Agreement in 1981.

monetary union.[6] Along with its economic objectives, the Cooperation Council aims to enhance and strengthen commercial ties among member states, through a number of policies, for instance, harmonising commercial laws, and establishing a free trade area between the member states,[7] which has now been superseded by the Customs Union.[8]

The GCC member states' interest in developing their internal economic relations is not limited to the level of creating a customs union and unifying economic policies, however, it also extends to improving relations from various perspectives, including technological improvements. While the initiative of the GCC itself is technology-neutral, the advent of the information age, aligned with the desire for technological improvements, has driven these states, for instance, to develop Information and Communication Technology (ICT), enhancing their ICT infrastructure [9] and improving governments' services for citizens and businesses, [10] along with adopting legislative measures that enable and support the usage of ICT, such as anti-cybercrime laws, [11] and electronic transaction laws.[12] The combination of these factors, as well as others, such as the affordability and availability of the Internet,[13] and connection devices, have led to the GCC countries having the highest penetration rates in using

[6] The Economic Agreement between the GCC states adopted in December 31, 2001, 22nd Session, held in Muscat, Sultanate of Oman, the GCC Secretariat General, available at: http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/TheMonetaryUnionandtheSingleCurrency/pages/Home.aspx

[7] The GCC Free Trade Area was the result of the first Economic Agreement in 1981 between the member states of the GCC, the GCC Secretariat General, *supra* no. 2.

[8] *Ibid*.

[9] *See* "Telecom/ICT Regulatory Reform Revolution: Achievements and Way Forward Arab Region Report 2013", International Telecommunication Union (ITU) website, available at: http://www.itu.int/ITU-D/arb/Special_About/2013/Arab-Book/Arab-Book-PDF-E.pdf.

[10] *Ibid*, p. 26, see also World Economic Forum, "The Global Competitiveness Report 2011–2012", available at: http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf, which states that the UAE ranks fifth in the world in government procurement of advanced technology products, and ranks tenth in the world in Foreign Direct Investment and technology transfer.

[11] For example, the UAE's Law no. 2 of 2006, and Saudi Arabia's Royal Decree no. M/17 on Anti-Cyber Crime Law of March 26, 2007.

[12] Such as the UAE's Law no.1 of 2006 on E-Commerce and Transactions, Oman's Royal Decree no. 69/2008 on the Law of Electronic Transactions, and Saudi Arabia's Royal Decree no. M/8 of March 26, 2007 on the Electronic Transactions Law.

[13] The Internet, as defined by M. Chissick, *supra* note 1, is "a co-operatively run global collection of computer networks with a common addressing scheme"; it can also be defined as "a network of computer networks interconnected by means of telecommunication facilities using common protocols and standards that allow for the exchange of information between each connected computer", according to Patrick Gallagher, "Case Study: A Practical Analysis of Electronic Commerce Revenue Flows" (paper presented at International Tax Symposium, Sydney, March 17–18, 1998) p. 58, cited in Dale Pinto, *supra* note 1, p. 2.

Internet, fixed lines and mobile phones, among countries in the Middle East and North Africa.[14] In 2010, Qatar, the UAE, Oman and Bahrain led the Arab region in number of Internet users per capita.[15]

Hence, these factors have contributed to raising the importance of ICT, and to providing the necessary environment for availing e-commerce in the GCC states. This reflects the direction of these states toward diversifying their economies and creating non-oil resources in general, and the interest of these countries in e-commerce in particular.

Certainly, e-commerce plays a major role in the development and growth of the modern world economy.[16] The implementation and deployment of e-commerce has become an integral part of the operation of many businesses and organisations. These engagements in e-commerce reflect the significance of this technological revolution to the extent that countries may risk the competitiveness of their economies if they do not have effective strategies for harnessing the potential of e-commerce.[17] Given the crucial role of e-commerce in the world economy, the GCC states have implemented various initiatives in infrastructure, governmental support and legislations to embrace e-commerce.

The interest of the member states of the GCC in e-commerce derives firstly from the vital role of e-commerce globally, and secondly from the advantages of e-commerce for the economies of these states.

2.3 The Development of E-Commerce in the GCC

[14] Telecom/ICT Regulatory Reform Revolution: Achievements and Way Forward Arab Region Report 2013, *supra* note 9, pp. 148–149. See also "Mobile, Tablet and Internet Usage 2012: SEEMEA", *think insights with Google*, available at: http://www.thinkwithgoogle.com/insights/emea/library/studies/mobile-tablet-and-internet-usage-2012-SEEMEA/, which states that Saudi Arabia and the UAE have the highest Internet usage via smartphones, and see Zeinab K. Shalhoub, "Internet Commerce Adoption in the GCC Countries", IRMA International Conference 2007, available at: http://www.irma-international.org/viewtitle/33423/

[15] Qatar, UAE, Oman and Bahrain had the highest number of Internet users in the Middle East, according to ITU Report 2013, *supra* note 9, p. 5.

[16] Zeinab K. Shalhoub and Sheikha Lubna Al Qasimi, *supra* note 16, p. 11.

[17] *Ibid*.

For the progress of examining the issues of jurisdiction and law applicable to e-commerce in the GCC later in the thesis, it is necessary to highlight at this point the development of e-commerce in the GCC member states, and how these states have entered into the race of implementing new technologies in order to facilitate and create an e-commerce environment in the GCC.

Economic development is of great importance among the member states of the GCC.[18] From the early stages of establishing the GCC, the member states have committed to implement plans to improve commerce and lessen or remove obstacles that may hinder trade between the states.[19] The emergence of e-commerce has the potential to help the GCC states to advance or achieve such goals. In fact, e-commerce, with its natural cross-border trade facilitation, is in line with the interest of the GCC countries in strengthening economic and trading activities among themselves.

The development of e-commerce has been rapid in the Middle East in general, and the GCC in particular.[20] Contributing to the accelerated pace of e-commerce development is the governmental influence in supporting electronic transactions, for example, the initiative launched by the Government of Dubai in 2000 for the transition of most governmental transactions and services to electronic forms.[21] In 2013, a further initiative was introduced by His Highness Sheikh Mohammed Bin Rashid[22] to

[18] See Alemayehu Molla and Paul S. Licker, "Perceived E-Readiness Factors in E-Commerce Adoption: An Empirical Investigation in a Developing Country", *International Journal of Electronic Commerce*, Vol. 10, no. 1 (2005), pp. 83–110, which indicates that merchants in developing countries should pay attention to both organizational and environmental considerations prior to deciding to adopt e-commerce; on the other hand, firms shall also consider the infrastructure development by governments and other agencies.
[19] The Economic Agreement of the GCC in 1981, the GCC Secretariat General, *supra* no. 2.
[20] According to a study prepared by IMRG International and commissioned by Visa Middle East, "Gulf Cooperation Council B2C e-Commerce Overview 2011", available at: http://www.intelligent-commerce.net/Gulf_Cooperation_Council_B2C_eCommerce_Overview.pdf. See also another study by the same organization, "MENAP B2C e-Commerce Overview 2012, available at: http://www.visamiddleeast.com/me/common/include/uploads/ecommerce_apr2013.pdf.
[21] The official portal of the Government of Dubai, About Dubai e-Government, available at: http://www.dubai.ae/ar/AboutDubaieGovernment/Pages/default.aspx.
[22] Official website, UAE Vice President and Prime Minister, and Ruler of Dubai: http://www.sheikhmohammed.ae/vgn-ext-templating/v/index.jsp?vgnextoid=490861b963bce310VgnVCM1000003f64a8c0RCRD&vgnextchannel=a22865a69cddd210VgnVCM1000004d64a8c0RCRD&vgnextfmt=default

transition from electronic government to smart government.[23] The other member states of the GCC have implemented similar initiatives, for example Yesser in Saudi Arabia,[24] and e-Government in Bahrain.[25]

The idea of e-government is a development based on the advent of the recent ICT revolution, as is e-commerce,[26] yet the government's initiatives on e-government are complementary to its interest in stimulating and supporting e-commerce. This support may take various forms, such as providing a secure and convenient environment for e-commerce. One of the main examples in this context is Tejuri.com, which is supported by Dubai's Department of Economic Development.[27] The website is simply an e-shopping mall, which provides merchants with an easy registration process, technical support and delivery services, while offering consumers a secure online platform to shop, which complies with UAE regulations.[28]

Another example of governmental support in the scope of business-to-business (B2B) e-commerce is Tejari.[29] Tejari provides a B2B platform for companies that facilitates the acquisition of commodities from suppliers.[30] Tejari covers the lifecycle of supply management, which is provided through professionals' consultations in resources and

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[23] Smart Government is considered one of the milestones towards achieving the UAE vision 2021, as one of its themes is for the UAE government to provide citizens with world-class infrastructure, services and leisure resources; UAE citizens will also benefit from customer-focused government services whose quality is rigorously monitored and improved. For further information see the UAE vision 2021 official website: http://www.vision2021.ae/home-page.html, the official portal of the Government of the UAE, available at: http://www.government.ae/web/guest/mobile-government, and the First Government Summit Proceeding Report, available at: http://www.thegovernmentsummit.ae/media/105358/GS13-Report_EN.pdf.

[24] Yesser is an e-government program that aims to develop e-services in various government agencies, available at: http://www.yesser.gov.sa/en/MechanismsandRegulations/strategy/Pages/default.aspx.

[25] E-Government of Bahrain, available at: http://tstwsl.cio.gov.bh/wps/portal/!ut/p/c5/jZBBDoIwFETPwgk6_dACSwRpGxERQkQ2hgUxGAEXxvMLujOB-Gc5eTM_w2o2aWhe3bV5duPQ3FnFanlBQdCCbKgkjEC5MTtkW-7YfPLPk79wAWY6VIF23ATwQh8wnm2kJoPDnr70ij93-wGJLCLAlxyUcZXmMUFJ95eOYg-0EdIcEU054q_Pl9PX6dO81Hr7J2F5mVSPfcuKdmCPvizLCjcnsKw3FGY3xQ!!/dl3/d3/L0lDU0lKSWdrbUEhIS9JRFJBQUlpQ2dBek15cXchLzRCRWo4bzBGbEdpdC1iWHBBRUEhLzdfTUFJMkk5NDI5OE83ODBJQzZIQlNVVTEwSTAvUzhwOEc2Mzg3MDAxNA!!/?WCM_PORTLET=PC_7_MAI2I94298O780IC6HBSUU10I0000000_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/EGOV+English+Library/eGovernment+Site/Left+Menu/About+eGovernment/

[26] Z. Shalhoub and L. Al Qasimi, *supra* note 16, p. 47.

[27] About Tejuri.com, available at: http://www.tejuri.com/en/customerservice/about-tejuri

[28] *Ibid*.

[29] The Official Magazine of Dubai's e-Government Department, e4all magazine, (issue 100, February 2012), available at: http://www.dsg.gov.ae/SiteCollectionImages/Content/DeG%20Documents/E4ALL-English-100.pdf

[30] Tejari website, available at: http://www.tejari.com/cms/uae/solutions.

procurement, and integrated software.[31] The Dubai Government established the company in 2000 as a private venture owned by Ports, Customs and Free Zone Cooperation,[32] and had limited scope in providing services for the companies in the free zones.[33] Subsequently, the scope of the company has been expanded for the companies outside the free zones.[34]

Tejari is now a global online platform where buyers meet service providers and sellers of goods. The company has expanded its services to both private and public sectors. Particularly noteworthy in this context is the launch of the eSupply portal between the Dubai e-Government and Tejari in 2012,[35] which has been used by 35 entities of the Dubai government to post tender opportunities for suppliers to search and submit evaluations for awarding contracts.[36] Using such an integrated system will allow equal and transparent opportunities for all suppliers and businesses, and increase the dynamic of supplying goods and providing services to all government entities.[37]

Tejari has also served other organisations in the GCC, for example, Oman National Engineering & Investment Co., Omantel from Oman,[38] and the National Bank of Kuwait from Kuwait.[39] At the international level, the company has reached many organisations from different continents,[40] credited to the partnership between Tejari and BravoSolution,[41] which led to the launch of a programme called BUY World with Dubai Ports World (DP World).[42] The system aims to provide an online platform

[31] *Ibid*.
[32] Z. Shalhoub and L. Al Qasimi, *supra* note 16, p. 115.
[33] Linzi Kemp, "Tejari.com, The Middle East Online Marketplace, under the Leadership of Shiekha Lubna Al Qasimi", *International Journal of Leadership Studies*, Vol. 4 issue. 1, 2008, p. 23.
[34] This expansion was according to the decision of the Dubai Crown Prince and UAE Minister of Defense His Highness Sheikh Mohammed Bin Rashid Al Maktoum in 2002, *Ibid*.
[35] E-Supply portal of Dubai e-Government: http://esupply.dubai.gov.ae/web/about-esupply.html
[36] The Official Magazine of Dubai's e-Government Department, e4all magazine, (issue 105, July 2012), available at: http://www.dsg.gov.ae/SiteCollectionImages/Content/DeG%20Documents/july2012_en.pdf
[37] *Ibid*.
[38] Tejari's Oman Portal: http://www.tejari.com/cms/uae/supplier-registrations/oman_portals/?searchterm=oman
[39] Tejari's Kuwait Portals: http://www.tejari.com/cms/uae/supplier-registrations/kuwait_portals
[40] About Tejari.com, *supra* note 30.
[41] Bravosolution provides expertise and technological tools for every aspect of the global supply chain, Bravosolution website: https://www.bravosolution.com/cms/uk/News/archived-news/press-center/august-8-2011
[42] DP World is considered one of the largest marine terminal operators in the world, and it is part of the holding company Dubai World. Dubai World official website: http://www.dubaiworld.ae. DP World official website: http://web.dpworld.com.

between DP World and 5,000 international buyers.[43] It could also be added to Tejari's list of large company clients, such as Etihad Airways,[44] Emirates Aluminum (EMAL),[45] and Leo Burnett.[46] Thus, the success of Tejari can be credited to many factors, including the commitment and support received from the Government of Dubai.[47]

On the other hand, there are also some initiatives from the business environment aiming at enhancing and encouraging the adoption of e-commerce by merchants. One of these campaigns is Atjar from Saudi Arabia, which was founded by e-commerce specialists to transfer and exchange experience and knowledge between online business owners, and to help new entrepreneurs in the field of e-commerce in Saudi Arabia and the Arab world.[48]

With regard to business-to-consumer (B2C) transactions through e-commerce, the Middle East and Africa rank highest in using mobile devices and tablets for online shopping, compared with other regions of the world.[49] Furthermore, consumer contracts through e-commerce have been increasing in the Middle East and North Africa in general, and in the member states of the GCC in particular,[50] where in 2012 consumers spent an estimated $3.2 billion through e-commerce.[51] Further, the GCC e-commerce market has reached $5.3 billion in 2015 and it estimated to reach $20 Billion in 2020.[52] By focusing on the UAE's consumers, more than 60% of them have

[43] *Ibid*.
[44] Etihad Airways eSoursing portal: https://etihad.tejari.com/web/login.html
[45] EMAL eSoursing portal: https://emalsourcing.tejari.com/web/login.html
[46] Leo Burnett eSoursing portal: https://leoburnett.tejari.com/web/login.html
[47] Z. Shalhoub and L. Al Qasimi, *supra* note 16, p. 117.
[48] Atjar website: http://www.ittejar.com/#/goals
[49] According to the Nielsen (a company that specializes in opinion research; see www.nielsen.com) report in August 2014, "E-Commerce: Evolution and Revolution in the Fast-Moving Consumer Goods World?", available at: http://ir.nielsen.com/files/doc_financials/Nielsen-Global-E-commerce-Report-August-2014.pdf
[50] Consumer confidence, from a general perspective, has been increasing in the Middle East and Africa, particularly in the UAE, which rose to first place regionally and fourth place globally in consumer confidence, according to the Nielsen report on Global Consumer Confidence in the fourth quarter of 2014, available at:
[51] A study of the e-commerce market across the Middle East and North Africa launched by Visa, available at: http://www.visamiddleeast.com/me/common/include/uploads/ecommerce_apr2013.pdf, see also A study by PayPal, PayPal Insights: e-commerce in the Middle East 2012–2015, available at: http://static.wamda.com/web/uploads/resources/24-09-2013_FINAL-low_res.pdf
[52] AT Kearney report, 'Getting in on the GCC E-Commerce Game', August 2016, avaliable at: http://www.middle-east.atkearney.com/consumer-products-retail/featured-article/-/asset_publisher/S5UkO0zy0vnu/content/getting-in-on-the-gcc-ecommerce-game

transacted with foreign e-merchants, and 35% of those merchants are from the United States, 30% from Asia, 25% from Europe and 10% from other counrties in the Middle East.[53] Those consumers mentioned five main reasons for transacting with foreign e-merchants, first for better prices, second the prodcuts purchased are not avaliable in the UAE, third to discover new items, forth because of offering wide variety of products, and last because of affordable shipping fees.[54]

Although the Middle East and North Africa are affected by political and security instability, these circumstances have not hindered the development and expansion of B2C transactions, particularly among GCC member states, where e-commerce still has a strong platform upon which to develop and expand. A recent report by UNCTAD estimated that the number of online buyers in the Middle East and North Africa would grow by 82% by 2018.[55] The report also forecast that the only two regions in which B2C e-commerce would increase its share of the global market were Asia-Oceania and the Middle East and Africa, by 9% and 2.5% respectively, by 2018.[56] This reflects the size and importance of B2C transactions through e-commerce from an economic perspective; consequently, this also reflects the importance of these transactions from a legal perspective, especially in matters of jurisdiction, applicable law and consumer rights.

2.4 The Current Legislations Concerning the Determination of Jurisdiction and Applicable Law in General Contracts and E-Commerce Transactions

As the subsequent chapters of this thesis will examine specific provisions concerning the determination of jurisdiction and applicable law in e-commerce transactions, it is important to present within this chapter the main relevant legislations of the GCC and its member states. This presentation will also introduce the thesis, and address the relevant GCC legislations and to what extent its member states are obliged to follow these laws. At the end of this section, the relevant laws adopted by the member states of the GCC will be examined. It is to be borne in mind that the main general

[53] Go-Gulf, Cross Border E-Commerce Shopping in UAE – Statistics and Trends, available at: https://www.go-gulf.ae/blog/cross-border-ecommerce-uae/
[54] Ibid
[55] UNCTAD Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries, supra note 1, p. 18.
[56] Ibid, at 13.

legislative provisions on jurisdiction and applicable law have been in place before the advent of e-commerce and, in that sense, are technology-neutral. This raises the question and adds to the case of the thesis of the adaptation of the law for e-commerce transactions.

2.4.1 The GCC Legislations

In the interest of achieving one of the objectives stipulated in its Charter,[57] the GCC has provided several initiatives to establish familiarity between the laws and regulations of its member states in various fields with an eventual aim of harmonisation. This harmonisation has not merely covered conflict regarding the rules of law, but has also embraced substantive rules, which reflects the GCC objective in building familiarities between the substantive rules implemented in the territories of its member states. Indeed, this aim is justifiable, considering that the mere unification of conflict of law rules would not achieve proper harmonisation in the scopes of interpretation and application of these provisions. Thus, the GCC has introduced several initiatives that are aimed at harmonising both the conflict and substantive rules among its member states. One of the GCC initiatives is the GCC Convention on Enforcement of Judgments and Judicial Declaration and Rogatory.[58] According to the Convention, if a court ruling is delivered from a GCC country, it will be considered as if it had been issued in the member state where the ruling needs to be enforced or executed. Along with the enforceability of judicial rulings, arbitration awards and letters rogatory for witnesses' testimonies or requiring experts' reports are also enforceable in the member states of the GCC, in accordance with the procedures stipulated in the Convention.[59]

However, the legal and judicial fields require further development towards harmonisation among the member states of the GCC, particularly regarding promulgating binding harmonised legislations. The GCC has issued a number of

[57] Article 4 of the GCC Charter, the GCC Secretariat General, *supra* note 2.
[58] The Convention was ratified by the member states of the GCC during the 16th assembly in Muscat, December 1995, the GCC legal and judicial cooperation, the GCC Secretariat General, *supra* no. 2, available at: http://www.gcc-sg.org/ar-sa/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/القانون%20والقضاء/771260251745.pdf
[59] *Ibid*.

harmonised laws and regulations;[60] some of these laws, in effect, have been mandatory for the member states, for example, the GCC Trademark Law,[61] whereas the majority of those harmonised laws are considered to be guiding legislations for the member states, such as the Harmonised Law of Civil Procedures,[62] the Harmonised Law of Evidence,[63] and the Harmonised Civil Law.[64] According to the justification provided by the GCC Supreme Council,[65] the purpose behind issuing these legislations with guiding effect is to allow the member states to benefit from such laws in drafting their national laws, and to consider these GCC legislations in their treaties and conventions with foreign countries or non-member states of the GCC.

On the other hand, there are several bills still under preparation by a committee of legal experts appointed by the Ministers of Justice of the member states of the Council.[66] Some of these bills could embrace provisions that govern matters of e-commerce, particularly those concerning jurisdiction and applicable law to e-commerce and consumer protection. These GCC legislations could play a critical role in regulating the areas and matters explored within this thesis. Indeed, these legislations, whether aimed at harmonising conflict rules or substantive commercial provisions, would influence directly or indirectly the conflict of law matters covered in this thesis. However, it is uncertain whether these forthcoming laws will be given guiding or mandatory effects upon the member states.[67]

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[60] Due to conceptual considerations inspired by Islamic principles, Saudi Arabian statutes are referred to as "regulations", rather than "laws" or "acts". Hatem Abbas Ghazzawi & Co. website, Saudi Arabia Law Overview: http://www.saudilegal.com/saudilaw/03_law.html. This is also reflected in the names of the GCC's laws, which have been given both terms of laws and regulations.

[61] The GCC Trademark Law was adopted in 2006, the 27th Session held in Riyadh, Saudi Arabia, the GCC Secretariat General, available at: http://www.gcc-sg.org/ar-sa/CognitiveSources/DigitalLibrary/Lists/DigitalLibrary/التجارة/1274526862.pdf

[62] Adopted in December 2001 by the Supreme Council during its 21st session in Muscat, the GCC Secretariat General, *Ibid*.

[63] *Ibid*.

[64] Adopted in December 1997 by the Supreme Council during its 18th session in Kuwait, *Ibid*.

[65] *Supra* note 59.

[66] It should be noted that a committee of legal experts, appointed by the Ministers of Justice of the member states, is assigned to prepare proposals on common laws among the GCC, which will be presented subsequently to the Supreme Council for ratification and to determine the status of these laws, whether guiding or mandatory for the member states of the Council. See the Legal and Judicial Cooperation under the GCC on its Secretariat General website, *supra* note 59.

[67] The General Secretariat has mentioned these bills on its website, however, the legal effect of these legislations will depend on the decision of the Supreme Council. With regard to the previous proposed legislations, the Supreme Council did not provide reasoning for issuing or adopting a guiding effect upon these legislations. Providing clarification for these decisions by explaining the weaknesses, and steps needed to improve these bills, will provide a clearer path for these bills.

It appears that the tendency for the unification of laws between member states is progressing in a cautious manner. In other words, GCC progress toward implementing harmonised laws is fraught with cautiousness among its member states. This characteristic feature is clear from the decisions made by the Supreme Council in postponing the enforcement or the obligatory effect of many proposed legislations. For example, the Harmonised Law of Civil Procedures, which was proposed in December 2001 before the Supreme Council during its 21st session in Muscat, [68] has been approved as a guiding legislation by the Supreme Council. The guiding effect of this legislation was not changed during the following assemblies of the GCC Supreme Council until the 31st assembly of the GCC in Abu Dhabi in 2010, during which the Supreme Council extended the approval on the Harmonized Law of Civil Procedures with its guiding effect for the following four years that automatically renewed due to non-receipt of comments or observations from the member states.[69] The Supreme Council has followed the same approach in relation to other harmonised legislations, for instance, the Harmonised Law of Evidence, Harmonised Civil Law and Harmonised Law of Enforcement of Judgments.[70]

The cautiousness of the member states in approving binding harmonised legislations under the GCC could be justified on the basis that these obligatory laws affect, to some extent, the sovereignty of the GCC member states.[71] Furthermore, this inclination of the member states toward sharing sovereignty with the GCC and its institutions has resulted in the emergence of opaque decision-making from intergovernmental bodies rather than empowered institutions.[72] The GCC member states are gradually turning the wheel of harmonisation in accordance with the gradual building up of the GCC institutions.[73] Hence, it may be possible to witness in the next

[68] *Supra* note 59.
[69] *Ibid*.
[70] *Ibid*.
[71] Maria Haimerl, "Governance Transfer by the Gulf Cooperation Council", Berlin Working Paper on European Integration number 18, available at: http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2013-18_Haimerl_In_Search_of_Legitimacy.pdf
[72] The World Bank Middle East and North Africa Region Report: Economic Integration in the GCC, October 2010, page 1, at: www.worldbank.org
[73] *Ibid*.

years the transition of the Cooperation Council into the Union phase, through which the bodies of the Gulf Union could appear efficient with more powers.[74]

Considering the existing gap in obligatory legislation for the member states, coupled with the uncertainty toward the forthcoming bills mentioned by the General Secretariat, there is currently no influence from the GCC in the fields of determining the jurisdiction and law applicable to international transactions in general, or e-commerce transactions in particular. Hence, the national laws of each of the member states will govern such issues of private international law.

2.4.2 Legislations of the UAE

UAE Federal Law no. 5 of December 15, 1985 on Civil Transactions, also known as the Civil Transactions Law, which entered into force in 1986, is the current legislation that embraces rules governing choice of law in contractual and non-contractual obligations. Jurisdiction issues in civil and commercial matters are governed by Federal Law no. 11 of 1992 on Civil Procedure Law, which was amended by Federal Law no. 30 of 2005.

Although the above legislations will be examined in detail throughout this thesis, it is important to highlight another relevant law of the UAE. In 2006, the UAE promulgated two legislations regulating electronic contracts and consumer protection, namely, Federal Law no. 1 of 2006 on E-Commerce and Transactions and Federal Law no. 24 of 2006 on Protection of Consumers, respectively.[75] The E-Commerce and Transactions law has recognised e-commerce and other electronic transactions. It aims to encourage and simplify electronic transactions and communications,[76] and

[74] The calling for the transition of the Gulf Cooperation Council into the Gulf Union made by King Abdullah Al Saud, who was King of Saudi Arabia, on December 19, 2011 during the 32nd session, the GCC Secretariat General, *supra* note 2, at: http://www.gcc-sg.org/ar-sa/Statements/SupremeCouncil/Pages/Astatementissuedbyallthirtysec34.aspx. See Ana Echgue (Ed.), the Gulf States and the Arab Uprisings, *FRIDE & Gulf Research Center*, 2013, available at: http://fride.org/descarga/The_Gulf_States_and_the_Arab_Uprisings.pdf

[75] Federal Law no. 7 of 2011 has amended this law; the amendment has provided clearer categories of penalties applicable in breaches to its provisions.

[76] Article 3 of the E-Commerce and Transactions Law enumerates the objectives of the legislation; the third paragraph therein states: "To facilitate and eliminate barriers to Electronic Commerce and other Electronic Transactions resulting from uncertainties over writing and signature requirements, and promote the development of the legal and business infrastructure necessary to implement secure Electronic Commerce".

develop the legal foundations necessary to provide secure e-commerce.[77] The law confirms the legal effect of using electronic forms, and the use of such forms in communications and in filing documents between governmental and non-governmental bodies.[78] It seems that the law bears similarities to the Model Law on Electronic Commerce promulgated by the United Nations Commission on International Trade Law (UNCITRAL), which aims to prevent obstacles to the use of electronic forms in contracting and other activities.[79]

Although the Federal Law of E-Commerce and Transactions has recognised the legality of electronic transactions, documents and signatures,[80] the legislation is silent regarding the issue of jurisdiction and law applicable to contracts concluded by means of the internet.

Federal Law no. 24 of 2006 on Protection of Consumers covers various aspects of consumer contracts, including consumers' rights, and providers' obligations and penalties. One of the legislation's significant features is that it recognises consumers' rights as a matter of public policy,[81] which deems accordingly any term or condition that contradicts those rights to be void. Regrettably, the consumers' rights listed under the Emirati Consumer Protection Law do not include the litigation right of consumers.[82] Even the Executive Regulation of later legislation has no provision for the subject of jurisdiction in consumer contracts. [83]

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[77] *Ibid*.

[78] Article 3 (4) of the E-Commerce and Transactions Law states: "To facilitate the electronic filing of documents with governmental and non-governmental agencies and departments and promote efficient delivery of the services of such agencies and departments by means of reliable Electronic Communications".

[79] Article 5, UNCITRAL Model Law on Electronic Commerce 1996, amended in 1998, available at: http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

[80] See Stephen E. Blythe, Fine-Tuning the E-Commerce Law of the United Arab Emirates: Achieving the Most Secure Cyber Transactions in the Middle East, *International Journal of Business and Social Science*, Vol. 1, no. 1, 2010, pp. 163–172.

[81] According to Article 18.

[82] Consumers' rights have been listed under Article 8 of the Executive Regulation to Federal Law no. 24 of 2006 on the Protection of Consumers, which states: "1- the right of protection against products and production transactions and services which damage health and safety. 2- the right to be provided with the facts which aid him in the appropriate purchase and consumption. 3- the right of election between several replacement goods and services by competitive prices with good quality warranty. 4- the right to listen to his opinions and that his interests be represented before official and non-official authorities and that his opinions be considered for the development of goods and services. 5- the right to satisfy his basic needs from the essential necessary goods and services such as food, clothes, shelter, health care and education. 6- the right of compensation for the bad goods or the unsatisfactory service or any other practices that damage the consumer. 7- the right of education and acquiring the required

The Emirati legislations discussed above have not supplied provisions that are capable of properly determining the jurisdiction or law applicable to e-commerce transactions or electronic consumer contracts. The absence of such private international law provisions, on the part of the UAE's legislature, would raise concerns from an academic perspective, and imply dramatic consequences from a practical perspective, particularly with regard to consumer protection.[84] Thus, in the absence of appropriate provisions to determine jurisdiction and law applicable to electronic contracts in the UAE, the provisions supplied under the 1992 Federal Law no. 11 of the Civil Procedures Law, designed to determine jurisdiction in the event of disputes arising from international contracts, will apply. The Civil Procedures Law consists of 331 articles listed under the following chapters: general provision,[85] persecution before the courts,[86] various procedures and litigations,[87] and execution.[88] Similarly, with regard to the law applicable to e-commerce, general provisions adopted under the Civil Transactions Law of the UAE will apply to determine the law applicable to e-commerce, for example, Articles 19–23 of the Civil Transactions Law.[89] Therefore at the end of this thesis, the recommended provisions are embraced with aspects of technological neutrality, knowing that these provisions will aim to replace the current general provisions applicable to jurisdiction and the law applicable to all civil and commercial transactions.

2.4.3 Legislations of the Kingdom of Saudi Arabia

With regard to the Kingdom of Saudi Arabia, the Regulation of Procedure before Sharia Courts (hereinafter SPL), which was promulgated by Royal Decree no. M/21 of 20 Jumada I 1421 Hejri (corresponding to August 19, 2000), will be examined in

knowledge and skills to exercise conscious examinations between goods and services, and to be aware of his basic rights and liabilities and method of their usage through permanent educative programs. 8- the right to live in a safe environment.

[83] Cabinet of Ministers' Resolution (12) of 2007 in regard to Executive Regulation to Federal Law no. 24 of 2006 on the Protection of Consumers.

[84] Reinhard Schu, The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?, *International Journal of Law and Information Technology*, vol. 5, no. 2, 1997, p. 194.

[85] Articles 1–19 of the Civil Procedures Law.

[86] *Ibid*, Articles 20–188.

[87] *Ibid*, Articles 189–218.

[88] *Ibid*, Articles 219–331.

[89] The applicable provisions, adopted by the UAE and other member states of the GGC, to determine the law that governs contractual commitments will be examined in the fifth chapter of this thesis.

this thesis in order to identify the applicable Saudi provisions on e-commerce to determine jurisdiction. Due to the Islamic jurisprudence they follow, Saudi Arabia's statutes are referred to as regulations, rather than laws or acts. This principle could be clarified by referring to two types of authorities: legislative and regulatory.[90] According to the Islamic doctrine that Saudi Arabia follows,[91] the State has the regulatory authority to issue regulations (or *anzimah* in Arabic, singular *nizam*), provided that these regulations comply with the holy sources of Islam (the Qur'an and the Sunna[92]) and fall within the public interest. Thus, the Qur'an and the Sunna have supremacy over the State's regulations.[93] The legislative authority, however, is referred to God as the only legislator.[94]

Based on these principles, the harmonised legislations adopted by the GCC have been also given two legislative titles in order to comply with the wording requirement of Saudi Arabia. This can be demonstrated by mentioning the title of one of the harmonised legislations of the GCC in Arabic, for example " النظام (القانون) المدني الموحد لدول مجلس التعاون",[95] which could be translated as "Harmonised Civil Regulation (Law) of the GCC States". It seems clear that the word *Regulation* is given priority over the word *Law* in the title. This could also reflect the importance and influence the Kingdom of Saudi Arabia has in the GCC. On the other hand, the harmonised legislations adopted by the GCC have also been entitled harmonised laws; such wording complies with the legal systems of the other GCC states. Based on the above statements, it seems that the GCC mechanism is built on the respect of the member

[90] Ayoub M. Al-Jarbou, Judicial Independence: Case Study of Saudi Arabia, *Arab Law Quarterly*, Vol. 19, 2004, p. 31.
[91] Saudi Arabia follows one of the four Sunni schools of jurisprudence, which is the Hanbali School, or *madhhab Al Hanbali* in Arabic. The name of this school came from the name of its founder, Imam Ahmed Ibn Hanbal (780–855). Among the schools of doctrine, including Hanafi, Maliki and Shafi'I, this school is considered the strictest, and the most dependent on the holy sources. Furthermore, Saudi Arabia specifically relies on the jurisprudence of a leading figure of the Hanbali school, Sheikh Ahmed Ibn Taymiyya (1263–1328), Esther van Eijk, 'Sharia and national law in Saudi Arabia', *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Jan M. Otto (Ed.), (Leiden, Leiden University Press, 2010), p. 142.
[92] The holy sources of Islam are the Qur'an, which is the word of God as revealed to the Prophet Muhammad – peace be upon him – through the Archangel Gabriel as the circumstances and situations demanded, and the Sunna, which are the statements and actions of Prophet Muhammad – peace be upon him – as well as the statements and actions of others made in his presence, with his knowledge and approval, Ayoub M. Al-Jarbou, *supra* note 90*,* at 13. *See* Esther van Eijk, supra note 91, pp. 157-158.
[93] Ayoub M. Al-Jarbou, *supra* note 88.
[94] *Ibid*.
[95] The GCC Secretariat General, *supra* note 2.

states' principles and values. Therefore, in order to introduce or develop cooperative measures between its member states, the GCC would implement such measures on the common ground and principles between these states; at the same time, such implementation would not dismiss the principles of any member state.

Due to the differences between Saudi Arabia's legislations and those of other member states of the GCC, it is important to draw attention to the relevant provisions in the Saudi laws, which would provide greater opportunities for the present thesis to reach fruitful and suitable recommendations to the current reality of e-commerce among the GCC member states. Therefore, this thesis will examine the Saudi provisions relevant to the application of jurisdiction law to e-commerce. It is important to mention at this juncture that Saudi Arabia does not have rules to determine the law applicable to contractual obligations or relationships. In other words, Saudi Arabia does not recognise the conflict of laws concept; Saudi courts will apply Sharia law to any dispute that falls within its jurisdiction.[96]

With regard to commercial and civil disputes, the general principle is affording jurisdiction to the court in whose territorial jurisdiction the defendant is in residence, according to Articles 24 and 25 of the SPL;[97] however, there are a number of exceptions to this principle listed under the Saudi procedure law. The first exception is on disputes *in rem* concerning real estate. For instance, in a dispute between two parties domiciled in the Saudi Kingdom concerning the ownership of real estate located in the UAE, the Saudi courts would not have jurisdiction over litigation, even if the litigants afforded jurisdiction to these courts.[98]

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[96] This is expressly stated in Article 1 of the Law of Procedure before Sharia Courts: "Courts shall apply to cases before them provisions of Sharia laws, in accordance with the Qur'an and Sunna of the Prophet (peace be upon him), and laws promulgated by the state that do not conflict with the Qur'an and Sunna, and their proceedings shall comply with the provisions of this Law". The rule has not provided any exception in order to apply foreign law, which confirms Saudi Arabia's approach to prohibiting the application of foreign laws. This consequently leads many businesses in Saudi Arabia, especially those involved in financial contracts, to litigate through arbitration.

[97] The Law of Procedure before Sharia Courts promulgated by Royal Decree no. M/21 of 20 Jumada I 1421 Hejri, August, 19 2000, Article 24: "The Kingdom's courts shall have jurisdiction over cases filed against a Saudi, even if there is no record of his general or designated place of residence in the Kingdom. Excepted are cases in rem involving real estate located outside the Kingdom". Article 25 states: "The Kingdom's courts shall have jurisdiction over cases or a designated place of residence in the Kingdom. Excepted are cases in rem involving real estate outside the Kingdom".

[98] The exception of disputes concerning real estate outside of the Saudi Kingdom has been mentioned in a number of Articles of the SPL, including Articles 24 and 25, as well as Article 28, which states: "Except for cases *in rem* involving real estate outside the Kingdom, the Kingdom's courts shall have

A second exception that allows Saudi courts to examine the proceedings against a defendant who is not a Saudi citizen and does not reside in the Kingdom[99] is in a lawsuit concerning personal status, such as marriage, divorce and alimony, provided that the plaintiff is a Saudi citizen or a foreigner who is domiciled in the Kingdom.[100]

The third exception that provides jurisdiction to Saudi courts, on the condition that the defendant is not a Saudi national and does not reside in the Kingdom, concerns litigations regarding a property located in the Kingdom, or an obligation performed or that shall be conducted in the Kingdom. According to Article 26 (a) of the SPL,[101] the plaintiff could litigate before the Kingdom's courts against the defendant who is not domiciled in Saudi Arabia. Hence, this rule is applicable to the contractual dispute, whether civil or commercial, in which the contractual commitment has been conducted or shall be executed partially or totally in the Kingdom, regardless of whether the contract is concluded inside or outside the territory of Saudi Arabia, and whether between real or corporate persons. Article 26 of the SPL, however, does not specify before which court in the Kingdom the plaintiff could bring his proceedings, which suggests that the litigation could be brought before the court where the plaintiff is domiciled or where the contractual obligation is conducted or shall be performed.

With regard to disputes concerning branches of a company, according to Article 36 of the SPL, the plaintiff has the option to bring litigation before the court in which the head office of the defendant is located, or before the court where the branch of such a firm is located, provided that the proceedings concern contractual obligations with the latter branch.

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jurisdiction to adjudicate cases when the litigants accept these courts' jurisdiction, even if the matter does not fall within their jurisdiction". The Civil Procedures Law of the UAE under Article 23 has adopted a similar provision to Article 28 of the SPL, which allows the courts to accept the submission of disputes that fall outside of its jurisdiction. See chapter 3.2.1 Jurisdiction Rules on B2B in the UAE.

[99] Article 10 of the SPL defines the place of residence as: "the place where a person normally resides".

[100] Article 27 of the SPL.

[101] Article 26 states: "The Kingdom's courts shall have jurisdiction over cases filed against a foreigner who has no general or designated place of residence in the Kingdom in the following circumstances:

(a) If the lawsuit involves property located in the Kingdom or an obligation considered to have originated or is enforceable in the Kingdom.
(b) If the lawsuit involves bankruptcy declared in the Kingdom.
(c) If the lawsuit is against more than one person and one of them has a place of residence in the Kingdom"; such provision corresponds to Article 21(3) of the Civil Procedures Law of the UAE and Article 30 of the Law of Civil and Commercial Procedures of Oman.

It seems that the most relevant provisions of the SPL, which may be applicable in determining jurisdiction in e-commerce disputes, are Articles 24, 25 and 26(a). There is no significant difference between these provisions from the SPL and the corresponding rules under the CPL of the UAE; namely Articles 20 and 21(3). Furthermore, the absence of appropriate provisions to determine the judicial authority over e-commerce disputes appears from the Electronic Transactions Laws of the UAE and Saudi Arabia. The Electronic Transactions Law of Saudi Arabia aims at "controlling, regulating and providing a legal framework for electronic transactions and signatures", according to Article 2 thereof.[102]

2.4.4 Legislations of the Sultanate of Oman

Royal Decree no. 29 of 2002 on the Law of Civil and Commercial Procedures provides the provisions applicable to determining the international jurisdiction of the Omani courts in civil and commercial disputes. Like the Emirati Civil Procedures Law, the later Omani legislation has not given suitable provisions to determine the jurisdiction of e-commerce disputes.

The Electronic Transactions Law of the Sultanate of Oman, promulgated by Royal Decree no. 69/2008, aims to recognise electronic transactions in order to eliminate any obstacles or challenges facing this form of transaction.[103] The law has covered various aspects of electronic transactions, for example, e-transaction requirements, legal consequences ensuing from electronic messages and signatures,[104] and contracts

[102] Article 2 of the Electronic Transactions Law, promulgated by Royal Decree no. M/8 on 8th Rabu' I 1428H – March 26, 2007, states: 'This Law aims at controlling, regulating and providing a legal framework for electronic transactions and signatures so as to achieve the following:

1- Setting uniform legal standards for using electronic transactions and signatures and facilitating the implementation thereof in both private and public sectors by means of reliable electronic records.
2- Ensuring the credibility and integrity of electronic transactions, signatures and records.
3- Facilitating electronic transactions and signatures, domestically and internationally, in all sectors, including government procedures, commerce, medicine, education and electronic payments.
4- Removing obstacles facing use of electronic transactions and signatures.
5- Preventing misuse and fraud in electronic transactions and signatures'.

[103] Article 2 of the Omani Electronic Transactions Law.
[104] Chapter two of the Law.

formation.[105] The law has not provided, however, any provisions concerning jurisdiction or the law applicable to e-commerce.

Therefore, the general provisions, which determine the international jurisdiction of Omani courts, will be applicable to e-commerce disputes before the Omani courts.[106] Comparing the latter provisions with the general provisions adopted by the Civil Procedures Law of the UAE, it seems that the Omani provisions do not differ significantly from the corresponding Emirati provisions. For example, Article 30 of the Civil and Commercial Procedures Law echoes Article 21 of the Civil Procedures Law with regard to the courts' jurisdiction over disputes involving a foreign party who is not domiciled or a resident in the State.[107] Another example is Article 50 of the Omani Civil and Commercial Procedures Law, which states: "In commercial matters, the jurisdiction shall be for the court within the precinct of which the defendant's domicile is situated or his place of business or the court within the precinct of which the agreement is made and totally or partially performed, or the court within the precinct of which the agreement must be performed".

It seems from the wording of Article 50 that the law has given the plaintiff the choice to select the court before which the proceedings can be submitted. Subsequently, the provision has not prioritised one court's jurisdiction over other courts; in fact, the provision has equalised the courts' jurisdictions. Such provision corresponds to Article 31(3) of the Civil Procedures Law of the UAE. In applying Article 31(3), the Dubai Court of Cassation held that: "According to Article 31(3), jurisdiction in commercial matters has been given to courts that are considered as equal options afforded by the law to the plaintiff to choose between them, for the purpose of facilitating litigation for the plaintiff".[108]

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[105] Chapter three of the Law.

[106] Specifically Articles 29–35 of the Omani Civil Procedures Law.

[107] Article 30 of the Civil and Commercial Transactions Law states: "Omani courts hall have jurisdiction to hear suits filed against Non Omani National who has no domicile or place of residence in the Sultanate in the following cases:

(a) If he has chosen domicile in the Sultanate.
(b) If the suit is related to property existing in the Sultanate or if it is related to obligation arised or performed or it would have been performed therein or if it is connected with bankruptcy declared therein".

[108] Dubai Court of Cassation case no. 275/2005, and applied in case no. 260/2008.

With regard to choice of court, Article 57 of the Omani Civil and Commercial Procedures Law has confirmed the contractual parties' freedom to choose a court to examine any contractual dispute arising from their contract.[109] However, the provision has provided jurisdiction to the defendant's court besides the court chosen by the parties. Thus, the Omani legislation has afforded the plaintiff a choice: he can bring the proceedings before the court of the defendant's domicile, or the court that has been chosen in the contract, bearing in mind that choice is merely available in domestic disputes. This principle has also been adopted under Article 31(5) of the Civil Procedures Law of the UAE.[110]

With regard to e-commerce, the provisions of the Omani Civil Transactions Law will apply,[111] specifically Articles 20–28 thereof. The Omani approach echoes the Emirati approach, particularly in the application of general rules with regard to jurisdiction and applicable law to e-commerce disputes, and in the application of general rules of jurisdiction and choice of law on those issues.

Another similar feature between the Omani and Emirati doctrines is in relation to consumer protection. Royal Decree no. 81/2002 on the Law of Consumer Protection has embraced different aspects of consumer contracts, such as consumer rights,[112] the obligations of suppliers and dealers,[113] and the penalties for violating the provisions of this law. However, the Omani law has not included provisions that could protect consumers' rights to litigate in their transactions within e-commerce. That approach echoes the one adopted by the Emirati Consumers' Protection Law.

2.4.5 Legislations of the Kingdom of Bahrain

[109] Article 57 states: "If it is agreed that the jurisdiction shall be assumed by certain court, then the jurisdiction shall be for the said courts within the precinct of which the defendant's domicile is situated. Provided, in cases where the law provided for the court assuming jurisdiction other than the court stipulated in Article (44), no agreement shall be allowed to contradict this jurisdiction".
[110] Article 31(5) of the UAE's Civil Procedures Law states: "In other than the cases stipulated in the Article 32 and the Articles from 34 to 39, it is possible to agree on the jurisdiction of a certain court to examine the litigation, and in such case the jurisdiction will be given to such court or the court in which circuit the prosecuted residence, domicile or workplace exists".
[111] The Civil Transactions Law is promulgated by Royal Decree no. 29 of 2013.
[112] Chapter two of the Consumers' Protection Law of the Sultanate of Oman.
[113] Chapter three thereof.

Having promulgated the Electronic Transactions Law in 2002, the Kingdom of Bahrain is considered second chronologically among the other GCC member states to adopt the legislation governing electronic transactions.[114] However, the legislation has not covered the issues of private international law with respect to electronic transactions. With regard to consumer protection, although the Kingdom of Bahrain promulgated its Consumer Protection Law in 2012, [115] which is assumed contemporary with the consumer growth's reliability on e-commerce, the legislation has not provided sufficient protection to consumers' litigation rights in e-commerce contracts. This is a common feature among the earlier member states of GCC.

This leads consequently to transferring these matters to be governed by the general provisions under the Civil and Commercial Procedures Law,[116] as amended in 1978, and the Civil Law.[117] This approach is similar to those adopted by the UAE and Oman.[118] The Bahraini approach is different, however, especially with regard to determining the law applicable to disputes involving a foreign element, which is applicable to international and e-commerce transactions. Article 7 of the Civil Law of Bahrain states: "Save for the provisions set forth in the Civil and Commercial Procedures Act, a special law shall specify the law which shall be applicable to disputes that include a foreign person and where there is a conflict of laws".

The Bahraini government has recently promulgated the law on Conflict of laws in Civil and Commercial Matters Involving a Foreign Element (hereafter the Bahraini Law on Conflict of Laws),[119] the provisions of which will be examined.

2.4.6 Legislations of Kuwait

The Kuwaiti Civil Law expressly refers any issue[120] that relates to determining the applicable law of a civil or commercial contract that involves a foreign element, to

[114] Legislative Decree no. 28 of 2002, with respect to Electronic Transactions.
[115] Legislative Decree no. 35 of 2012.
[116] Legislative Decree no. 12 of 1971.
[117] Legislative Decree no. 19 of 2001.
[118] For instance, Article 15 of the Bahraini Civil and Commercial Procedures Law echoes Article 21 of the Emirati Civil Procedures Law and Article 30 of the Omani Civil and Procedures Law.
[119] Legislative Decree no. 6 of 2015. Shura Council of the Kingdom of Bahrain, available at: http://www.shura.bh/en/Pages/default.aspx
[120] Legislative Decree no. 67 of 1980.

be governed by a special legislation according to Article 7 thereof.[121] The special Kuwaiti legislation in this context is Law no. 6 of 1961.[122] This legislation consists of 74 Articles, Articles 50–67 of which govern the law applicable to civil and commercial matters. These provisions cover various matters, including property possession and ownership,[123] transition of debt,[124] the transfer of shares and promissory notes,[125] and contracts concluded in the stock market.[126] Although later Kuwaiti law differs in specifying the law applicable to a number of different civil and commercial contracts, the general rule thereof under Article 59 echoes Article 19 of the Civil Transactions Law of the UAE and Article 20 of this law in Oman. In order to avoid digression, it seems necessary at this juncture to leave this discussion to the fifth chapter of this thesis.[127]

With regard to determining jurisdiction, neither Law no. 38 of 1980 on Civil and Commercial Procedures nor Law no. 20 of 2014 on Electronic Transactions has given specific provisions to determine the jurisdiction of disputes arising from e-commerce. In this situation, Articles 23–28 of the Kuwaiti Civil and Commercial Procedures Law will apply. Similarly, those provisions echo those adopted by the other member states of the GCC. For instance, Article 24(B) of the Civil and Commercial Procedures Law of Kuwait corresponds to Articles 21 of the Emirati Civil Procedures, 30 of the Omani Civil Procedures, 26 (a) of the Saudi Procedures Law, and 15 of the Bahraini Civil and Commercial Procedures.

Thus, the Kuwaiti approach toward the applicable law differs from that adopted by the UAE and Oman, but the states' approaches toward jurisdiction seem very similar.

2.4.7 Legislations of Qatar

[121] Article 7 states: "Shall be appointed by special legislation the applicable law to the matters involving a foreign element" (this translation is not official).
[122] Confirmed by the Explanatory Memorandum of the Kuwaiti Civil Law with regard to Article 7 thereof, which states: "These issues are regulated by a special law in the state of Kuwait, namely, Law no. 5 of 1961 with respects to regulate legal relations that involved foreign element" (this translation is not official).
[123] Article 51.
[124] Article 53.
[125] Article 54.
[126] Article 61.
[127] See section 4.2.2 The Applicable Law to B2B in the Other Member States of the GCC in chapter 4.

In 2010, Qatar adopted legislation governing electronic transactions; namely Decree-Law no. 16 of 2010 on Electronic Commerce and Transactions. The law covers various aspects of e-Commerce and transactions, such as the requirements of electronic transactions,[128] the effects and authentication of e-transactions,[129] and Electronic signatures.[130] The law has embraced a number of provisions concerning consumer protection.[131] These provisions aim to protect consumers' privacy,[132] control commercial practices toward consumers,[133] and provide certain and comprehensive terms and conditions in electronic contracts for consumers.[134] Although the law differs in certain areas from the laws of other GCC countries, the laws are similar in that they lack provisions concerning jurisdiction in e-commerce. Furthermore, the Qatari Civil and Commercial Procedures Law has not provided any provisions that determine the international jurisdiction of the Qatari courts.[135] This point will be examined in detail in the third chapter of this thesis.[136]

On the other hand, Law no. 8 of 2008 on Consumer Protection, under Article 2(7), has confirmed consumers' right to file a lawsuit for any act that would prejudice, damage, or restrict their rights.[137] The legislation has not given further details on whether such a right could be obtained by the consumer against national and international merchants, or before which courts the consumer has such a right. The interpretation of such a rule, from a broad perspective, could afford Qatari consumers, whether

[128] Articles 4 – 19 cover offer, acceptance and acknowledgment between the originator and the addressee in electronic transactions.
[129] Articles 20 – 27.
[130] Articles 28 – 34.
[131] Articles 51 – 59.
[132] Article 59 states: "The service provider must identify the purposes for which personal information of the consumer is collected, prior or at collecting of this information, and shall not collect, or use, or retain, or disclose that personal information for unauthorized or unpermitted purposes, unless it is required or authorized by the law, or by the consent of the client who is related to that information. The service provider is responsible for any records containing personal information of the client, or any data of electronic communications for the client in the hands of the service provider, or under his control, or with his agents. The service provider shall take reasonable measures to ensure the personal information of the client and the relevant records are protected in a secure manner that fits their importance".
[133] Article 54.
[134] Article 55.
[135] Qatar's Law no. 13 of 1990 on Civil and Commercial Procedures.
[136] See section 3.2.2 Jurisdiction Rules Concerning B2B Transactions in Other Member States of the GCC
[137] Article 2(7) of the Consumer's Protection Law of Qatar, which states: "Basic consumer's rights guaranteed under the provisions of this law, and prohibited for any person to conclude any agreement or practice any activity that would prejudice those rights and in particular the following rights: 7- The right to bring lawsuits for all that would prejudice, damage, or restrict his rights. Provided that such right does not prejudice the international conventions in which the State is party".

nationals or citizens of Qatar, the right to bring proceedings before their national courts or against both national and international suppliers and traders involved with Qatari consumers in online contracts of provisions of goods or services. In this context, it is worth drawing attention to the rule under Article 23 of the Civil Law,[138] which provides the Qatari court the power to apply Qatari rules of jurisdiction and procedure to legal relationships involving a foreign element.[139]

Clearly, the approach adopted by Qatar toward e-commerce is different from that of the other member states of the GCC, particularly with regard to consumer protection. Another significant difference between Qatar and the other member states is that the former member state has not adopted rules regulating the international jurisdiction of its national courts.

2.4.8 Sharia Law

The thesis will examine the previously mentioned regulations of the GCC member states concerning the determination of the jurisdiction and the applicable law to both B2B and B2C e-commerce transactions. Therefore, the determined scope of this thesis will investigate the application of related rules and highlight situations and matters that are demonstrated or have occurred and those that could occur; and one of those scenarios, which could appear from e-commerce, is where the applicable law to the contract is the Sharia Law.

At this point, it is important to address the fact that the Islamic Sharia has influenced cultures, constitutions, and laws of GCC Member States, such as the UAE Federal Law no. 28 of 2005 regarding Personal Status. However, its influence on the rules examined in this study, except for those from Saudi Arabia, is minimal. Because almost all the GCC Member States have adopted coded legislations (national laws) that govern matters from a perspective that is different or contrary to the Islamic Sharia, and among those matters is the recognition the choice of law, except Saudi Arabia in which the concept of conflict of laws (specifically the doctrine or principle of choice of law, or the application of a foreign law) is not recognised. However, that

[138] Law no. 22 of 2004.
[139] Article 23 of the Civil Law of Qatar states: "In legal relationships involving a foreign element, Qatari courts shall apply the rules of jurisdiction and procedure as determined by Qatari law".

position is not absolute. In fact, Saudi courts still enforce arbitration awards that were decided based on foreign laws. Moreover, the Kingdom of Saudi Arabia is still on the path codifying its laws.[140] Therefore, it will soon be possible to witness new codified legislations that stem from the Islamic Sharia in Saudi Arabia.

The following paragraphs lead to the fact that discussing the Islamic Sharia in detail, in this thesis, would not be relevant or supportive to the outcome of the thesis, regarding the proposal of harmonised provisions among the GCC member states. Furthermore, these proposed harmonised legislations among the GCC member states will be obligatory in all these states, including the Kingdom of Saudi Arabia. Thus eventually, the principle of the choice of law will, hopefully, be recognised before the Saudi courts, based on the binding effect of proposed harmonised provisions among GCC member states.

On the other hand, in the following chapters, specifically chapters 4 and 5, this thesis will discuss the choice of non-state law and will examine the recognition of such choice under the laws of the GCC member states and the EU,[141] if the chosen law by the contracting parties was Islamic Sharia. Therefore, the example of Islamic Sharia in the context of the choice of non-state law provides an appropriate examination that serves the objectives of the thesis and its proposed approaches and rules.

2.5 Overview of the Judicial Systems in the GCC

2.5.1 The Judicial System of the UAE

The Judicial system of the UAE is divided into federal and local courts. The Constitution of the UAE permits its emirates to establish their own judicial authority; however, the Federal Supreme Court has supremacy over these local courts. In case of conflict of jurisdiction between a federal court and a local judicial authority, or between a judicial authority in one emirate and a judicial authority in another emirate,

[140] Minstry of Justice of the Kingdom of Saudi Arabia, available at: https://www.moj.gov.sa/ar-sa/ministry/Pages/mojsystems.aspx, and see also The Board of Grievances, available at: https://www.bog.gov.sa/ScientificContent/JudicialBlogs/1435/Pages/default1.aspx

[141] see the following subsections: 4.2.1 The Applicable Law of B2B Transactions in the UAE, 4.2.2 The Applicable Law of B2B Transactions in the Other Member States of the GCC, 5.4.1 The Applicable Law of B2B Transactions, and 5.4.3 Recommended Choice of Law Approaches for the GCC and UAE

the Federal Supreme Court has jurisdiction.[142] According to Article 104 of the Constitution, the local judicial authorities have jurisdiction on all matters that have not been entrusted to the Federal judiciary. Upon a request made by the emirate, a Federal law could be issued in order to transfer all or part of the competencies of the local judiciary to the Federal judiciary.[143]

One of the significant local judiciary systems established in the UAE is Dubai, which has established the Courts of Dubai International Financial Center (DIFC Courts),[144] in parallel with its traditional Courts.[145] The DIFC courts were established by Dubai Law no. 12 of 2004 as amended by Dubai Law no. 16 of 2011. In accordance with later laws, the DIFC Courts are an independent judicial authority with certain jurisdiction. Dubai Law no. 10 of 2004 identifies the DIFC Courts' authorities, procedures and functions. With regard to arbitration, the UAE embraces the Abu Dhabi Commercial Conciliation and Arbitration Center,[146] and Dubai International Arbitration Centre (DIAC).[147]

2.5.2 The Judicial System of the other Member States of the GCC

Unlike the earlier judicial system of the UAE that embraces two types of national courts, namely federal and local courts, the judicial systems of the other Member states of the GCC share the similar feature of being confined to a single type of national court. In the other member states of the GCC, the civil courts are the ones entitled to preside over disputes in relation to civil and commercial contracts.[148]

It is important in this context to draw attention to the recent reform in Saudi Arabia, which aims to stimulate and modernise the Saudi Judicial System. The movement came by Royal Decree in 19 Ramdan 1428 Hijri (corresponding to 1st October 2007) (hereinafter the Saudi Law of the Judiciary), issued by King Abdullah to reform and

[142] According to Article 99 of the UAE's Constitution.
[143] According to Article 105 of the UAE's Constitution.
[144] DIFC Courts, available at: http://difccourts.ae/about-the-courts/
[145] Dubai Courts, available at: http://www.dubaicourts.gov.ae/
[146] Abu Dhabi Commercial Conciliation and Arbitration Center, available at: https://www.abudhabichamber.ae/English/AboutUs/Sectors/CCAC/Pages/Default.aspx
[147] DAIC, available at: http://www.diac.ae/idias/
[148] Article 1 of Bahrain's' Civil and Commercial Procedures Law, Articles 29 and 34 of the Kuwaiti Civil and Commercial Procedures Law, Articles 36, 37 and 41 of the Omani Civil and Commercial Proceedures Law, and Article 4 of the Qatari Civil and Commercial Procedures Law.

create a new court system that would include the establishment of a Supreme Court.[149]

The new judicial system has determined jurisdiction between the Courts of First Instance. Such jurisdictional distribution is based on two perspectives. The first perspective concerns the nature of the dispute in question, for example commercial, employment, personal status, or urgent matters.[150] The new reform has established different Courts of First Instance based on the subject matter. Previously, the Board of Grievances had jurisdiction over most types of commercial dispute;[151] however under the latest reform, this jurisdiction has been transferred to the commercial tribunals of First Instance. This doctrine would provide greater legal certainty and judicial predictability towards the judicial commercial resolution in Saudi Arabia.

The second perspective is based on location, which allows the courts to determine jurisdiction based on the defendant's place of residence, the plaintiff's place of residence, real estate, or the location of a contractual obligation. The reform has also extended to other aspects concerning the judicial jurisdiction separation based on the locational separation between the national Saudi courts. Suppose that a plaintiff has brought proceedings concerning a commercial contract to the court of his place of residence in Riyadh[152] against a defendant who is a Saudi national and has no place of residence in the Kingdom, according to the information provided by the plaintiff in the proceedings, and, at the first hearing of the case, the defendant challenges the jurisdiction of the court in question on the basis that he has a place of residence in the Kingdom, for example in Jeddah,[153] which the plaintiff had not provided in filing the case. In this situation, the court would not transfer the case to the competent court in Jeddah unless the judgment was rendered.[154]

[149] Article 9 of the Saudi Law of Judiairy. Esther van Eijk, supra note 89, at 160.
[150] Article 9 of the Saudi Law of Judiairy.
[151] The Board of Grievances also has jurisdiction on disputes involving governmental bodies, enforcement of foreign judgments and arbitral awards.
[152] The capital of the Kingdom of Saudi Arabia.
[153] Jeddah is one of main cities in the Kingdom of Saudi Arabia. See Jeddah Municipality website: http://www.jeddah.gov.sa/english/JeddahCity/About.php
[154] Article 11 of the SPL states: "No case properly filed with a competent court may be transferred to another court or agency before judgment is rendered".

On the other hand, suppose that both litigants have brought proceedings concerning the same matter before two different courts in the Kingdom, and neither of these courts has renounced litigations, or both courts have renounced. According to Article 27 of the Saudi Law of the Judiciary,[155] in such cases a petition shall be submitted to the Jurisdictional Conflict Committee in the Supreme Judicial Council[156] in order to determine the competent court. This provision echoes Article 99 (8) of the UAE's Constitution, which requires the submission of any jurisdictional conflict between two national courts to the Federal Supreme court in order to adjudicate.[157]

Although the GCC has not established a judicial authority, a proposal to establish the Commercial Arbitration Center of the GCC was submitted before the GCC Ministers of Justice meeting in 1982 in Riyadh, and the Center was established in Bahrain according to Bahraini Law no. 6 of 2000. The Center specialises in commercial disputes between GCC citizens, or between them and others (foreigners), whether they are a natural or legal person,[158] as well as commercial disputes that arise from the implementation of the provisions of the GCC economic agreement and the decisions of the implementation thereof.[159] The parties shall agree in writing in their contract, or in a subsequent agreement, to arbitrate through this Center.[160]

2.6 The Significance of Harmonisation between GCC Countries in the Field of Determining Jurisdiction and Applicable Law to E-Commerce

Generally, harmonising the laws, including the conflict of law rules, among the member states of the GCC would mainly boost economic and commercial ties, and benefit different sectors, such as industry, agriculture and tourism.

[155] Article 27 of the Law of the Judiciary, promulgated by Royal Decree no. M/78 of 19 Ramadan 1428 Hejri, September 21, 2007, states: "If a suit is brought before a court subject to this law and the same suit is also brought before another body having jurisdiction to decide on certain disputes, and if both courts do not relinquish [jurisdiction over] the suit, or both decide to abstain from hearing it, a petition shall be submitted to the Jurisdictional Conflict Committee for designating the competent body.
[156] Such Committee is consisting of three members, and it has jurisdiction to decide upon the dispute, which concerning the enforcement of two conflicting final decisions, on of which is rendered by a court subject to this Law and the other by the other body.
[157] Article 99 (8) of the UAE's Constitution states: "The Federal Supreme Court shall have jurisdiction in the following matters: 8- Conflict of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. The rules relating thereto shall be regulated by a Federal Law".
[158] Article 2 of Bahraini Law no. 6 of 2000.
[159] *Ibid*.
[160] *Ibid*.

Harmonisation, from a legal perspective, would provide greater certainty and predictability to businesses in the GCC. The legal certainty and stability achieved by the harmonised legislations, ecpecially those concerning the jurisdiction and the applicable law to civil and commercial trasnactions, could attract more investments in the GCC,[161]and would also enhance the commerce environment for businesses and merchants to transact between the member states of the GCC, in which e-commerce plays a vital role.

Many logistics and e-commerce experts have expressed the importance of improving the current GCC legislations related to e-commerce, along with regulations within the UAE.[162] This serves as clear indicative evidence that businesses support legislative reform in the area of e-commerce.

The UAE's current general rules for determining jurisdiction and applicable law in contracts were adopted between 1985 and 1992. These provisions, similarly with those adopted by the other member states of the GCC, have not been adapted to comply with the subsequent development of e-commerce and its attendant legal issues, or the consequences of the vastly increased involvement of consumers in cross-border trade. Consequently, applying these traditional rules of private international law may not provide proper protection to consumers in electronic contracts, with the exception of Bahraini and Qatari rules.[163]

Furthermore, the application of the provisions in terms of determining the applicable law in e-commerce could lead to unexpected results for the parties of such contracts, particularly in circumstances in which there is no express or implied choice of law settled between the parties.[164] Thus, the legal certainty in such matters is a vital objective to promote e-commerce within the UAE, and among the GCC member states. This objective could also be achieved by legislating effective harmonised laws

[161] The UAE ranks among the top five developing countries in attracting foreign direct investment projects in software. See Information Economy Report 2012 from UNCTAD, available at: http://unctad.org/en/PublicationsLibrary/ier2012_en.pdf
[162] According to a survey conducted at Jebal Ali Free Zone "Jafza" Associates Forum 2013, available at: http://www.jafza.ae/dubai-has-logistics-capability-to-lead-15bn-mena-e-commerce-market/
[163] This argument will be fully presented in the following chapter.
[164] This point will be examined in detail in Chapter 4.

that regulate the issues of jurisdiction and applicable law in e-commerce among member states, and even between member states and non-member states.

Based on the objectives of the GCC,[165] economic development is a top priority among the member states. Consequently, the adoption of harmonised legislation that regulates e-commerce will fall within the Council's interest. Significant strides have been made in establishing information and communication technology infrastructure, [166] in encouraging e-commerce for established businesses and entrepreneurs, and in transitioning to e-governments; these advancements reflect the importance of e-commerce to the member states of the GCC. Thus, the adoption of harmonised legislation, which regulates e-commerce in general, and jurisdiction and applicable law in particular, will reflect the common interest of the GCC countries.

In practice, the harmonsied GCC laws, ecpecially those governing conflict of law matters, would provide greater legal certainity to businesses in relation to the applicable law to their transactions and the court that will preside over their disputes, and it would encourage these businesses to transact with other merachants or consumers of other member states of the GCC. Furthermore, these unified legisaltions would increase the confidence of GCC consumers in transacting with merchants of other member states of the GCC, ecpecially through e-commerce, considering the effect of harmonised substantive and conflict of law rules between the GCC member states and their electronic courts.[167] The current legislations do not fill this gap and consequently could be one of the reasons that hinder consumers and buisinesses to trade with merchants of other member states of the GCC.

2.7 Summary

Generally, the legislations of the member states recognise the transactions concluded through e-commerce, for instance the E-Commerce and Transactions Law of the

[165] See pages 1–2 of this chapter.
[166] See Information Economy Report 2013 from UNCTAD, available at: http://unctad.org/en/PublicationsLibrary/ier2013_en.pdf, as well as the ITU Annual Report of 2013, *supra* note 9.
[167] The proposed electronic courts will be discussed later in the thesis, see Chapter 6 subsection 6.1.3 E-Courts.

UAE,[168] and the Electronic Transactions Law of Saudi Arabia.[169] Such legislations provide the necessary platform for establishing and conducting electronic transactions and communications. Although these laws are considered as the legislations most closely related to e-commerce transactions, they do not cover important subjects in e-commerce such as jurisdiction and applicable law regarding transactions. These issues of e-commerce are governed by the general rules of jurisdiction and applicable law adopted by the GCC member states.[170]

Those general rules, which shall be applicable to determine the jurisdiction of disputes arising from e-commerce, are in many perspectives alike, with the exclusion of Qatar's laws, which have abandoned the inclusion of provisions to determine the international jurisdiction of the Qatari courts. On the other hand, compared to the protection provided under the laws of the other member states of the GCC, Qatar's laws provide greater protection to consumers in e-commerce transactions.

It seems that most GCC member states have adopted similar provisions regarding the determination of the law applicable to contractual obligations, applicable to e-commerce transactions, except for Kuwait and Bahrain, which have provided specific provisions to determine the law applicable to certain civil and commercial contracts; however, Kuwait and Bahrain, along with other member states of the GCC, share a similar approach to the general rule regarding the choice of law, except for Saudi Arabia, which does not recognise the choice of law or the application of foreign law based on Islamic Sharia rules.

[168] Federal Law no. 1 of 2006 on Electronic Commerce and Transactions.
[169] Royal Decree no. M/8 of 8 Rabi' I 1428H – March 26, 2007.
[170] According to Article 2 (1) of the E-Commerce and Transactions Law of the UAE, which states: "Matters for which no specific provisions is laid down in this Law shall be governed by the international commercial laws affecting Electronic Transactions and Commerce and the general principles of civil and commercial practice".

Chapter 3: Jurisdiction Rules and Electronic Commerce in the UAE and the GCC

3.1 Introduction

Jurisdiction in e-commerce transactions is one of the essential matters that would potentially benefit from a unified legal framework among the member states of the Gulf Cooperation Council (GCC). This topic, particularly from the perspective of legislative cooperation and harmonisation, is one of the areas of importance in relation to e-commerce development in the GCC. As a member state of the GCC, the United Arab Emirates ('UAE') is expected to be a significant contributor to and beneficiary of initiatives to harmonise rules within GCC member states on jurisdiction over e-commerce disputes.

As examined in the previous chapter, developing and bolstering economic cooperation is among the fundamental objectives for establishing the Gulf Cooperation Council among the member states from the Arabian Gulf. In order to achieve this economic integration and cohesion, the member states have invested in developing Information and Communication Technologies (ICT) infrastructure; establishing a legislative foundation for electronic commerce and transactions; improving their governmental services, initially through converting these services from traditional to electronic form, then transforming these services from electronic to smart;[1] and, finally, their interest in supporting and encouraging the private sector to adopt this transformation to electronic and smart services.[2] It should be emphasised that these developments in the sphere of electronic transactions and commerce are not only aimed at serving the GCC's interest in strengthening the economic cooperation and cohesion among the member states; these developments also appear to simultaneously fulfil the national interests of the individual member states of the GCC.

One of the main objectives of this thesis is to propose a harmonised legal framework in relation to jurisdiction of civil and commercial transactions including e-commerce

[1] *See* subsection 2.3, the Development of E-Commerce in the GCC, in the Chapter 2.
[2] All these factors have been discussed in Chapter 2.

transactions among the GCC countries;[3] thus it is essential to explore the legislations of the GCC member states in the field of jurisdiction. Therefore, this chapter focuses on the current measures adopted by the GCC member states in relation to jurisdiction in general, and the applicable provisions on determining jurisdiction over e-commerce disputes in particular. Examining these provisions will provide a proper platform in the thesis on which to build the theoretical and practical proposals required to eliminate difficulties in applying these rules when e-commerce jurisdiction disputes arise.

Prior to examining the applicable rules adopted by the GCC member states to determine jurisdiction of e-commerce disputes, it is necessary to address in brief the general approaches in establishing jurisdiction of disputes concerning contractual obligations. One of these approaches is related to personal elements, such as nationality, upon which jurisdiction is afforded to courts of the state where the defendant holds nationality. Another perspective in determining jurisdiction, such as the place of residence, is connected to personal and locational elements. This appears in rules that provide jurisdiction to the court where the defendant is domiciled or resident. Jurisdiction concerning contractual obligations could also be determined based merely on a locational element, such as the place where the obligation is agreed or is to be performed, or the location where the contract has been concluded. In addition to these approaches, jurisdiction rules could also aim to achieve particular objectives; for example, where rules afford jurisdiction to the court where the consumer is domiciled or resident with the aim of protecting consumers.

Based on the two main types of transaction in e-commerce, this chapter is divided into two parts: the first part will focus on jurisdiction in business-to-business (B2B) transactions,[4] while the second part will be concerned with jurisdiction in business-to-consumer (B2C) transactions. Both parts will examine the relevant rules adopted by the member states of the GCC to determine jurisdiction of e-commerce transactions,

[3] The aim of introducing harmonized jurisdiction provisions among the GCC member states complies with the economic and strategic objectives of establishing the Council and its integration dimensions; *see* the Chapter 2 of this thesis.

[4] There are many different definitions of B2B e-commerce. For instance, it is referred by D. Lucking-Reiley and D. Spulder in "Business-to-Business Electronic Commerce," *Journal of Economic Perspectives*, 2001, vol. 15, p. 55, as 'the submission of computer data processing and Internet communications for labour services in the production of economic transactions.'

specifically jurisdiction in B2B and B2C contracts, to evaluate the appropriateness of these provisions in determining jurisdiction of disputes that arise from these contracts of e-commerce.

This chapter will also investigate the importance of implementing a harmonised legal framework in the area of jurisdiction among the member states of the GCC. It will focus on the provisions that are recommended to be adopted by the member states of the GCC in order to determine jurisdiction of e-commerce disputes.

At this juncture, it is important to draw attention to the fact that certain provisions of the United Arab Emirates' laws with regard to judicial jurisdiction in international contracts, which will be examined in the following part (beginning with subsection 3.2), are similar to those adopted by other GCC member states. Based on this, the analysis of the UAE's provisions will represent the corresponding provisions adopted under the laws of other GCC states. In addition, the examination will also highlight any significant differences between the UAE's provisions and those of the other GCC member states.

3.2 Jurisdiction Rules Concerning B2B Transactions in the UAE & the Other Member States of the GCC

E-commerce has created a new platform that has facilitated trading and the conclusion of transactions between businesses with regard to sale of goods and provision of services. This form of commerce has also revolutionised the speed and economics of business-to-business commerce, which has traditionally often been fraught with high cost and slowness.[5] In order to gain the benefits of e-commerce and to maintain or improve competitiveness,[6] many merchants realise the importance of adopting technologies that enable their involvement in the environment of e-commerce. Although e-commerce could increase business and improve merchants'

[5] Traditional commerce between businesses relies on a number of procedures that have been reduced in time and cost by B2B e-commerce. The benefits of the adoption of B2B e-commerce, for example, include increasing information flow, direct communication with customers, facilitating distribution, and extending the business scope to reach new customers. *See* Richard E. Downing, "The Benefits and Obstacles of E-Commerce: Towards an Understanding of Adoption," *Journal of Internet Commerce*, 2006, 5(2), pp. 95–122.
[6] *Ibid*.

competitiveness, it is also vital for these businesses to plan their e-commerce involvement to ensure appropriate measures are put in place.[7]

In the Arabian Gulf, the majority of e-commerce transactions are between businesses and consumers; on the other hand, transactions between businesses are gaining more importance and increasing in use. There are many factors that have contributed to increasing the propagation and reliability of e-commerce among businesses in the GCC member states.[8] The popularity of e-commerce in the GCC region is in part due to the improvements implemented in the ICT infrastructure of the GCC member states[9] in order to serve individuals and businesses,[10]and also due to the developments within governmental bodies to adopt contemporary technologies and provide smart services.[11] Moreover, other factors have directly or indirectly contributed to the development of e-commerce in the GCC, including the governmental support and encouragement to businesses and merchants to implement modern technology in dealing with the government and individuals;[12] and finally, motivation and inspiration from the business environment to keep abreast of developments that aim to speed up commerce and trading processes while reducing costs. Therefore, the importance of installing effective and appropriate measures is worth considering in the Arabian Gulf, where e-commerce in general, and B2B transactions in particular, are increasing in popularity.[13]

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[7] *See* Cynthia Ruppel, Linda Underwood-Queen, and Susan Harrington, "E-Commerce: The Roles of Trust, Security, and Type of E-Commerce Involvement," *e-Service Journal*, 2003, 2(2), pp. 25–45, and *see* Michael Porter, "Strategy and the Internet," *Harvard Business Review*, from the issue March 2001, pp. 63–78.

[8] For further details, refer to 2.3, The Development of E-Commerce in the GCC, in the second chapter.

[9] *See* a study by Booz & Company, "Fast, Lean and Agile: How GCC Governments Can Make the Most of ICT Investments", available at: http://www.strategyand.pwc.com/media/uploads/Fast_Lean_and_Agile.pdf.

[10] Dubai Electricity and Water Authority has announced on 15th June 2014 the complete transformation of its services into smart services. *Al-Masdar* published by Dubai Electricity and Water Authority, issue 51, July 2014, available at: https://www.dewa.gov.ae/images/almasdar/almasdar_51.pdf.

[11] Defining governmental smart services does not seem adequate in this space, bearing in mind its broad meaning and extensive details. *See* J. Ramon, Natalie Helbig, and Adegboyega Ojo, "Being Smart: Emerging Technologies and Innovation in the Public Sector," *Government Information Quarterly*, vol. 31, 2014, pp. 11–18; and Dennis Linders, "From e-government to we-government: Defining a Typology for Citizen Coproduction in the Age of Social Media," *Government Information Quarterly*, 2012, vol. 29, pp. 446–454.

[12] *See* 2.3, The Development of E-Commerce in the GCC, in the second chapter.

[13] Ibid.

Despite the importance of e-commerce, however, the GCC has not yet promulgated a specific legislative act that governs e-commerce, nor has it promoted a prospective law that would govern the issue of jurisdiction in the event of disputes arising from e-commerce contracts. On the other hand, a piece of legislation that could regulate e-commerce among the member states of the GCC may see the light of day in the future as, for example, it seems that the GCC is considering introducing a law governing electronic transactions.[14] Nevertheless, there is no indication as to whether this potential legislation will include provisions governing jurisdiction over e-commerce transaction disputes.[15] Specifically, this matter depends on whether the relevant committee under the Secretariat General of the GCC, which is committed to preparing this legislation, would consider extending the scope of such a bill to cover jurisdiction for e-commerce transactions in general, and B2B transactions in particular.[16] In the absence of binding legislation from the GCC, which determines jurisdiction of international contracts in general and jurisdiction of e-commerce transactions in particular among its member states, each of these member states will apply its national laws to determine jurisdiction.

The examination in this chapter will focus on the provisions supplied by the UAE laws and those provided by other GCC member states regarding general jurisdiction, as these will also currently apply in relation to the determination of the e-commerce transaction jurisdiction, specifically for B2B and B2C contracts. In a sense, the present rules on jurisdiction are 'technology-neutral' in that they apply generally and are not focused on, or do not consider, electronic commerce. The advantage in this is that it provides an opportunity for the thesis to consider a need for wider reform concerning the rules of jurisdiction regarding contractual disputes, as well as the thesis' primary focus of disputes arising from electronic commerce contracts.

[14] The GCC Secretariat General addressed on its website some incoming unified legislations that will be adopted by the council; among these is Electronic Transactions Law. The GCC Secretariat General is available at: http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationinTrade/Pages/Achievements.aspx

[15] The information provided by the official website of the GCC Secretariat General, with regard to the proposed harmonized law on e-commerce, merely mentions the title of the proposed legislation and does not indicate further details (for example, the aims and scope of the legislation).

[16] For further information on the GCC legislation, return to 2.4.1, The GCC Legislations.

It is important to note that the UAE has adopted similar approaches to other GCC member states regarding judicial jurisdiction in international contracts. This examination will also highlight any significant differences between the corresponding provisions of the UAE and the other GCC member states.

3.2.1 Jurisdiction Rules Concerning B2B Transactions under Present UAE Law

This subsection will examine the Civil Procedures Law of the UAE,[17] which was first introduced in Chapter 2, and its provisions concerning the determination of jurisdiction as well as whether and to what extent these provisions are applicable to determining jurisdiction in relation to e-commerce transaction disputes. Furthermore, it will analyse the extent that these rules recognise the parties' choice of court, particularly if the chosen court is located in one of the emirates of the UAE, in one of the GCC member states, or in a foreign country. This will consequently require focusing on the circumstances where parties' autonomy will be restricted under the Emirati Civil Procedures Law. In addition, the application of these provisions will be examined in the event that a choice of court agreement between the contractual parties does not exist.

The first set of provisions in examining the issue of international jurisdiction of Emirati courts in civil and commercial disputes is Articles 20–24 of the Civil Procedures Law. Considering there is no appropriate provision applicable to determining jurisdiction of electronic transactions,[18] the later provisions are considered the most relevant, and they will be applied to determine jurisdiction in e-commerce. These provisions of the Emirati Civil Procedures Law provide a number of approaches to determine jurisdiction in civil and commercial disputes.

[17] The Civil Procedures Law (or the Civil Procedures Code) has amended by the Federal Law no 30 of 2005 and the Federal Law no 10 of 2014.

[18] The absence of specific provisions regarding the determination of e-commerce transactions jurisdiction is not a limited feature in the UAE laws. However, it also appears in the laws of the other member states of the GCC. For further details on this subject, refer to the second chapter: 2.4, The Current Legislations.

As provided by Article 20,[19] the first rule affords to the Emirati courts jurisdiction over actions against Emirati nationals or against foreigners who are domiciled or resident in the UAE although disputes concerning real property located outside of the UAE are excluded from this purview. It seems that there are two grounds on which Emirati courts could obtain jurisdiction, according to Article 20. The first basis relies on the question of the defendant's UAE nationality; if the defendant holds UAE nationality, this gives the Emirati court jurisdiction over the dispute in question. This would appear to be the case even if the defendant is not domiciled or does not have a place of residence in the UAE. The defendant's possession of domicile or place of residence in the UAE is the second basis on which the Emirati court could claim jurisdiction. It appears that the latter basis is applicable in the case of a foreign defendant, that is, a defendant who does not possess nationality of the UAE.

The definition of "domicile" for individuals or persons, as provided by Article 81 (1) of the Civil Transactions Law of the UAE, is "the place where a person habitually resides". The provision also states that a person may have more than one domicile at the same time,[20] and in the case where a person has no habitual residence, he shall be considered without domicile.[21] The domicile of a legal person is 'the place where its administration set-up is situated'.[22] The administration seat of a juristic person that has its principal office abroad but carries out activities within the UAE shall be the place where its local administration is located, according to Article 93(2) of the Civil Transactions Law.

Persons can have an elected domicile according to Article 84 of the Civil Transactions Law, which provides: "1- A person may elect a domicile of choice to perform a specific legal act. 2- Election of a domicile must be established in writing. 3- A domicile elected for performance of a legal act shall be considered the domicile for all

[19] Article 20 provides: "With the exception of the real action related to a real estate abroad, the courts shall have the jurisdiction to examine the actions prosecuted against the citizen and the actions prosecuted against the foreigner who has residence or domicile in the state." (All English translations of the provisions of the Civil Procedures Law and all other UAE Laws are from the UAE's Ministry of Justice website: available at: http://www.elaws.gov.ae/ArLegislations.aspx)
[20] Article 81(2) of the Civil Transactions Law
[21] Article 81(3)
[22] Article 93(2) of the Civil Transactions Law

matters relating to this act, including execution procedures, unless it is expressly specified that this domicile is restricted to certain acts to the exclusion of all others."

In this context, it is worth questioning the sufficiency of these rules in determining the domicile of the parties in e-commerce transactions, particularly whether a Saudi company with a website in the UAE is considered 'domiciled' or 'resident' in the UAE, or the presence of the website gives jurisdiction to the UAE courts, and also whether an Emirati company whose website can be seen in foreign countries can be sued in the UAE in respect of any transaction that occurred or was performed anywhere in the world.

The two bases of jurisdiction provided by Article 20 of the Civil Procedures Law reflect the main principles upon which the Emirati legislature relies in determining personal jurisdiction, and these principles also echo traditional perspectives of private international law rules for determining jurisdiction noticeable in many legal traditions.

Article 20 does not exclude many types of contract from its scope, except actions related to a real estate located outside of the UAE, such as judgments concerning tenancy or ownership of property outside the UAE. Thus, the scope of this rule could extend to cover most civil and commercial actions, including e-commerce transactions. Therefore, Article 20 could be applicable to a circumstance where a defendant is an Emirati or even a foreigner who is domiciled or resident in the UAE while the plaintiff is a foreign merchant.[23] In such a situation, Article 20 of the Civil Procedures Law could be beneficial from a consumer perspective in that UAE consumers have the option to bring actions against foreign entities before the courts of the emirate in which that individual or corporate entity is domiciled or resident.

On the other hand, the manner in which the provisions of Article 20 may be interpreted or applied can have a negative effect from the perspective of business entities in particular, for example when they operate on the basis of terms and conditions requiring the submission of disputes to a court outside the UAE or even to arbitration. In a dispute that they wish to set before a foreign court or arbitration on

[23] For further details on the effects of applying Article 20 of the Civil Procedures Law to e-consumer contracts, *see* 3.3.1, Jurisdiction Rules on B2C in the UAE, in this chapter.

the basis of a clause in their terms and conditions, it is possible for the other party to commence an action in the courts of the UAE insisting on the jurisdiction of those courts to hear the dispute. Potentially of even greater concern is that a person or business domiciled or resident in the UAE may be sued in the UAE with respect to a transaction that was entered into and was to be performed outside the UAE and, possibly, even one that had a choice of a foreign jurisdiction for the resolution of disputes.

Here, it is important to draw particular attention to Article 24 of the Civil Procedure Law, which provides significant effect to the enforceability of articles 20–23. Article 24 provides that "any agreement which shall be inconsistent with the articles of this section shall be considered null."[24] Based on this provision, an Emirati merchant could challenge the jurisdiction of a foreign court that has been chosen expressly by the parties under their contract. This rule could create hesitation or "difficulty of trust" from the foreign businesses' side during the process of reaching agreements with Emirati firms. In order to avoid the implications of the rule, the contractual parties could choose to resolve any dispute arising from their contract through arbitration, as the impact of the rule is blunted if the parties choose arbitration as their dispute resolution method. This is in light of the provisions of Article 203(5) of the Civil Procedures Law which states that no suit may be filed if the parties have agreed to arbitration. Nevertheless, under the provision, if a suit is filed before an Emirati court and the other party does not object at the first hearing of the litigation, the suit may continue and the arbitration is deemed to be cancelled.

In addition to Article 20, Article 21 draws the jurisdiction of UAE's courts into an international scope[25] and specifically extends the jurisdiction of these courts over

[24] Article 24 of Civil Procedure Law is a rule adopted exclusively by the UAE and not by the other member states of the GCC.

[25] Article 21 provides:

"The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases:

1- If he had an elected domicile.
2- If the action is related to real estates in the state, a citizen's heritage, or an open estate therein.
3- If the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts.

disputes in which the defendant is a foreigner who is not domiciled or who does not have a place of residence in the UAE. Some of the circumstances listed under Article 21 concern personal status, marriage, or heritage; however, the focus within this article will be on paragraph 3, which is related to the scope of this thesis in general and this chapter in particular.

Paragraph 3 of Article 21 is applicable to determining jurisdiction in cases where a contractual obligation has been concluded, performed, or is to be executed in the UAE. The applicability of this rule seems useful to non-electronic civil and commercial contracts, and certain electronic contracts in which obligations are linked to geographical elements: for example, an electronic transaction that is concluded online but whose obligation is performed outside of the Internet in the form of sold goods or provided services. However, the application of Article 21(3) vis-à-vis other types of e-commerce transaction could face difficulties, particularly in e-contracts that are concluded and performed wholly by means of the internet. The form of obligations executed through such e-contracts does not clearly depend on a link to a specific location. Therefore, the implementation of Article 21(3) to such type of e-commerce contracts could produce significant challenges to the UAE's courts in determining the location of the disputed obligation and whether or not the obligation is connected to the UAE.[26] For example, whether the court will consider the location of the server,[27] and whether or not the server is located within the UAE.

Article 22 of the Civil Procedures Law allows the national courts of the UAE to settle preliminary issues and interlocutory requests, provided that the principal action falls

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4- If the action has been prosecuted from a wife who has a residence in the state, against her husband who had a residence therein.
5- If the action is concerned with an alimony of one of the parents or the wife or with a sequestered or with a minor, or with his relationship or with a custody on fund or on person, in case that the claimer of the alimony, the wife, the minor or the sequestered has a residence in the state.
6- If the action is concerned with the civil status and the plaintiff is a citizen or a foreigner who has residence in the state, provided that the defendant had not a determined residence abroad or the national law is imperatively applicable on the action.
7- If one of the defendants has a residence or domicile in the state".

[26] According to Article 20 of the Civil Procedures Law, which excepted real action that related to a real estate abroad from the scope.

[27] "Server," as defined by Michael Chissick and Alistair Kelman in *Electronic Commerce: Law and Practice* (London: Sweet & Maxwell, 2002) in the glossary, is "a central computer which provides multiple users simultaneous access to data and services."

within their jurisdiction. However, in cases where the original action does not fall under the jurisdiction of the national courts, these courts will have limited jurisdiction over summary and precautionary proceedings.[28]

In the event that the defendant does not appear before an Emirati court, provided that the court does not have jurisdiction based on Articles 20–22 to entertain the proceedings, the court in question shall rule its lack of jurisdiction over the dispute, according to Article 23 of the Civil Procedures Law.[29] The application of Article 23 in such circumstances depends on the availability of two conditions; once both of these conditions are met, the court shall dismiss the case on the grounds of lack of jurisdiction.

The first condition entails the absence of the defendant,[30] and the second condition requires that the matter of the dispute does not fall within the jurisdiction of the UAE's courts. Consequently, if the defendant has appeared before an Emirati court for a case in which the court is not competent, the Emirati court shall not decide the lack of competency over the dispute. This is indicated by the implied rule of the Civil Procedures Law's Article 23, which aims to accept the voluntary submission of disputes, thus allowing a hearing by another court of a dispute that falls outside of the UAE courts' jurisdiction. Article 23 also indicates that the absence of a defendant is not considered as implied consent towards the competency of the Emirati court over the dispute, but the absence of the plaintiff (after bringing the proceedings before the Emirati court) is considered implied consent in this regard.

In this context, some scholars believe in the importance of two conditions in order to accept voluntary submission of disputes, which Article 23 of the Civil Procedures Law does not include. Its first condition is the existence of a genuine connection

[28] Article 22 provides: "The courts shall have jurisdiction to settle the primary issues and the interlocutory requests on the original action falling under its jurisdiction, and they shall also have jurisdiction to decide on every request related to such actions and which the good course of justice requires its examination therewith. They shall also have jurisdiction to order summary and precautionary provisions which shall be executed in the state even if they were not related to the principal action"

[29] Article 23 states that: "If the defendant has not come and the court has not had the jurisdiction to examine the action according to precedent articles, the court shall automatically decide its lack of jurisdiction"

[30] The absence of the defendant shall be in all hearings.

between the contract and the court chosen by the parties of the contract;[31] the second condition is the voluntary submission bringing the jurisdiction to the chosen court,[32] thus the submission of interlocutory requests by the litigants should not activate the rule of Article 23.

On the other hand, another party of scholars believes in the importance of adding another requirement stipulating that the dispute shall include an international element.[33] It seems that the stipulation that the dispute shall include an international element is recognised under Article 23 of the Civil Procedures Law; the provision is listed under the provisions of the UAE courts' international jurisdiction, which indicates the provisions' international substance or concern. Hence, the implementation of Article 23 would be considered only in disputes involving an international element.

Regarding the requirement of a genuine or objective connection between the parties or the contract and the territory of the court chosen, it is justified based on two grounds: firstly, in order to preclude fraud or cheating from individuals in respect of jurisdiction; and secondly, to maintain the effectiveness of rulings delivered from the national courts.[34] The justifications provided for requiring an objective or genuine connection are logical, considering that the ruling of the court chosen is unlikely to be enforced in the foreign territory if it is seen as having been delivered by a non-competent court. However, from a realistic perspective, identifying the genuine or objective connection claimed by this party is an issue fraught with difficulties, because there is no measured standard or criterion that determines the substance of this connection.[35]

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[31].This requirement is not, however, mandatory under the European Union, according to Article 23 of the Brussels I Regulation (the Council Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). *See* Peter Stone, *EU Private International Law: Harmonization of Laws* (Cheltenham: Edward Elgar, 2006), pp. 166–167.

[32] These requirements are supported by a large number of scholars, for example Ukasha Mohammed Mustafa, *Conflict of laws* (Dubai Police Academy, 2006) pp. 64-65, and Hisham Sadek & Hafeeza Al-Hadad, الموجز في القانون الدولي الخاص (Tr) *Summary in Private International Law*, Alexandria (Publisher: دار المطبوعات الجامعية), 2015, at 392.

[33] Hisham Sadek & Hafeeza Al-Hadad, supra note 32, pp. 393–400.

[34] Ukasha, *supra* note 32, pp. 64–65.

[35] Ukasha is one of the scholars who supports the requirement of objective connection. However, he had also admitted that there is no doubt that identifying the connection that must be between the dispute and the court chosen is a difficult task in all circumstances, *Ibid*, at 65.

Furthermore, the party who supports the notion of an objective connection has also introduced the concept of "legitimate interest" as an alternative criterion for determining this connection.[36] Even with the introduction of this alternative, however, difficulties in determining the substance of this concept exist. From another perspective, the validity of an arbitration clause does not entail an objective connection or a legitimate interest between the arbitrator and the dispute, or between the territory where the arbitration will be conducted and the dispute. Thus, dropping this requirement in favour of an arbitration clause entails necessarily disregarding this condition in relation to the choice of court.[37] Therefore, we believe that it is not necessary to require any connection between the chosen court and the contract or its parties.

The Civil Procedures Law, under Articles 20–23, has specified the circumstances in which the courts of the UAE have jurisdiction over international disputes, and on the basis of Article 24 the law apparently denies the opportunity of extracting that jurisdiction to a foreign court by the parties' agreement. It appears that the wording of Articles 20–24 has not prioritised one of these circumstances over the others; in fact, the provisions have only identified the conditions in which the Emirati courts have jurisdiction in international disputes. However, the confusion in this context arises if the circumstances of the case indicate, on one hand, that the contract has many elements linked to a specific state other than the UAE; and on the other hand, the contract has only a single connection to the UAE – that the plaintiff holds of nationality in the UAE, or is domiciled or has a habitual place of residence in the UAE. According to these circumstances, it is unlikely that the Emirati courts would defer such a case to the court of the state most connected to the contract – only if referring the case to this foreign state's courts falls within the concept of appropriate considerations.[38]

It is apparent that the UAE's legislature has not expressly considered allowing the parties to forward their dispute to the jurisdiction of a foreign court based only on the parties' agreement where the dispute was within the jurisdiction of the Emirati courts,

[36] *Ibid*, p. 66.
[37] Hisham Sadek & Hafeeza Al-Hadad, *supra* note 32, p. 402.
[38] The concept of appropriate considerations will be examined in detail later in the chapter

according to Articles 20–23 of the Civil Procedures Law. In other words, the international jurisdiction drawn by Articles 20–24 of the Civil Procedures Law does not provide specifically for recognising the choice of court by the parties. This approach echoes the legal perspective of the old Egyptian school of law, which has long been bypassed.[39]

The Civil Procedures Law, on the other hand, has recognised the choice of court made by the contractual parties merely in the domestic scope, or specifically between the emirates' courts in the UAE,[40] according to Article 31(5).[41] The provision allows the parties to reach an agreement on affording the jurisdiction, for instance, to Dubai's court in order to adjudicate the dispute that in principle falls within the jurisdiction of Fujairah's courts, except in actions concerning certain matters.[42] Based on the wording of Article 31(5), it has not specified or required a certain time by which the choice of court shall be reached. Thus, the contractual parties could agree to choose a specific court in the UAE, whether during or after the conclusion of the contract.

It is important to draw attention particularly to the last sentence of Article 31(5) of the Civil Procedures Law, which provides: "In such case the jurisdiction will be given to such court or the court in which circuit the prosecuted [party] residence, domicile or workplace exists." The rule initially allows the contractual parties to select a court, which will be awarded the hearing of disputes that arise from their contract. Afterwards, the rule confirms in such cases that the jurisdiction will be afforded to the chosen court. According to this statement, Article 31(5) clearly recognises the choice of court by the parties; however, the provision subsequently adds that the jurisdiction could also be given to the court located where the defendant is domiciled, resident, or working. It seems that this provision could apply if the contractual parties have an

[39] Ukasha, *supra* note 32, at 121.
[40] Essam Al Tamimi, *Practical Guide to Litigation in the United Arab Emirates*, (Hague, Kluwer Law International, 2003), p.29
[41] Article 31(5) of the Civil Procedure Law provides: "In other than the cases stipulated in the Article 32 and the Articles from 34 to 39, it is possible to agree on the jurisdiction of a certain court to examine the litigation, and in such case the jurisdiction will be given to such court or the court in which circuit the prosecuted residence, domicile or workplace exists."
[42] The parties' choice of court will not be considered in the following matters: real estate actions, Article 32; actions concerning inheritances, Article 34; actions concerned with commercial bankruptcy, Article 35; actions related to real estate issues, such as supplies and contracting works and leasing, Article 36; actions concerned with the claim of the insurance value, Article 37; actions including a demand for undertaking a temporary or summary provision, Article 38; and Article 39, regarding the court which examines the principal action has jurisdiction to decide in the interlocutory requests.

agreement on the choice of court; however, if this agreement is not formal, or has a deficiency in formal requirements, then an Emirati court could determine jurisdiction according to the general principle, which depends on where the defendant is domiciled, resident or the location of his workplace.

The scope of Article 31(5) is also an issue worth focusing on in this context. In fact, Article 31(5) has been provided under the chapter of domestic jurisdiction and has not been listed under the international jurisdiction chapter of the Civil Procedure Law, which may suggest that the choice of court is only recognised domestically; in other words, the Emirati court will authorise the parties' choice of court only if the chosen court is in another emirate in the UAE in limited circumstances.[43] The choice of court between the UAE's courts is not permitted, for example, in disputes concerning commercial bankruptcy,[44] supplies and contracting works and leasing,[45] and claim of the insurance value.[46] Hence, it seems from the legislative perspective that the recognition of the parties' autonomy in selecting a foreign court for their contractual disputes is forbidden, while choosing one domestic court over another is restricted. The next section will examine whether the judicial perspective in the UAE would echo this approach or would adopt a more instructive approach towards recognising the choice of foreign courts.

3.2.1.1 The Approach of the UAE's Courts towards Jurisdiction Rules

The preceding paragraphs provided an initial analysis of the provisions of the Civil Procedures Law relevant to the question of jurisdiction; the following paragraphs will highlight some of the rulings of the Dubai Court of Cassation and the Federal Supreme Court[47] in order to examine the implications of these rules from a

[43] With regard to the plea against the local jurisdiction or to forward the action to another court for setting the same litigation there before, Article 84(1) provides: "the plea to local jurisdiction and the plea to forward the action to another court for setting the same litigation there before, or for engagement, and the refutation of nullity which is not related to the public policy, and all of the pleas related to the discontinuing procedures, should be revealed together before presenting any other procedural plea, request, defense in the action, or disapproval, otherwise the right of what has not been revealed thereof shall be extinguished, and also the right of the appellant shall be extinguished in such pleas if he has not revealed them in the appeal initiatory pleading."
[44] Article 34 of the Civil Transactions Law
[45] Article 35 of the Civil Transactions Law
[46] Article 36 of the Civil Transactions Law
[47] The Federal Supreme Court is considered the highest court for the whole UAE, while Dubai Court of Cassation is the highest court in Dubai which is independent from the Federal Judicial authority,

judicial perspective. It is noteworthy that the case law of the UAE courts has not provided decisions upon disputes concerning jurisdiction of electronic transactions; nevertheless, the cases examined in this chapter could provide a useful understanding of the possible applications of the jurisdiction rules on e-commerce disputes.

Dubai Court of Cassation case no 86/1996 – Civil: Appropriate Considerations

In a case filed by company (A) against the shipping company (B) and the insurance company (C) concerning the shipment registered under a bill of lading dated 06/15/1991, the plaintiff claimed compensation for damage to the shipment and interest on the claimed amount until full payment. B appealed against the ruling of the Court of Appeal that obliged B and C jointly to pay compensation to A. The appeal before the Dubai Court of Cassation was made on four grounds, one of them challenging the Dubai court's jurisdiction over the dispute on the basis of the jurisdiction clause agreed upon by the parties of the contract.

The Dubai Court of Cassation in this judgment (no. 86/1996) ruled the parties' agreement to be invalid, which affords any dispute arising from their contract to a foreign court and withholds the dispute from the international jurisdiction of national courts.[48] The Dubai Court held that the provisions concerning the international jurisdiction of courts under the Civil Procedures Law invalidate any agreement that defers the jurisdiction to a foreign court. However, it also held that these rules do not prevent the national court from abandoning its jurisdiction over the dispute if this transference was on the grounds of appropriate considerations that are dictated by certain factors, one of which is identifying the enforcement of national courts' ruling in the country of the foreign court chosen by the parties' agreement.[49]

It appears that the court decision referred to one of the signs that indicate the availability of appropriate considerations: specifically, the enforcement of the UAE judgments in the country where the chosen court is located. Hence, if the Emirati

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however still the Federal courts have supremacy over these local courts, for further details on the Judicial system in the UAE *see* 2.5.1: The Judicial System of the UAE

[48] Dubai Court of Cassation no 86/1996–Civil, and followed in Dubai Court of Cassation no. 10/1999–Civil.

[49] The judgment itself was delivered in Arabic but I have endeavoured to provide here a faithful presentation of the terms of the judgment in English.

court has not found the availability of appropriate considerations, the court shall not rule out its jurisdiction over the dispute in question. It seems, per contra, that the Emirati courts could refer a dispute if one of the factors are regarded as appropriate considerations: a mutual recognition between the judicial systems of the UAE and the country where the court afforded to settle the dispute is located.

It is thought that the justification (or rather, the concept of) "appropriate considerations" provided by the Dubai Court of Cassation is vague, and it requires further interpretation from the Emirati courts, although it has given a glimmer of hope to the possibility of recognising the parties' choice of court and accepting the jurisdiction of foreign courts. The ruling in this case has only mentioned a single example of appropriate considerations, namely the enforcement of Emirati judgments. Furthermore, the concept of appropriate considerations provided under the court's ruling could depend mainly on the extent of mutual cooperation between the UAE and the country where the chosen court is located, and it could also depend on the overall judicial cooperation between both countries. Consequently in this context, the availability of appropriate considerations could be considered a tool that reflects the extent of judicial collaboration between the UAE and other countries.

In light of the case under consideration, the importance of addressing the issue of judicial cooperation among the GCC member states is vital in order to achieve legislative harmonisation especially on matters of judicial jurisdiction. Hence, in order to achieve greater harmonisation in the field of private international law, the GCC must overcome some difficulties, in particular the absence of appropriate collaboration between the judicial authorities of the GCC countries, besides the caution in enforcing the harmonised legislations of the GCC within GCC member states.[50]

Dubai Court of Cassation case no. 155/1997–Civil: Any Agreement to transfer international jurisdiction of the UAE's court is void.

A firm from the Kingdom of Saudi Arabia brought proceedings before the Dubai courts in the UAE against a company based in Dubai with regard to payment for work

[50] Please return to the previous chapter to further information concerning the caution among the GCC states to enforce harmonized legislations.

the plaintiff had carried out in Saudi Arabia according to the contract between the parties in question.[51] The defendant had contracted to carry out work in relation to the extension of a hospital in Riyadh, Saudi Arabia. The Saudi-based company had contracted with the defendant as a subcontractor to carry out celling work, which the plaintiff had completed. The Emirati-based merchant, however, failed to pay the plaintiff the amount outstanding for the work done. The case reached the Dubai Court of Cassation based on the defendant's appeal against the decision of the Court of Appeal. In their appeal, the defendant challenged the UAE Court's jurisdiction and claimed the competency of the Saudi Courts over the dispute on the basis of the agreement between the contractual parties, which stipulates that any dispute that arises from the contract will be settled by a competent authority in the Kingdom of Saudi Arabia.

In its ruling, the Dubai Court of Cassation referred to Article 20 of the Civil Procedures Law, holding that an action instigated against a person who has a place of domicile in the UAE, with the exception of real estate cases, may be filed against the person at his place of domicile, and that according to Article 24 any agreement to the contrary will be null and void. On this basis, the court stated that the Dubai courts do have jurisdiction regardless of agreements made between parties that give jurisdiction to other courts, in this case the Saudi Courts, as such agreements are null and void under articles 20 and 24 of the Civil Procedures Law.[52]

According to the ruling of this case, the explicit wording of Articles 20 and 24 of the Civil Procedures Law was the main basis of the court's decision with regard to the jurisdiction over the dispute in question. Article 20 provides jurisdiction to the Emirati courts over international disputes, provided that the defendant is a UAE national or the defendant is a non-Emirati who is domiciled or has a place of residence in the UAE.[53] Article 24 of the Civil Procedures Law adds a significant effect to Article 20, including Articles 21–23, by classifying any agreement that contradicts the former provisions as void. Consequently, it seems that the foundation created by Article 24 (in considering any agreement that entails the transfer of

[51] Dubai Court of Cassation no. 155/1997–Civil.
[52] The judgment itself was delivered in Arabic but I have endeavoured to provide here a faithful presentation of the terms of the judgment in English.
[53] *Supra* note 19.

jurisdiction from Emirati courts to foreign courts as null and void) protects the international jurisdiction of the national courts and categorises such matters as being under the purview of public policy.[54]

In this context, one scholar has interpreted the inclusion of the wording "the courts shall have jurisdiction" in provisions concerning judicial jurisdiction, which is provided under Articles 20–23 of the Civil Procedures Law, as meaning that these provisions shall be considered as compulsory and as a matter of public policy.[55] In addition, some scholars have justified this doctrine by stating the connection between the international jurisdiction of the national courts and state sovereignty.[56]

Furthermore, the decision of the Dubai Court of Cassation in this case indicates from another perspective the implied adherence to a general principle of litigation in private international law, which stipulates that the jurisdiction is afforded to the court located where the defendant is domiciled. Inference of this principle, adopted from Article 20 of the Civil Procedures Law by the court in question, is correct, considering the fact that the defendant is domiciled in Dubai,[57] unless, from our perspective, there is another reason that outweighs this principle, such as an agreement between the parties to provide jurisdiction to a foreign court.

The aforementioned ruling reveals the negative attitude of the UAE's courts toward international jurisdiction, through which the Emirati court does not readily accept a waiver of its jurisdiction to a foreign court, even one that has grounds of competency

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[54] *See* the sixth section: Public Policy in International Jurisdiction, in Ukasha, *supra* note 32, pp. 113–129, and it also worth mentioning that the public policy could be used as a justification for enforcing choice of court agreements or for denying this enforceability, in this context William J. Condon states, regarding the enforceability of choice of court clauses in click-wrap agreements: "public policy is a double-edged sword for, or shield to, depending on the one's perspective, the enforceability of click-wrap agreements", William J. Condon, 'Electronic Assent to Online Contract: Do Courts Consistently Enforce Clickwrap Agreements?', *Regent University Law Review*, Vol. 16, (2004), p.456.

[55] A large portion of Egyptian scholars believes that international jurisdiction of the national courts is related to the public policy. For instance, Ezzeldin Abdullah, القانون الدولي الخاص ـ الجزء الثاني ـ في تنازع القوانين و تنازع الاختصاص القضائي الدوليين (Tr) Private International Law–Part II–in Conflict of Law and Conflict of International Jurisdiction, 8th edition, 1977, pp. 739–740, and Hisham Sadek, تنازع الاختصاص القضائي الدولي (Tr) The Conflict of International Jurisdiction, 1972, Alexandria (Publisher: منشأة المعارف) p.55, cited in Ukasha, *supra* note 32, at 69.

[56] Ukasha, *supra* note 32, at 115, in the context of states' sovereignty in the midst of this massive technological advancement through cyberspace, *see* Georgios I. Zekos, 'Demolishing State's Sole Power over Sovereignty and Territory via Electronic Technology and Cyberspace', *Journal of Internet Law*, (2013) pp. 3-17.

[57] The Dubai Court of Cassation stated that the defendant has address in Dubai.

over the dispute in question – for example, on the basis of the parties' agreement on affording jurisdiction; or when the foreign court has genuine or substantial connections with the relevant circumstances of the dispute, such as the place of execution of the contract. Additionally, it seems that the Emirati court's ruling has not adequately considered the challenges brought by the defendant for seeking to defer the dispute to the Saudi courts.

The defendant provided his claims on the following grounds. The first was the existence of the agreement between both parties in their contract, which stipulates that any dispute arising from the contract shall be settled by the competent authority in the Kingdom of Saudi Arabia. The second argument made by the defendant was that the country where the contract has been concluded and performed was Saudi Arabia. Neither challenges convinced the Dubai court to transfer jurisdiction of the dispute to the courts of Saudi Arabia. The Dubai Court of Cassation, on the other hand, has ruled its competency over the case in question by referring to the explicit wording of articles 20 and 24 of the Civil Procedure Law.[58] The Dubai Court of Cassation in a number of subsequent rulings has also followed this approach; for example, the Dubai Court of Cassation ruling in cases no. 244 & 265/2010 dated 9/11/2010, and 79/2002 dated 12/5/2002.

[58] Furthermore, the implications of considering articles 20 and 24 of the Civil Procedures Law as provisions from the public policy could affect (or rather, create) a barrier to the enforcement of judgments in the UAE against Emiratis and foreigners. Article 235 of the Civil Procedures Law provides: "1- The execution of the decisions and orders delivered in a foreign country may be mandated in the state of the United Arab Emirates under the same conditions decided in the law of that country for executing the decisions and the orders delivered. 2- The execution order shall be requested before the court of first instance in which area the execution is required, through the usual procedures of the action prosecution, and it shall not be possible to order execution before the verification of the following:
A-That the state's courts are not authorized to examine the litigation in which the decision or the order has been delivered and that the foreign courts which have delivered it are authorized therewith according to the international rules of the judicial jurisdiction decided in their law."
On the basis of considering articles 20 and 24 among the public policy, this will provide the Emirati courts the competency over all foreign disputes in which the defendant is either a UAE national or foreigner who is domiciled or has place of residence in the UAE, except those concerning real estate located outside of the UAE. Consequently, the rulings of foreign courts in such disputes against Emiratis or foreigners who are domiciled or residence in the UAE would not be enforced by the UAE's courts. Ukasha believes that it was preferable from the UAE's legislator to allow the enforcement of foreign judgments against foreigners who are domiciled or residence in the UAE, while restricting the enforcement of these judgments against UAE nationals. Ukasha Abdel Aal, تنفيذ الاحكام الاجنبية بين فكرتي الاختصاص القاصر و الاختصاص المشترك (Tr) Foreign Judgments between the Idea of Exclusive Jurisdiction and Joint Jurisdiction, Alexandria (Publisher: مجلة الحقوق) 1992, pp. 134–135.

Some scholars propose the recognition of the parties' agreement that entails the extraction of jurisdiction from the international scope of Emirati courts to the chosen court, provided that one of the parties of the contract is a foreigner or both of them are foreigners.[59] Applying this method, however, will restrict the parties' choice of court if both of the parties are UAE nationals, regardless of other factors backing the jurisdiction of the chosen court, particularly if the contract is entirely executed there. Furthermore, it is unlikely that the Emirati court's judgment will be enforced in the territory of the chosen court, because the connection between the chosen court and the contract, which is based on the contract's place of execution, is stronger than the link between the Emirati court and the contract in question, which depends only on the nationality of the parties.

An alternative and arguably preferable approach could be illustrated by the following example based on similar circumstances to case no. 155/1997 of the Dubai Court of Cassation, but assuming the non-existence of Article 24 of the Civil Procedures Law. On one hand, one of the contractual parties brings proceedings against the other before an Emirati court, which is the domicile country of the defendant. On the other hand, an agreed condition between both parties submits any dispute arising from the contract to the courts of a specific country (for instance, Kuwait). In the absence of Article 24 of the Civil Procedures Law, the jurisdictional agreement made by the contractual parties remains authoritative before the UAE court in question; hence, challenging the UAE court's competency over the dispute by the defendant on the basis of the jurisdiction agreement is plausible and cannot be dismissed on the basis of contradicting public policy. In contrast, the plaintiff also has a strong argument that supports holding the Emirati court's jurisdiction in the dispute on the grounds of Article 20 of the Civil Procedures Law. In such a condition, the court will have to weigh up both parties' agreement to foreign court jurisdiction and its own jurisdiction over the dispute based on the competency of the court where the defendant is domiciled, according to Article 20 of the Civil Procedures Law.

In such circumstances, from our point of view, it is preferable for the Emirati court, with regard to jurisdiction over the dispute, to adopt its decision using the same

[59] Hisham Khalid, قواعد الاختصاص القضائي الدولي و تعلقها بالنظام العام (Tr) The Rules of International Jurisdiction with regards to the Public Policy, Alexandria (Publisher: منشأة المعارف) 2000, p. 250.

method in which it deals with the arbitration clause according to Article 203(5) of the Civil Procedures Law, which states: "If the litigant parties have agreed on the arbitration in some litigation, it shall not be possible to prosecute an action therewith before the judiciary, however, if one of the two litigant parties has resorted to prosecute the action without taking into consideration the arbitration condition and the other party has not objected at the first sessions, the action should be examined and the arbitration condition shall be void."

Thus, if the defendant failed to argue the UAE court's jurisdiction in the first hearing of the judgment, the Emirati court shall rule in the dispute and shall not consider such argument in the following sessions. In contrast, the court will have to consider the party's challenge towards its jurisdiction, on the condition that this challenge is provided during the first hearing of the case and is also based on the agreement, which stipulates to afford the dispute to the Kuwaiti courts. Thus, the Emirati court in this situation shall rule on its own jurisdiction and whether to defer to the court chosen by the parties for the determination of the dispute.

The court might take into consideration, for example, the availability of judicial cooperation between the UAE and the country where the chosen court is located. This procedure falls within the concept of 'appropriate considerations', which was introduced by the Dubai Court of Cassation ruling in case no. 86/1996.[60] Furthermore, the court may take into account similar factors as are considered in common law countries when applying the common law doctrine of forum non conveniens to decide which of two different courts is the more appropriate forum. The factors could include such connecting factors as the parties' free choice, which is critical, where the contract was made, where it was to be performed and other similar connecting factors.

In summary, the proposed solution is based on three parts. The first part requires the repeal or amendment of Article 24 of the Civil Procedures Law, which will allow the Emirati courts to recognise the parties' agreement to submit jurisdiction to a foreign court, without automatically dismissing this agreement on the basis of public policy. Public policy could nevertheless remain as part of "appropriate considerations" by

[60] See Dubai Court of Cassation case no. 86/1996.

which the Dubai courts may refuse to waive their jurisdiction in justifiable instances. The second part of this solution is the recognition of the parties' choice of court and the adoption of measures similar to those applied with the arbitration clause, according to Article 203(5) of the Civil Procedures Law.

These proposed provisions could be provided as follows: "It shall be possible for parties to a contract to agree, as a condition in the principal contract or by a subsequent agreement, for the resolution of disputes that may arise among them or litigations concerning the execution of a certain contract to be referred to the courts of a particular country."

"If the parties to a contract have agreed to refer some or all disputes concerning the contract to a specific court, a court other than the chosen court shall ordinarily respect and uphold the choice of the parties. However, if one of the parties has resorted to pursue the action before a court other than that agreed by the parties, and the other party does not object by the time it files or makes its first defence on the substantive merits of the case, the court can proceed to hear and determine the action."

The adoption of such provisions will avoid the seemingly contradictory or at least discriminatory position in favour of arbitration clauses over jurisdiction clauses caused by Article 24 of the Civil Procedures Law. This appears clearly in the nullity by Article 24 of any agreement that would forward the dispute to the jurisdiction of a foreign court, and Article 203, which allows the parties to extract their disputes from the jurisdiction of UAE courts and to forward such disputes to arbitration.[61] On the basis of these proposed provisions, the Civil Procedures Law will equalise to some extent between the choice of arbitration and the choice of court.

The third part of this solution is applicable to the situation where the Emirati court would refer the dispute to the court chosen by the parties. In this circumstance, it seems preferable for the Emirati court to clarify, refine and expand the concept of appropriate considerations, under which the courts contemplate deferring to the court chosen by the parties of the contract, albeit presently only in limited circumstances. It

[61] The contradicted position toward the choice of foreign court and arbitration under the Civil Procedures Law has also been criticised by other scholars. *See* Ukasha, *supra* note 32, pp. 121–129

may seem contradictory to adopt the concept of appropriate considerations, dispite criticising this approach in the former case.[62] However, the reason for choosing this notion is to introduce a solution designed to comply (to some extent) with the legislative direction adopted under the UAE's Civil Procedures Law and its application by the UAE's courts. In particular, the courts have been able to introduce the concept of "appropriate considerations" under current legislative provision; that is, even without the repeal of the current Article 24. Thus, if the courts consider that the introduction of the concept is compatible with the presence of Article 24, a refinement within reasonable limits should also be possible. This would then mean that the repeal of Article 24 might not even be necessary.

While aspects of this proposed solution might not necessarily be perfect, it is aimed at providing a relevant and balanced approach that could fit within the current legislation of the UAE. Of particular significance is that a refinement and expansion of the concept of appropriate considerations might successfully and justifiably avoid a necessity to repeal Article 24 at least in the short term, while a decision on its retention may possibly be deferred. The current concept of appropriate considerations requires availability of the enforcement of UAE's judgments in the country in which the chosen court is located. It also seems to assume that the enforcement of Emirati judgments in the foreign country depends on collaboration between both countries, though is not necessarily dependent on the existence of a treaty between these countries. The Federal Supreme Court of the UAE has supported this approach in case no. 247/2012, in which the court upheld the appeal against the Court of Appeal ruling that disallowed the enforcement of foreign judgment due to the absence of a convention or treaty between the UAE and the foreign country. The Supreme Court held that in order for the Emirati courts to enforce foreign judgments, the law did not require the existence of a treaty between the UAE and the foreign country from which the judgment is delivered, inferring from Articles 235 and 238 of the Civil Procedures Law.[63] Furthermore, the Supreme Court asserted that according to Articles 235 and 238, the foreign judgment is treated in the state (the UAE) with regard to its enforcement as the Emirati judgment is treated in the foreign state. This is known as

[62] Dubai Court of Cassation Case 86/1996.
[63] Articles 235 and 238 of the Civil Procedures Law.

the condition of reciprocity, which does not require a legislative exchange between the two states; mere diplomatic exchange suffices.

At this juncture it is important to identify the connection between the concept of appropriate considerations, introduced by the Dubai Court of Cassation in case no. 86/1996, and the condition of reciprocity, introduced by the Federal Supreme Court in case 247/2012. The concept of appropriate considerations is considered in the examination of whether to defer jurisdiction for the resolution of a dispute to a foreign court based on the agreement between the parties. On the other hand, the condition of reciprocity is considered in the examination of enforcing a foreign judgment by the UAE's courts.

The condition of reciprocity seems to be the foundation or basis of determining the availability of appropriate considerations. The following example will illustrate the connection between these two concepts. For example, State A enforces the Emirati judgments, on the condition that these judgments do not fall within the jurisdiction of State A's courts. On the other hand, State B enforces the Emirati judgments even if these judgments fall within the jurisdiction of its courts. Based on these circumstances, the Emirati court may not accept the parties' agreement to forward a dispute to the courts of State A. However, the Emirati courts will accept a deferral of a dispute to the courts of State B, on the condition that the parties have an agreement to submit such disputes before the courts of State B. It appears that the condition of reciprocity is wider than the concept of appropriate considerations. Specifically, in the example of State A, the condition of reciprocity is fulfilled to an extent that does not provide a factor of appropriate considerations. On the other hand, the example of State B indicates that the availability of appropriate considerations automatically entails the availability of the condition of reciprocity. This point of view is underpinned by the Federal Supreme Court ruling in case 247/2012, which stated that the impugned Court of Appeal ruling had violated the law and erred in its application of the law, which withheld investigating firstly the availability of the condition of reciprocity as explained above in the ruling, then investigating the availability of the conditions stipulated in Article 235(2) of the Civil Procedures Law.[64] Thus, the

[64] *Supra* note 58.

court's investigation into the availability of the condition of reciprocity could lead to three possibilities.

In cases where the foreign court does not enforce the Emirati judgments, the Emirati court would not accept enforcement of the foreign courts' judgments. If the foreign courts accept the enforcement of Emirati judgments to some extent or with conditions, however, the Emirati courts would enforce the rulings of these foreign courts, provided that these judgments comply with Article 235(2) of the Civil Procedures Law. Considering this possibility, it seems that the Emirati court would accept the parties' agreement that stipulates the competency of the foreign courts in adjudicating their dispute, provided that the foreign judgment over this dispute does not contradict Article 235(2) of the Civil Procedures Law.

The third possibility is that the foreign court enforces the Emirati judgments without conditions or with fewer conditions than those in the second possibility, such as that judgments from the UAE are not related to real estate in the foreign country. In these circumstances, the Emirati court will accept the enforcement by the foreign court, and it will also accept the transferring of disputes to the chosen courts in the foreign country. The last possibility indicates the availability of appropriate considerations, introduced by Dubai's Court of Cassation in case 86/1996.

Summary

Although the Civil Procedures Law prohibits any agreement that entails deferring a dispute before the Emirati court to a foreign court chosen by the parties, the previous analysis and examination provides a sufficient picture of how the Emirati courts implemented this legislation and to what extent these agreements are recognised before these courts, and also illustrates how these courts have adopted exceptions to the clear or express prohibition of recognising parties' choice of foreign court. The approach introduced by the Emirati courts opens slightly the possibility of their recognising that the choice of court can be considered a positive sign, however, the concepts and conditions[65] provided by the rulings of these courts in order to activate the recognition of the parties' jurisdiction agreement are confusing and vague,

[65] The concept of appropriate considerations, introduced by the Dubai Court of Cassation in case no. 86/1996, and the condition of reciprocity, provided by the Federal Supreme Court in case 247/2012.

because they do not establish a clear path or indicate the limits where the parties' jurisdiction agreement will be rejected or respected. Hence, they are not entirely satisfactory and a refinement of the concept of "appropriate considerations" is necessary.

Consequently, the recommendation to remove Article 24 of the Civil Procedures Law in the long run is essential to eliminate the contradictory position of the law towards the choice of court and the arbitration agreement. This consequently requires a legislative amendment.[66] From both cases examined, it is obvious that the courts of the UAE will not simply refer any case to other courts (or, rather, a foreign court),[67] even if other courts have strong reasons to claim jurisdiction. This situation may be one of the most important reasons for foreign and local businesses to including arbitration clauses within their contracts.[68] In this context, the adoption of a legislative amendment related to the provisions of the Civil Procedures Law, which entails the recognition of parties' choice of court, will also maintain the UAE's position as a business hub in the Middle East, and it will provide an essential foundation for the resolution of disputes arising from e-commerce.

3.2.2 Jurisdiction Rules Concerning B2B Transactions in Other Member States of the GCC

This section will focus on the provisions that determine the international jurisdiction of national courts of the GCC's other member states. In that context, the thesis will address these provisions and compare them with those examined previously from the UAE's Civil Procedures Law, with a view to clarify the similarities and differences as far as possible in order to determine what legal framework could be developed or introduced that would most efficiently regulate the jurisdiction of e-commerce transactions between member states of the GCC.

Firstly, with regard to Article 20 of the Civil Procedures Law, almost all of the other GCC states have adopted similar measures to this provision: for example, Article 23

[66] Ukasha has also supported the legislative amendment towards Article 24 of the Civil Proceudres Law, *supra* note 32, p. 73
[67] Except cases that concern real estates located beyond the UAE's borders.
[68] Ukasha, *supra* note 32, p.73

of the Kuwaiti Civil and Commercial Procedures Law,[69] Article 29 of the Omani Civil and Commercial Procedures Law,[70] and Articles 24 and 25 of the Law of Procedures before Sharia Courts in Saudi Arabia.[71] All of these have provisions to the effect that the courts of the respective countries have jurisdiction in respect of actions against their citizens or against foreign nationals domiciled or resident in the country.

In the case of Bahrain, Article 14 of the Bahraini Civil and Commercial Procedures Law has only made specific reference to non-Bahrainis who have a domicile or a place of residence in the Kingdom. It does not, however, make specific reference to the fact that the Bahraini courts have jurisdiction over Bahraini nationals. It could be interpreted from this rule that the Bahraini courts are not always competent to examine disputes held against Bahrainis, based on the wording of Article 14.[72] This interpretation leads to the presumption that the Bahraini Civil and Commercial Procedures Law prioritises the jurisdictional element of domicile or place of residence over the nationality of the defendants, which consequently, however, means that the Bahraini courts would not necessarily have jurisdiction over any dispute involving Bahraini nationals as defendants.

It seems implausible to believe that the legislation under Article 14 is aimed at providing jurisdiction to Bahraini courts in relation to disputes involving non-Bahrainis, yet does not afford the jurisdiction of disputes involving Bahraini nationals to Bahrain's courts.

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[69] Article 23 of the Kuwaiti Civil and Commercial Procedures Law states: "The Kuwaiti courts shall have the jurisdiction to examine the actions prosecuted against the Kuwaiti, and the actions prosecuted against the foreigner who has domicile or residence in Kuwait, with the exception of the real actions that related to real estate abroad"

[70] Article 29 of the Civil and Commercial Procedures Law of the Sultanate of Oman provides: "Except cases of immovable property connected with property situated outside, the Sultanate Omani courts shall have jurisdiction to hear suits filed against Omani National, even though he has no domicile or place of residence in the Sultanate, also shall have jurisdiction to hear suits filed against Non Omani National who has domicile or place of residence in the Sultanate"

[71] Article 24 of the Law of Procedures before Sharia Courts provides: "The Kingdom's courts shall have jurisdiction over cases filed against a Saudi, even if there is no record of his general or designated place of residence in the Kingdom. Excepted are cases in rem involving real estate located outside the Kingdom". Article 25 thereof states: "The Kingdom's courts shall have jurisdiction over cases filed against an alien who has a general or designated place of residence in the Kingdom. Excepted are cases in rem involving real estate outside the Kingdom"

[72] Article 14 of the Bahraini Civil and Commercial Procedures Law "The courts of Bahrain shall have competence to hear actions against any non-Bahraini having domicile or residence in Bahrain, with the exception of real property actions relating to realty situated abroad" (this translation is not official transalation).

It is essential in this context to highlight Article 29 under the Egyptian Civil Procedures Law of 1949,[73] which echoes Article 14 of the Civil and Commercial Procedures Law of Bahrain. Article 29 had not provided jurisdiction to the Egyptian courts based on an Egyptian defendant's nationality, which has divided some Egyptian scholars regarding interpretion of this provision. Some scholars believed that although the legislation had not mentioned such a reason to claim jurisdiction for Egyptian courts, it should not be interpreted as a rejection of this principle.[74] This group of scholars added that, considering that one of the legislation's objectives is to serve the interests of the state's citizens, it is not reasonable or logical to presume that the Egyptian legislature has marginalised or ignored the implementation of this objective under Article 29 of the Egyptian Civil Procedures Law of 1949.[75] On the other hand, another group of Egyptian scholars interpreted such a situation as an indication of the Egyptian legislature's intention to abandon the principle of nationality in determining jurisdiction.[76]

It seems more appropriate or proper to believe that Article 14 of the Bahraini Civil and Commercial Procedures Law applies implicitly to judgments or circumstances in which Bahraini nationals are defendants. Furthermore, the Bahraini case law also confirms that the Bahraini courts have not dismissed or referred disputes in which defendants are Bahraini nationals to other courts, on the basis that Article 14 has not expressly provided such jurisdiction to the Bahraini courts.[77]

This rule in Article 14 of the Bahraini Civil and Commercial Procedures Law has also been adopted under the laws of the other GCC countries, such as Article 26 of Saudi Arabia's Regulation of Procedures before Sharia Courts, Article 24 of the Kuwaiti Civil and Commercial Procedures Law and Article 30 of the Omani Civil and Procedures Law.

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[73] Article 29 of the Egyptian Civil Procedures Law of 1949 provides: "The Republic Courts shall have the jurisdiction of actions brought against the foreigner who has domicile or residence in the Republic, with exception of the real actions that related to real estate abroad"
[74] Hisham Sadek & Hafeeza Al-Hadad, *supra* note 32, p. 350.
[75] *Ibid*, at 351.
[76] *Ibid*.
[77] Bahrain Court of Cassation ruling in case no. 659/2010 dated 4/7/2010

In this context, it is important to draw attention to one of the differences between the international jurisdiction rules of the UAE and those of the other GCC countries. Article 23 of the Civil Procedures Law has implicitly allowed the Emirati courts to examine cases that fall outside of their international jurisdiction, on the condition that one of the parties has brought the proceedings before the national courts, besides the fact the defendant has appeared before the UAE court and explicitly or implicitly submitted to the jurisdiction of the UAE court. The other GCC member states have expressly allowed their courts to examine such disputes; however, there is a slight difference between the provisions of these states on whose acceptance of jurisdiction will be considered by the court between the parties of the dispute.

Article 28 of the Law of Procedures before Sharia Courts in Saudi Arabia has required the acceptance of both parties of the dispute in order to allow the Saudi courts to examine a case that falls outside of their jurisdiction.[78] The Saudi provision, however, has not specified what could be regarded as the parties' acceptance, which grants permission for the court to examine the dispute. In contrast, according to Article 32 of the Omani Civil and Commercial Procedures Law, the Omani courts are permitted to examine litigation that does not fall within their jurisdiction, on the condition that the defendant has provided explicit or implied acceptance.[79] The Kuwaiti and Bahraini provisions, namely Article 26 of the Kuwaiti Civil and Commercial Procedures Law and Article 17 of the Bahraini Civil and Commercial Procedures Law, have adopted similar approaches in requiring the party's acceptance to the jurisdiction of their courts.[80] However, neither provision has mentioned or identified whose party acceptance shall be considered by the courts, because the wording of both provisions has merely mentioned "the party" without specifying whether this refers to plaintiff or the defendant.

[78] Article 28 of the Law of Procedures before Sharia Courts states: "Except for cases *in rem* involving real estate outside the Kingdom, the Kingdom's courts shall have jurisdiction to adjudicate cases when the litigations accept these courts' jurisdiction, even if the matter does not fall within their jurisdiction"
[79] Article 32 of the Civil and Commercial Procedures Law provides: "Omani Courts shall have jurisdiction to hear the suit – in other cases not stipulated in the preceding Article – if the defendant has expressly or impliedly accepted assuming jurisdiction by such courts"
[80] According to Article 26 of the Kuwaiti Civil and Commercial Procedures Law, and Article 17 of the Bahraini Civil and Commercial Procedures Law which provides: "The Courts of Bahrain (Kuwait) shall have competence to decide an action, even though it does not fall within their competence pursuant to the preceding Articles, if the party in question expressly or implicitly accepts its jurisdiction"

Article 24 of the UAE's Civil Procedures Law, however, does not have similarities with other provisions from the other GCC member states. For example, the Law of Procedures before Sharia Courts has no provision that precludes any agreement to transfer a dispute from the jurisdiction of Saudi courts to a foreign court. The Bahraini and Kuwaiti civil and commercial procedure laws have not adopted a similar rule to Article 24 of the Civil Procedures Law of the UAE.

Although the legislations of Kuwait, Bahrain and Saudi Arabia have not adopted a similar provision to Article 24 of the UAE's Civil Procedures Law, the case law of these GCC member states indicates that the provisions concerning the international jurisdiction of their national courts are classified or categorised under public policy, and thus any agreement contrary to these provisions would not be recognised by the national courts.

With regard to the Omani Civil and Commercial Procedures Law, Article 57 thereof stipulates: "If it is agreed that the jurisdiction shall be assumed by certain court, then the jurisdiction shall be for the said courts or the court within the precinct of which the defendant's domicile is situated. Provided, in cases where the Law provided for the court assuming jurisdiction other than the court stipulated in Article 44),[81] no agreement shall be allowed to contradict this jurisdiction."

The former provision is listed under the Third Chapter of Local Jurisdiction; thus, it is not clear whether this rule applies or extends to agreements that contradict the provisions of international jurisdiction of Omani courts. It seems that the inclusion of the word "Law" instead of "chapter" indicates that the provision aims to preclude any agreement that is contrary to the provisions of the Omani Civil and Commercial Procedures Law with regard to the international and local jurisdiction of the Omani courts. Hence, Article 57 of the Omani law serves the same purpose as Article 31 (5) of the UAE's Civil Procedures Law.

[81] Article 44 of the Omani Civil and Commercial Procedures Law provides: "Unless the Law provides otherwise, the jurisdiction shall be for the court within the precinct of which the defendant is having domicile. If the defendant has no domicile I the Sultanate, the jurisdiction shall for the court within the precinct of which his place of residence is situated. If there is more than one defendant, the jurisdiction shall be for the court within the precinct of which the domicile of them is situated"

It may seem strange not to have mentioned so far Qatar's Civil and Commercial Procedures Law in the context of this section. However, the reason is simple: recent legislation has not included any provisions regulating the international jurisdiction of Qatari courts. These provisions are usually at the forefront in any legislation regulating civil and commercial procedures, and they are listed prior to or take precedence over qualitative jurisdiction.[82] The imperative to include international jurisdiction provisions appears particularly in disputes involving a foreign element. Furthermore, the absence of such rules would enable the Qatari courts to determine the borders within which it conducts its judicial authority. Moreover, Qatari legislations have covered various matters that are integral parts or closely connected with the courts' international jurisdiction – for example, the enforcement of foreign judgments and orders.[83] From our perspective, it is not clear why the Qatari legislature has abandoned regulation of the courts' international jurisdiction.

3.2.3 Summary: Evaluating the Rules of the UAE and the Other GCC Countries in terms of Determining Jurisdiction in Relation to Electronic Commerce Disputes

It is difficult to predict on which basis the Emirati court will determine jurisdiction of disputes arising from B2B transactions in e-commerce. However, it is possible to assess the implications of applying the traditional jurisdiction measures that have been adopted under the Civil Procedures Law rules and the corresponding legislations of the GCC states, which are linked to the notion of domicile, habitual residence, nationality, or the place of performance. The application of such traditional international law rules to private e-commerce could face many difficulties, which may hinder the work of the judiciary and could affect certainty towards the judicial position.[84] The difficulty of applying such measures particularly appears from disputes that arise from B2B contracts concluded and executed online, such as electronic transactions conducted through an electronic intermediary by which payment is performed online, outside the scope of the traditional forms. Confronting

[82] The courts' qualitative jurisdiction is regulated under the Qatari Civil and Commercial Procedures Law under articles 22–30 thereof.
[83] The enforcement of foreign judgments and orders is governed by Articles 379–383 of the Qatari Civil and Commercial Procedures Law.
[84] Abdul Baset Jassem Mohammed, تنازع الاختصاص القضائي الدولي في التعاملات التجارية الألكترونية (Tr) *Conflict of International Jurisdiction in E-Commerce Transactions*, (Publisher: منشورات الحلبي الحقوقية) 2014, p. 192.

these same difficulties is also possible by the GCC national courts in disputes concerning web hosting contracts or the downloading of software.[85] The nature of these contracts does not depend on notions or principles of geographical locations or nationality, which are essential in applying the international jurisdiction provisions adopted by the GCC member states.

Furthermore, considering the accessibility of the internet from almost all countries in the world, and the globalised scope of e-commerce in particular, locating the contractual performances of B2B transactions or their conclusion, and identifying the nationalities of contractual parties in order to ascertain the jurisdiction, are difficult tasks, because the execution of these contracts depends on accessing online databases without requiring this access to be from a particular location.[86] The dilemma of locating the place of performance seems to be limited with regard to contracts, which are concluded via the internet and performed offline. This presumption applies to online contracts that include the delivery of physical goods or provision of services outside the internet. Such contracts may indicate the place where the contract is performed, which could help to determine jurisdiction. However, there are still circumstances that could introduce difficulties in determining the jurisdiction of such contracts. For example, if a contract was concluded between a Saudi company and an Emirati merchant, in order to deliver goods to the merchant's Emirati branches that are located in Qatar and Bahrain, in which country is the contract performed?

Contracting through the internet is not fully harmonized with measures that have regional characteristics,[87] such as domicile or place of residence. On the other hand, it is not appropriate to generalise this conclusion about all transactions concluded in e-commerce. In fact, specific and substantive objectives could be achieved by applying these measures to limited e-commerce contracts, specifically electronic consumer contracts, in order to provide greater protection to the weaker party in these e-contracts.[88]

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[85] The definition of website hosting, according to Article 14 of the EU Directive 2000/31 on electronic commerce OJ L178, is "the storage of information provided by a recipient of the service"

[86] Contracting parties could not be certain of the domicile or habitual residence of each other. Abdul Baset, *supra* note 85, p. 317.

[87] Ahmed Salama, التجارية قانون الدولي الخاص النوعي: الإلكتروني - السياحي - البيئي (Tr) *Qualitative Private International Law: Electronic – Touristic – Environmental*, (Publisher: دار النهضة) 2000, p.40–41.

[88] This point will be examined in the next part of this chapter.

Therefore, this analysis signifies the importance of introducing new provisions or amendments, for the GCC legislations and the UAE in particular, that comply with the nature of electronic commerce in the sphere of determining jurisdiction. One of the essential features that these amendments must have is recognition of the agreements by parties in B2B transactions to provide jurisdiction to a specific court or courts in cases of disputes that arise from the parties' contract. If there are restrictions the GCC member states would impose on the parties' choice of court, these restrictions must be clear: for instance, restricting these agreements with regard to disputes related to real estate in the state.

The question that could arise in this context is: Is it appropriate to restrict the parties' agreement on grounds of the public policy? The concept of public policy is far-reaching and is not entirely easy to delimit. Thus, introducing this restriction on the parties' choice of court would not provide certainty or clarity to the contractual parties concerning the geographic borders of their agreement, which relates to the court that shall be competent to settle their contract disputes. Furthermore, the public policy restriction is already applied to the enforcement of foreign judgments under the legislations of the GCC member states. Therefore, there is no need to impose the same restriction on the parties' choice of court; otherwise, it will be a double restriction.

It would be instructive for the GCC member states to provide jurisdiction or recognise the parties' agreement to afford jurisdiction to the courts of other GCC member states. This step will provide mutual benefit to the member states of the GCC, and it will also support integration between the member states. From business and investment perspectives, this step could ease difficulties for businesses in settling their disputes before national courts of other member GCC states, and it could also help attract investment from foreign businesses.

In order to ensure the effectiveness of these amendments, it would be essential to promulgate these provisions in the form of a treaty among the GCC member states, or possibly in the form of an edict issued by the GCC that is compulsory for the member states. It seems preferable that these provisions would allow the contractual parties to

settle their disputes through online alternative dispute resolution, such as online mediation or online arbitration.

Furthermore, it is important for the contractual parties to include an explicit clause that identifies the place of performance of the contact, whether delivering physical goods or providing online or offline services. This would assist the judiciary in determining the competent court to examine the dispute in the case of choice of court being absent from the parties' contract.

3.3 Jurisdiction in Business-to-Consumer Transactions

Consumer contracts have been traditionally known and regarded as domestic transactions involving supply by a local business to a local consumer. However, many consumer contracts can now no longer be considered purely domestic transactions, particularly those concluded through the internet,[89] which may involve a consumer based in one country ordering products from a business or supplier based in another country. This change in the scope of consumer contracts is credited to the involvement of consumers in the world of e-commerce, which has paved the path for businesses around the world to advertise, promote, sell goods, and provide services for consumers across borders.[90]

As a result of the development of consumer involvement in electronic commerce, the question of determining jurisdiction in consumer contracts has emerged in the field of private international law.[91] The issue of jurisdiction in such types of contract is worth investigating for a number of reasons. The introduction of consumer contracts within e-commerce has brought new perspectives and thoughts to the private international law field, particularly in examining how private international law shall organise the imbalanced contractual relationship in electronic consumer contracts. The principles

[89] Jonathan Hill, *Cross-Border Consumer Contracts* (Oxford: Oxford University Press, 2008) pp. 6–7
[90] *See* Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts," *The Journal of Legal Studies*, published by Chicago Journals, 43(1), pp. 1–35.
[91] The European countries are considered the first in demonstrating the consumers' protection in private international law through legislative instruments, specifically in the area of jurisdiction. Zheng S. Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Oxford: Hart Publishing, 2009), p. 5.

and assumptions that established traditional private international law[92] do not fully comply with the nature of e-commerce and do not provide proper protection to consumers.[93]

Although e-commerce has expanded the scope of consumer transactions from the domestic to international sphere, the definition of "consumer" is still flexible enough to cover the e-consumer.[94] The main difference between the non-electronic and electronic consumers is that e-consumers have to be involved in electronic commerce in order to contract.

It is fair to argue that disputes that arise from e-consumer contracts do not frequently appear or are less likely to appear before courts and more often these disputes are resolved through alternative dispute resolutions.[95] For instance, the UAE's Ministry of Economy has revealed that the number of consumer complaints received by its Department of Consumer Protection in 2009 was 2,523: 2,448 of those were settled amicably, while 70 were settled through reconciliation, and the other 5 of those complaints were transferred to the courts.[96] According to the Department of Economic Development (DED) of Dubai, the number of consumer complaints in 2014 increased by 24% compared to 2013.[97] The DED of Dubai has not provided specific figures of consumer complaints that arise from B2C e-commerce; however, the Dubai DED claims that the number of consumer complaints from e-commerce transactions (including purchases of electronic goods and telecom contracts) is 3,558

[92] For example, one of these assumptions is that the contractual relationship between parties is built on their free will or free autonomy regardless of whether they have unequal position and power. *See* J. Fawcett and J. Carruthers, *Cheshire, North & Fawcett: Private International Law*, 14th ed. (Oxford: Oxford University Press, 2008) pp. 19–37.
[93] *Ibid*, pp. 3–4.
[94] According to Article 1 of Cabinet of Ministers' Decision no. 12 of 2007 in relation to the Executive Regulation to the Federal Law no.2 4 of 2006 in respect of Protection of Consumers, which provides "the consumer: any natural or juristic person who obtains goods or services–with or without–in satisfaction to his personal need or others need."
[95] Examples of alternative dispute resolution for e-consumer contracts could be online arbitration, online mediation, and settlements,.
[96] These statistics presented in Al Ittihad Newspaper on 2nd June 2010, available at: http://www.alittihad.ae/details.php?id=32176&y=2010.
[97] The researcher has requested any available statistics from the Department of Economic Development in Dubai with regard to the number of consumer complaints that arise from e-commerce transactions, how the department has resolved such complaints, and what is the practice used in resolving such complaints. Considering that these complaints arise from online transactions with foreign merchants, however, the DED has only provided information on the number of consumer complaints with classification of these complaints in the following categories: services, electronics, automotive, textiles, furniture, and others.

so far in 2015.[98] Regrettably, these statistics indicate consumer complaints related to e-commerce in general; they do not specify the number related to electronic transactions and how these complaints have been resolved.[99]

Although the number of consumer disputes resolved through alternative dispute resolution outweighs the number of those disputes referred to the courts,[100] this fact does not lessen the importance of protecting consumers through jurisdiction rules, particularly in considering the number and total value of consumer e-commerce transactions. These provisions would support consumers' redress and would assist them to claim their rights even if such claims would take prolonged procedures before the courts. Adopting measures that support consumers' rights, especially their right of access to justice, is vital, even if the applicability of such measures could be narrow or less frequent. If such measures have been legislated in a binding form or in the form of mandatory rules, these provisions would be considered a solid foundation, which could provide the minimum guarantee of consumers' rights within the scope of jurisdiction in their electronic and non-electronic contracts. In order to ensure the effectiveness of protecting consumers' litigation right and to ensure that this right does not entail a long, costly process that would discourage consumers from bringing proceedings against online businesses, these consumers' lawsuits should be exempt from all judicial fees in all phases of litigation and execution. Moreover, these litigations should be examined expeditiously.[101]

Furthermore, implementing or adopting appropriate measures in the matter of jurisdiction, which protect consumers' rights and provide greater certainty and confidence to online businesses, would also support commercial activities in the internet markets. The importance of these measures would also come from

[98] *Ibid*.
[99] In this context, it is recommend that the relevant authorities in the UAE and the GCC member states should record the number of consumer complaints; classify these complaints in more detail, including the classification of complaints arise from B2C transactions; and record the method through which these complaints have been resolved or settled. This information is essential to reinforce the appropriateness and effectiveness of the current legislative measures adopted to protect consumers in e-commerce.
[100] *Ibid*. According to the Dubai's Department of Economic Development statistics, which indicates the number of consumer complaints solved through the Commercial Compliance and Consumer Protection Sector. This indicates that the litigation through courts could be considered as the last choice for resolving consumer disputes.
[101] A similar approach is also adopted for workers' litigations under Article 5 of the Labour Relations Law of the UAE (Federal Law no. 8 of 1980).

eliminating the differentiation between the extent of protection afforded to the non-electronic consumers (namely, the consumers involved in domestic contracts out of e-commerce) and consumers from e-commerce transactions.

From a realistic perspective, the effectiveness of consumers' protection is more obvious in the domestic transactions, because domestic businesses (compared with foreign businesses) are usually aware of the consumers' rights under domestic legislation.[102] If these local businesses act contrary to these rights (for instance, creating terms and conditions that contradict or restrict legal rights of consumers), such violations would be addressed in most cases through complaints or disputes brought by consumers. The consequences of these violations are the implementation of necessary procedures. These measures, for example, could take the form of warnings or penalties by the appropriate bodies such as a consumer protection department,[103] or in some occasions these violations could lead to a lawsuit in which the court could maintain the consumers' legislated rights that have been violated.

Hence, the effect of these procedures or measures raises awareness of the rights afforded to consumers by the laws and spreads awareness among the domestic businesses about these protected rights. Thus, this indicates one of the main reasons that maintains the effectiveness of consumers' protection against violations by domestic businesses.[104]

The above scenario illustrates the effectiveness of consumer protection in domestic transactions through affording consumers the right to file complaints before a domestic body. Accordingly, in the absence of litigation power for consumers that would allow them to prosecute foreign businesses that have violated their rights, the effectiveness of this protection will be weakened. Therefore, this situation is more

[102] According to Article 29 of the Civil Transactions Law: "Unawareness of provisions is not an excuse", which means that lack of knowledge of the law does not justify committing the violation.
[103] For instance, Article 7 of the Executive Regulation of Consumer Protection provides: "The Department (the Department of Consumer Protection under the UAE's Ministry of Economy) shall take the necessary procedures and measures in accordance with the provisions of Law and this Regulation and the resolutions handed down in implementation thereof against any monopoly practices or dealings, which cause damage to the national economy or consumers."
[104] Maintaining consumers' right to access judicial authorities in their national countries or countries where they are domiciled or a resident is considered one factor in ensuring the effectiveness of consumers' protection. (Other reasons include campaigns and media and spreading the rights of consumers)

obvious in B2C e-commerce transactions, where the litigation power of consumers is diluted by, on one hand, the insertion of clauses that provide exclusive jurisdiction or arbitration in foreign countries and, on the other hand, the absence of effective or mandatory provisions that would prohibit restriction to consumers' litigation power.

The protection provided to consumers by their state's laws or regulations would not be effective except if it was covered by litigation power. The consumers' right to bring lawsuits against any person or business, whether local or foreign, who by any agreement or practice would prejudice, damage, or restrict consumers' rights afforded by the law, helps to effectively protect the consumers.

Furthermore, if such measures have been adopted by different countries (for example, the member states of the GCC), it would create common and effective private international law rules in jurisdiction, which would eventually simplify the recognition and enforcement of judgments. Nevertheless, states' relations, cooperation, and coordination are vital in facilitating the recognition and enforcement of judgments by international agreements.[105]

Some may argue that regulating jurisdiction in consumer contracts will subject businesses in e-commerce to an unexpected number of consumer laws.[106] However, such an assumption seems incorrect because online businesses should be aware of the consumers they are targeting, and consequently these merchants should also understand the laws of countries that apply to e-commerce and the rights of the consumers in their target countries. Moreover, the internet has opened the path for online merchants and businesses to reach consumers from almost everywhere around the world, and as a consequence these businesses should also consider the potential of laws and legislations that protect the rights of those consumers. Thus, the involvement in e-commerce should be carefully considered from different perspectives by

[105] Lorna E. Gillies, "Adapting International Private Law Rules for Electronic Consumer Contracts," in Charles E. F. Rickett & Thomas G. W. Telfer (Ed.), *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003. At 364, *see* Avril D. Haines, "Why Is It So Difficult to Construct an International Legal Framework for E-Commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments: A Case Study," *European Business Organization Law Review*, 2002.

[106] *See* Joakim ST Øren, "International Jurisdiction over Consumer Contracts in e-Europe," *International and Comparative Law Quarterly*, 2003, vol. 52, pp. 667–668.

merchants; for instance, to determine the scope of their commercial activities – whether to limit these activities to particular states or to widen the scope of these transactions to all states. This preparation is rational for businesses that would deal with consumers through the internet, considering the current legislations that have been developed to protect consumers in different areas, including in jurisdiction or protecting their litigation power.[107]

3.3.1 Jurisdiction Rules for Consumer Transactions in the UAE

The UAE adopted two important laws in 2006 related to electronic consumer contracts: Federal Law no. 1 of 2006 on E-Commerce and E-Transactions, and Federal Law no. 24 of 2006 with respect to Protection of Consumers. However, neither laws included provisions to determine the jurisdiction in e-commerce consumer contracts.

Federal Law no. 24 of 2006 with respect to Protection of Consumers[108] covers various aspects of consumer contracts, such as consumers' rights, providers' obligations, and penalties. One of the significant features under the legislation is recognising consumers' rights as a matter of public policy.[109] Accordingly, any term or condition that contradicts those rights shall be void. Regrettably, the consumers' rights provided by the Emirati Consumer Protection Law do not include the litigation right of consumers.[110] Even the Executive Regulation of the former Consumer Protection Law does not cover the subject of jurisdiction in consumer contracts. [111]

The Emirati laws mentioned above do not provide an appropriate provision to determine jurisdiction in e-commerce transactions, and in electronic consumer contracts in particular. Thus, in this situation where there are no protective provisions

[107] One of these legislations, which has been developed to protect consumers in e-commerce transactions, is the Brussels I Regulation under the European Union (the Council Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).
[108] The Federal Law No. 7 of 2011 has amended this law; the amendment has provided clearer categories of penalties applicable in breaches to its provisions.
[109] According to Article 18 thereof.
[110] Consumers' rights have been listed under Article 8 of the Executive Regulation to the Federal Law no. 24 of 2006 on Protection of Consumers.
[111] Cabinet of Ministers' Resolution (12) of 2007 in respect of Executive Regulation to the Federal Law no. 24 of 2006 on Protection of Consumers.

adopted in the UAE by which judicial jurisdiction in electronic consumer contracts may be determined, the general provisions of Federal law no.11 of 1992 of the Civil Procedures Law, which determine the judicial jurisdiction in the event of disputes arising from international contracts, will probably apply.[112]

The relevant provisions to identifying the jurisdiction of consumer contracts, which are Articles 20, 24 and 31 of the UAE's Civil Procedures Law, are the same provisions that are applicable to e-commerce between businesses. However, in this part of the chapter, an additional provision from the Civil Transactions Law of the UAE will be examined, Article 248, in order to identify whether e-consumer contracts are considered as one of the contracts of adhesion according to the UAE's provisions.

The first part of this chapter reached a conclusion that the traditional provisions within the Civil Procedures Law to determine jurisdiction did not take account of the nature of e-commerce between businesses.[113] Accordingly, these provisions would still be the provisions to apply presently in relation to B2B e-commerce transactions. Similarly, these jurisdiction rules would also be applicable to transactions involving consumers; therefore they will also be applied in relation to B2C e-commerce transactions. The key issue would then be whether these provisions are adequate or appropriate and to investigate the potential for an alternative approach involving new rules or amendments that take e-commerce transactions into account.

In order to demonstrate the extent of consumer protection provided by these traditional rules of private international law under the Civil Procedures Law, it is important to apply these rules to the most common scenarios with regard to terms and conditions of consumer contracts that are concluded through electronic commerce, specifically to the issue of jurisdiction. This will require considering three possibilities for electronic consumer contracts in terms of jurisdiction clauses. The first case is the inclusion of an exclusive jurisdiction clause to a specific court; the second circumstance is the exclusive arbitration clause; and the third case is the

[112] The absence of specific provisions governing e-consumer contracts from jurisdictional perspective also exists in the legislations of the other GCC countries except Qatar. This will be examined under the following subsections in this chapter: 3.3.2, Jurisdiction Rules on B2C in Qatar; and 3.3.3, Jurisdiction Rules on B2C in the Other Member States of the GCC.

[113] The UAE courts' negative approach towards foreign jurisdiction clauses is also contributing in preventing businesses from settling their disputes before the UAE courts or even to invest in the UAE.

absence of exclusive jurisdiction or arbitration clauses, i.e. a free or non-compulsory jurisdiction clause in e-consumer contracts.

3.3.1.1 Consumer Contracts with an Exclusive Jurisdiction Clause

One of the most common clauses of jurisdiction under e-consumer contracts is the clause of exclusive jurisdiction to the court of a specific country, which usually is not the court where the consumer is domiciled or has a place of residence. On the contrary, this court has been chosen by the online business, which realistically would be more comfortable and favourable to the online merchant than to consumers.

In order to demonstrate the implications of the traditional private international law rules provided by the Civil Procedures Law of the UAE, the following example of an e-consumer contract will be examined.

An electronic contract is concluded between a consumer who is domiciled in the UAE, and an online merchant who is domiciled in Singapore. The contract obliges the trader to deliver the goods purchased by the consumer to the UAE. The trader deliveres the purchased goods to the consumer, but in an inappropriate condition. The consumer brings proceedings before an Emirati court against the merchant who supplied and delivered the goods.[114] According to the terms and conditions of the contract, any dispute shall be heard before Singaporean courts, and the law of Singapore shall apply. The consumer claims the UAE court's jurisdiction on the grounds that the obligations in question were executed in the UAE, according to Article 21(3) of the Civil Procedures Law,[115] "if the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts."

According to the above example, there are a number of possibilities or predictions as to how the UAE's court will rule on this particular case. The first expectation is that the court may confirm its jurisdiction over this case based on Articles 21 and 24 of the

[114] Consider that the consumer has not reached a settlement with the online merchant before the proceedings brought before the UAE court.
[115] *Supra* note 25.

Civil Procedures Law. It is important to remember the rule under Article 24 that entails the nullity of any agreement if it contradicts the provisions under the international jurisdiction of the Civil Procedures Law. In this situation, the court would protect the consumer's litigation power, on the basis that the obligation of the trader was executed, whether partly or fully, on UAE soil.

The obligation of the trader in question (the delivery of goods) does not introduce complexity to the Emirati court in determining whether the obligation has been executed in the UAE. However, the higher complexity of this question could be about obligations executed on the internet, such as downloading software or applications. In these circumstances, the Emirati court would not find an appropriate classification of these obligations under the E-Commerce and Transactions Law of the UAE; on the other hand, the court would refer to the general principles of the private international law under Article 23 of the Civil Transactions Law. Thus, the determination of whether the obligation in question is executed or should have been executed in the UAE will depend and vary from one obligation to another. This determination, consequently, will be decided on whether or not the court will be able to hear the claim brought by the consumer. Hence, the application of Article 21 of the Civil Procedures Law will not provide a proper and certain protection of the consumer's litigation power.

The second prediction of the court's ruling on this case is to accept the jurisdiction clause that refers the judgment to the court that has been chosen by the online merchant, provided that this choice of court complies with the conditions provided by the UAE's courts, namely the principle of appropriate considerations, introduced by the Dubai Court of Cassation in case no. 86/1996.[116] The expectation that the UAE's court would accept a transfer to the foreign court of the consumer litigation based on the agreement under the electronic consumer contract is narrow, considering the complexity in implementing this procedure and the negative approach of the UAE's courts toward such agreements. Still, there is a possibility that such compulsory jurisdiction agreements being enforced by the UAE's courts entails the lack of

[116] For further analysis, *see* 3.2.1.1, The Judicial Position Towards Jurisdiction Rules, in this chapter.

protection to the consumer and as a result leads to litigation being deferred to a court that is inconvenient to the consumer.

In case the chosen court under the consumer's contract is located in the UAE, Article 31(5) of the Civil Procedures Law will govern this agreement. [117]

To protect the consumer from a compulsory agreement that entails the submission of his dispute to a foreign court that is chosen by the online business, it is preferable for the Emirati courts to apply Article 248 of the Civil Transactions Law, which states: "If the contract is one of adhesion, and includes arbitrary conditions, the judge may modify such conditions or exempt the adherent from it, according to the requirements of justice. Any agreement to the contrary shall be void."[118] The Explanatory Memo of the Civil Transactions Law provides that: "Article 248 authorizes the court to rebalance between contractual parties if the contract was a contract of adhesion and included arbitrary conditions, the Article affords the Emirati courts the right to amend those conditions, such amendment that relieves the burden on the weaker party or exempts the later from that terms as required by the justice. To put this rule into effect, there was no alternative than stipulating the invalidity of any agreement contrary to that rule."[119]

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[117] Article 31 of the Civil Procedure Law states:

1- The court, in which area the defendant's residence exists, should have the jurisdiction unless the law stipulates otherwise, in case he had not a residence in the state, the jurisdiction should be given to the court in which area his residence or his workplace exists.
2- It is possible to prosecute the action to the court in which area the prejudice has taken place, and that is to be in case of the actions of indemnity for the occurrence of damage on a person or a property.
3- The jurisdiction should be in the commercial matters of the court in which circuit the prosecuted residence exists or be given to the court in which circuit the agreement has been concluded, totally or partially executed or to the court in which circuit the agreement should be executed.
4- If there are more than prosecuted, the jurisdiction should be at the court in which circuit the residence of one of them exists.

In other than the cases stipulated in the Article 32 and the Articles from 34 to 39, it is possible to agree on the jurisdiction of a certain court to examine the litigation, and in such case the jurisdiction will be given to such court or the court in which circuit the prosecuted residence, domicile or workplace exists"

[118] This provision corresponds to Article 58 of the Civil Law of Bahrain, Article 158 of the Civil Transactions Law of Oman, Article 81 of the Civil Law of Kuwait, Article 105 of the Civil Law of Qatar, Article 149 of the Egyptian Civil Law, and Article 176 of the Iraqi Civil Law.

[119] The translation provided is made by the researcher.

The application of Article 248 of the Civil Transactions Law depends on the classification of electronic consumer contracts from the perspective of the Emirati court. If the Emirati court is convinced that the consumer contract through the internet is one of adhesion, and is in fact widely recognised as such,[120] that will enhance the consumer protection. Article 248 provides the court with the right to change any clause that weakens one of the parties to the contract. Moreover, the court may exclude the vulnerable or weaker party from the adhesion terms, according to Article 248.

Although the application of Article 248 of the Civil Transactions Law might rebalance the e-consumer contract's terms and conditions in general, and it could be the ticket through which Emirati consumers can be assured of access to UAE courts in particular, the present case law of the UAE remains a concern. The Emirati courts have not encountered the question of whether to apply Article 248 of the Civil Transactions Law to electronic consumer contracts. However, in this context, a decision by the Dubai Court of Cassation in Case No. 6/1992 held that "in order to classify a contract as a contract of adhesion, it must include legal and effective monopoly or a little control on the facility makes the competition in limited scope."

The aforementioned ruling has provided some of the criteria required to consider a contract as one of the contracts of adhesion that falls within Article 248 of the Civil Transactions Law. These contract criteria include, for example, sale of goods that are exclusively sold by a sole merchant, or services that are exclusively provided by a particular provider. It is rare, however, to find these requirements in most e-consumer contracts, which leads to most e-consumer contracts being excluded from the scope of Article 248. At this juncture, it seems appropriate for the UAE's courts to exclude the exclusivity of the goods or services provided to the consumer as a condition to applying Article 248, because this condition entails the exclusion of almost all consumer contracts, including those concluded electronically. A new interpretation of Article 248 of the Civil Transactions Law, which extends the scope of this rule to

[120] The recognition of the consumer contract as being among the contracts of adhesion is widely, and in particular those concluded through electronic commerce, mainly because of the standard form in which these contracts are made and of their none-negotiable nature, for further details in the definition of "contract of adhesion" and its historical background see Andrew A. Schwartz, 'Consumer Contract Exchanges and the Problem of Adhesion', *Yale Journal on Regulation*, Vol. 28 (2011), pp. 314-366.

apply to e-consumer contracts, is highly recommended to the UAE's courts to adopt. This approach, by applying Article 248 to e-consumer contracts, would provide authority to the courts to amend any terms of the contract that prevent or lessen the rights provided to consumers by UAE legislation.

3.3.1.2 E-Consumer Contracts with a Mandatory Arbitration Clause

Referring to an obligatory arbitration any dispute arising from e-consumer contract is another method widely used by online merchants to avoid facing proceedings in courts where consumers are domiciled or have a place of residence.[121] This subsection will shed light on a specific situation in which consumer contract embraces an arbitration clause in a non-negotiable form, however, it would not cover circumstances where there is an agreement between the trader and the consumer to settle in arbitration whether before[122] or after the dispute occur.

The Civil Procedure Law under Article 203(1) has recognised the right for the contractual parties to refer any dispute concerning contractual obligation to arbitration, on the basis of an arbitration clause under the contract or by a subsequent agreement.[123] Besides the conditions laid down by Article 203(2–4) in order to invoke the arbitration,[124] the provision has also given the contractual parties the option to resort to the national court if one of the parties has brought the dispute before the

[121] See David Collins, "Compulsory Arbitration Agreements in Domestic and International Consumer Contracts," *King's Law Journal*, 2008, 19(2), pp. 335–355, and Khalil Mechantaf, "Balancing Protection and Autonomy in Consumer Arbitrations: An International Perspective," 2012, *Arbitration*, 78(3), pp. 232–246. In this context, a famous online shopping website, souq.com, directs its activities to the GCC's and the UAE's consumers. Under its terms and conditions, the website has included a binding arbitration agreement, available at: http://uae.souq.com/ae-en/terms-and-conditions/c/#26. This example proves the reality of including binding arbitration clauses in contracts that would involve consumers from the member states of the GCC.

[122] It is understandable that consumer's legal acknowledge is usually fall short in terms of recognizing the arbitration agreement before a dispute occur with the trader could be one of the criticism towards this view, however, this agreement deserves recognition and creditability as a proper agreement between the consumer and the trader if the latter has provided the consumer appropriate information about this agreement, his rights to access to the courts and is made in negotiable form.

[123] Article 203(1) of the Civil Procedure Law states: "It shall be possible that contractors, in general, states as a condition in the principal contract or with a subsequent agreement, the exposition of what may arise among them of litigations, and it also possible to agree on the arbitration in a certain litigation under special conditions"

[124] Article 203(2–4) of the Civil Procedure Law provides: "2- the agreement shall not be recorded except in writing. 3- the litigation's facts should be designated in the arbitration document or during the examination of the action even if the arbitrators were authorized for reconciliation, otherwise shall be void. 4- it shall not be possible to arbitrate in the matters in which the reconciliation is not possible, and it shall not be valid to agree on the arbitration unless by those who have the capacity of the disposition in the litigated right".

court and the other party has not challenged the jurisdiction of the court in question at the first sessions.[125]

Based on the latter provision of Article 203, the consumer who has an electronic contract that includes an arbitration clause may bring the litigation of the contract before the UAE's courts. However, whether the court continues to hear the case depends on whether the other party, namely the online merchant, would demand arbitration during the first sessions. The most predictable scenario in such cases is that the merchant would challenge the jurisdiction of the court based on the arbitration clause. It is irrational that the merchant would renounce the opportunity to resort to arbitration, which has been stipulated by him in the contract. This situation does not seem to be a preferable solution for consumers, nor does it provide stable grounds to submit their contractual disputes before Emirati courts.

In order to avoid determining the fate of such cases before the Emirati courts on whether the online merchant would refer the case to arbitration in the first sessions, it seems appropriate to apply Article 248 of the Civil Transactions Law to these types of contractual clause. This would require the UAE's courts to recognise e-consumer contracts as contracts of adhesion, but none have yet provided such a ruling.

The application of the Civil Transactions Law's Article 248 to e-consumer contracts would create a stable foundation for examining disputes arising from e-consumer contracts before the courts of the UAE. It will also afford a major rule to the judicial bodies in maintaining and protecting the rights provided by the UAE's laws to consumers. This role played by the courts would lessen or prevent any excesses on consumer rights in e-commerce; hence, this would eventually create prestige among online merchants towards respecting consumers' rights.

In fact, if the Emirati courts have not considered these consumer contracts among the contracts of adhesion, it will weaken the consumers' position, which will lead to them

[125] Article 203(5) states: "If the litigant parties have agreed on the arbitration in some litigation, it shall not be possible to prosecute an action therewith before the judiciary, however, if one of the two litigant parties has resorted to prosecute the action without taking into consideration the arbitration condition and the other party has not objected at the first sessions, the action should be examined and the arbitration condition shall be void"

being further confined by the terms and conditions that have been drawn up by the online businesses, and it will specifically force consumers to follow the arbitrational steps stipulated in the contract by the merchant. It leaves no room for doubt that the path the consumer has to follow in order to file litigation against the online merchant before the arbitration body (chosen by the merchant), will certainly create hardship for the consumer in many different aspects. For instance, the consumer might need to travel to the country where the arbitration entity is located, incurring the cost of staying in the country until the arbitral award is issued, and above all, additional costs could burden the consumer, such as translation and filing fees. If the arbiter eventually rules in favour of the consumer, there is no assurance that the arbitral award would include compensation to the consumer for earlier costs.

Such possibilities have been raised on the grounds that Article 248 of the Civil Transactions Law is not applicable to a dispute concerning an electronic consumer contract. If the Emirati courts had accepted the applicability of Article 248 to e-consumer contracts, the above possibilities would not be substantial or worth considering. Implementing Article 248 on e-consumer contracts, with the assumption that those contracts are considered contracts of adhesion,[126] will provide greater protection to consumers. Furthermore, this approach complies with the objective of Article 248, as stated in the Explanatory Memo of the Civil Transactions Law: "to create a balanced contractual relationship between the parties by allowing the court to amend or exempt the vulnerable party from the one-sided conditions."[127]

The Civil Transactions Law, even with its explanatory memo, has not provided examples of what types of terms or conditions define a contract of adhesion. On the other hand, Article 248 has specified the role of the court in amending or exempting the vulnerable party from arbitrary terms. Article 248 has not been specified for certain contracts; hence, the court has great discretion in the article's application.

[126] Article 145 of Civil Transactions Law provides: "Acceptance in contracts of adhesion is confined to adhesion to standard conditions laid down by the offeror to all his customers and which are not subject to discussion." For more on contracts of adhesion, *see* Mo Zhang, "Contractual Choice of Law in Contracts of Adhesion and Party Autonomy," *Akron Law Review*, 2007, vol. 41, pp. 123–173; Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction," *Harvard Law Review*, 1982, 96(6), pp. 1147–1284. *See* also Friedrich Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," *Columbia Law Review*, 1943, vol. 43, pp. 629–642.

[127] The translation provided is made by the researcher.

Furthermore, the court is not limited to examining certain terms of the contract, which allows the court the competence to examine the entire conditions of the contract, including the jurisdiction clause. The question worth examining at this point is: Are binding jurisdictional courts or arbitration clauses considered an arbitrary condition in e-consumer contracts?

It is undoubtedly true that parties' autonomy is considered a substantial pillar in contracts, and it is limited only in exceptional circumstances – if, for instance, it contradicts public policy. The Emirati laws have recognised the parties' autonomy in many different areas: for example, in applying the law chosen by the parties of the contract,[128] in the subject of the contract,[129] and in the terms and conditions of the contract,[130] unless it violates public policy and morals. Thus, the UAE's Civil Transactions and Procedures laws provide the principle of *pacta sunt servenda*. However, there are some exceptions to this general principle, which are justified on the grounds of justice, public policy, morals, and national interest.

The most common fact about terms and conditions of e-consumer contracts is that they have been set up by one party, the online business. This practice by the online merchants may be justified from different perspectives. One justification is the large number of transactions processed; another is the professionalism and economic capacity of that party. One side drafting the terms and conditions of the contract mostly leads to two types of conditions. Firstly, conditions might be favourable to the professional, which would boost his rights or lessen his obligations toward the consumer.[131] For instance, a condition may exempt the professional from guaranteeing his commitment, or a condition may allow the professional to amend or terminate the contract unilaterally without providing justifications to the other party.

[128] Article 19 of the Civil Transactions Law.
[129] Article 126 of the Civil Transactions Law.
[130] Article 206 of the Civil Transactions Law provides: "a contract may include a suitable condition which confirms it terms admitted by custom or usage, beneficial to one of the contracting parties or others unless it is prohibited by the legislator or contrary to public policy or morals, in which case the condition is void but the contract remains valid except where the condition is the prime motive of contracting and, in this case, the contract shall also be void".
[131] Muwaffaq Hammad Abd, حماية المستهلك المدنية في عقود التجارة الالكترونية(Tr) *Civil Consumer Protection in Electronic Commerce Contracts*, (Publisher: مكتبة السنهوري) 2011, p. 254.

Secondly, conditions might be disadvantageous to the consumer, which would lessen his rights or increase his burdens.[132] For example, requiring the contract to be concluded by the consumer within a limited period, or demanding the consumer's assent to the terms and conditions, which are unread by almost all consumers,[133] by clicking on an "I agree" icon in order to purchase goods or services.[134]

A number of points present the common features of the conditions in e-consumer contracts. Firstly, these conditions are valid as a general principle and not contrary to public policy or mandatory rules under the UAE laws. Secondly, the favourability of these conditions to one party (the business) could be achieved by measuring and evaluating all these conditions, since focusing on ceetain conditions individually could be considered beneficial to the other party (the consumer). Therefore, there is no need to search for the intention of the party who set these conditions, as long as they provide or are able to provide benefit to that party. Thirdly, such conditions indicate the imbalance between the professional and the consumer, who requires legislation to intervene on the grounds of justice and fair trading practices

Accordingly, it seems proper to classify electronic consumer contracts before Emirati courts as one of the contracts of adhesion. Hence, binding choice of court or arbitration clauses in e-consumer contracts are considered one of the arbitrary conditions, which the Emirati court could amend or exempt the consumer from, on the grounds of justice, according to Article 248 of the Civil Transactions Law. The role of the Emirati court does not extend to terminating the consumer contract in question or concluding a new consumer contract with new terms and conditions; the court is limited to amending or excluding the consumer from these conditions.

Applying Article 248 to e-consumer contracts, and specifically to choice of court or arbitration clauses imposed by the professional, would benefit consumers in many different circumstances where such clauses bring enormous difficulties. It appears in this context that the importance of protecting the litigation power of consumers could

[132] *Ibid*, p. 255.
[133] See Yannis Bakos, *supra* note 90, pp. 1–35
[134] See Christina L. Kunz, John Ottaiani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter, and Jennifer C. Debrow, "Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements," *The Business Lawyer*, 2003, vol. 59, pp. 279–312

be lost by recognising arbitration or choice of court clauses in their electronic contracts, under the current provisions of the UAE's laws.

Considering the above examination, if the UAE's courts still have not amended their approach or interpretation, which is not in favour of applying Article 248 of the Civil Transactions Law on e-consumer contracts, then the legislative interference in this case is highly important, particularly to protect the vulnerable party in these contracts of e-commerce.

3.3.1.3 E-Consumer Contracts with a Free Jurisdiction Clause

The simple meaning of "free jurisdiction clause" is that the online merchant has not stipulated an exclusive jurisdiction clause, whether referring to a specific court or to a particular arbitration firm, under the e-consumer contract. This condition may appear in contracts without an exclusive jurisdiction clause or a nonbinding jurisdiction clause, by which the online merchant gives the consumer the choice of whether to resolve any dispute arising from their contract through the courts where the consumer is domiciled or has a habitual place of residence; or through the courts or arbitration entity that the merchant specified under the contract as an optional jurisdiction to the consumers.

It seems that such terms are more convenient to the consumer than binding clauses of jurisdiction because they provide the option to choose the preferable path of litigation. In fact, such jurisdictional clauses respect the consumer's right to litigate before the courts of his domicile. It is highly recommended for all online businesses to adopt such optional clauses instead of the binding ones. This would eventually eliminate the difficulties of litigation for consumers, and it would enhance trust between consumers and online merchants, although these jurisdiction clauses would not limit the jurisdictions in which the merchant might face allegations.

This type of e-consumer contract would not cause any difficulties for the Emirati courts to determine the jurisdiction of cases that may arise from such contracts, provided that these contracts do not bind the consumer to any particular jurisdiction.

In the case of absence of a jurisdiction or arbitration clauses under the e-consumer contract, the UAE's courts could confirm their jurisdiction over litigation brought by the consumer who is domiciled or has a place of residence in the UAE, based on Article 21(3) of the Civil Procedures Law. According to a condition of a claim of damages, the consumer would be able to bring the proceedings before an Emirati court, providing that the prejudice occurred in the area of that court, according to Article 31(2) of the Civil Procedures Law. An example of this type of case is when a consumer domiciled in the UAE suffers damages from the failure of the cruise control of a car bought through a website of a manufacturer domiciled in the US. With this condition, the consumer could rely on Article 31(2) of the Civil Procedures Law to claim the adjudicatory jurisdiction of national courts regarding the damages claim, provided that the damage occurred within the geographical jurisdiction of the court in question.

It seems that the Emirati court could adopt a protective and positive approach by applying Article 248 of the Civil Transactions Law on e-consumer contract disputes. On the other hand, the Emirati court may choose to consider e-consumer contracts as ordinary contracts, which would leave consumers with no other choice than to follow the jurisdiction provided under the terms and conditions drawn up by the professional. The applicability of one of these approaches to e-consumer contracts depends on future rulings by Emirati courts on Article 248 to the Civil Transactions Law. Although the application of Article 248 on e-consumer contracts would be a significant step in protecting consumers' litigation power, the legislative intervention is still more important in order to confirm litigation power to consumers and to provide greater certainty to businesses dealing with Emirati consumers in e-commerce.

3.3.2 Jurisdiction Rules on B2C in Qatar

The purpose behind a separate section to examine the Qatari approach with regard to jurisdiction rules that apply to e-consumer contracts is due to the distinctive approach Qatar has adopted compared with the other member states of the GCC. The absence of international jurisdiction provisions under Qatari legislations has been

criticised earlier in this chapter.[135] However, in the context of this subsection, the focus is on Article 2(7) of Qatar's Law no. 8 of 2008 on Consumer Protection.[136] Article 2(7) allows the consumer to bring litigation before the Qatari courts against any supplier or service provider, provided that there is a term under the contract or practice conducted by the merchant that contradicts or restricts one of the consumer's rights under the Consumer Protection Law. Thus, any compulsory jurisdiction clause that entails the submission of any dispute arising from the consumer contract to a foreign court or arbitration is considered contrary to Article 2(7); therefore, such terms would not affect the litigation power of the consumer. The Qatari approach in this context seems positive and clear towards protecting consumers' rights in general and their litigation rights in particular. In contrast, the other member states of the GCC have not taken such steps under their consumer protection legislations. These states' approaches, however, entail application of the general provisions of international jurisdiction to e-consumer contracts, which do not provide the same level of protection of the consumer's litigating right as the Qatari approach provides. It would be highly recommended for the other member states of the GCC to consider adopting a provision similar to Article 2(7) of the Qatari Consumer Protection Law.

3.3.3 Jurisdiction Rules on B2C in Other Member States of the GCC

Legislations of the other GCC member states, with the exception of Qatar, have not differed from the doctrine that the UAE's legislation has followed, mainly due to the absence of specific rules that protect the consumers' litigation power.[137]

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[135] *See* 3.2.2, Jurisdiction Rules on B2B in the Other Member States of the GCC, of this chapter.

[136] Article 2 of the Qatari Consumer Protection Law provides: "the basic rights of consumer are guaranteed in the provisions of the present law. no person may conclude any deal or carry any activity that infringes the basic rights of the consumer, and in particular:

1- The rights of health and safety during the normal use of the products and services.
2- The rights to obtain the correct data and information about the products that he purchases, or uses or that are presented to him.
3- The right of free choice of products that are of good quality and in conformity with their specifications.
4- The right to respect the religious values as well as customs and traditions.
5- The right to obtain knowledge related to the protection of the Consumer's legal right and interests.
6- The right to join associations and private institutions, counsels and committees whose purpose is related to the consumer protection
7- The right to bring legal actions concerning all attempts against the consumer's rights, or that restricts them.

All without prejudice to the international treaties and agreements applicable in Qatar"

[137] A similar example to the UAE's approach, in abandoning the issue of the consumer protection under the Electronic Transactions Law and leaving such issue to be governed by the general rules of the

For instance, the Omani,[138] Kuwaiti[139] and Bahraini[140] consumer protection laws have not provided a rule that affords consumers the right to litigate against any term or any conduct by suppliers that restricts or affects their rights.[141] This, consequently, refers the issue of jurisdiction on e-consumer contracts to the international jurisdiction provisions under the laws of these member states. It seems that the set of rights listed under the UAE, Bahrain, Kuwait and Oman consumer protection laws partially echoes the rights listed under the United Nations Guidelines for Consumer Protection (UNGCP), which were adopted in 1985.[142] The UNGCP aims to implement protections for consumers in physical safety,[143] economic interests,[144] and setting safety and quality standards for consumer goods and services.

In the absence of specific provisions protecting the litigation rights of the consumer, this means the question of determining e-consumer contract jurisdiction is referred to the traditional private international law rules of these member states. Considering the similarity between the Emirati private international law rules and those adopted by the other member states of the GCC, the earlier examination and analysis of the UAE's provisions[145] will correspond to the relevant rules provided by the other GCC members.

One of the uncertain issues concerns the classification of electronic consumer contracts: whether they are considered one of the adhesion contracts by the other member states of the GCC. From a legislative perspective, there is no indication or proof that e-consumer contracts are considered contracts of adhesion, because the provisions adopted by these states are similar to those adopted by the UAE, namely Article 248 of the UAE's Civil Transactions Law. However, the interpretation and

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Civil Transactions Law, is the Jordanian Law No. 85 of 2001 on Electronic Transactions, *see* in this context Emad Abdel Rahim Dahiyat, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law', *Journal of Consumer Policy*, Vol. 34 (2011), 423-436.
[138] The Sultanati Decree no. 81 of 2002 on Consumer Protection Law.
[139] The Law no. 39 of 2014 on Consumer Protection of Kuwait.
[140] The Law no. 35 of 2012 on Consumer Protection of the Kingdom of Bahrain.
[141] The Kingdom of Saudi Arabia has not promulgated a law on consumer protection and rights.
[142] The United Nations Guidelines for Consumer Protection (as expanded in 1999) available at: http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf.
[143] Paragraphs 11–14 of the UNGCP.
[144] Paragraphs 15–27 of the UNGCP.
[145] In 3.2.2, Jurisdiction Rules on B2B in the Other Member States of the GCC of this chapter.

application of these provisions by the national courts of the other member states might be different from the approach of the UAE courts.

3.4 Summary and Proposals

The first part of these proposed solutions may be implemented in the UAE, with the second part adopted by each member state of the GCC. These proposed methods or solutions will be concerning both B2B and B2C transactions.

3.4.1 Recommendations for the UAE

With regard to consumer protection in e-commerce, there are a number of areas in which consumers must be protected, especially in the area of jurisdiction. The following recommendations, which are aimed at protecting consumers in terms of jurisdiction, can be divided into two parts. The first set of proposals for the UAE concerns protecting consumers through jurisdiction, both judicially and legislatively. The proposals from the judicial perspective are based on the assumption that the current provisions of the UAE legislation would be preserved; in other words, these proposals are designed to suit the current provisions and focused on the application of these rules by the UAE courts.

Protecting consumers through Article 248 of the Civil Transactions Law is the first solution in this context. This entails considering an e-consumer contract as a contract of adhesion. However, activating or implementing this approach depends mainly on the Emirati courts' interpretation of Article 248. If the courts of the UAE adopt this doctrine, then:

1- The UAE courts will have the authority to examine the terms and conditions of the electronic contracts between consumers and online businesses. Consequently, according to Article 248, the court will be allowed to amend or exempt the consumer from the electronic contract terms and conditions, if these conditions have contradicted or restricted the consumers' rights provided by UAE legislation.

2- With regard to binding jurisdiction or arbitration clauses, the Emirati courts could also exempt the consumer from such conditions; hence, the consumer could bring proceedings before these courts based on Article 21(3) of the Civil Procedures Law. However, there are possible difficulties that could arise in determining the jurisdiction of electronic contracts by the UAE's courts (specifically, those concluded and conducted through the internet, such as software purchased and downloaded from a website). This difficulty appears in applying the international jurisdiction provisions under the Civil Procedures Law, namely Articles 20–24, in order to determine the jurisdiction of this type of e-commerce transaction. Accordingly, this leads to the importance of legislative interference to enhance the international jurisdiction scope of the UAE's courts.

The second set of proposals falling within the UAE's legislation that concerns the international jurisdiction of the national courts. The current provisions of Civil Procedures Law, which is applicable to determining international jurisdiction, seem to be compatible or comply to some extent with international contracts that are concluded outside of e-commerce. On the other hand, the application of such rules to e-commerce contracts could be fraught with difficulties, particularly in determining the jurisdiction of contracts that are completely concluded and performed online. Such contracts do not rely on a locational element, which is considered an integral part of the principles that underpin the current provisions of international jurisdiction under the Civil Procedures Law. Furthermore, the current provisions, namely Articles 20–24 of the Civil Procedures Law, are considered mandatory to any dispute that falls within the international jurisdiction of the UAE's courts, and the contractual parties are not allowed to have an agreement contrary to these provisions. This is apparent particularly by the earlier examination of the UAE's Article 24 of the Civil Procedures Law.[146]

Therefore, the first legislative amendment required in this context should recognise the choice of court agreement by the contractual parties – regardless of whether this agreement provides jurisdiction to a foreign court in a state that has signed a judicial

[146] *See* 3.2.1, Jurisdiction Rules on B2B Transactions in the UAE, of this chapter.

cooperation treaty with the UAE or in a state that merely has diplomatic exchange with the UAE.[147] Respecting the parties' jurisdiction agreement would support the confidence of the local businesses in the UAE and would also attract foreign investments to the country.

The nature of e-commerce has added a distinctive element to its transactions that differ to some extent from traditional international transactions. Therefore, it seems that the most appropriate rules in determining jurisdiction of disputes that arise from e-commerce contracts are those that fulfil or recognise the choice of court made by the parties. This solution seems more convenient to the parties of e-commerce transactions and also complies with the nature of e-commerce. However, a dispute may arise from an e-commerce contract that does not include the parties' choice of court. Determining jurisdiction of such disputes could also be complicated in the case of a contract that is concluded and executed completely on the internet. It seems preferable in that particular case to recognise the voluntary submission by the parties to any court they choose. This approach would avoid the difficulties in tracking or identifying precisely where the contract is performed. In the case that the contractual parties have specified the location where the e-commerce transaction is performed, this could be a significant element in determining the jurisdiction.

Another issue could arise when one of the contractual parties brings the proceedings to a UAE court while the contract indicates the parties' express agreement in choosing another foreign court, and the UAE court has grounds to examine the dispute – for instance, the contract is partially conducted on UAE territory. In this context, it seems appropriate to adopt measures that allow the Emirati court to examine such disputes, provided that the defendant has not challenged the jurisdiction of the UAE courts on the basis of the choice of court agreement. This provision could be similar to Article 203(5) of the Civil Procedures Law, which governs the case where there is a previous arbitration clause or agreement and the dispute is submitted before the UAE courts.

The proposed provision in this context could be promulgated in the following wording:

[147] This approach complies with the Federal Supreme Court in case 247/2012. For further details, *see* 3.2.1.1, The Judicial Position Towards Jurisdiction Rules, of this chapter.

"It shall be possible for parties to a contract to agree, either as a term in the principal contract or by a subsequent agreement, to refer disputes that may arise out of or in relation to the contract, to a particular court or to the courts of a particular place or country. The courts of the UAE shall ordinarily respect and give preference to the parties' agreement on a court for dispute resolution. However, if one of the parties has commenced action before the courts of the UAE despite the parties agreement on another court, and if the other party does not object by the time of making/filing his substantive defence, the courts can proceed to hear and determine the action."

The restrictions on the recognition of the parties' choice of court should be clear: for instance, prohibiting any agreement related to real estate disputes in the UAE; and more importantly, the exclusion of consumer contracts from the proposed provision in order to protect the consumer's litigation power before the Emirati courts.

With regard to consumer contracts, it seems preferable for the UAE to adopt a provision that expressly allows consumers of the UAE,[148] whether they are citizens, or individuals who are either domiciled or have a place of residence in this country,[149] to bring proceedings concerning their electronic or non-electronic contracts before the courts of the UAE, provided that any agreement that contradicts or restricts this right should not be enforceable. This provision is adequate to provide protection to consumers' litigating power before the UAE's courts.

Furthermore, a similar provision has been adopted by one of the GCC member states, Qatar. Specifically, Article 2(7) of its Consumer Protection Law provides that: "Basic consumer's rights guaranteed under the provisions of this law, and prohibited for any person to conclude any agreement or practice any activity that would prejudice those rights and in particular the following rights: 7- The right to bring lawsuits for all that would prejudice, damage, or restrict his rights. Provided that such right does not prejudice the international conventions in which the State is party." Another example

[148] This provision could be adopted through promulgating a new legislation to the Consumer Protection Law, or through introducing new amendments to the current legislation.
[149] It is important to dismiss the condition of having domicile or place of residence in the UAE towards tourists who file consumer lawsuits before the UAE's courts. This approach would also support the UAE's tourism and

of these provisions is Article 16 of the Brussels I Regulation,[150] which states that: "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled."

The current relevant provisions under the Civil Procedures Law merely provide protection to the consumer who is being sued by a business. According to Article 20, the business is obliged to bring any proceedings before the Emirati courts against the consumer who is a UAE national or foreigner domiciled or resident in the UAE.[151] This rule is enforceable even in the existence of a choice of court agreement that entails the submission of the dispute to a non-Emirati court;[152] it does not, however, protect the consumer's litigation right before the Emirati courts in the case of a compulsory arbitration clause, because the arbitration clause is enforceable by the Civil Procedures Law.[153] Thus, the protection provided to consumers under the Civil Procedures Law, and their litigation power in particular, is incomplete and even far from the realistic nature of consumers' disputes, where consumers are usually the plaintiff party.

3.4.2 Recommendations for the GCC

Through the earlier examination of the provisions of international jurisdiction adopted by the GCC member states,[154] from many perspectives the similarity and rapprochement between approaches adopted by these states is apparent, and hence, it seems instructive to establish a unified legislation between the member states of the GCC that organises the jurisdiction of civil and commercial disputes in general and those arising from e-commerce transactions in particular. One of the most important objectives that must be achieved through a harmonised legislation between the GCC member states is recognising the choice of court agreement made by the contractual parties, besides abandoning any provision by the member states of the GCC that

[150] Council Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial mattes.
[151] According to Article 20 of the Civil Procedures Law.
[152] On the basis of Article 24 of the Civil Procedures Law.
[153] According to Article 203 of the Civil Procedures Law.
[154] Based on the examination of the GCC member states' provisions on international jurisdiction in section 3.2 Jurisdiction Rules on B2B Transactions in the UAE & in the other Member States of the GCC of this chapter.

restricts this right,[155] except restrictions with regard to disputes of contracts concerning real estate located in the member state. This rule would provide a convenient platform that complies with the nature of electronic commerce in terms of determining jurisdiction in general and it would provide in particular greater recognition to the B2B transaction parties' agreement that entails providing jurisdiction of disputes arising from their contract to a specific court or courts.

The proposed provision will provide protection to the consumer, whether in the situation of plaintiff or defendant. Moreover, adopting such a provision in the scope of the GCC, through a binding legislation on the member states, would benefit the consumers in these states.

Furthermore, the enforcement of these courts' ruling on the territories of the GCC member states could be expeditious with the adoption of a harmonised consumer protection law among the GCC member states to be applied by later courts. Hence, this will provide fast execution or implementation of the courts' rulings, without requiring the submission of these rules before the national courts in order to obtain the exequatur procedure from the domestic courts that entails the enforcement of the ruling delivered by the courts of another member state. This fast track of enforcing the consumers' court judgments does not entail ignoring of information sharing between the national courts of the member states, particularly with regard to the rulings delivered. It is also important that this information is passed on to the relevant governmental bodies, such as the consumer protection department or the ministries of commerce or economy, in order to track the commitment of the business which has been found to breach the consumers' protection law based on the GCC courts' ruling.

[155] For example Article 24 of the Civil Procedures Law.

Chapter 4: Applicable Law in Relation to E-Commerce in the UAE and GCC

4.1 Introduction

Electronic contracting and e-commerce, generally, unlike the more traditional forms of contracting, does not rely on a specific location in order for a contract to be concluded; rather, it requires merely using software systems and electronic means through the internet or computer networks. Additionally, e-commerce does not require face-to-face or physical presence of the contractual parties; it depends only on their computer-generated attendance. With these features and others, many new types of contract have appeared or been created in e-commerce that have not been developed during the era of ordinary contracts, such as web-hosting contracts, downloading or developing software systems contracts, and insurance against internet liability.[1]

One of the main features of electronic contracts is the environment in which they are concluded, which is not limited to state borders. In fact, the environment is a shared platform between individuals, firms, and states around the world. Therefore, contracting through this virtual world is often tinged with internationality. The international element, however, is not always necessarily present in e-commerce; for instance, if a contract is concluded between two parties who are both domiciled in the same state and the contract is performed in its entirety in the same state. In such a situation, the contract does not include an international element even though it has been concluded through e-commerce and part of the electronic means involved in the transaction formation are located in a foreign country. On the other hand, if the same contract concluded between the same parties has to be performed in a different country, the contract then includes an international element. The weight and, consequently, the importance of the international element in contracts of e-commerce vary. It is more significant when the parties are in different states and the contract involves the delivery of goods or services across state borders.

[1] Bruke T. Ward, Janice C. Sipior and Linda Volonino, Internet Jurisdiction for E-commerce, *Journal of Internet Commerce*, Vol. 15 (2016) p.14.

The appearance of the international element in e-commerce, which links contracts with more than one jurisdiction, has also raised the question of which shall be the applicable law of e-commerce contracts.[2] It is important, in this context, to address the difficulty in setting one method that determines the internationality of electronic contracts. There are many different perspectives through which a contract could be seen as an international contract; for example, it could be from the parties' residence perspectives, or the place where the contract is performed or is to be performed. However, the classification of the internationality of the contract does not solely depend on the parties' intentions.[3]

According to the classic approach in determining the internationality of a contract, the contract is considered international if one of the contract elements has taken an international hue.[4] Hence, according to this approach, for example, if a contract is between a party who holds Kuwaiti nationality and another party who holds Emirati nationality, but both parties are domiciled in the UAE and the contract is only performed in the UAE, the contract can still be considered an international contract. It seems obvious that this approach of categorising a contract as international is objectionable as it equalises different contractual connections regardless of their importance, considering the fact that the approach merely focuses on whether the foreign element exists in the contract, regardless of its importance.

A different approach is to analyse the circumstances of the contract as a method aimed at identifying the significance of the foreign element.[5] This approach suggests identifying and weighting the foreign element in order to decide whether the contract is considered international or domestic. For instance, by returning to the previous example, according to this approach, the contract would not be considered to fall within the international scope, although one of the parties holds foreign nationality, because the parties reside in the same country where the contract was made and is to be performed. The difference in nationalities of the parties does not have a substantial

[2] Jan-Jaap Kuipers, *EU Law and Private International Law: the interrelationship in contractual obligations*, (Leiden, Martinus Nijhoff Publshers, 2012), at 2.
[3] Mohammed Ukasha, قانون المعاملات المصرفية الدولية (Tr) *The Law of International Banking Transactions* (Publisher: دار المطبوعات الجامعية Dar Al-Matboaat Al-Jamiaa, Alexandria) 1994, p.76.
[4] Ahmed Al-Shuqeri, Modern Approaches in the Law Governing International Contracts, *Egyptian Journal of International Law*, Vol. 1, 1965, p.75.
[5] *Ibid*.

influence considering that the parties' domiciles and the place of performance fall within the jurisdiction of a single state.[6] There are elements deserving of greater weighting such as: whether the parties are actually located in different countries; whether the contract is entered into in a different country from that of at least one of the parties; whether payment or performance of the contract is to be made in a different country. These are all more significant than the difference in the nationalities of the parties, though even that may be significant in appropriate circumstances.

The approaches that determine whether a contract is international have usually been examined in the context of traditional or rather offline contracts. Thus, the question here is whether these approaches could sufficiently determine the international element in e-commerce contracts. It is claimed by some authors that, in the first approach, the international element cannot be excluded from e-commerce because the nature of e-commerce tends to blur national boundaries between the contracting parties in these transactions, and especially in terms of the infrastructural framework underlying e-commerce, which facilities the accessibility of information and trade internationally; on these grounds, internationality is an integral part of e-commerce and, consequently, the international element is embraced by all e-commerce transactions.[7]

In response to the approach, there are still some exceptions and reservations to this general feature of e-commerce, considering the fact that it is possible to exclude some e-commerce contracts from the international scope of e-commerce; for example, if an online service provider or seller of goods provides their offers exclusively to a certain country in which they are domiciled. In this situation, these contracts are related to one country, even if part of the electronic means used in forming these contracts is located in another country, because this factor is not significant compared with the other factors that refer the transaction to the domestic level. Hence, it seems appropriate to limit such transactions within the domestic scope rather than the international. On this basis, the private international law rules concerning choice of law or jurisdiction would not be involved in the disputes arising from these online

[6] Hisham Ali, القانون الواجب التطبيق في عقود التجارة الدولية (Tr) *The Applicable Law on International Commercial Contracts* (Publisher: دار الفكر الجامعي (Tr) Dar Alfikr AlJamiei, Alexandria) 2001, p.76.
[7] Saleh Al-Minzlawi, القانون الواجب التطبيق على العقود الالكترونية (Tr) *Applicable Law on E-Commerce Contracts*, (Publisher: دار الجامعة الجديدة, Alexandria) 2008, p.80.

contracts. On the other hand, if a seller or service provider has not limited his commercial activities to a certain state, in this case, the contract falls within the international scope, which consequently requires the application of private international laws to determine jurisdiction or the applicable law to these activities. Accordingly, the existence of the international element in online transactions raises an important question in the field of private international law; that of how to determine the applicable law to these electronic contracts.

In this context, the present chapter will examine, firstly, the applicable provisions of the GCC member states in relation to choice of law in B2B transactions, and secondly, the relevant rules to determine applicable law to B2C contracts in e-commerce. In order to examine the applicable provisions to determine the law applicable to e-commerce, it is important to draw attention at this juncture to the fact that none of the member states of the GCC have promulgated legislation that specifically focuses on these private international law issues in the specific context of e-commerce, although all of them have enacted laws that recognise e-commerce. Even the GCC as an organisation has not so far promulgated any legislation that deals with private international law issues in e-commerce; although, according to the General Secretariat of the GCC, it is currently preparing a bill on e-commerce.[8]

Considering that the UAE and the GCC countries currently lack appropriate provisions governing the issue of applicable law in civil and commercial transactions and e-commerce, this legislative gap will be filled by the application of the general provisions of private international law that exist under the legislation of the UAE and the member states of the GCC. Accordingly, while the focus of this chapter is to examine choice of law rules in relation to e-commerce, the discussion is necessarily with the technologically-neutral perspective so that the extant rules relate to contractual activity more generally and not e-commerce exclusively. On this basis, the suggested rules in the last chapter of the thesis will aim to replace these general rules, applicable to all civil and commercial transactions including e-commerce; accordingly they will be drawn using technological neutral wording.

[8] The General Secretariat of the GCC website, at: http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/EconomicCooperation/CooperationinTrade/Pages/Achievements.aspx

4.2 The Applicable Law of B2B Transactions

4.2.1 The Applicable Law of B2B in the UAE

The first provision to examine in this context is Article 19 of the Civil Transactions Law of the UAE,[9] which provides that:

> 1- Contractual commitments in form and context shall be governed by the law of the State where the common residence of the contracting parties is located. Should they have different residence, the law of the State where the contract is made shall apply, unless the parties agree otherwise, or the conditions show that another law is to be applied.
>
> 2- However, the law of the location of the real estate is the law to be applied on contracts made in this regard.[10]

Article 19 embraces the measures applicable to ascertain the law applicable to civil and commercial contracts in the case of express, implied choice of law and in the absence of choice of law.

4.2.1.1 Express Choice of Law

There is no grounds to criticise the principle that is upheld by the UAE's legislature in Article 19 of Civil Transactions Law in recognising the parties' autonomy in selecting the law applicable to the contract; however, criticism could be raised towards the procedure the UAE's courts would follow or impose in order to apply the foreign law that is chosen by the contractual parties.

From the concerned party, the courts would require to know who is seeking the application of the chosen foreign law, and to prove this foreign law, through providing appropriate evidence of the provisions of the foreign law to the court in question. [11] This requirement would not be fulfilled through provision of

[9] The Civil Transactions Law is referred to by some authors as 'the UAE Civil Law', see Essam Al Tamimi, *Practical Guide to Litigation in the United Arab Emirates* (Hague, Kluwer Law International, 2003), or also 'the Civil Transactions Act', see Abdulla Al Suboosi, *Choice of Law in Tort: A Comparative Study involving The Laws of the United Arab Emirates and of Other Countries* (PhD Thesis) University of Essex, 2009.

[10] The source of the translation of all the UAE provisions is from the official website of the Ministry of Justice of the UAE, available at: http://www.elaws.gov.ae/ArLegislations.aspx

[11] Dubai Court of Cassation ruling in case no. 467/1995 dated 15/6/1996, and in case no. 24/2005 dated 26/6/2005.

miscellaneous interpretations unrelated to the substance of the foreign law.[12] On the other hand, this requirement would be achieved through submission of official copies of these provisions, translated into the Arabic language.[13] The court would accept a photocopied version of the relevant provisions of the foreign law; however, this would depend on the other party in the dispute not proving that this submitted copy did include different or irrelevant provisions than those contained in the foreign law.[14] Therefore, in the context of e-commerce, it seems possible for the parties to submit an electronic copy of the foreign law provisions provided that this copy refers to a genuine or appropriate source, for instance, an official website, such as the website of the Ministry of Justice or other governmental entities,[15] presenting the electronic version of the law.

Furthermore, the claim that aims to apply the provisions of a foreign law must be brought initially before the Court of First Instance.[16] Thus, the party's request for the application of a foreign law for the first time before the Court of Appeal or second-degree court would not be recognised, based on the reason, which is invoked by the Dubai Court of Cassation, that the other party, who is not seeking the application of the foreign law, was not given an opportunity in the original trial to address/respond to the request for the application of a foreign law.[17] It seems that the Dubai Court of Cassation has restricted the request for the application of a foreign law to be merely submitted before the Court of First Instance; however, the claim can be submitted in any session before the Court of First Instance, without limiting the submission of this

[12] Dubai Court of Cassation ruling in case no. 71/2011 dated 22/11/2011, and case 467/1998 and 11/1999 dated 28/2/1999 cited in Essam Al Tamimi, *supra* note 9, p.30.
[13] Dubai Court of Cassation 467/1998 and 11/1999 dated 28/2/1999 cited in Essam Al Tamimi, *supra* note 9, p.30.
[14] Dubai Court of Cassation ruling in case no. 70/2005 dated 31/10/2005.
[15] One examples of an official websites is the UAE's Ministry of Justice website, which presents the UAE's laws in Arabic and English languages, available at: http://www.elaws.gov.ae/ArLegislations.aspx.
[16] Dubai Court of Cassation ruling in case no. 51/2011 dated 25/10/2011. It is important to distinguish between the claim of applying foreign law (from one party of the dispute) and the allegation to resort the dispute to arbitration (whether from one or both parties of the dispute). Both claims shall be brought before the Court of First Instance. However, the allegation for applying a foreign law could be submitted in session before the latter court, while the challenge of transferring the dispute resolution to arbitration is restricted in the first session before the Court of First Instance.
[17] *Ibid*.

claim during the first session of the case, such as the allegation of resolving the dispute through arbitration.[18]

The approach established by the courts seems logical and reasonable;[19] even in the situation where both parties of the dispute request the application of the foreign law for the first time before the Court of Appeal. Firstly, on the basis that neither party have raised this claim at the first-degree court; secondly, this claim will be imposing undue burden on the courts in which the courts will have to use a foreign law to retry an issue that was already determined under the UAE laws. Thirdly, the parties' late claim to apply the foreign law might create greater controversy when each of them claims different foreign law, and raise questions as to whether the dispute at this juncture should be referred back to the Court of First Instance or be examined by the Court of Appeal?

For these procedures required in order to apply the foreign law provisions by the UAE's courts, some authors propose that the contractual parties who agreed on the choice of a foreign law to govern their contract should resolve their disputes through arbitration instead of submitting their disputes before the courts of the UAE, in order to ensure the application of the chosen law; the arbitration award would be enforced by these courts eventually.[20]

In order to respond to this argument, it is important to identify the reason behind this attitude from the UAE's courts towards foreign law. This attitude from the courts stems from considering that the matter of foreign law is a mere fact;[21] thus, those who hold on to it must substantiate it before the courts.[22] Although dispute resolution

[18] Article 203(5) of the Civil Procedures Law, see chapter 3 of the thesis, 3.2.1 Jurisdiction Rules Concerning B2B Transactions under Present UAE Law.
[19] *Ibid.*
[20] Essam Al Tamimi, *supra* note 9, p.30.
[21] Dubai Court of Cassation ruling in case no. 96/2011 dated 22/11/2011. For general details on the difference between the matter of fact and the matter of law, see Rainer Hausmann, Pleading and Proof of Foreign Law - a Comparative Analysis, *The European Legal Forum*, issue 1 (2008) pp.I-1-I-2.
[22] The treatment of foreign law in such a manner is similar to some extent to those implemented by the English courts. One of the general principals of English civil procedure is that the foreign law must be pleaded and proved by the parties before the English courts. In this context see *Fremoult v Dedire* (1718) 1 P. Wms. 429, Dicey, Morris and Collins, *The Conflict of Laws*, (London, Sweet and Maxweel, 2012) 15th ed, paragraphs 9R-0011 to 9-030. See also Richard Fentiman, *Foreign Law in English Courts* (Oxford, Oxford University Press, 1998) and Sofie Geeroms, *Foreign Law in Civil Litigation* (Oxford, Oxford University Press, 2004).

through arbitration would effectively ensure the application of foreign law, on the other hand, the Dubai Court of Cassation has adopted a semi-positive or rather an encouraging attitude towards proving foreign law, which has prompted some authors to suggest that the Dubai Court of Cassation has transformed its approach to consider foreign law as a law rather than a mere fact.[23]

The Dubai Court of Cassation, in case no. 49 and 50/2000, dated 26/11/2000, has urged the national court to search for the 'objective truth' and not to depend merely on the judicial evidence concerning the foreign law provided by the parties, in order to detect the substance of the foreign law. The court has the right of recourse to all suitable means of legal knowledge to reach the real substance of the foreign law. For example, the court could glean from judgments rendered by the foreign judiciary, once these rulings are presented properly in such a way that the court in question could detect the substance of this law; considering the fact that the national court ultimately applies foreign law when it relies on foreign judgments.[24]

Furthermore, the Dubai Court of Cassation, in another case,[25] held the erroneous application of the law in the Court of Appeal decision, which was based on the interpretation of foreign law and not the law itself, and the court should have sought an accredited version of the foreign law.

The last ruling in this context is held by the Dubai Court of Cassation, in case no. 26/2000, dated 25/6/2000, in which the parties' failure to provide the relevant provisions of foreign law does not equal the non-existence of the foreign law. In fact, the court should initially verify the existence of the foreign law and should not translate the parties' failure to provide it as an excuse to apply the national law, on the basis of Article 28 of the Civil Transactions Law.[26]

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[23] Ukasha Mohammed Mustafa, تنازع القوانين (Tr) *Conflict of laws* (Dubai, Dubai Police Academy, 2006) (Dubai Police Academy, 2006) p.245. It is important to reaffirm in this context that this approach is merely of the Dubai Court of Cassation and does not represent the Federal Supreme Court approach, which still considers foreign law as a matter of fact.

[24] Dubai Court of Cassation ruling in case no. 49 and 50/2000 dated 26/11/2000.

[25] Dubai Court of Cassation case no. 9/2003 dated 19/04/2003.

[26] Article 28 of the Civil Transactions Law provides: "The law of the United Arab State shall apply in case the existence of the governing foreign law cannot be established or its context cannot be delimited".

The court also reaffirmed the principle of non-correlation between the court's convening of court jurisdiction and the application of its national law to the dispute. In other words, the examination of a dispute before the Emirati court does not necessitate the application of the UAE's law.[27] Hence, the court is obliged to apply the choice of law made by the parties or that which is determined according to the default rules of private international law concerning the applicable law to commercial and civil contracts. Furthermore, the court has also held that the application of foreign law would focus on applying internal provisions thereof, without considering its private international law rules, or even whether or not these provisions were referring to the UAE's national law.[28]

Another reason that might be raised or argued for the preference of resolution through arbitration over the Emirati courts is that the courts may frequently challenge or hinder the application of the provisions of foreign law under the pretext of violating Islamic Sharia or public policy and morals according to Article 27 of the Civil Transactions Law.[29] This argument, however, is not appropriate because the rulings of the UAE courts in general, and the Dubai Court of Cassation in particular, have demonstrated and indicated in a number of cases in which the mere infraction of the provisions of the UAE's laws or Islamic Sharia that this does not necessitate the exclusion of applying the foreign law provisions.[30] This reaffirms the narrow scope and limited circumstances in which the UAE's courts would rule out the application of foreign law provisions, and it is not as envisioned by those who might adopt this argument.

The above rulings demonstrate a positive transformation of the Dubai Court of Cassation's approach towards the foreign law matter; still, the parties are required to play an initial role in proving the relevant provisions of foreign law. The court, however, is involved in ensuring the substance of foreign law through all suitable means of legal knowledge.

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[27] Dubai Courts of Cassation ruling in case nos. 244 and 265 /2010 dated 9/11/2010 and case no. 8/2003 dated 19/04/2003.
[28] *Ibid*.
[29] Article 27 of the Civil Transactions Law will be examined in detail under subsection 5.2.1.4: Reservations and Limitations on the Choice of Law.
[30] These decisions of the Dubai Courts of Cassation will be examined in subsection 5.2.1.4: Reservations and Limitations on the Choice of Law.

Article 19 has not stipulated a writing requirement or any specific formality for the parties' express choice of law in order to recognise their choice before the national courts. Therefore, the parties' agreement on choice of law through electronic means will be sufficient, and even unwritten agreement of the law governing the contract will be effective. For example, an oral agreement concluded via telephone between the contracting parties will suffice to meet this requirement. In the situation in which the Emirati court has made the decision to apply a foreign law, based on Article 19, the court will focus on applying the domestic law of the foreign state, regardless of the private international law provisions adopted by the latter country.[31]

On the other hand, there are essential matters that have not been addressed by Article 19 of the Civil Transactions Law. The first matter is whether there should be a connection or link between the law chosen by the parties and the contract. Secondly, Article 19 has not stipulated whether the parties are permitted to make changes to their choice of law at any time. Finally, the rule is also silent with respect to the parties' freedom to choose more than one law applicable to the contract.

4.2.1.1.1 A Connection Between the Online Transaction and the Chosen Law

Article 19 of the Civil Transactions Law does not specify any connection required between the law chosen by the parties and their contract. On this basis, it seems appropriate that the Emirati court should not lay down a condition to application of the chosen law that the chosen law should have a connection to the contract. Another basis for the Emirati court to adopt this approach could be through referring to Article 23 of the Civil Transactions Law, which provides that: "Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles, regarding cases of conflict of laws".[32] Accordingly, the Emirati court can rely on Article 23 to refer to the prevailing principles of private

[31] According to Article 26 of the Civil Transactions Law, which states: "1- should the governing law be a foreign one, its domestic provisions hall be applied, to the exclusion of the private international law provisions". This provision echoes Article 27 of the Omani Civil Transaction Law, Article 37 of the Qatari Civil Law, and Article 72 of the Kuwaiti Law on Contractual Relations that have Foreign Element.

[32] Article 23 of the Civil Transactions Law echoes Article 34 of the Qatari Civil Law, Article 25 of the Civil Transactions Law of Oman, Article 69 of the Kuwaiti Law on Contractual Relations that have Foreign Element.

international law in the absence of an express provision with regard to conflict of laws.[33]

Neither the wording of Article 23 nor the Explanatory Memo of the Civil Transactions Law provides an explanation of how the court would identify these prevailing principles. Perhaps this is one of the main criticisms of this approach. However, this criticism could be countered through the forthcoming principles to be adopted by the Federal Supreme Court and the Dubai Court of Cassation with regard to Article 23 of the Civil Transactions Law.[34] The reference to the prevailing principles of private international law under Article 23 is not limited to a specific source of principles; thus, the UAE courts could examine the prevailing approach adopted by the Arab countries, most of which follow a similar approach, or refer to the predominant approach of private international law in Europe or that adopted by the European Union, considering that EU legislations prevail in most European countries.

Furthermore, on the same provision, the UAE's courts could also refer to international treaties such as the Hague Conventions,[35] which are considered one of the main resources or reflections of private international law; for instance, the Hague Principles on Choice of Law in International Commercial Contracts,[36] or the Hague Convention of 1986 on the Law Applicable to Contracts for International Sale of Goods.[37]

However, the question that arises here is that of whether it is essential for the court to require a connection between the contract and the law chosen by the parties, particularly with respect to e-commerce transactions between businesses. For

[33] See Dubai Court of Cassation ruling in case no. 24/2005 on 26/6/2005. (In this case, the Dubai Court confirmed the application of Article 23 of the Civil Transactions Law in matters concerning personal status, such as the applicable law in matters relating to nursery, in which the Civil Transactions Law has not provided an express rule.)
[34] Still, none of those principles are adopted by these courts concerning how to identify the prevailing principles of private international law according to Article 23.
[35] Hague Conventions available at: http://www.hcch.net/index_en.php?act=conventions.listing.
[36] Hague Principles on Choice of Law in International Commercial Contracts approved on 19 March 2015, available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=135.
[37] The Hague Convention of 22 December 1986 on the Applicable Law to Contracts for the International Sale of Goods, available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=61. Article 7 thereof provides: "(1) A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract".

instance, if an Emirati firm bought a software system through the internet from a German company, and the parties agreed on French law as the law governing the contract and of any dispute arising therefrom, if the German firm brings proceedings before the competent court in the UAE against the Emirati merchant, the court would determine the applicable law according to Article 19 of the Civil Transactions Law. In this respect, it seems appropriate to recognise the parties' choice of law without considering or requiring a connection between the chosen law and the e-contract, or even imposing any restriction on their choice except in the case of contradiction with public policy, or if this choice was not made in good faith.[38]

When considering the law applicable to international contracts, it is important from certainty and predictability perspectives to rely on the law chosen by the parties; this reassures the certainty of the parties' primary contractual arrangement.[39] It also seems essential and appropriate to recognise the parties' choice of law in e-commerce transactions because, in addition to recognising the parties' autonomy, this would avoid uncertainty in the determination of the law applicable to these contracts because of the nature of e-commerce, which usually connects a single transaction with more than one jurisdiction. On this basis, the recognition of the parties' autonomy, which falls within the determination of the law applicable to the e-commerce transactions, seems important to prioritise among the other forms of international contracts that are concluded outside of e-commerce, even if this choice of law is irrelevant to the contract, provided that this choice was not contrary to public policy.

4.2.1.1.2 Modifying the Chosen Law

The second missing issue under Article 19 of the Civil Transactions Law is whether the parties are allowed to modify the chosen law of the contract. Given the absence of governing provisions of such matters under the Civil Transactions Law, it seems possible, according to Article 23 of the Civil Transactions Law, for the court to search for a method from the prevailing approaches of private international law. In

[38] Such an approach echoes that adopted by the Common Law. In this context, Lakshman Maraisnghe states that "In modern law, the courts have recognized the right of the parties to choose any system of law, whether or not it has any connection with the substance of the contract. This is subject to the general requirement that the express choice made shall not violate public policy, and is both legal and made in good faith", *Principles of International Trade Law* (Singapore, Butterworth Asia, 1998) p.16.
[39] Commentary 1.3 of the Hague Principles on Choice of Law in International Commercial Contracts, *supra* note 37.

this context, the Emirati court could examine the approach provided by the Hague Conventions,[40] or the approach adopted by the European Union that allows the contractual parties to change the chosen law if it does not negatively affect the rights of third parties and does not affect the validity of the contract.[41] Generally, since the contractual parties have the freedom to select the applicable law for the contract, they are free to change their choice at any time, whether prior to or subsequent to the conclusion of the contract, provided that this change of the applicable law does not affect other relevant parties' rights or the formal validity of the contract.

The next issue worth investigating under Article 19 of the Civil Transactions Law is whether it limits the parties' freedom to choose a state's law or permits the parties to select a non-state law. In order to examine this matter, it is important to focus on the wording of Article 19. The first part of Article 19(1) states: "… the law of the State of the joint domicile … the law of the state in which the contract is made …". This wording may suggest that the Emirati legislature has alluded to or favoured the application of the law of a state, which consequently entails the non-recognition of the parties' choice of non-state laws, such as Sharia Law. This assumption could cause a remarkable or obvious contradiction, considering the status of Sharia Law within the UAE's legislation and particularly in its constitution.[42]

On the other hand, by focusing on the second part of Article 19(1), which states that, "unless the parties agree otherwise, or the conditions show that another law is to be applied", this suggests that the Emirati legislature has permitted the parties to select a non-state law. This assumption or interpretation of Article 19 would lead to the recognition of the parties' choice of Islamic Sharia to govern their contract. The latter assumption seems preferable because it would avoid creating a contradiction if Article 19 limited the parties' choice to the law of a particular country. Limiting the parties' choice of law to the law of a particular country would effectively prohibit the application of Islamic Sharia provisions, which are considered to be a main source of

[40] *Supra* note 36.
[41] This position is adopted under Article 3(1) of the Rome I Regulation No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations.
[42] Article 7 of the permanent constitution of the UAE provides: "Islam is the official religion of the Union. The Islamic Sharia shall be a main source of legislation in the Union. The official language of the Union is Arabic".

UAE legislation according to Article 7 of the Permanent Constitution of the UAE.[43] Furthermore, complying with Islamic Sharia principles is a fundamental requirement in many financing, banking, trading and marketing contracts, which account for a significant percentage of contracts in the UAE economy.[44]

Parties of an international sale of goods contract or loan contract, for example, agree on the choice of law clause, which stipulates that the law of a foreign country shall govern any dispute arising from the contract, provided that the application of that law is subject to Islamic Sharia principles.[45] The contract may also include an exclusive jurisdiction clause referring disputes to the Emirati courts. If a judgment arises from such a contract, it seems that the Emirati courts would not disregard the reference provided under the contract to the principles of Islamic Sharia, on the basis that this reference is decorative or not substantive in the contract. It seems, however, that the UAE's courts would determine the relevant rules from the law chosen by the parties, and examine these provisions from the perspective of Sharia principles. Hence, the result of this procedure could eventually lead to the application of provisions from two different sources to the contract; provisions of the chosen law that complies with Sharia principles, and provisions of Islamic Sharia replacing the chosen law provisions that are contrary to the Sharia principles, considering that the court in question would allow the provisions of Islamic Sharia to prevail over the opposing provisions of the chosen law.

Nevertheless, this process could be fraught with difficulties, especially for judicial authorities or resolution bodies that are not familiar with the provisions of Islamic Sharia;[46] *per contra*, there are solutions to overcome these difficulties. Whenever the contractual parties intend to agree on this type of choice of laws, they would be

[43] *Ibid*.
[44] Furthermore, the economy of the UAE, and Dubai in particular, are focusing on the development of the Islamic economy, which objective is reflected by the establishment of the Dubai Islamic Economy Development Centre (DIEDC), which aims to position Dubai as the Capital of the Islamic Economy. See the website of the DIEDC at: http://www.iedcdubai.ae/page/view/2/about_the_centre.
[45] See Peter Stone, *EU Private International Law: Harmonization of Laws*, (Edward Elgar, Cheltenham, 2006) pp.275-278 (explaining that Sharia principles are generic and independent of their adoption and interpretation in any particular territory), and Olugbenga Bamodu, 'The Rome I Regulation and the relevance of non-State law', P. Stone and Y. Farah (eds.), *Research Handbook on EU Private International Law* (Edward Elgar, Cheltenham, 2015) pp.221-247.
[46] See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, Oxford University Press, 2008) pp.385-387.

advised to choose a judicial authority or alternative resolution body that is familiar with Islamic Sharia principles in order to avoid introducing this choice of law to a court that does not have a proper understanding of these principles or that considers these principles mysterious or strange. Even if the court chosen by the parties is not familiar with Sharia principles, the parties could stipulate under the contract a number of specific provisions from Sharia principles, which could provide appropriate guidance to the chosen court.

Furthermore, based on the second interpretation of the wording of Article 19(1), the Emirati court could apply the parties' choice of the set of legal principles adopted by international organisations under instruments such as the United Nations Convention on Contracts for the International Sale of Goods 1980.[47] The Emirati court would not preclude the application of such choice of law provided that the law's existence and importance could be determined, according to Article 28 of the Civil Transactions Law.[48] Accordingly, if the Emirati court could not establish the existence or connotation of the law chosen by the parties, for instance if the parties had not provided an official and translated transcript of the law chosen or the court found a contradiction between the applicable provisions of the law chosen, then in these circumstances, the Emirati court could dismiss the application of the chosen law and apply its national law. It seems that the burden of proving the existence and significance of the law chosen is on the contractual parties, in order to convince the UAE's courts that the applicable law meets the requirements under Article 28.

4.2.1.1.3 The Application of more than One Chosen Law

The last matter that Article 19 of the Civil Transactions Law has not covered is whether the contracting parties are allowed to select more than one law to govern

[47] The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980, available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

[48] Article 28 provides: "The law of the United Arab State shall apply in case the existence of the governing foreign law cannot be established or its context cannot be delimited", and the Explanatory Memorandum for the Civil Transactions Law provides that: "this article (Article 28) establishes a general provision upon which the UAE's Law is applicable if the proof of the existence of the applicable foreign law could not be established nor its denotations could be determined. This article is derived from the draft of the Unified Arabian Civil Law" (the translation of the Explanatory Memorandum is not official).

their contract. According to the Explanatory Memorandum for the Civil Transactions Law:

> the legislature has addressed the general rule in contractual obligations and different forms of contract and its execution, and at the end of this rule, [the legislator] provided the specific rule which stipulates that the peremptory rules shall be respected to certain extent, while taking into consideration that the jurisprudence of private international law is still unstable in relation to determining the applicable law to contractual obligations, due to the diversity of contract types and the dissimilarity of the rules governing these contracts in terms of the contracts' formation, validity, and effects.
>
> Therefore, the legislature sought to avoid specifics and confine to stable provisions in the scope of the legislation. Accordingly the legislature provided in Article 19 that the contractual obligations to be governed by the parties' explicit or implied choice of law and taking into account the provisions set forth. This is a general provision that recognizes the parties' autonomy and ensures the unity of the law applicable to the contract; a unity that does not allow the (dissection or dismantle) of the contract elements in order to select a law that complies with the nature of each element. It is noted that the legislature has chosen a flexible wording which does not preclude the judiciary from discretion nor prevent the benefit from forthcoming development in the jurisprudence. [49]

Based on the above statements of the Explanatory Memorandum of the Civil Transactions Law, it seems that, on one hand, Article 19 of the law is not directed to apply the parties' choice where this choice subjects their contract to more than one state law. This approach echoes that provided under the Explanatory Memorandum of the Egyptian Civil Law with regard to determining the applicable law to contractual obligations.[50] On the other hand, the Explanatory Memorandum affirms the wide scope of discretion afforded to the UAE's courts in order to keep abreast of the development in the field of private international law. This explanation of Article 19 could put the Emirati court in a contradictory position, when it finds that the doctrine of applying different states' laws to a single contract is considered as one of the general principles of private international law,[51] which contradicts the explanation

[49] Article 19 under the Explanatory Memorandum for the Civil Transactions Law (the translation of the explanatory memorandum is not official).
[50] This is one of the features that indicates the extent to which the Egyptian Civil Law influenced the Emirati Civil Transactions Law, Ukasha Mohammed Mustafa, *supra* note 23, p.723.
[51] There are a number of international conventions and states' legislations have adopted the principle of respecting the parties' choice of law that entails the application of different states' laws on their contract, which affirms that the principle is one of widely and respected principles of private

provided regarding Article 19 under the Explanatory Memorandum. Thus, the court would have to decide whether to adopt the general principle of recognising the parties' agreement on applying different states' laws to different parts of the contract, providing that the application of these laws does not affect the rights of other parties and does not affect the validity of the contract, or to disallow the recognition of such an agreement and apply a single state law to the contract against the parties' autonomy. The preferable option in this context is for the judicial authority to follow the recent developments in private international law, through recognising the parties' choice of more than one state's law, according to Article 23 of the Civil Transactions Law,[52] which directs the Emirati court to search in the prevailing principles of private international law.

Furthermore, it is possible to envisage the doctrine of applying different laws to different parts of a contract from the rules adopted under UAE legislation. For instance, a dispute arising before an Emirati court concerning an e-commerce transaction between an online merchant domiciled in Singapore and an Emirati consumer, provided that the contract includes a choice of law agreement that entails the application of Singaporean laws. Hence, according to Article 19 of the Civil Transactions Law, the court would recognise the choice of law by the parties, which entails the application of the Laws of Singapore in the dispute. However, on the other hand,[53] the court would follow or apply Emirati law, according to Article 11 of the Civil Transactions Law, in order to examine the consumer's capacity in terms of concluding contracts. Accordingly, in this example, the UAE's courts would apply different laws to different elements of the contract, which is contrary to the approach provided by the Explanatory Memorandum with regard to Article 19. Hence, the

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international law; for example, Article 2 (2) of the Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015, and Article 3 (1) of the Rome I Regulation.

[52] This view is also supported by Ukasha Mohammed Mustafa, *supra* note 23, p.724.

[53] Article 11 provides: "1- Civil status and capacity of persons are governed by the law of the State to which they belong by nationality. However, in financial dealings transacted in the State of United Arab Emirates and producing their effects therein, should one of the parties be an incapacitated alien and the reason of his incapacity is not easily detected by the other party, this reason shall not affect his capacity. 2- The legal system related to foreign juridical personalities, such as companies, associations, institutions and others shall be governed by the law of the States where such personalities have the actual headquarters thereof. Should such personalities carry out an activity in the United Arab Emirates States, the national Law shall prevail". Confirming this provision, the Dubai Court of Cassation ruling in case no. 117/2006 on 10/9/2006, the court held that the civil status of foreign persons is governed according to Articles 11 and 16 of the Civil Transactions Law by the law of the state to which they belong by their nationality.

current provisions of the Civil Transactions Law reaffirm the principle of subjecting a single contract to more than one state's law.

Based on the above examination, it seems appropriate and preferable for the UAE's courts to ignore or dismiss the narrow approach provided by the Explanatory Memorandum with regard to Article 19, and to recognise the parties' choice that entails the application of more than one states' laws to different parts of the contract, on the condition that this application is logically severable to different parts of the contract, and does not affect the rights of other parties nor the validity of the contract. The Emirati court could justify the adoption of this approach by referring to the prevailing principles of private international law, according to Article 23 of the Civil Transactions Law. [54] In addition, the Dubai Court of Cassation reaffirms on the effect of the Explanatory Memorandum of the law that it cannot produce or create new provisions in the law which did not exist previously.[55]

4.2.1.2 Implied Choice of Law

Article 19 of the Civil Transactions Law has recognised the implied choice of law by the contractual parties through the circumstances that indicate the parties' implicit choice. The wording of the provision has not guided the UAE's courts towards considering any particular element or condition; in fact, it merely directs the court to consider the circumstances in order to determine the implied choice of law. This flexible wording provided through Article 19 affords the court a wide margin of discretion to determine the tacit choice of the parties. On the other hand, this approach may eventually lead to the court applying a law that is contrary to the contracting parties' intentions and, consequently, affects the judicial certainty and reliability,[56] because Article 19 has not provided a specific method that the Emirati court should follow, besides the diverse contractual elements and circumstances on which the court could rely in its determination of the implied choice of law.

Therefore, in order to avoid such outcomes, it is recommended and seems appropriate for the Emirati courts to consider, on the basis of Article 23 of the Civil Transactions

[54] Ukasha Mohammed Mustafa, *supra* note 23, p.724.
[55] Dubai Court of Cassation case no. 90/2006 dated 13/02/2007.
[56] Ukasha Mohammed Mustafa, *supra* note 23, p.710.

Law, the prevailing principles of private international law that concern the determination of the implied choice. In this context, the court could follow the principle adopted by the EU under Article 3(1) of the Rome I Regulation,[57] which provides that the implied choice of the parties is applied when an implied choice of law is clearly demonstrated by the terms of the contract or the circumstances of the case.[58] The Emirati courts could also consider the approaches adopted by the Hague Conventions that determine the implied choice of law in different types of contract;[59] for example, Article 4 of the Hague Principles on Choice of Law in International Commercial Contracts relies on the clear or obvious appearance of the tacit choice from the terms and conditions of the contract or the circumstances.[60]

Furthermore, on the same basis of Article 23, the UAE's courts shall rely on the prevailing approaches of private international law in considering or examining specific circumstances and contractual conditions in the process of identifying the implied choice of law; for example, in the case of an exclusive jurisdiction clause in the contract, and in a situation in which an electronic transaction is formed in a particular standard, which is widely known to be subject to a specific set of laws and its parties have not referred expressly to these laws to govern their contract.

It seems that Article 19 does not restrict the Emirati courts on the criteria through which the court will determine the implied choice of law; thus, this determination could be based on the contract provisions or its circumstances. Hence, the court could determine the tacit choice of whether there are clear or unclear circumstances or elements, according to Article 19 and its Explanatory Memorandum, which has not provided any guidelines or examples in this context. This issue does not clarify to the court where the tacit choice of law could be determined and where this choice is absent.

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[57] Article 3(1) of the Rome I Regulation.
[58] This suggestion echoes also that provided by Ukasha, who recommends, by referring to Article 23, the inclusion of a restriction that entails the recognition of the parties' implied choice of law when their intention appears definitely from the contractual circumstances or its conditions, Ukasha Mohammed Mustafa, *supra* note 23, p.710.
[59] *Supra* note 36.
[60] Article 4 of the Hague Principles on Choice of Law in International Commercial Contracts provides: "A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law".

Considering the absence of criteria that draw a line between the absence of choice of law and the tacit choice of law, it seems appropriate for the Emirati court to examine the prevailing principles of private international law, based on Article 23, prior to applying the measures that determine the law applicable in the absence of choice of law. On this basis, the court could rely on criteria that require the availability of a clear choice from the circumstances or the provisions of the contract, in order to apply this implied choice of law. This approach would eliminate the considerable difficulty of ascertaining the implied choice of the parties and would encourage the court to apply the law that meets the contracting parties' expectations.

Article 23

There are essential questions that would arise concerning the application of Article 23 of the Civil Transactions Law, specifically, how the court would determine the relevant prevailing principles of private international law to a dispute, the sources of those principles, and, finally, how those principles would be applied to the disputes. This also raises the question of the extent to which those principles would be implemented, and whether those principles would be followed according to the legal systems that adopted them or according to the combination of legal systems and their judicial decisions that adopted and implemented those principles, respectively. Without a doubt, the application of Article 23 of the Civil Transactions Law by the UAE's courts holds the answers to these questions, which have still not appeared from the case law of the UAE's courts.

4.2.1.3 The Absence of Choice of Law

Discussing the issue of determining the law applicable to contractual obligations entails investigating the absence of the parties' choice of law. Following the above review of Article 19 in terms of the determination of the implied choice of law, which indicated and emphasised the absence of a clear principle or measure that separates the implied choice of law and the absence of express or tacit choice of law, this assumes that the Emirati court has followed one of the prevailing principles of

private international law, according to Article 23 of the Civil Transactions Law,[61] which determines the implied choice of law on the condition that there is a clear indication from the provisions and circumstances of the contract. The UAE court could not indicate, based on this assumption, a clear tacit choice of law; hence, in this context, the court would follow the rules under Article 19 with regard to the absence of explicit or implicit choice of law, in order to determine the applicable law.

Article 19 of the Civil Transactions Law provides two measures aimed at determining the applicable law in the absence of choice of law. The first rule directs the UAE's courts to apply the law of the country in which both contracting parties are domiciled, while the second measure entails the application of the law of the country in which the contract is made in the case where the parties are domiciled in different countries.

The first criterion relies on the assumption that the parties of the contract are domiciled in the same country; thus, on these grounds, the provision applies the law of that country to the contract, assuming that that state's law is more closly connected to the contract. It seems, however, that the applicability of this rule is very limited and it would not find the merchantability to apply to most electronic transactions, because usually or normally the parties of international contracts, particularly those concluded through e-commerce, are not domiciled in the same country. Furthermore, even if this element is fulfilled or present in an international contract, it does not necessarily imply or entail that the law of the country in which both parties are domiciled is the most closely connected to the contract, whereas a different state in which the contract is conducted or to be performed could be more connected to the contract than the country in which the parties are domiciled. In fact, the joint domicile of the contractual parties mostly appears in domestic contracts; hence, this rule does not adequately determine the applicable law to international and electronic transactions in the absence of choice of law.

The second measure in the context of Article 19 of the Civil Transactions law, which is applicable in the case where parties of the contract are not domiciled in the same state, directs the UAE's courts to apply the law of the country where the contract is

[61] Article 23 of the Civil Transactions Law allows the Emirati court to consider the prevailing approaches of private international law in the absence of rule in relation to conflict of laws.

made. In the context of forming a contract electronically, the UAE's E-Commerce and Transactions Law deems a contract to be concluded upon an offer or acceptance, whether in whole or in part, by electronic means,[62] or a contract to be formed by the interaction of an automated electronic system.[63] The provision under Article 19 also does not seem to be instructive particularly with respect to its implementation in international civil and commercial contracts in general and e-commerce in particular. The most appropriate scenarios to apply this provision could be with regard to ordinary international contracts, which have identifiable location of conclusion. Furthermore, the place of conclusion of the contract is deemed to be significant and is to be considered in determining the applicable law to typical or traditional forms of contract, in which the parties meet in a particular place (sometimes before a notary), in order to put the contract into a proper form.[64] Hence, in such situations, it seems reasonable to apply the law of the place in which the contract is made or concluded.[65]

On the other hand, it does not seem appropriate or realistic to apply this single template or method to all types of international contract, considering that each type of contract has particular contractual links between the parties that refer the contract to a specific legal system from other legal systems, which could be to some extent related to the contract. The rules provided under Article 19 of the Civil Transactions Law in relation to the absence of choice of law are limited to two methods and they do not comply with the diversity of contracts, particularly with those concluded through electronic means. In fact, when contracting through the internet, the place of the transaction concluded does not have particular weight or significance in the contractual relationship between the parties. Consequently, the reference to the law of

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[62] Article 11 of the UAE's E-Commerce and Transactions Law states: "1- For contracts purposes, it is allowed to express the offer and acceptance in whole or in part through the electronic message.
2- The contract may not be denied its validity or enforceability solely because it is concluded in one or several electronic messages".

[63] Article 12 of the UAE's E-Commerce and Transactions Law provides: "1- It is allowed to conclude contracts between confidential electronic mediums that include two or several electronic information systems, designed and programmed in advance to perform so, the agreement shall be deemed valid, enforceable and giving its legal effects even in the instance of no personal or direct interference of any physical person in the contract conclusion in the systems.
2- It is allowed to conclude contracts between a confidential electronic information system in the possession of physical or juristic person and another physical person, should this latter knows or supposed to know that the system shall conclude the contract automatically".

[64] In the context of discussing the criterion of the location of contract conclusion as a ground for jurisdiction or choice of law. Dan Jerker and Börje Svantesson, *Private International Law and the Internet* (Kluwer Law International, Netherlands, 2012) 2nd ed, p.329.

[65] *Ibid*.

the place in which these transactions is formed would lead to the application of less relevant laws to these transactions. On the other hand, it is suggested that the approach of applying the law of the country in which the electronic contract is formed could be justified for a limited situation which entails both contractual parties being "knowingly present at the same location when the electronic transaction is formed".[66] The occurrence of this scenario, despite its rarity, is possible through technological solutions, such as Global Positioning Systems (GPS); however, this does not suffice to implement this approach for all electronic transactions. Furthermore, ascertaining the place of e-contract formation would not prioritise over the importance of knowing the place of domicile of the parties, considering the fact that the place of the parties' domicile is an important element in e-contracts, while the location of those parties when concluding the electronic transaction is far less important. It could be said that the above method could be considered as a tool to find actuality or realism or rather the reality of applying the place of contract conclusion in the e-commerce environment.

For instance, a sale of goods performed online between representatives of two companies in the UAE between a company from Saudi Arabia and an Omani merchant, for which the contract entails delivering the goods to Saudi Arabia by the Omani firm. We assume that a dispute arises before an Emirati court between the parties with regard to this contract and that the parties have not chosen a law applicable to their contract; in addition, that there is not an implied choice of law that appears from the provisions or circumstances of the contract. Based on these factors, the UAE courts will apply, according to Article 19 of the Civil Transactions Law, the Emirati law as the law of the place where the contract is formed. One of the main implications of this approach is that the court has disregarded other significant elements of the contract, which could lead, if they were considered, to the application of the law of a state, which is more significant and relevant, other than the state in which the contract is concluded. Moreover, this measure deviates the court from considering the weight of each party's obligations and commitments under the contract, which could also guide the court in question to apply the law of the state in

[66] Dan Jerker and Börje Svantesson, supra note 64, at 330.

which the party, whose performance is principal or characteristic in the contract,[67] is domiciled. Accordingly, by applying the latter approach in the earlier example, the UAE's court would apply the law of the Sultanate of Oman since it is the country in which the seller is domiciled, and whose performance is considered principal in the contract.

The above example indicates the unsuitability of applying the law of the state in which the ordinary contract is made, which is rather more apparent and sensible today, not least due to the prevalence of the internet.[68] Therefore, it does not provide proper certainty to the parties' expectations in the absence of choice of law, because the element where the contract is concluded does not have or match the significance of other elements in international contracts. Furthermore, this template (of applying the law of states in which the contract is made) does not suit the current diversity of international contracts and especially electronic contracts, considering the fact that there are many different types of such transaction, which consequently require different approaches in determining the applicable law in the absence of the parties' choice of law. In addition, the place in which an electronic contract is said to be made may be purely fortuitous and mechanical, not necessarily being a matter of considered thought by the parties, or may just result from legal rules that simply presume the place of the making of the contract.

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[67] In brief [how the characteristic performance could be determined], the determination of the "characteristic performance" in a contract could be referred to the performance of the act by which payment is made (this approach was adopted previously in the Rome Convention under Article 4 thereof). See, in this context, the Report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde (OJ 1980 No C282/1) at p.20. Rome I Regulation, the successor of the Rome Convection, has also adopted default rules under Article 4(1) thereof, which are applicable in the absence of choice of law, depending on the characteristics of the parties or the object of the transaction. In the case that a contract is not covered by the latter default rules, or a contract is covered by more than one provision thereof/of Article 4(1), Article 4(2) entails determining the applicable law by referring to the country in which the party required to effect the characteristic performance has his or her habitual residence. Identifying the characteristic performance is based on functional analysis of the contract's provisions, obligations and circumstances in order to identify the party who effects characteristic socio-economic performance. Ivana Kunda and Carlos Manuel, *Practical Handbook on European Private International Law*, 2010, p.14, available at: http://ec.europa.eu/justice/civil/files/practical_handbook_eu_international_law_en.pdf.
[the assessment of the socio-economic function of the contract in a certain legal system' in order to identify the contractual obligation distinguishing that contract from other contracts] [further analyses in this context will provided in Chapter Six of the thesis, which will focus on the European Union provisions with regard to jurisdiction and applicable law to e-commerce].

[68] In the context of discussion, see Dan Jerker and Börje Svantesson, supra note 64, at 330.

Considering the inappropriateness of applying the law of the state in which the contract is made to contracts concluded outside the scope of e-commerce, this feature appears more clearly when this approach is applied to e-commerce transactions. Considering the form and process in which e-commerce contracts are concluded, the Emirati courts will face a tough task in determining the place in which the electronic contract is concluded, because the conclusion of electronic transactions usually occurs through electronic means located in different locations or territories. In addition, there are diverse types of online transaction; in fact, the most common of these transactions are those formed between systematic websites and persons.

Indeed, determining the location of the electronic contract conclusion could possibly be a complicated mission. On the other hand, there are some possible situations or circumstances, albeit rare, in which this tough task could be easy for the court. There is one possible scenario in which the contracting parties agree on specifying a location in which the e-contract is deemed to be formed. Accordingly, the Emirati court could find that this term simplifies the task of searching or determining the location of contract formation; however, the contractual parties could also agree on specifying another location in which the contract is considered as being executed or performed. Hence, in these circumstances, the question that may arise is on which grounds the Emirati court would determine the choice of law or the law applicable to such an electronic contract. In a straightforward scenario, or rather the most likely one, the court would apply or follow the measures of Article 19, through applying the law of the country in which the e-contract is deemed to be concluded based on the parties' agreement. On the other hand, the preferable option would be if the court would apply the law of the country in which the e-contract is performed according to the parties' agreement.

Assuming that the parties of the earlier electronic transaction have agreed merely on specifying the place of performance under the contract, in this context the Emirati court would investigate or search for the place of contract conclusion or would refer to the place in which the contract is performed according to the parties' agreement. There are many possibilities concerning how the Emirati court in question would handle this matter and which method it would follow in this resolution, due to the absence of specific and appropriate provisions governing such circumstances under

the UAE laws. This, accordingly, indicates the lack of certainty and predictability, which necessitates the adoption of appropriate rules in relation to electronic transactions by the UAE in order to govern this matter with more clarity through the courts and to provide foreseeability to the contractual parties on the approach or method that the Emirati court would adopt in this context.

The first possible approach – that the UAE's courts would refer to Article 23 of the Civil Transactions Law – considers that the determination of the place of electronic contract formation is not possible. Thus, the court could pick, from the prevailing principles of private international law, the approach that refers the matter in question to the law of the country in which the characteristic performer is domiciled. Obviously, the source from which the Emirati court takes this approach could be EU legislation, namely the Rome I Regulation.

The second possibility could be when the Emirati court disregards the difficulty of determining the place of electronic contract conclusion through upholding the approach that the place of contract formation through the internet is deemed to be the place of domicile of one of the contractual parties, considering that this place is where the offeror (regardless of the location of the electronic means that used or facilitated conclusion of the electronic transaction). Although this approach could be useful to some extent, it could affect the party with the characteristic obligations under the contract, and refer the contract to the law of the country other than that in which the characteristic performer is domiciled.

Thus, in order to avoid investigating the place in which such contract is made in cyberspace, it seems appropriate to refer in this respect to the prevailing principles of private international law, according to Article 23. From these prevailing approaches, the Emirati court could rely, for instance, on the principle of the closest connection,[69] which entails applying the law of the state with the closest connection to the contract. However, the process of relying on Article 23 of the Civil Transactions Law (the best

[69] This approach has been adopted, for instance, by the Common Law, (which was applicable by the English Courts prior to the enforcement of the Rome Convention and the Rome I Regulation; however, the Common Law approach is still applicable in Australia and Hong Kong), and by the United States Restatement (Second) of Conflict of Laws under section 188. While the Rome I Regulation adopted the approach of the most closely connected law to the contract, its role appears at the end of the mechanism under Article 4 for determining the applicable law in the absence of choice of law.

of the present provisions, besides the effort of the Emirati court in seeking to determine the applicable law) would reflect the positive intention and effort of the Emirati courts in seeking an appropriate approach in determining the applicable law.

It seems vital to introduce new appropriate provisions or amendments to Article 19 of the Civil Transactions Law, which could provide the Emirati courts with reliable measures or tools to apply to determine the law applicable in the absence of express or implied choice of law in international contracts, and, more importantly, to customise these new measures to be compatible with sale of goods and provision of services contracts in e-commerce. It seems proper for the UAE to promulgate new legislation aimed at governing the subject of conflict of laws.

Under the present provisions, the Emirati courts seem to refer, in cases concerning the absence of choice of law in e-commerce transactions, to the escape mechanism under Article 23 of the Civil Transactions Law, which directs the court to refer to the prevailing principles of private international law. This is an objectionable method because it does not provide appropriate certainty to the parties towards the rulings the Emirati court would deliver, and on which conflict of law principles the court would rely or depend in making its decision in the dispute. These measures could create obstacles and deter merchants and businesses who wish to settle their contractual disputes before the UAE's courts, because these provisions do not provide the required level of certainty and clarity as to the law applicable and predictability of the outcome of litigation, which are essential and preferred by businesses.

Some scholars suggest that the principle of applying multiple states' laws to different elements of the contract does not seem appropriate in the case of absence of choice of law,[70] considering that the rules under Article 19 determining the law applicable in the absence of choice of law, namely the measures that entail the application of the law of the country in which both parties are domiciled or the law of the country in which the contract was made in cases in which the parties are domiciled in different states, are directed or aimed at applying one state's laws.[71] This view could be justified on the basis that searching for an applicable law for each part of the contract

[70] In contrary to this approach see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728
[71] Ukasha Mohammed Mustafa, *supra* note 23, p.724.

is a very complicated procedure for the court in question and will usually lead to conflicted outcomes. In addition, the absence of the choice of law is usually accompanied by the condition that the contact in question is connected to a number of states and the circumstances do not indicate a preference for a specific state over the other related states.

Thus, the doctrine of splitting the contract by different states' laws does not seem appropriate in the absence of choice of law; however, this does not necessarily preclude the Emirati court from applying the law of a state to a particular part of the contract on the basis of the law of the state which has been referred to according to the measures determining the law applicable in the absence of choice of law. An example of this could be when the UAE's court applies Qatari laws that are identified as the applicable law in a consumer contract through the application of measures under Article 19 of the Civil Transactions Law that concern the absence of choice of law. Subsequently, the Qatari provisions in question refer to the application of the Consumer Rights Law of Kuwait in which the consumer is domiciled. Thus, in this example, the Emirati court would apply Qatari laws to most parts of the contract, except the parts that are governed or protected by Kuwaiti Consumer Rights Law.

4.2.1.4 Reservations and Limitations on the Choice of Law

Article 27 of the Civil Transactions Law provides the first reservation on applying foreign law, whether chosen by the parties or determined through the default rules, which states that: "the provisions of the law indicated by the foregoing provisions may not be applied in case they are contrary to the Islamic Sharia, public policy or morals in the United Arab Emirates State". [72] Thus, in order to apply the provisions of foreign law, which are determined according to Article 19 or Article 23 of the Civil Transactions Law, these provisions shall not be contrary to Islamic Sharia, public policy or morals in the United Arab Emirates. It is necessary at this point to examine two questions. First, what is the concept of public policy under Article 27 of the Civil Transactions Law? Second, what is the impact of Article 27 on

[72] This rule corresponds to Article 28 of the Omani Civil Transactions Law, while Article 38 of the Qatari Civil Law and Article 73 of Kuwaiti Law on Contractual Relations that have Foreign Element have adopted a similar approach, though without mentioning Islamic Sharia in their provisions.

the application of the chosen law, in the case that some of its provisions have violated or been proven to violate Islamic Sharia, public policy or morals?

Ascertaining the precise concept, contents and scope of public policy is described as almost "mission impossible",[73] because public policy is a notion that represents the essential foundations and morals of a society at a certain time.[74] Thus, what is considered contrary to public policy at a particular time or in a particular country can be inconsistent with the public policy in a different time or state.[75] Hence, the notion of public policy is variable and cannot be determined adequately. The focus here, however, is on examining the contents of public policy under Article 27 of the Civil Transactions Law, and particularly investigating whether public policy is comprehensive to Islamic Sharia, which accordingly raises the suggestion of mentioning merely public policy in Article 27 on the grounds that this term sufficiently embraces Islamic Sharia. Article 3 of the Civil Transactions Law has identified some of the contents that fall within the concept of public policy,[76] stating that:

> Shall be considered of public policy, provisions relating to personal status, such as marriage, inheritance, lineage, provisions relating to systems of governance, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based, provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Sharia.

Without a doubt, the public policy doctrine plays a fundamental role in the sphere of private international law,[77] namely in the exclusion of applying a foreign law's provisions that are contradictory, whether this law is chosen by the contractual parties or referred to through the conflict of law provisions. This exceptional effect distinguishes the role of public policy in private international law from its effect

[73] Westlake, *Private International Law* (London, Sweet and Maxwell, 1925) p.51, provides: "no attempt to define the limits of that reservation has ever succeeded", cited in David Mcclean and Veronica Ruiz Abou-Nigm, *Morris on the Conflict of Laws* (London, Sweet and Maxwell, 2012) 8th edition, p.49.
[74] Hisham Sadiq and Hafiza Al-hadad, الموجز في القانون الدولي الخاص (Tr) *Digest in Private International Law* (Publisher: دار المطبوعات الجامعية (Pronounced) Dar Almatbueat AlJamieia, Alexandria, 2015) p.150.
[75] *Ibid*.
[76] Dubai Court of Cassation ruling in case no. 36/2008 on 23/9/2008.
[77] David Mcclean and Veronica Ruiz Abou-Nigm, *supra* note 73,p.49.

within the national laws that aim at maintaining the enforceability of the peremptory rules regardless of the parties' autonomy.[78]

Some academics recommend limiting or shortening the wording of Article 27 of the Civil Transactions Law to refer merely to public policy without the need to mention Islamic Sharia, on the basis that Islamic Sharia is embraced within public policy.[79] Based on this approach, the term *public policy* is claimed to be more comprehensive and could provide greater certainty. Although the reasoning of this approach, to some extent, is correct, considering that many aspects of the public policy and morals of the UAE are influenced by or established according to the principles of Islamic Sharia, on the other hand, the mention of Islamic Sharia in Article 27 of the Civil Transactions Law, firstly, reflects the importance of Islamic Sharia in the UAE.[80] Secondly, its inclusion in Article 27 serves the objective of the provision and it is consistent with Article 3 of the Civil Transactions Law, which provides the condition of public policy provisions to comply with "the imperative provisions and fundamental principles of the Islamic Sharia". In addition, the statement in Article 3 does not indicate that those principles of Islamic Sharia are considered under the concept of public policy; in fact, it considers those principles as a regulating or governing tool to the provisions that fall within the concept of public policy. Thus, from the legislation part, the wording of Islamic Sharia under Article 27 is instructive and serves the legislature's objective.

Furthermore, the judicial approach with regard to Article 27 also reaffirms the significance of mentioning Islamic Sharia under Article 27 of the Civil Transactions Law. In a ruling held by the Dubai Court of Cassation, the court ruled the inapplicability of foreign law provisions considering that, first, these foreign provisions violated the provisions of Islamic Sharia according to Article 27, and second, the provisions of Islamic Sharia are applicable in this case.[81] It should be noted in this context that the court, in its decision to apply the provisions of Islamic

[78] Hisham Sadiq and Hafiza Al-hadad, *supra* note 74, pp.152-153.
[79] Abdulla Al Suboosi, *supra* note 9, pp.260-262.
[80] Article 7 of the UAE's permanent constitution provides: "Islam is the official religion of the Union. The Islamic Sharia shall be a main source of legislation in the Union. The official language of the Union is Arabic".
[81] Dubai Court of Cassation ruling in case no. 24/1995 on 16/3/1996, in which the court ruled the inapplicability of the foreign law's provisions on the grounds of breaching Islamic Sharia provisions, according to Article 27 of the Civil Transactions Law, and thus the court ruled application of the national law, which is Islamic Sharia in this case.

Sharia, expressed that "considering the inapplicability of the foreign law according to Article 27, hence the law applicable is the national law which is the Islamic Sharia in this case".[82]

On the other hand, the same court ruled in a number of cases for the application of the foreign law provisions, notwithstanding that these provisions were contrary to Islamic Sharia, considering that such circumstances were subject to the provisions of the national laws,[83] and did not refer to the provisions of Islamic Sharia. Thus, the implementation of Article 27 by the Dubai Court of Cassation, firstly, illustrates the criteria by which the foreign law's provisions could be banned from application on the grounds of violating public policy and of breaching Islamic Sharia. Secondly, this implementation also reaffirms the significance of the wording of Article 27 of the Civil Transactions Law, and it does not indicate uncertainty from the courts towards the wording of Article 27.

Hence, in this context, it is clear that the wording of Article 27 has provided a unique feature in which Islamic Sharia and public policy and morals construct the limit that the applicable provisions of the foreign law should not violate. In other words, these concepts or elements are nested on the one hand and are complementary to each other on the other hand. Thus, this leads to the outcome that both concepts construct the limit that the applicable provisions of the foreign law should not violate.

Some scholars also add that the parties' choice of law should be made in good faith and not on the grounds of deception or fraudulence towards the Emirati law or a foreign law.[84] This approach is based on, firstly, Article 23 of the Civil Transactions Law; considering that this principle is recognised and adopted by many countries or legislations.[85] Secondly, by analogy of "[he] who rushes the happening of a thing,

[82] *Ibid* (the translation of the ruling is not official).
[83] Dubai Court of Cassation ruling in case no. 3/1998 on 24/5/1998, in case no. 46/2002 on 14/12/2002, and in case no.36/2008 on 23/9/2008.
[84] Ukasha Mohammed Mustafa, *supra* note 23, p.336. Also *see* in this context Hisham Sadiq and Hafiza Al-hadad, *supra* note 73, pp.165-174.
[85] Ukasha Mohammed Mustafa, *supra* note 23, p.336. this approach echoes that adopted by the Common Law. In this context, see Lakshman Maraisnghe, *supra* note 38, p.16

before it is due, [is] punished by depriving him", [86] fraud in law is a general principle that stems from the fundamentalist principles of the law.[87]

There is no objection in principle to disallowing the application of the chosen law on the grounds of fraud towards the national law or foreign law; however, there is an objection on how the court would prove that the parties' choice of law was made on the basis of fraud against a national law or foreign law. One may suggest that the court should be satisfied in terms of the purpose that underpins the parties' express choice of law in order to apply it.

It seems that this measure could add more complexity to the application of the law chosen, where the contractual parties may have to justify their choice and the significance of the law they selected, which will alter the focus on the main dispute to questioning or rather investigation of the parties' choice of law. Furthermore, proving fraud in law essentially revolves around providing evidence of an incorporeal nature, namely the fraudulent intention by the parties, which would not be an easy and straightforward task for the court in question.

Hence, it seems preferable for the courts to consider principles that may prevent the fraud towards the law, for example, whether the contract is manifestly more connected to a state's law than the chosen law.[88] On this basis, the court may apply the relevant overriding mandatory provisions of the law that is manifestly connected to the contract. In order to identify this manifest connection between the country and contract, the UAE's court in question would have a degree of discretion to discover this connection from the circumstances of the contract as a whole.[89]

Without requiring proof and reasoning behind the parties' choice of law and proving the parties' fraudulent intention towards the law, the court would avoid such complexity and prevent the fraud in law through this approach.

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[86] Article 69 of the Civil Transactions Law. (emphasis added)
[87] Ukasha Mohammed Mustafa, *supra* note 23, p.336.
[88] This principle is inspired by Article 4(3) the Rome I Regulation, which will be examined in the next chapter of the thesis.
[89] The court may consider all types of factors, however, it seems plausible for the court to consider in particular that this connection is identified with a country that the rulings would be enforceable on its territory.

4.2.2 The Applicable Law to B2B in the Other Member States of the GCC

This subsection will examine the provisions adopted by the other member states of the GCC in relation to determining the applicable law to international contractual obligations. Through the examination of this part, it will be seen that the measures implemented by those states are to some extent similar to and do not differ significantly from the provisions under Articles 19-23 of the Emirati Civil Transactions Law. Unlike other member states of the GCC, one of the main differences appears in Kuwaiti and Bahraini laws, which have adopted default provisions applicable in the absence of choice of law in order to determine the applicable law to specific transactions.[90] However, both Bahraini and Kuwaiti laws have adopted similar provisions to those adopted by the other member states of the GCC, namely Articles 19-23 of the UAE's Civil Transactions Law. Thus, there are still some common features between the approaches of the member states of the GCC towards determining the law applicable to e-commerce transactions.

The following examination will focus on the rules adopted by the Sultanate of Oman, the State of Kuwait, the Kingdom of Bahrain and the State of Qatar, while the Kingdom of Saudi Arabia will be excluded, because it does not recognize the choice of law or rather the application of foreign law by its courts.

4.2.2.1 The Express Choice of Law

The explicit choice of law made by the contractual parties is recognised by all member states of the GCC in question, as mentioned earlier, specifically under the following provisions. Articles 20 and 21 of the Civil Transactions Law of the Sultanate of Oman,[91] Article 27 of the Civil Law of Qatar,[92] Article 4 of the Bahraini

[90] Furthermore, the Bahraini and Kuwaiti Civil Laws (Decree no. 19 of 2001 on promulgating the Civil Law and Decree no. 67 of 1980 on promulgating the Civil Law, respectively) have not regulated issues that concern conflict of laws; unlike the other civil laws of the member states, however, Bahraini and Kuwaiti Civil Laws have transposed such matters to other legislations that specialize in the legal relations that involve a foreign element, according to Articles 7 of the Bahraini and Kuwaiti Civil Laws.

[91] Article 20 of the Omani Civil Transactions Law provides: "1- Contractual commitments in form and context shall be governed by the law of the State where the common residence of the contracting parties is located. Should they have different residences, the law of the State where the contract is made

law on Conflict of laws in Civil and Commercial Matters Involving a Foreign Element (hereafter the Bahraini Law on Conflict of Laws),[93] and Article 59 of the Kuwaiti Law number 5 of 1965 that governs legal relations with a foreign element (hereinafter the Kuwaiti Law of Contractual relations that have a Foreign Element).[94] It is clear that the earlier rules of these member states of the GCC share a similar perspective to that under Article 19 of the UAE's Civil Transactions Law.[95] Among these provisions, a slight difference appears from Article 4 of the earlier Bahraini legislation, which, in addition to recognising the choice of law in general, has also recognised the parties' choice of international trade law and customs.[96] It seems that the Bahraini approach, in terms of adding expressly the recognition of the international trade law and customs, aims at providing legal certainty for the commercial sector in general and foreign merchants and investments in particular.

The recognition of the parties' choice of law through general provisions, without specifying certain and relevant issues or circumstances, is a common feature between the UAE provisions and those adopted by the other member states of the GCC. For

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shall apply, unless the parties agree otherwise. 2- The law on the location of the real-estate is the law to be applied on contracts made in regards to this real-estate. " Article 21 of the same law states: "contract shall be governed by the law of the State where the contract is made, the parties may agree expressly or implied on otherwise."

[92] Article 27 of the Qatari Civil Law states: "1. In terms of the substantive conditions to be imposed and the effects thereof, a contract shall be governed by the law of the common domicile to the contracting parties. If the domicile of one party is different from that of the other party, the law of jurisdiction where the contract is concluded shall be applied, unless the contracting parties agree otherwise or the circumstances indicate that another law is intended to be applied.
2. Contracts relating to immovable property, however, shall be governed by the law in which the immovable property is situated." There is slight difference between this provision and Article 19 of the UAE's Civil Transactions Law, in which Article 19 has covered both the substance and form of the contract, while Article 27 of the Qatari Civil Law is merely applicable to the context of the contract. In respect of the contract's form, Article 29 of the Qatari Civil Law provides: "1. The form of contracts shall be governed by the law of the country where such contracts are concluded.2. The law governing the contract in its substantive provisions, the law of the domicile of the contracting parties, or their common national law, may also apply.". Also, Articles 59 and 63 of the Kuwaiti Law on Contractual Relations that have Foreign Element correspond to the latter Articles of Qatari Civil Law.

[93] Article 4 of the Conflict of Laws of Bahrain provides: "The parties may agree on the choice of the applicable law or the choice of international trade law and customs" (the translation of all provisions of the Conflict of Laws of Bahrain in the thesis are made by the student, due to unavailability of official translation for the legislation).

[94] Article 59 of the Kuwaiti Law on Contractual Relations that have Foreign Element provides: "A contract, in terms of its substantive conditions and implications, shall be governed by the law of the country in which the common domicile of the contracting parties is located. If they have different residences, the law of the country where the contract is concluded shall be applied, unless the contracting parties agree otherwise or the circumstances indicate that another law is intended to be applied.".

[95] Also, Article 19 of Egyptian Civil Law echoes these provisions from the member states of the GCC.

[96] *Supra* note 93.

instance, those provisions in question have not specified whether the parties are allowed to change their choice of law, the parties' choice of more than one states' laws to govern the contract, and whether or not the parties' choice is restricted to the law of a state or allows for a non-state system of law.

As mentioned earlier with regard to Article 19 of the UAE's Civil Transactions Law,[97] it seems that the national courts of Kuwait, Qatar and Oman would fill this gap in their legislations through referring to the prevailing principles of private international law, according to Article 69 of the Kuwaiti Law on Contractual Relations that have a Foreign Element,[98] Article 34 of the Civil Law of Qatar,[99] and Article 25 of the Omani Civil Transactions Law.[100] In this context, it seems appropriate to exclude the Bahraini approach, which has regulated the issue of applying more than one law to the contract. Specifically, Article 17(B) of Bahrain's law on Conflict of Laws has allowed the contractual parties to choose a specific law for each part of the contract provided that this part is capable of being separated from the rest of the contract.[101] Therefore, the chosen law for a specific part of the contract would not be enforceable before the Bahraini courts if this part is considered as an integral part of the whole contract. Accordingly, Article 17(B) seems to be applicable to contracts that appear ostensibly as a single contract and are included within a number of contracts or different stages of implementation or execution, so that each stage of execution has different conditions and form, such as a contract of establishing, managing, securing and maintaining a website, or a contract of designing, maintaining and updating software.

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[97] See subsection 4.2.1.1, Express Choice of Law.

[98] Article 69 of the Kuwaiti Law on Contractual Relations that have Foreign Element provides: "the principles of private international law shall apply in the case of a conflict of laws for which no provision is made in the preceding Articles".

[99] Article 34 of Qatari Civil Law states: "The principles of private international law shall apply in the case of a conflict of laws for which no provision is made in the preceding Articles". (This translation is not official)

[100] Article 25 of Omani Civil Transactions Law provides: "The principles of private international law shall be followed where no provision provided in the foregoing rules of the conflict of laws matters". (This translation is not official)

[101] Article 17 of Bahrain's law on Conflict of Laws provides: "A- A Contract in form and substantive conditions and in relation to its effects shall be governed by the law of the State where the common residence of the contracting parties is located. If they have different residences, the law of the State where the contract is made shall apply, unless the parties agree otherwise, or the conditions show that another law is intended to be applied. B- the contracting parties may choose an applicable law for each part of the contract, if this part capable of being detachable from the other parts of the contract".

The provision of excluding the contracts in relation to real estate from the scope of the parties' choice of law, and subjecting such contracts to the law of the place where the real estate is located, is also common among the GCC member states' provisions in question.[102]

4.2.2.2 The Implied Choice of Law

Another common feature also appears among the provisions adopted by the member states of the GCC in the context of the implicit choice of law. Like the UAE's approach in this regard, the Kuwaiti,[103] Bahraini,[104] Omani[105] and Qatari provisions have recognised the implied choice of law,[106] which shall be determined from the circumstances. This approach, however, does not specify limitedness on tacit choice of law, because it does not direct the national courts to the ascertainment or extent that the implied choice of law shall be considered. Consequently, this could lead to the production of different or conflicting rulings from the national courts. Furthermore, the absence of specific criteria that differentiate between the implicit choice of law and the absence of this choice could confuse the courts in terms of the circumstances in which the implied choice of law exists and from which that choice is absent. In order to avoid such consequences, it is important for the GCC member states to amend such provisions and introduce a clear criterion upon which the tacit choice shall be considered.

With the current provisions, the national courts could rely on the escape mechanism, such as Article 23 of the Civil Transactions Law, in order to consider an approach from the prevailing principles of private international law in determining the implied choice of law. On the other hand, this procedure or measure does not provide certainty towards the court's rulings and towards the approach the court would adopt from the principles of private international law.

4.2.2.3 The Absence of Choice of Law

[102] Article 15 of Bahrain's law on Conflict of Laws, Article 20 of the Civil Transactions Law of Oman, Article 27 of Qatar's Civil Law, and Article 51 of Kuwaiti Law on Contractual Relations that have Foreign Element.
[103] Article 59 of the Kuwaiti Law on Contractual Relations that have Foreign Element, *supra* note 94.
[104] Article 17 of Bahrain's law on Conflict of Laws, *supra* note 101.
[105] Article 20 of the Omani Civil Transactions Law, *supra* note 91.
[106] Article 27 of the Qatari Civil Law, *supra* note 92.

At this juncture, it is important to distinguish the approach adopted by Kuwait and Bahrain from the other member states, namely the UAE, Qatar and Oman. Kuwait and Bahrain have provided a number of rules that are applicable to determine the applicable law to specific contracts in the absence of choice of law. Although both Kuwait and Bahrain moved to a different approach to the other member states, there are some differences between the provisions of Kuwait and Bahrain. The main difference appearing in this context is that Bahraini legislation has brought new and updated provisions to those adopted under Kuwaiti law. For instance, Bahrain's Law on Conflict of Laws includes provisions to determine the law applicable to consumer contracts,[107] franchise contracts[108] and commercial agency and representation,[109] which are not regulated specifically under Kuwaiti law. Bahraini law has also provided recently developed provisions on employment contracts, intellectual property,[110] unjust enrichment,[111] and obligations arising from unlawful acts.[112]

Although the above legislation of Bahrain has provided developed provisions in different areas of conflict of laws, the legislation has not included provisions for significant types of contract, namely sale of goods and provision of services. Bahrain's law on Conflict of Law is considered the latest legislation among the other laws of the GCC member states in the field of conflict of laws, and, accordingly, the Bahraini legislature should not have missed the opportunity to provide specific provisions for sale of goods and provision of services, which are considered the most popular transactions in e-commerce. The inclusion of such provisions would have added significant dimensions to the legislation, and, accordingly, it could have encouraged the other member states of the GCC to follow the Bahraini lead in this respect.

Under the present provisions of the Bahraini Law on Conflict of Laws, the determination of the applicable law to e-commerce transactions, such as sale of goods and provision of services, in the absence of choice of law will be in accordance with

[107] Article 22 of Bahrain's Law on Conflict of Laws.
[108] Article 20 of Bahrain's Law on Conflict of Laws.
[109] Article 21 of Bahrain's Law on Conflict of Laws.
[110] Article 27 of Bahrain's Law on Conflict of Laws.
[111] Article 26 of Bahrain's Law on Conflict of Laws.
[112] Article 25 of Bahrain's Law on Conflict of Laws.

the general rule under Article 17 thereof.[113] The measure provided under Article 17 does not differ from Article 19 of the UAE's Civil Transactions Law and the corresponding provisions from the other member states of the GCC.[114] The Bahraini and Kuwaiti laws have introduced a different approach to the other member states of the GCC in regulating many matters of conflict of laws; however, these two member states have a meeting point with the other member states in relation to the matter of determining the applicable law in the absence of choice of law.

At this point, also, the new Bahraini legislation has missed the opportunity to introduce proper mechanisms that determine the applicable law in the absence of choice of law, rather than following the old approach adopted by the other member states. The approach provided in Article 17 of Bahrain's Law on Conflict of Laws, which was examined earlier in section 4.2.1.3,[115] entails two measures; the first measure directs the Bahraini courts to apply the law of the state in which the contracting parties are domiciled, while if the parties are domiciled in different countries, the second measure leads to applying the law of the country in which the contract is made. The main drawbacks of these provisions are the reliance on elements, namely joint domicile of the parties and the place where the contract is made, which do not appropriately serve the determination of the applicable law in e-commerce transactions and international contracts in general. The application of these measures to e-commerce would not be instructive for the national courts, and it would eventually lead the courts to use the escape mechanism under Article 2 of the Bahraini law,[116] which refers the courts to apply the prevailing principles of private international law in relation to matters not covered by the legislation.

At this juncture, it is important to highlight one of the Kuwaiti provisions that could be considered as introducing a distinctive feature from the other member states of the GCC. Article 61 of the Kuwaiti Law on the Legal Relations that have a Foreign

[113] Article 17 of Bahrain's law on Conflict of Laws, *supra* note 101.
[114] Article 27 of Qatari Civil Law, Article 20 of the Omani Civil Transactions Law, Article 59 of the Kuwaiti Law on Contractual Relations that have Foreign Element.
[115] See subsection 4.2.1.3, The Absence of Choice of Law.
[116] Article 2 of Bahrain's law on Conflict of Laws provides: "Subject to the provision of Article 1 of the Law, the principles of private international law shall apply with regards to matters not mentioned in this Law".

Element governs sale of goods contracts made for commercial purposes,[117] which entails initially the application of the law chosen by the contracting parties or which appears implied from the circumstances. However, in the case of the absence of such choice, the law of the state in which the seller is domiciled shall apply. This provision appears to be a positive step from the Kuwaiti legislature in limiting the uncertainty towards the law applicable to such types of international contract. Furthermore, Article 61 of the Kuwaiti law seems compatible with e-commerce and applicable to sale of tenders through e-commerce platforms, such as *Alibaba.com* [118] and *Tejari.com*.[119] On the other hand, Kuwaiti law is limited in providing a similar approach in governing contracts of providing services, or rather providing specific provision to determine the applicable law to provision of services, instead of referring such a matter to the uncertainty under the general provisions.[120]

4.3 The Applicable Law to the B2C Contracts

Determining the applicable law to e-consumer contracts requires taking into account the protection of consumers' rights regardless of the law applicable to the contract. This section will review the conflict of laws provisions applicable to determine the applicable law to disputes arising from B2C e-commerce transactions, and the extent to which these provisions protect the consumers' rights. In this context, this section will be divided into subsections based on the approaches adopted by the member states of the GCC in determining the applicable law to B2C transactions. The first approach is represented by the UAE, Oman and Kuwait, while the second is adopted by Qatar, and the third approach has recently been provided under the Bahraini Law on Conflict of Laws.

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[117] Article 61 of the Kuwaiti Law provides: "the law of seller's domicile shall be applied to *'Biei Alarod'* (or the sale of goods for trading purposes or sale of tenders), unless they agree or appear from the circumstances that the law of buyer's domicile or another law shall be applicable". It should be noted that the original Arabic wording of the Article has stated '*Biei Alarod*'; it could also be called '*Arod Altejarah*' which are purchases of goods made by merchants who intend to trade in these goods. Based on this definition, it is deemed appropriate to call this type of transaction 'sale of goods for trading purposes'.

[118] *Alibaba.com* could be considered the largest e-commerce platform in the world, and is a leading marketplace for consumers and businesses, http://www.alibabagroup.com/en/about/overview.

[119] Tejari.com, (see Chapter 2 of this thesis, section 2.3: The Development of E-Commerce in the GCC), http://www.tejari.com/cms/uae.

[120] Article 59 of the Kuwaiti Law on Contractual Relations that have Foreign Element, *supra* note 95.

4.3.1 The Applicable Law to B2C in the UAE, Kuwait and Oman[121]

Article 19 of the UAE's Civil Transactions Law, which represents the general provision in determining the applicable law to international transactions and that applicable to B2C transactions, merely provides an exception of immovable contracts from its scope, which should be governed by the law of the country in which the property is located. The exception applies to all contracts in relation to immovable property based on the generality of its wording such as rights in rem contracts and tenancy contracts. The provision does not, however, provide any further exclusion to other contracts such as consumer contracts, in which the consumer is in a weaker position, and there is no other specific provision under the current UAE laws that protects the consumer from the applicable law perspective. Consequently, consumers will be left at the mercy of the law chosen by businesses.

The generality of the wording of Article 19 emphasises that this chosen law should be applicable to all contracts with the exception of immovable property contracts. Thus, this provision applies in relation to all commercial and civil contracts in general, and, accordingly, it is applicable to e-commerce transactions and particularly to B2C contracts. Furthermore, according to the same provision of the Civil Procedures Law, the law that is chosen by the contracting parties applies to the whole of the contract, and governs the form and substance of the contract without providing any excluded terms or clauses. Consequently, the validity of the contract or any term of the contract is regulated or governed by the law that is determined pursuant to Article 19.

The significant feature of Article 19 of the Civil Transactions Law in providing the parties the autonomy in choosing the law applicable to their contract is not instructive to the consumers' positions in their contracts that are concluded through the internet. The consumer's vulnerable position is obvious in contracts of e-commerce given the fact that most (or rather all) of the terms and conditions of e-consumer contracts are drawn up by the seller or the service provider, and the consumer has no choice in negotiating these terms and conditions. Accordingly, a single party, namely the online business or merchant, chooses the law applicable to such contracts.

[121] The following examination of this section will mention the UAE; however, this situation and analysis also applies to Oman and Kuwait.

Although the legislative gap in protecting consumers appears clearly from the conflict of law rules of the member states of the GCC, with the exception of Qatar[122] and Bahrain,[123] it is possible to overcome this weakness in relation to protecting consumers in the circumstance of applying a foreign law other than the law of the state in which the consumer is domiciled or habitually resident. This solution depends on the application of adhesion provisions, which are adopted under the civil laws of the member states in question,[124] on e-consumer contracts. Article 248 of the Civil Transactions Law provides that: "If the contract is one of adhesion, and includes arbitrary conditions, the judge may modify such conditions or exempt the adherent from it, according to the requirements of justice. Any agreement to the contrary shall be void".[125]

Article 248 affords the national courts the right to change any clause or even exclude the vulnerable party from the adhesion terms. However, this approach may be criticised on the following grounds: firstly, the application of such a provision would provide limitless authority to the Emirati courts and could lead to infringement of the principle of *pacta sunt servenda*,[126] or rather it could lead to violation of the parties' autonomy. Secondly, this approach could also lead to imbalance in the contract, considering that the court would support the party who is in the weaker position (the consumer); this support could place the other party, who was in the stronger position (the merchant), in a weaker position. Although this scenario is quite far from reality, it remains a possibility. This court involvement could fluctuate the balance of power between the parties. Criticising the provision of Article 248 for these reasons could, however, be refuted for the following reasons. Firstly, the Emirati court would not apply such a rule to all types of contract; its application would merely be applied to contracts that are considered under the category of contracts of adhesion. Secondly,

[122] See subsection 5.3.2: The Applicable Law to B2C in Qatar.
[123] See subsection 5.3.3: The Applicable Law to B2C in Bahrain.
[124] Article 248 of the UAE's Civil Transactions Law, which echoes Article 158 of the Omani Civil Transactions Law, and Articles 80 and 81 of the Kuwaiti Civil Law.
[125] This provision corresponds to Article 58 of the Civil Law of Bahrain, Article 158 of the Civil Transactions Law of Oman, Article 81 of the Civil Law of Kuwait, Article 105 the Civil Law of Qatar, Article 149 of the Egyptian Civil Law, and Article 176 of the Iraqi Civil Law.
[126] This principle is one of the main principles in contracting. Article 196 of the Civil Law of Kuwait provides: "*pacta sunt servenda*, it is not permissible for one of them (the parties) to end or amend its provisions (the contract) alone, except in the extent permitted by agreement or the law".

the competent court has to follow "the requirements of justice" in its application of Article 248. Although this condition is general and unconfined to specific criteria, this could be justified by considering the scope of this provision, which covers all civil and commercial contracts and, accordingly, the circumstances in which the contract could be regarded as a contract of adhesion cannot be confined or limited; therefore, it seems logical to formulate this guideline in general terms.

Thirdly, the application of Article 248 is one of the issues that falls within the competence of the Dubai Court of Cassation, which would denounce the ruling if the court that rendered the judgment had erred in the application of Article 248 of the Civil Transactions Law. Therefore, the aim of Article 248 is to rebalance the contractual terms and conditions between the parties of the contract. Based on the above reasoning, the application of Article 248 of the Civil Transactions Law, and the corresponding provisions adopted by Oman and Kuwait to the disputes arising from B2C transactions, is highly recommended.[127]

The application of Article 248 of the Civil Transactions Law shall be dependable or shall depend on the position of the consumer who would be affected by applying the law chosen under the e-consumer contracts. For example, if the chosen law provides improved rights and protection to the Emirati consumer over those provided under UAE legislation, then the Emirati court does not need to apply Article 248 to the applicable law clause of the contract. In this case, the consumer would not lose the advantage under the chosen law in the contract, in order to provide a better position to the consumer. On the other hand, if the applicable law under the contract lessened or prevented the consumer from availing his rights under Emirati legislation, then it would be appropriate to apply Article 248 of the Civil Transactions Law. In the context of applying a foreign law by the Emirati court, Article 28 of the Civil Transactions Law provides that: "The law of the UAE shall be applied, if the proof of the existence of the applicable foreign law could not be established nor its significance could be determined". Thus, if these two requirements are not satisfied

[127] It is not possible to confine the application of Article 248 of the Civil Transactions Law merely to electronic consumer contracts, in fact; the provision applies to any contract that falls within the concept of contract of adhesion. Thus, it is plausible to imagine the Emirati court interference on the basis of Article 248 to rebalance a B2B transaction; in which disparity between the contracting parties is apparent. Nevertheless, the application of Article 248 over B2C transactions is still necessarily uppermost.

before the Emirati court, the law of the UAE shall be applied. The burden is on the interested parties to prove that the foreign law meets these requirements since the national court is not familiar with foreign laws.

The application of Article 248 does not only depend on the existence of express choice of law; the provision may also be applicable in the case of implied choice of law, or even in the absence of choice of law. Hence, applying Article 248 of the Civil Transactions Law depends on the application of a foreign law in the consumer contract, without prejudice to applying the former Article to the terms and conditions of the contract.

4.3.2 The Applicable Law to B2C in Qatar

At this juncture, it is important to distinguish between the Qatari provisions applicable to e-consumer contracts and the provisions adopted by the other member states of the GCC, including the UAE. The reason for this distinction is based on Article 2 of the Consumer Protection Law of Qatar,[128] which provides that:

> The basic rights of Consumer are guaranteed in the provisions of the present Law. No person may conclude any deal or carry any activity that infringes the basic rights of the Consumer, and in particular:
>
> 1- The rights of health and safety during the normal use of the products and services.
> 2- The rights of obtaining the correct data and information about the products that he purchases or uses or that are presented to him.
> 3- The right of free choice of products that are of good quality and in conformity with their specification.
> 4- The right to respect the religious values as well as customs and traditions.
> 5- The right to obtain knowledge related to the protection of the Consumer's legal rights and interests.
> 6- The right to join associations and private institutions, counsels and committees whose purpose is related to the consumer protection.
> 7- The right to bring legal actions concerning all attempts against the consumer's rights, or that restrict them.
>
> All without prejudice to the international treaties and agreements applicable to Qatar.

[128] Article 2 of the Consumer Protection Law of Qatar no. 8 of 2008 on Consumer Protection (translation).

The promulgation of the above rule has differentiated the Qatari consumers' position from the consumers of the other GCC countries. The wording of Article 2 is clear in protecting the consumers' rights in any contract they might conclude; hence, this rule is applicable to consumer contracts in e-commerce. The protection provided by Article 2, from the perspective of private international law, extends to the scope of jurisdiction and, it seems, even to the applicable law to the consumers' contracts. With regard to the applicable law, the Article nullifies any agreement that could result in lessening or preventing consumers from availing their rights provided by the legislation. Thus, the law applicable, which is chosen by the seller or service provider, to e-consumer contracts that involve a Qatari consumer, may not prevent the application of Qatari rules that afford the rights to consumers. Furthermore, the rule provided under Article 2 does not merely apply to agreements, which includes contractual terms and conditions, concluded with consumers; it also applies to any activity that could violate consumers' rights.

Regrettably, the other member states of the GCC, excluding Bahrain, have not followed such an approach, even in their legislations on consumer protection. In view of the lack of provisions enforceable to protect consumers' rights in their contracts with businesses, consumers in e-commerce from these countries have to accept the risk, which is in the application of the law chosen by the sellers or the service providers. This outcome comes by default through the application of traditional private international law provisions adopted by these member states, such as Article 19 of the Civil Transactions Law, to B2C transactions.

4.3.3 The Applicable Law to B2C in Bahrain

Article 22 of Bahrain's Law on Conflict of Laws provides that: "the States' law of habitual residence of the consumer shall apply to the consumer contract, unless otherwise agreed or indicated by the circumstances that another law is to be applied, provided that may not have the result of depriving the consumer of the protection afforded to him by mandatory provisions of the State's Law in which his habitual place of residence located".

The provision under Article 22 of the recent Bahraini Law on Conflict of Laws is encouraging and also preferable for the other member states of the GCC to follow. It is clear on the matter of protecting consumers' rights in their international transactions, which indeed covers the scope of B2C transactions in e-ecommerce. The protection of consumers' rights is assured whether there is an express or implied choice of law under the consumer contract. In this context, it is possible to highlight some differences between the Bahraini approach and the Qatari approach. The Bahraini provision is specifically aimed at protecting the consumer from the conflict of laws perspective, while the Qatari provision governs the matter through the consumers' protection window. As a result, the scope of Article 2(7) of the Qatari law is wider than the scope of Article 22 of the Bahraini law; for instance, the Qatari provision provides protection to the area of jurisdiction.

4.4 Conclusion

The above examination of the conflict of laws rules confirms that five of the six GCC member states, namely the UAE, Bahrain, Kuwait, Oman and Qatar, share similar approaches towards recognising the parties' choice of law in e-commerce transactions, and in determining the implied choice of law; however, the measures or criteria the national courts would apply in determining the tacit choice of law in e-commerce are not clear and require amendment. The amendment in this context shall aim at providing greater certainty of the mechanism the court would follow to determine the implied choice; thus, it seems preferable to adopt the approach that entails the recognition of the implied choice of law if such choice appears clearly from the circumstances of the e-commerce transaction. If there is not a clear indication of an implied choice of law, then it seems preferable to adopt a second measure that directs the national court to apply the law of the country that has the closest connection(s) to the contract. This approach would require the courts to examine all connections, such as the places in which the contractual obligations were or shall have been performed and the places of the parties' domicile, and then the court would have to weigh the available connections in order to identify the country that is most connected to the contract.

The proposed measures will eliminate specifically the uncertainty under current provisions that do not clarify the national courts' process in determining the implied choice of law. At the same time, they will establish a clear line between the implied choice of law and the absence of choice of law, which is also not featured under the present provisions of the GCC member states. Accordingly, if the national court cannot establish an implied choice of law based on the latter measures, then it seems appropriate to introduce specific provisions that would determine the applicable law to particular types of contracts; for instance, applying the seller's law of domicile to a sale of goods contract, or applying the service provider's law of domicile to a provision of services contract.

This measure would provide clear steps for the national courts with regard to their task in determining the applicable law to international contracts in general and e-commerce transactions in particular; it also entails certainty concerning the applicable law and predictability of the litigation outcome. On the other hand, the present provisions of the GCC member states do not seem instructive at providing the level of certainty that the latter approach would provide.

The elements employed under the current provisions, namely the joint domicile of the parties and the place in which the contract is made, to determine the applicable law in the absence of choice of law, do not comply with the nature of international contracts, in general, or e-commerce transactions. In fact, these elements could be considered, under the proposed measures, using the closest connection approach, in which the court would consider such elements among other connections in establishing the implied choice of law over international contracts. Furthermore, the proposed measures would lessen the possibility of relying on prevailing principles of private international law by the national courts, or rather limit the scope of employing such an escape mechanism to very limited circumstances, providing greater predictability and certainty to both the judiciary bodies and the parties in the matter of determining the applicable law to international contracts and e-commerce.

Although these proposed measures would be efficient if they were adopted by the member states of the GCC, the positive impact or returns of employing these measures would be on a larger scale if they were adopted by the GCC. In fact, this

objective is achievable at GCC level, through promulgating a harmonised legislation that regulates the issue of applicable law to contractual obligations, whether in relation to electronic or non-electronic transactions, regional transactions conducted between parties in the GCC member states, or transactions between firms or individuals from the GCC with parties from non-member states. Furthermore, this harmonisation will place emphasis on the economic objectives upon which the GCC is established, and it will provide greater certainty from businesses' perspective towards the law governing civil and commercial transactions including e-commerce transactions.[129]

The harmonisation of law in the foregoing respect among the GCC member states, as well as harmonising other parts of the laws governing the jurisdiction, would encourage and facilitate the expansion of existing merchants and businesses between the member states of the GCC; this would eventually enhance the GCC internal market. Also, from a different perspective, the impact of such harmonisation would eliminate the legal uncertainty and difficulties faced by foreign businesses in contracting with local businesses and would encourage and increase foreign investments in the member states of the GCC.

The flow of foreign investments in the GCC member states may be resulted mainly, or partly, from the harmonisation of GCC regulations and those concerning jurisdiction and the applicable law to civil and commercial transactions. Taking one example of a foreign investment in the real estate sector of one of the GCC member states, this new investment, or even the mere announcement of it, could trigger simultaneously or subsequently the establishment and development of different sectors of the economy including e-commerce. For instance, some technology merchants would develop smart technologies that serve individuals searching for their desired property in the real estate market, or in designing the interior of their properties through smart applications and purchasing their chosen furniture.

On the other hand, some technology merchants may create technological solutions that serve the commercial and business environments, such as developing smart

[129] See The Charter of the GCC, the GCC Secretariat General, available at: http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx

platforms for property developers or contractors to choose and transact with building material merchants. The result of earlier foreign investments could also directly and indirectly influence further fields and various areas of the economy, governmental projects, transportation, infrastructure, and industry, including e-commerce.

With regard to the applicable law to B2C transactions, the effect of adopting a rule(s) that protects the consumers' rights in their dealings, whether outside or through e-commerce, such as the Qatari provision under Article 2(7) of the Consumer Protection Law or the Bahraini provision under Article 22 of the Law on Conflict of Laws, seems obvious. In contrast, the other legislations for consumer protection and e-commerce laws that are adopted by the other member states of the GCC, namely the UAE, Oman and Kuwait, provide less effective protection to consumers in e-commerce. It is surprising that these laws have not provided appropriate or proper protection to consumers despite these legislations having been promulgated at a time when e-commerce is widely used by consumers. Due to the absence of appropriate protective measures under the latter laws of the member states, e-consumer contracts are subject to the general rules of choice of law, such as Article 19 of the Civil Transactions Law.

Applying these traditional provisions of private international law to e-consumer contracts would entail subjecting these transactions to the chosen law by the merchant under the contractual terms and conditions. We assume that the consumer's law, whether his national law or the law of the country in which he is domiciled, protects the consumer's litigation right before the courts; this protection, however, cannot be regarded as adequate for the consumer if it is limited to providing partial or single-sided protection, namely in jurisdiction. Consumer protection in the field of private international law consists of two parts (in general), which are jurisdiction and the applicable law to the consumer contract. The protection provided to consumers cannot be considered as appropriate or adequate when it is confined to covering a single part and cannot extend to both areas of jurisdiction and the applicable law. Therefore, in order to introduce proper protection for the consumer from the private international law perspective, it is important to extend this protection to the areas of jurisdiction and the applicable law of the consumer contract.

Relying on Article 248 of the Civil Transactions Law on e-consumer contracts could be regarded as the least preferable solution in the current absence of protective provisions for consumers under the law of the GCC member states; hence, it is vital to introduce legislation that establishes a unified consumer law among the member states of the GCC. This proposed legislation should aim to establish unified consumer rights between the GCC member states and to protect those rights in all consumers' contracts.

Chapter 5: European Union Rules on Jurisdiction and Applicable Law of E-Commerce Transactions

5.1 Introduction

This chapter examines the rules operative in European Union member states in relation to issues of jurisdiction and applicable law with respect to e-commerce transactions. The purpose is to make comparisons and to draw lessons that can be learned for adopting a desirable approach and efficient private international law rules concerning e-commerce transactions among the GCC countries, including especially the UAE.

There are significant differences in many aspects between the European Union (EU) and the Gulf Cooperation Council (GCC), and it would be difficult to highlight all these differences within this chapter. However, the chapter will focus on the differences between EU provisions and those adopted by the GCC Member States with regard to jurisdiction and choice of law in e-commerce. From a historical perspective, the establishment and development of the EU started in the period after the Second World War, eventually leading to the establishment of the European Economic Community in 1958,[1] while the GCC was established in 1981.[2] This age or maturity difference is particularly reflected in the mechanism and organisation of the EU, where its institutional bodies are involved in various areas, such as in law-making,[3] monetary policy and its single currency,[4] foreign and security policies,[5] and also ensuring the transparency and effectiveness of EU institutions.[6] Furthermore, the EU has established an internal market that is considered the world's largest free-trade

[1] For further details, see the official website of the European Union, available at: http://europa.eu/about-eu/index_en.htm
[2] For a historical overview of the GCC, see the second chapter of this thesis.
[3] Ibid, http://europa.eu/about-eu/institutions-bodies/index_en.htm#30
[4] The European monetary policy is managed by the European Central Bank. For further details, see http://www.ecb.europa.eu/home/html/index.en.html
[5] The European External Action Service manages http://www.eeas.europa.eu/index_en.htm
[6] The EU has established the European Ombudsman, which handles individuals' complaints regarding failure to respect the principles of good administration or infringement of rights by any firm or association, or other body that has a registered office in the EU. For further details, see http://www.ombudsman.europa.eu/home/en/default.htm

area, and has established common protection and safety standards for the environment.[7]

The EU has passed or moved through great strides and phases in the field of cooperation and integration, which has led eventually to establishing the union among its Member States. Although the EU is considered a unique example,[8] it seems appropriate to draw lessons from the EU model in order to provide the most beneficial approaches and practices for the GCC. These practices, for example, could serve in enhancing cooperation between the Member States, or in developing and organising the GCC's institutions and bodies, considering the fact that these practices have contributed in achieving such objectives in the EU sphere. The EU regulatory and legal approaches are important areas from which the GCC could also absorb significant advantages, particularly from the EU instruments that regulate judicial jurisdiction and choice of law in relation to civil and commercial transactions including e-commerce.

Considering that the EC Directive on Electronic Commerce does not deal with private international law,[9] jurisdiction of the courts and the choice of law in e-commerce are subject to the provisions of Regulation no. 1215/2012 [10] on jurisdiction and recognition, and enforcement in civil and commercial matters (Brussels I Regulation recast), and Council Regulation no. 593/2008 on the law applicable to contractual obligations (Rome I Regulation), respectively.[11] In addition, the EU has recently introduced an online dispute resolution framework to enhance consumer confidence and participation in electronic commerce. Accordingly, this chapter will examine the following EU legislations: Brussels I Regulation, Rome I Regulation, and Council

[7] Alina Kaczorowska, *European Union Law* (New York, Routledge-Cavendish, 2009), pp. 3–41. See also, Paul Carig and Grainne De Burca, *EU Law: Text, Cases and Materials* (New York, Oxford University Press, 4th ed., 2008), pp. 1–37.
[8] It should be noted in this context that the nature of the Member States and their intention are significant factors in the formation and development of their union, and more importantly in the extent and fields of cooperation or harmonization. This can be witnessed in the differences between the EU and the GCC.
[9] Recital 23 and Article 1(4) of Directive 2000/31/EC of the European Parliament and of the Council of 6 June 2000 on certain legal aspects of information-society services, in particular e-commerce, in the internal market (EC Directive on Electronic Commerce) 05 L 178.
[10] OJ L 371 20.12.2012 (recast). This chapter refers to the latest version of the Brussels I Regulation, namely the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1215/2012, [2012] OJ L351/1, which has replaced the previous version and became enforceable on 10th January 2015.
[11] OJ L 177 4.7.2008.

Regulation no. 524/2013 on online dispute resolution (ODR) for consumer disputes (Regulation on Consumer ODR),[12] which amends Regulation no. 2006/2004 and Directive 2009/22/EC.

The focus of this chapter is on analysing the above EU instruments in order to identify their features, scope, limitations, benefits, shortcomings and to shed light on the rationale behind them. This will form an instructive step toward assessing and visualising the optimal course by which to establish recommended proposals for the GCC and the UAE in the final chapter of the thesis. Hence, this chapter aims to introduce and examine EU notions and approaches that could suit the current level of organisation and cooperation between the Member States of the GCC, and also propose instructive approaches in terms of instruments and principles that can be applied in the UAE. Subsequently, these ideas will be transferred into proposed provisions in the next chapter.

5.2 Jurisdiction

The rules of the Brussels I Regulation are technology-neutral and apply to all main civil and commercial matters,[13] with the exception of matters concerning the legal capacity of natural persons;[14] family law, including matters of wills and succession; bankruptcy; social security; and arbitration.[15] There are several reasons for excluding these matters from the scope of the Brussels I Regulation. Firstly, most of them involve divergence between the related laws and practices of Member States. For instance, social security is classified as a matter that falls solely within public law by some Member States, while others consider it as falling within private and public law.[16] Secondly, the exclusion of arbitration from the scope of the Regulation is

[12] OJ L 165/1 18.6.2013.
[13] Recital 10 and Article 1(1) of the Brussels I Regulation.
[14] Article 1(2)(a) of the Brussels I Regulation. The exclusion of the legal capacity of natural persons covers matters concerning, for example, status, nationality, divorce, marriage, and legal capacity of minors; however, this exclusion would be effective merely in the condition that the judgment's subject matter directly concerned those matters. Dicey, Morris and Collins, *The Conflict of Laws* (London, Sweet and Maxwell, 2012) 15th edition, p. 384.
[15] Article 1(2)(b) of the Brussels I Regulation.
[16] For further details see Dicey, Morris and Collins, *supra* note 14, pp. 384–386.

justified based on the international conventions that are in force to govern this matter.[17]

The provisions of the Brussels I Regulation govern the matter of jurisdiction in electronic transactions, whether in the case of disputes arising from business-to-business or business-to-consumer transactions. In line with Article 65 of the Treaty establishing the European Community,[18] the Regulation aims to harmonise the judicial cooperation and facilitate cross-border litigation through 'promoting the compatibility of the rules applicable in the Member States concerning the jurisdiction'.[19]

Since it was initially adopted in 2000,[20] the implementation of the Brussels I Regulation has been largely satisfactory in achieving its stated objectives;[21] serving the EU's ultimate objective of 'maintaining and developing an area of freedom, security and justice' via simplifying access to justice, through 'the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'.[22] However, there was still room to improve certain provisions, especially clarity, so the Regulation was reformulated in 2012.[23] The recast of the Brussels I Regulation, which came into force on 10th January 2015, focuses mainly on rules concerning *lis pendens* before Member States' courts,[24] or before non-Member States' courts,[25] jurisdiction agreements by

[17] See Dicey, Morris and Collins, *supra* note 14, pp. 386–390.
[18] Article 65 of the consolidated version of the Treaty establishing the European Community, 24 December 2002 OJ C 325/33.
[19] Ibid, Article 65(b).
[20] The Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, 16.1.2001.
[21] The Recital 1 of the Brussels I Regulation (recast), and see also Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM (2009) 174 final, Commission of the European Communities, available at: http://ec.europa.eu/civiljustice/news/docs/report_judgements_en.pdf
[22] The Recital 3 of the Brussels I Regulation (recast).
[23] Ibid.
[24] Article 29 of the recast Brussels I Regulation echoes Article 27 of the Brussels I Regulation in affording the priority to the court that commenced the proceedings; however, the recast Regulation provides an exception to this provision that entails giving priority to the chosen court irrespective of which court was first to examine the proceedings according to Article 31(2) thereof.
[25] Articles 33 and 34 of the Brussels I Regulation recast requires the Member State court to stay its proceedings and affords the priority for action to a non-Member State court, though only if, first, the action before the non-Member State court is identical or related to the proceedings, second, the non-Member State court was first to examine the action before the Member State court, third, the non-

parties who are not domiciled in the EU,[26] the exclusion of arbitration from the scope of the Regulation,[27] and, more importantly, extending the protection in consumer contracts and individual contracts of employment.[28] This latter amendment, regarding consumer protection under the recast Brussels I Regulation, will be examined in subsection 5.2.2, Jurisdiction in B2C Transactions.

The general provision of the Regulation refers to jurisdiction based on the defendant's domicile or residence, according to Article 4 thereof,[29] while other specific provisions refer to the place of performance of the contractual obligation in question,[30] or to the court or courts of a Member State on which the parties have conferred jurisdiction on the basis of an agreement,[31] or by appearance before one of those courts.[32] In certain matters, the jurisdiction would not necessarily vest in the court of the defendant's domicile, namely in the case of insurance contracts,[33] specific consumer contracts,[34] employment contracts,[35] contracts concerning immovable property such as tenancy and ownership contracts,[36] and contracts relating to family matters or succession upon death.[37]

The following subsections will focus on examining the provisions applicable to determine the jurisdiction over contractual disputes that may arise from B2B and B2C transactions.

Member State court ruling can be recognized or enforced in the Member State, and finally, the Member State court is satisfied that a stay is necessary for the proper administration of justice.

[26] Article 25 of the Brussels I Regulation recast affords jurisdiction to the Member State courts chosen by parties domiciled in non-Member States. For example, if an Emirati company and a Saudi company have a jurisdiction clause to French courts in their agreement, then the French court will have jurisdiction on the grounds of Article 25.

[27] Recital 12 and Article 73 of the Brussels I Regulation recast.

[28] Article 18(1) and Article 21(2) of the Brussels I Regulation recast permit consumers and employees to bring proceedings before a Member State court against a non-EU trader or employer.

[29] Article 4 of the Regulation provides: '1- subject to this Regulation, persons 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 Member State'

[30] Article 7(1) of the Brussels I Regulation.

[31] Article 25 of the Regulation.

[32] Article 26 of the Regulation.

[33] Articles 10–16 of the Regulation.

[34] Articles 17–19 of the Regulation.

[35] Articles 20–23 of the Regulation.

[36] Article 24(1) of the Regulation.

[37] Article 24(2) of the Regulation.

5.2.1 Jurisdiction in respect of B2B Transactions

Article 4: General Principle of Jurisdiction in Brussels I Regulation

Ascertaining jurisdiction of disputes concerning contractual obligations made between businesses in the online environment is subject in principle to the general rule of the Brussels I Regulation,[38] which confers jurisdiction of those disputes on the courts of the Member State in which the defendant is domiciled, regardless of his nationality.[39] On the other hand, contrary to this general principle, in certain circumstances the defendant may be sued before the courts of other Member States.[40] The domicile of legal persons, such as online companies and merchants, is ascertained on the basis of the Member State in which their statutory seat, central administration, or principal place of business is located, according to Article 63(1) of the Regulation.[41]

With regard to determining the domicile of a natural person, the court presiding over the dispute shall apply the law of the Member State in which the party is domiciled to determine if indeed s/he is domiciled in that state, according to Article 62 of the Brussels I Regulation.[42] The Regulation, however, avoids providing a definition for the concept of domicile.[43]

It is important to draw attention to the scope of the general rules of the Brussels I Regulation with regard to e-commerce. Specifically, Article 4 of the Regulation affords the jurisdiction to the court of the Member State in which the defendant is domiciled, regardless of his or her nationality.

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[38] Recital 15 of the Brussels I Regulation.
[39] Article 4(1) of the Brussels I Regulation provides: 'Subject to this Regulation, person domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'
[40] Article 5(1) of the Regulation.
[41] Article 63(1) of the Brussels I Regulation states: 'for the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) a statutory seat; (b) central administration; or (c) principal place of business.'
[42] Bharat Saraf & Ashraf U. Sarah Kazi, 'Analysing the application of Brussels I in regulating e-commerce jurisdiction in the European Union – Success, deficiencies and proposed changes', *Computer Law & Security Review*, vol. 29 (2013), pp. 128-129, for further examination on domicile, see Peter Stone, *EU Private International Law: Harmonization of Laws*, (Edward Elgar Publishing, Cheltenham, 2006), pp. 45 – 63.
[43] Dicey, Morris and Collins, *supra* note 14, p.131

From an e-commerce perspective, this general rule may not constitute or cause major problems in practice, because the parties' place of domicile is information that is frequently known or identified or declared by the contractual parties. Nevertheless, determining the place of domicile in e-commerce transactions can be difficult.[44] In the context of the internet, determining the central administration of e-businesses can also be difficult, especially where the central administration meetings are conducted through the internet between the members of the board of directors of an online business, provided that these members are located in different member states and assuming that none of these online businesses is considered a statutory seat or central administration body.[45] In this situation, the likelihood is that the online business is established or incorporated in a particular country; therefore, it should not be difficult to determine its domicile.[46]

In the situations of persons who are not domiciled in a Member State, Article 6 (1) of the Regulation refers jurisdiction over disputes that involve defendants not domiciled in a Member State to the national rules within each Member State.[47] Accordingly, the Regulation does not establish jurisdiction for Member States' courts over disputes that involve a defendant who is not domiciled in a Member State, except if the non-EU party does not contest jurisdiction,[48] has agreed to the jurisdiction of a court in the EU,[49] is a trader contracted with a consumer domiciled in the EU,[50] or is an employer involved in an employment contract with an employee domiciled in the EU.[51]

This feature has been criticised by some commentators,[52] particularly in the sphere of e-commerce between businesses, considering that the EU has missed the opportunity to provide unified or rather harmonised jurisdiction provisions for European businesses against defendants who are not domiciled in Member States, and vis-à-vis

[44] Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China*, (Cambridge, Cambridge University Press, 2010), at 45.
[45] J Fawcett, J Harris and M Bridge, *International Sale of Goods in the Conflict of Laws*, (New York, Oxford University Press, 2005), p. 511.
[46] Bharat Saraf & Ashraf U. Sarah Kazi, *supra* note 41, at.129.
[47] Article 6 (1) of the Brussels I Regulation states: 'If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2), and Articles 24 and 25, be determined by the law of that Member State.'
[48] Article 26 of the Brussels I Regulation.
[49] Article 25 of the Brussels I Regulation.
[50] Article 18 (1) of the Brussels I Regulation.
[51] Article 21 (2) of the Brussels I Regulation.
[52] Bharat Saraf & Ashraf U. Sarah Kazi, *supra* note 41, pp.129 – 130.

e-businesses domiciled in non-Member States, will be subject to varied national provisions.[53]

5.2.1.2 *Article 7: the place of performance*

The Regulation provides certain exceptions under sections 2–7 to the general principle under Article 4, where the defendant who is domiciled in a Member State may be sued in other Member States.[54] The contractual obligation's place of performance is provided as one of those exceptions under Article 7.

At this juncture, the question is whether determining the jurisdiction of disputes arising from e-commerce transactions on the basis of the place of performance is instructive. In order to determine the judicial jurisdiction (from the place of performance perspective) of disputes arising from electronic transactions between businesses, it is important to differentiate between disputes involving supply of goods or services outside of the internet, and those concluded and executed entirely through the internet. Ascertaining jurisdiction of disputes in relation to the first category of electronic contracts is relatively straightforward, considering that the connections or elements upon which the rules of jurisdiction are implemented, such as the place where these contracts are to be performed, are clear.

For example, a French e-merchant sells machinery equipment over the internet to an Austrian factory; the parties have not made an agreement to confer jurisdiction of any dispute that may arise from their contract on a specific court, and the contract's provisions do indicate the place where delivery of goods is to be carried out, for instance, from France through Germany to Austria.[55] In such circumstances, where the contract's place of performance is connected to various Member States, France, Germany and Austria, considering that the delivery of goods in question is performed over the territories of these Member States, the Austrian courts (and even the German courts) could claim jurisdiction of the dispute brought by the Austrian firm in relation to the seller's obligation on the grounds that the place where the purchaser obtained

[53] *Ibid*, at. 130.
[54] Article 5 (1) of the Brussels I Regulation.
[55] The contractual parties may agree to consider the place of performance of their contract in a specific Member State among the other Member States in which the contract is performed. See C-386/05 *Color Drack GmbH v. Lexx International Vertriebs GmbH* [2007] I. L. Pr. 35.

the goods falls within the jurisdiction of the Austrian courts,[56] according to Article 7(1) of the Brussels I Regulation.[57] These contracts consist of physical elements implemented in geographical places, upon which (these elements) the judicial jurisdiction can be ascertained, even in the event that the contracting parties have not specified the place of performance in the contract. Thus, the contractual performance upon which the jurisdiction would be established for the courts of a Member State according to Article 7(1) must have been conducted or have been conducted within the territory of the latter Member State.[58]

Where a contract (other than for sale of goods or provision of services) consists of a number of obligations that are performed or to be performed in different Member States, provided that none of these obligations is considered a principal obligation, then each of these obligations has the potential to confer judicial jurisdiction on the courts of the State in which the obligation giving rise to the dispute is (to be) performed.[59] Conversely, if there is more than one performance obligation in dispute, and one of these obligations is considered principal compared with the other obligations, then jurisdiction can be assumed by the courts of the State in which this principal obligation is (to be) performed.[60] It seems plausible for the contractual parties to agree on one of the specific contractual obligations as being principal. Furthermore, the agreement on place of performance does not have to fulfil the requirements laid down under Article 25 of the Brussels I Regulation.[61] Thus, an oral or informal agreement determining the place where the contract is performed will be effective by virtue of Article 7(1) of the Brussels I Regulation.[62]

On the other hand, transactions concluded and performed entirely over the internet could introduce some difficulties, particularly in relation to determining the

[56] See Case C-87/10 *Electrosteel Europe SA v. Edil Centro SpA* [2011] I. L. Pr. 28, Case C-381/08 *Car Trim GmbH v. KeySafety Systems Sri* [2010] Bus. L.R. 1648.
[57] See Article 7(1) of the Brussels I Regulation.
[58] David McClean & Kisch Beevers, *Morris - The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2005), 6th edition, p. 72.
[59] Faye Fangfei Wang, *supra* note 43, at 48. See Case C-420/97 *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* [1999] ECR I-6747.
[60] See Case C-266/85 *Shenavai v. Kreischer* [1987] ECR 239.
[61] See Article 25(1) of the Brussels I Regulation, Case C-56/79 *Siegfred Zelger v. Sebastiano Salinitri* [1980] ECR 98.
[62] Peter Stone, *supra* note 41, at 85.

competent court to preside over disputes that arise from such electronic contracts.[63] For example, an English merchant requests the designing of software that suits its particular or special needs from a software programing company based in Germany through the internet. The delivery of the software was done by electronic transmission, i.e. downloading. Subsequently, the English firm cannot install the designed software on its operating system as the designed program does not match the instructions provided by the German merchant. Accordingly, the requesting party considers making a judicial claim against the programming company.

In such circumstances, litigation could be brought before the courts of the Member State in which the software was provided, or should have been provided, according to Article 7(b)(ii) of the Brussels I Regulation,[64] which derogates from the general principle under Article 4(1).[65] Given that the contract in question was formulated and supplied over the internet, it may not be straightforward to determine the place in which the software in question was, or should have been, provided. According to judicial interpretations of Article 7(2)(ii), this place is to be determined based on the provisions of the contract;[66] however, if the contractual parties have not identified that place and, perhaps unlikely, if it cannot be ascertained because of the nature of the contract, then a possible solution would be to confer judicial jurisdiction on the courts of the place where the characteristic performer is domiciled.[67] Nevertheless, this solution would not be instructive or particularly helpful, especially when such electronic contracts have more than one characteristic performer, or, in the case of contracts where both parties' performances are equal (that is, where there is no characteristic performer).

For example, merchant (A), established in England, concludes a contract with firms (B) in Germany and (C) in Finland in order to develop an application for smart phones. In this contract, both B and C are equally obliged to develop and deliver the

[63] See Peter Stone, 'Internet transactions and activities', P. Stone and Y. Farah (eds.), *Research Handbook on EU Private International Law* (Cheltenham, Edward Elgar Publishing Limited, 2015) pp. 4–6.
[64] Article 7(b)(ii) provides: 'in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.'
[65] Article 4(1) of the Brussels I Regulation provides: '1- subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'
[66] See P. Stone, *supra* note 62, pp. 5–6.
[67] P. Stone, *supra* note 62, pp. 5–6.

application through the internet to A, and the terms of the contract do not weigh the role of one of the developers as being more than the other. Therefore, both developing firms from Germany and Finland are considered characteristic performers under the contract. Hence, in these circumstances, it would be appropriate and preferable for the contracting parties to provide and agree on the place of performance of the contract. If, however, in such a case the place of performance has not been identified, it seems appropriate to refer to the jurisdiction for the country in which each party is domiciled, provided that both parties acting as characteristic performers are domiciled in the same country. If the contracting parties are domiciled in different countries, it seems preferable to refer to the basic principle of jurisdiction in Article 4(1) of the Brussels I Regulation; namely, the country in which the defendant is domiciled. It may also be possible in such a case to invoke the provisions of Article 8 of the Regulation, which allows related claims against more than one defendant to be pursued in the courts of the Member State in which one of them is domiciled.

This solution would provide certainty and predictability to the matter of jurisdiction in such circumstances. This basic principle also complies with situations in which there is more than one characteristic performer under the electronic contract, also assuming that there is a possibility to implement or introduce a jurisdiction approach that allows the characteristic performer to sue, before the courts of his domicile, the other party (who is also considered a characteristic performer) only, and merely with regard to obligations of the claimant, where this judgment does not concern obligations performed by the defendant. This approach seems to be analogous to splitting the laws applicable to the contract doctrine. Although this approach seems plausible to some extent, the basic principle of suing the defendant before the courts of the country in which he is domiciled is preferable, and maximises certainty between the parties.

At this juncture, it is important to point out one of the principles adopted by the European courts with regard to determining the jurisdiction of e-commerce transactions – an approach that could also be considered in relation to ascertaining the applicable law to electronic transactions.[68] The principle is established on the grounds

[68] See Peter Stone, *supra* note 62, pp. 2–4.

of Article 2(c) of the Directive on Electronic Commerce.[69] Although this Directive is not directly related to private international law, nor does it address issues of private international law,[70] it has provided tools and guidance that have helped the European Courts to establish principles related to disputes arising from electronic transactions, particularly with regard to judicial jurisdiction and choice of law. Specifically, in *Wintersteiger AG v. Products 4U*,[71] the European Court held that, given the objective of foreseeability and by reason of the uncertain location of the server, the place of establishment of the server, through which the harmful event was conducted in an action for intellectual property infringement,[72] 'cannot be considered to be the place where the event giving rise to the damage occurred', according to Article 7(2) of the Brussels I Regulation. Thus, in order to 'facilitate the taking of evidence and the conduct of the proceedings', the applicant had the option to bring his proceedings before the courts of the place of establishment of the defendant, namely the advertiser, considering that this was the place in which the harmful event occurred.[73]

Nevertheless, ascertaining the location of the server may be useful in the context of enforcing courts' rulings;[74] for example, a court order obliges a defendant to remove content, but this order does not seem to be instructive, considering that it is merely focused on a particular or specific server, while the defendant may have copied and saved this content on other servers. Thus, in this context, it seems appropriate for the court to oblige the defendant in its order to remove the content, wherever it is saved.[75]

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[69] Article 2(c) of the Directive EC Directive 2000/31 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market, [2000] OJ L178/1, which provides 'established service provider' as 'a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.'

[70] Article 1(4) of the Directive on E-Commerce provides: 'This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.'

[71] Case C-523/10: *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* [2013] Bus LR 150, para. 36.

[72] The harmful event in the context of this dispute was the infringement of a trade mark registered in a Member State by an advertiser, who used the identical keyword of the trade mark in the Google search engine for the top-level domain of another Member State, in which the trade mark was also protected.

[73] Ibid, para. 36–39.

[74] Dan Jerker B. Svantesson, Private International Law and the Internet (Netherlands, Kluwer Law International, 2012), p. 357.

[75] Ibid.

The Brussels I Regulation also provides other grounds upon which the court of a Member State may preside over litigations, namely submission by agreement or appearance. The contractual parties may choose a court or courts of a Member State to preside over any dispute arising from their contract, provided this agreement is made in writing,[76] in the form of practices established between the parties,[77] or in accordance with practices widely known in trade or commerce and recognised by the parties involved in the contract.[78] Moreover, the Regulation expressly recognised the parties' agreement regarding exclusive jurisdiction that is made through electronic means, on the condition that this method provides a permanent record of that agreement.[79] Further, the European Court held, in the *El Majdoub* case,[80] that the acceptance of general terms and conditions, which included a jurisdiction clause, provided electronically in the form of 'click-wrapping',[81] was sufficient to represent consensus between the parties,[82] and fulfilled the requirement under Article 25(2) of the Regulation. It is noteworthy in this context that the claimant must demonstrate before the chosen court that the jurisdiction clause is based or built on consensus between the parties and the requirements of form in Article 25(1) or (2) are fulfilled.[83]

With regard to submission to jurisdiction by appearance, Article 26 of the Brussels I Regulation applies where a defendant appears before the court of a Member State in which he is not domiciled,[84] aside from the other jurisdictional rules under the Regulation. It does not, however, prevail over the rules that afford exclusive jurisdiction to other courts[85] – namely, Article 24. On the other hand, Article 26

[76] Article 25(1)(a) of the Brussels I Regulation. Thus, a mere draft agreement does not become an effective agreement; however, there must be sufficient evidence that reflects consensus between the contractual parties on the jurisdiction agreement or clause. See, in this context, *Bols Distilleries BV v. Superior Yacht Services Ltd* [2007] 1 W.L.R. 12.
[77] Article 25(1)(b) of the Brussels I Regulation.
[78] Article 25(1)(c) of the Brussels I Regulation.
[79] Article 25(2) of the Brussels I Regulation.
[80] Case C-322/14 *El Majdoub v. CarsOnTheWeb.Deutschland GmbH* [2015] 1 W.L.R. 3986.
[81] Click-wrapping can be defined as a practice or method used by an online seller or service provider in which the potential purchaser must accept the seller's general terms and conditions of the contract by clicking on the relevant box before making a purchase.
[82] See Recital 19 of the Brussels I Regulation, which confirms that the parties' autonomy should be respected, with the excepted grounds provided by the Regulation.
[83] This principle, which is referred to as a 'good arguable case', was introduced in *Bols Distilleries BV v. Superior Yacht Services Ltd* [2007] 1 W.L.R. 12
[84] See Article 26 of the Brussels I Regulation.
[85] In the context of exclusive jurisdiction, see Case C-73/04 *Klein v. Rhodos Management Ltd* [2005] ECR I-8667, and Case C-438/12 *Weber v. Weber* [2015] Ch. 140.

prevails over Article 25 of the Regulation;[86] accordingly, if the parties have agreed to submit any dispute that may arise in relation to their contract to one or more courts of a Member State, this does not preclude a court of another Member State from presiding over such disputes on the grounds of submission by appearance, on the condition that the defendant's appearance before the latter court is not intended to contest the jurisdiction of the court in question.[87]

5.2.2 Jurisdiction in respect of B2C Transactions

5.2.2.1 *The Definition of Consumer*

Articles 17–19 of the Brussels I Regulation defined the context of protection provided to EU consumers, and especially to those involved in transactions through the internet. Article 17 initially designates, or rather defines, the type of individuals who shall enjoy the protective measures under the legislation.[88] In the context of e-commerce, a consumer,[89] according to Article 17(1), is a person who concludes an electronic transaction for a purpose outside his trade or profession. Hence, a person's intention to trade or to conduct professional activity, either at the moment of concluding the contract or after its conclusion, will deprive him of the concept of consumer.[90]

[86] David McClean and Veronica Ruiz Abou-Nigm, *Morris on the Conflict of Laws* (London, Sweet and Maxwell, 2012) 8th edition, at 98.
[87] According to Article 28 of the Brussels I Regulation, if the defendant is absent in proceedings brought against him before a court of a Member State in which he is not domiciled, the court in question shall declare that it has no judicial jurisdiction over the case, providing that the jurisdiction is not based on other provisions of the Regulation.
[88] The definition of consumer under Article 17(1) of the Brussels I Regulation is echoed by Article 6(1) of the Rome I Regulation, and Article 4(1)(a) of the EU Directive 2013/11 of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation No. 2006/2004 and EC Directive 2009/22 (Directive on Consumer ADR).
[89] The European Court in *Shearson v. TVB* defined the concept of consumer as 'the party deemed to be economically weaker and less experienced in legal matters than other party to the contact, [where] the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the contracting State in which the other party to the contract is domiciled', Case C-89/91 *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, para. 18.
[90] See Case C-269/95 *Benincasa v. Dentalkit Srl* [1997] ECR I-3767, in which the European Court of Justice held that the concept of consumer under the Brussels I Regulation did not include an individual whose profession or trade intention appears during either conclusion of the contract or post-contracting.

Furthermore, the definition of consumer is extended under the Consumer Rights Directive;[91] specifically, Recital 17 thereof provides that: 'where the contract is concluded for purposes partly within and partly outside the person's trade, additionally the trade purpose is so limited as not being predominant in the overall context of the contract, that person shall also be considered as a consumer.'

One example of mixed purposes could be if a dentist buys a laptop to use in replying to emails concerning his clinic, but also to communicate with his family abroad and for leisure, such as browsing social media websites and watching movies. The dentist could prove, in order to fall within the concept of 'consumer' under Article 17 of the Brussels I Regulation, that his professional purpose for buying this laptop was very limited, to the extent that it is marginal compared with his use of the device for personal reasons, while he made adequate attempts to make the trader or supplier aware of that intention.[92] In contrast, if the individual acted in a manner that gave the trader or business the reasonable impression that he was contracting for the purpose of fulfilling his professional needs, and if the individual, who wishes to be deemed a consumer, cannot prove before the court in question that his trade or professional intention was negligible, then the special rules of jurisdiction in relation to consumer contracts would not apply to the case.[93]

The question that may arise in this context is which party is obliged to prove the person's purpose, when his actions reasonably indicate non-consumer intention for contracting to the trader or when the person has mixed purposes that consist of minimal trading and dominant personal consumption for contracting with a trader. It seems plausible to refer the burden of proof of non-trading intention to the party who claims to be a consumer, particularly in a case where this party holds dual purposes for contracting, because such intentions are intangible and the onus is on the party who claim them to prove them. Thus, an individual who claims to be a consumer may rely on any appropriate method in order to prove that his non-trading intention to contract is dominant, while trading intention is negligible.

[91] Directive EU 2011/83 on Consumer Rights, amending Council Directive EEC 93/13 and Directive EC 1999/44, replacing Directive EEC 85/577 and Directive EC 97/7.
[92] See Case C-464/01 *Gruber v. BayWa AG* [2006] QB 204.
[93] See Case C-419/11 *Ceska sporitelna as v. Feichter* [2013] CEC 923.

On the other hand, if the trader or business alleges that the other party who is supposed to be a consumer has conducted actions that indicate otherwise, the burden of proof falls on the trader. It seems appropriate for the trader, in proving this condition, to provide a plausible or reasonable link between the actions conducted by the individual and the assumption that this person's intention aimed to fulfil his trading or professional need. Referring the burden of proof in this situation to the trader or supplier is based on the fact that the impression that the consumer is acting in a manner indicating a professional or trade intention is sourced from the supplier or the trader.

It is essential to point out that the e-commerce environment may serve the mixed purpose individuals whose consuming purpose for contracting is less dominant than or minimal compared to their trading intention, and possibly some of those persons may take advantage of distance contracts to cover their trading or professional intention,[94] for instance, through using their home address for the delivery of goods purchased online from a trader, or using different names to cover professional identity and purpose. Furthermore, those persons may also take advantage of social media to promote and facilitate their commerce, and thus it would be difficult for the other party to prove that these commercial activities are conducted by that person who is under the cover of consumer identity. Moreover, electronic transactions are carried out or concluded without the need for a face-to-face meeting between the parties, and hence it would be difficult for the other party to the contract to examine the person's behaviour or actions, upon which the other party could establish the assumption that the individual was acting for professional or trade purposes.[95]

Hence, this leads to the establishment of a general principle that any individual who buys an item or pays for a service through the internet is a consumer, unless it appears otherwise, whether from the circumstances or the person concerned declaring his non-

[94] As regards to distance contract, Recital 20 of Consumer Rights Directive provides: "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 service- provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded"

[95] This assumption could be judged on the possibility of physical meeting, or even through electronic communication mediums such as video or voice calls, between the parties prior of concluding electronic contracts. Although this possibility of this scenario, however, the common practice in e-commerce transactions does not involve such meetings.

consumer intention or behaving in a way that indicates his business purpose for contracting. Additionally, it is for the court seized, from the evidence submitted and circumstances, to decide whether this general principle applies to the individual concerned or whether that person is exempted from that principle and considered as a professional or business.

5.2.2.2 *Protective Measures for Consumers*

Consumer protection is an areas that witnessed significant amendments under the Brussels I Regulation, compared with its predecessor, the Brussels Convention.[96] The Regulation upholds the protection provided to consumers on the basis that they are the weaker party, who should be protected by rules of jurisdiction that are more favourable in their interests than general rules.[97] Article 18 of the Brussels I Regulation affords consumers the right to either sue before the courts of the Member State in which they are domiciled or before the courts of the country in which the business or trader is domiciled.[98] The trader or business can bring proceedings against the consumer only before the courts of the Member State in which the latter is domiciled. It is apparent that this protective rule for consumers also refers to the domicile, the same element upon which the general jurisdiction rule for B2B transactions is based.[99] Consumer protection, provided under the Brussels I Regulation, also extends to denying recognition of judgments given in violation of jurisdiction rules concerning consumer contracts.[100]

[96] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 [1972] OJ L299/32. It is important to note that 'the Brussels Convention was the first instrument to protect consumers at the private international law level in relation to the jurisdiction', Xandra E. Kramer, 'The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?', in *Research Handbook on EU Private International Law* (Cheltenham, Edward Elgar Publishing Limited, 2015) p. 268

[97] The Recital 18 of the Brussels I Regulation (recast).

[98] It is important to note in this context that this right is afforded merely to consumers and does not extend to consumer-protection associations, which have a legitimate interest under the national law in protecting consumers. For example, according to Article 7(2) of the Unfair Terms in Consumer Contracts Directive, these associations 'may take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair', thus, in exercising this right, these bodies should bring such proceedings before the court where the defendant is domiciled. See C 413/12 *Asociacion de Consumidores Independientes De Castilla y Leon* v. *Anuntis Segundamano* [2014] 2 C.M.L.R. 24, in which the court took this view on the grounds that a consumer protection association's position is not as weak as that of the consumer.

[99] Faye Fangfei Wang, *supra* note 43, at 58.

[100] Article 45(1)(e) of the Brussels I Regulation

The Brussels I Regulation under Article 17(1) explicitly identifies certain contracts to be subject to its protective rule for consumers. These are, firstly, contracts concerning sale of goods on instalment credit, and secondly, transactions for a loan repayable by instalments. The provision was further extended to any other form of credit made to finance the sale of goods.[101]

On the other hand, Article 17(1)(c) lays down the criteria by which the consumer protective provisions of the Brussels I Regulation apply to other consumer contracts. Specifically, the rule applies to contracts resulting from the trader or supplier pursuing his commercial or professional activities in the Member State in which the consumer is domiciled or, by any means or method, directing these activities to that Member State or to several States, including that in which the consumer is domiciled.[102] Thus, the main pillars required in applying the latter provisions are as follows: first, the consumer has to be domiciled in a Member State; and second, the trader or business has to pursue or direct its professional or commercial activities to that Member State.[103]

According to Article 17(1) of the Regulation, two circumstances are excluded from the scope of these protective measures of jurisdiction; the first exception refers to the application of national jurisdiction rules to specific circumstances,[104] and the second is applicable to disputes concerning the activities of branch, agency or other establishments.[105]

The protective approach clearly benefits the consumer, which is especially credited to the technologically neutral wording of Article 17: 'pursues commercial or professional activities in the Member State ... or, by any means or method, directs such activities'. This has allowed the provision to embrace various ways that a consumer's contract could be concluded. Specifically, the objective of this wording is highlighted by the Joint Statement of the Commission and the Council on Articles 15 (Article 17 in the Regulation Recast) and 73 of the Regulation, stating that it is aimed

[101] Article 17(1)(b) of the Brussels I Regulation.
[102] Article 17(1)(c) of the Brussels I Regulation.
[103] Faye Fangfei Wang, *supra* note 43, at 60.
[104] Article 6 of the Brussels I Regulation.
[105] Article 7(5) of the Brussels I Regulation.

at embracing 'a number of marketing methods, including contracts concluded at a distance through the internet'. [106] Accordingly, the scope of protection provided to consumers has widened under the Brussels I Regulation provisions, which aimed to cover electronic transactions involving consumers.[107] This protection also assumes that the e-trader or e-business has to comply with the laws of the country from which the consumer is contracting the business. This assumption can be justified on the following grounds: the first is based on the borderless nature of e-commerce, which facilities e-traders' activities in offering consumers goods or services, [108] and considering that consumers, in contracting through websites that provide these goods and services, do not acknowledge that these contracts may affect or limit their jurisdictional right.[109] Secondly, the number of disputes arising from B2C transactions is minimal[110] compared with other electronic transactions. Finally, e-businesses can manage their online commercial activities, especially in directing these activities towards consumers of specific countries with whom they intend to transact, and avoid consumers from other countries.[111]

This protective approach for consumers has, however, been criticised mainly with regard to its implications for e-commerce,[112] considering that the concept of directing activities could create an unpredictable environment, particularly from a business perspective, because of the ambiguity of the latter concept and uncertainty with respect to its extents.

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[106] Legal Affairs Series, available at: http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf. See also the European Parliament Working Paper, The Impact of Private International Law on e-Commerce on the Internal Market, JURI 105 EN, pp. 6-9, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2001/303747/IPOL-JURI_ET(2001)303747_EN.pdf

[107] Dicey, Morris and Collins, *supra* note 14, p. 511,

[108] Bharat Saraf & Ashraf U. Sarah Kazi, *supra* note 41, p.128.

[109] The European Commission Official Journal C 376E/1, Vol.42, 28 December 1999. David McClean and V. Ruiz Abou-Nigm, *supra* note 85, p. 88.

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[111] Ibid.

[112] David McClean and V. Ruiz Abou-Nigm, *supra* note 85, at 88. See in particular the International Chamber of Commerce's comments in its Electronic Commerce Project (ECP) Ad hoc Task Force on Jurisdiction and Applicable Law in Electronic Commerce, published on 6th June 2001, available at: http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2001/jurisdiction-and-applicable-law-in-electronic-commerce/, J. Øren, 'International Jurisdiction over Consumer Contracts in e-Europe' (2003), *The International and Comparative Law Quarterly*, Vol. 52, No. 3. 689, and Youseph Farah, 'Allocation of Jurisdiction and the Internet in EU law' (2008), *European Law Review*, Vol. 33, No. 2. pp. 257–270.

Jurisdiction agreements concerning consumer contracts is merely effective in departing from the rules of section 4 of the Brussels I Regulation in three situations, according to Article 19 thereof. First, the jurisdiction agreement is made after a dispute has arisen.[113] Second, since this agreement allows the consumer to bring proceedings before courts other than those in the provisions of section 4,[114] this agreement should give the concerned consumer more court options for proceedings concerning the contract than previously; nevertheless, this agreement does not preclude the consumer from bringing proceedings before the courts determined according to the provisions of section 4 of the Brussels I Regulation. In the third situation, the jurisdiction agreement is made between the consumer and another party, who are both domiciled at the time of concluding the contract in a Member State, and the jurisdiction agreement confers jurisdiction on the court of that State, providing that this agreement does not contradict the laws of that Member State.[115] Article 19(3) of the Brussels I Regulation sets the required time in which the consumer's domicile is ascertained, which is at the time of concluding the contract. Thus, for example, where a consumer domiciled in Germany purchases a home entertainment system from a German, and subsequently moves to the Netherlands where the system proves to be faulty, the consumer might bring proceedings before a Dutch court, but the court would not preside over the judgment on the basis of no jurisdiction.[116]

In the case that the defendant is the consumer and appears before a court of a Member State, other than courts that have jurisdiction by virtue of Articles 17–19 of the Regulation, this consumer's appearance must not be recognised or considered as a submission to the jurisdiction of the court presented to, unless the court in question has ensured that the consumer is aware of his right to challenge its jurisdiction and is informed of 'the consequences of entering or not entering an appearance', according to Article 26(2) of the Regulation.[117]

It is important to highlight that the consumer would not be eligible for the protection afforded by the jurisdiction provisions under the Brussels I Regulation if he entered

[113] Article 19(1) of the Brussels I Regulation.
[114] Article 19(2)
[115] Article 19(3).
[116] Dicey, Morris and Collins, *supra* note 14, p. 514.
[117] See Article 26(1) of the Brussels I Regulation.

into the contract with the trader or business in bad faith.[118] For example, the individual who is acting as a consumer could provide the address of domicile in a Member State in which he is not, in fact, domiciled, in order to take an advantage of the special rules for bringing proceedings before the courts of the latter Member State.

5.2.2.3 *The European Courts' Rulings*

In order to examine the application of these protective provisions, and especially to identify the concept of 'directing activities', it is fundamental to refer in this context to the European Court's ruling in the cases *Pammer v Reederei Karl Schlüter*[119] and *Hotel Alpenhof GesmbH v Oliver Heller*.[120] Here, the European Court listed a number of examples or circumstances that were considered to fall within the concept of directing activities under Article 17(1)(C) of the Brussels I Regulation,[121] namely, 'the international nature of the activity, mention of itineraries from other member states for going to the place where the trader is established, use 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, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other member states, use of a top-level domain name other than that of the member state in which the trader is established, and mention of an international clientele composed of customers domiciled in various member states.'

Hence, a question that may arise in this context is if an e-trader has provided on his website a link to another e-business website, which provides activities directed to the Member State of the consumer's domicile, then would the first e-trader be considered to have activities directed to the latter Member State? For example, if website A, which specialises in the sale of home electronic appliances, provides a recommendation on its website to visit the website of business B, which provides a service of repairing such appliances, it seems unlikely that the first trader's conduct is

[118] Y. Farah, *supra* note 110, at 270.
[119] Case C-858/08 [2010] ECR I-12527.
[120] Case C-144/09 [2010] ECR I-12527.
[121] Joined cases C-858/08 and C-144/09 [2012] Bus. L.R. 972, para. 95.

capable of falling under the concept of directing activities under Article 17(1)(C) of the Brussels I Regulation.

There is a question of whether a website that merely presents a business's or professional's contact details, and does not incorporate a processor that allows consumers to transact with the trader through the website, should be considered as falling within the concept of directing activities. The court in the latter case expressly ruled out such a distinction, considering that in presenting a trader's contact information consumers can contract with this trader outside of the internet environment.[122]

Specifically in relation to the mention of telephone numbers with an international code, the European Court in *Pammer* considered such a matter as one of a non-exhaustive list of indications that the court may rely on to establish that the trader's activity is directed to the consumer's Member State. This factor, however, cannot be solely relied on in order to classify the trader's activity as being directed to the Member State of the consumer's domicile, except if this matter is accompanied by other factors.

Imagine that a Moroccan business sells Moroccan souvenirs and saffron over the internet to French consumers, but a British tourist, while on vacation, comes across the shop and takes the shop's business card. The tourist, when he or she travelled back to the United Kingdom, contacts the business via telephone and purchases some Moroccan souvenirs and saffron, although the business expressed that it had not transacted previously with customers from the UK. In such a circumstance, would the British courts have jurisdiction, by virtue of the consumer contact provisions under the Brussels I Regulation, over any dispute arising from this contract?

Considering that the business's website is in the French language and the currency that appears on the website is euros, the business does not seem to be directing its activities to the UK; however, the fact that its contact information, such as an international telephone number, is presented on the website could be considered an

[122] Ibid, Para. 79, see also Dan J. B. Svantesson, *supra* note 73, pp. 364–365.

indication of directing activities from the business. It does not seem convincing that this consumer contract in such circumstances would fall within the concept of directing of activities under Article 17(1)(c) of the Regulation. The mere fact that the business provided its telephone number with an international code may also suggest that it is directing activities to consumers of other Member States; however, it does not seem appropriate, considering on the other hand that the trader mainly directs its commercial activities to a particular Member State, and does not also facilitate deliveries through its website to other Member States. In fact, mentioning the international code on the website is intended to facilitate communication between the business and consumers of the specific Member State; for instance, to track their orders, discuss any complaints, and even help consumers meet special needs.

Furthermore, the business's inclusion of an international number seems to have a weight similar to the factor of accessibility of the business's website, considering that the international number provides a connection between the business and consumers; thus, the contact number of the business provides consumers with access to its goods or services, as does the business's website.[123] On this basis, it does not seem plausible for the court of a Member State to rely only on this single factor to classify the business activity as being directed to that Member State's consumers, in order to apply the protective consumer provisions of jurisdiction.

On the other hand, imagine that a business domiciled in Member State A has not provided an international contact number on its website, and only provides its local or national contact number and address. Would this factor be sufficient to regard the activities of this business as not being directed to Member State B? Referring to the European court ruling in the *Pammer* case, this feature should not consider the latter business activity as being directed to Member State B, even if the consumer domiciled in that Member State contracted the business, by identifying the international code that needed to be added to the business's local number, and concluded a contract. According to the latter example and above examination of the business's international contact number, it does not seem to be a decisive factor for

[123] 'In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 (Article 17 in the Regulation recast) to be applicable', the Joint statement of the Commission and the Council on Arts 15 (Article 17 in the Regulation recast) and 73 of the Regulation, *supra* note 104.

applying protective jurisdiction rules to consumer contracts. Hence, it seems appropriate for the court seized, in the situation where a consumer transacts with a business as a result of the business's international contract number being provided, to consider and analyse all circumstances surrounding the consumer contract in order to identify whether this factor played a vital part in concluding the contract between the consumer and the business.

In the *Pammer* case, the court expressly excluded other matters or factors from the scope of directing activities, specifically 'the mere accessibility of the trader's website by consumers, providing contract details on e-business' website, such as an email address or landlines, or using a language or currency that is generally used in the member state in which the business is domiciled'.[124] The court also provided a means by which to determine whether an e-business activity is directed to the Member State in which the consumer is domiciled. In detail, the court would examine the e-business's website and what is apparent from its overall activity before concluding any contract with the consumer, where the business is transacted with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that this activity was intended to conclude a contract with them. [125]

Furthermore, in another ruling, the European Court held that the application of Article 17(1)(c) of the Brussels I Regulation is not limited to contracts concluded through the internet or at distance, but also extends to consumer contracts concluded in the place in which the business conducts its activities, provided that the consumer has contacted the business earlier through a telephone number provided via the business's website.[126] This illustrates some of the factors that fall within the concept of directing activities, which the European Court mentioned in the *Pammer* case. The first factor is the mention of a telephone number with an international code on the trader's website, through which the consumer in the *Yusufi*[127] case communicated with the

[124] Ibid.
[125] Ibid.
[126] Case C-190/11 *Muhlleitner v. Yusufi* [2012] I.L. Pr. 46.
[127] Ibid.

trader.[128] The second is the mention of itineraries from other Member States for going to the place where the trader is established, which is evidenced when the consumer goes to the trader's establishment in order to conclude the contract in question.[129]

The European Court in *Emrek v. Sabranovic*[130] provided further interpretation of the circumstances that fall within Article 17(1)(c) of the Brussels I Regulation. In this ruling, the court affirmed the application of Article 17(1)(c) to contracts concluded outside of the internet between a consumer and trader, provided that earlier communication is made between the parties through the internet or telephone.[131] The court expressed that there is no need for a causal link between the methods (such as a website or mobile application, or possibly an online advertisement) used by the trader to direct its activities to the Member State of the consumer's domicile and the conclusion of the contract with that consumer, in order to apply Article 17(1)(c) of the Regulation.[132] The court also stated that proof of such a link may be difficult and consequently may hinder the consumer from litigating before the national courts under Articles 17–18 of the Regulation; hence, this would be contrary to the objective pursued by these provisions.[133]

Furthermore, according to the court ruling, in a situation where a business is located in an urban area of a Member State (A), and that area extends to the border of another Member State (B), while additionally the business provides a local telephone number that may be used by consumers domiciled in Member State (B), such circumstances could provide evidence that the business's activity is directed to the latter Member State.[134] On the other hand, the court did not rule out the importance of the existence of a causal link, which may represent strong evidence for the court to consider in ascertaining whether the activity falls within the concept of directing activities.[135]

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[128] Ibid, para. 13. Furthermore, the trader had also emailed the consumer with further details of the car that the latter was keen to pay.
[129] Ibid, para. 14.
[130] Case C-218/12 [2014] BUS LR 104
[131] The ruling of the European Court in Case C-190/11 *Muhlleitner v. Yusufi* [2012] I.L. Pr. 46, see Peter Stone, *supra* note 62, pp. 7–9.
[132] Case C-218/12 *Emrek v. Sabranovic* [2014] Bus. L.R. 104, Para. 20.
[133] Ibid, para. 25.
[134] Ibid, para. 30.
[135] Ibid, para. 26.

It may seem apparent from the foregoing court's rulings that the exclusion criteria for a trader's activities from the scope of Article 17(1)(c) of the Brussels I Regulation are limited, and may entail careful assessment of the trader's website and overall activities by the national courts.[136] In this context, it is suggested, for example, that the court, when examining the reason a trader chooses a domain name from a Member State other than that in which he is established, may discover that the objective underpinning this choice is to suit the trader's name, rather than directing his activities to consumers of that Member State.[137] Additionally, it is suggested that the purpose of directing activities should not be evidenced merely by reference to the business's registration of domain name or the location of hardware used for facilitating operation of its website, but in fact it should be demonstrated by a continuous trade strategy that aims to have an economic impact on the business.[138]

The opinion of the Advocate General on this matter, however, is that the domain name is clear evidence that the trader's activity is directed to the consumer's Member State, though this does not prevent the trader from transacting with consumers of other Member States.[139] This approach seems to be correct to some extent; however, it seems appropriate to add an exception to this principle, where the trader or business provides proof that the choice of domain was not aimed to direct activities. Logically, the burden of proof for this argument or claim is on the trader's part before the court seized.

From another perspective, a question worth considering is whether the court shall consider, in order to apply Article 17(1)(c) of the Brussels I Regulation, the intention of the trader's activity. In this context, it is important to cite part of the Advocate General's opinion on the cases of *Pammer* and *Hotel Alpenhof*,[140] which provides that:

[136] Peter Stone, *supra* note 62, at 9.
[137] Dan J. B. Svantesson, *supra* note 73, at 364.
[138] Faye Fangfei Wang, *supra* note 43, at 120.
[139] Opinion of Advocate General Trstenjak delivered on 18th May 2010 on joined cases C-585/08 and C-144/09, para.84.
[140] Opinion of Advocate General Trstenjak delivered on 18th May 2010 on joined cases C-585/08 and C-144/09, para. 2.

'When interpreting this term [directing of activities] it is therefore necessary to achieve a balance between protection of the consumer, who is entitled to call upon the special rules of jurisdiction under Regulation No. 44/2001, and the consequences for the undertaking, to which these special rules of jurisdiction can only apply once it has made a conscious decision to direct activities to the consumer's Member State.'

This statement may suggest that application of the Regulation's consumer contract provisions is limited to circumstances in which the trader has consciously decided to direct his activities to the Member State of the consumer's domicile. This could weaken the consumer's position, which does not comply with the Regulation objective of protecting the consumer,[141] although it may protect the trader who is acting in good faith and has directed his activities to the Member State of the consumer's domicile unintentionally. It seems appropriate for the European courts to apply the consumer contract provisions of the Regulation even if the business has mistakenly directed its activities to the consumer's Member State, on the basis that, firstly, this approach will avoid uncertainty in determining the trader's intention, and secondly complies with the Regulation's objective of protecting the consumer.[142]

A possible approach in the context of applying Article 17(1)(c) of the Brussels I Regulation lies in the focus on a single criterion – namely the conclusion of a contract between the business and the consumer[143] – instead of four conditions.[144] According to this approach, it is assumed that when a business concludes a contract with a consumer domiciled in a Member State, it has directed its activities to that State, on the basis that the conclusion of the contract is strong, but not absolute, evidence that the business has directed its activities to the Member State in which the consumer is

[141] Dan J. B. Svantesson, *supra* note 73, at 365.
[142] Ibid.
[143] Dan J. B. Svantesson, *supra* note 73, at 367.
[144] Advocate General Trstenjak provided four conditions required in order to apply Article 17(1)(c) of the Brussels I Regulation, which are:(1) the conclusion of a contract; (2) the conclusion of a contract between a consumer and a person who pursues commercial or professional activities; (3) the conclusion of a consumer contract that falls within the scope of the undertaking's commercial or professional activities; and (4) the pursuit of activities in the consumer's Member State or the directing of activities to that Member State. See Opinion of Advocate General Trstenjak delivered on 18th May 2010 on joined cases C-585/08 and C-144/09, para. 52–59.

domiciled.[145] The burden of proving the opposite of this presumption is on the business.[146] This approach aims to avoid the complexity in ascertaining the concept of businesses' directed activities to consumers' Member States, as apparent from the European Court's interpretation of Article 17(1)(c), and to provide certainty to the scope of consumer contract provisions of the Brussels I Regulation.[147] The implication of adopting this approach is for businesses to implement proper measures to avoid transacting with consumers of certain Member States, such as limiting the delivery of sold goods to specific Member States, and restricting the acceptance of payments by debit or credit cards to those registered in the desired Member States.

The latter approach could be considered tough on e-businesses, especially those considered small or medium-sized, from the perspective that it will establish a general principle that every e-business is deemed to be directing its activities to the Member State of the consumer's domicile, unless, as an exception to this principle, the concerned business has envisaged avoiding transacting with consumers domiciled in one or more Member States, in the sense that its activities were not intended to conclude contracts with those consumers. On the other hand, this approach provides greater certainty with respect to protecting consumers and with respect to businesses, and furthermore may lead businesses involved in e-commerce with consumers to reconsider their commercial or professional policies, activities, and measures in order to determine which Member States' consumers they are targeting. Still, the question of determining the definition of directing activities may be considered by the European courts. In practice, this approach may minimise the blurry scope of directing activities through driving e-business, whose activities might fall within the uncertainty towards this scope, to determine the consumers of Member States targeted by commercial activities, in order to avoid transacting with consumers of other Member States.

5.2.3 Recommended Jurisdiction Approaches for the GCC and UAE

[145] Dan J. B. Svantesson, *supra* note 73, at 367. An opposite to this approach is in J. Øren, *supra* note 111, 687, who suggests that the applicability of section 4 of the Brussels I Regulation should not simply be considered based on the existence of a consumer contract.
[146] Ibid.
[147] Ibid, at 368.

The main points that the GCC and the UAE should focus on are adopting provisions that maintain the beneficial effect or the effectiveness of e-commerce between businesses, and providing appropriate protection to consumers involved in electronic transactions with businesses. Furthermore, these provisions, which are recommended for the GCC and the UAE to adopt particularly in the fields of maintaining the effectiveness of e-commerce between businesses and ensuring consumer protection, should use wordings and terms that comply with the nature of e-commerce, or in other words embrace the technological neutrality aspect,[148] considering that these provisions are aimed to govern almost all civil and commcercial transactions including those concluded electronically.

For the purpose of ensuring predictability of the jurisdictional rules applicable to e-commerce transactions, and to facilitate administration of proceedings that may arise from these transactions, it is essential for the GCC Member States and the UAE to adopt appropriate measures that ensure the courts do not consider the location of the hardware, such as servers of search engines, used to establish internet or online platforms for e-commerce, in determining the jurisdiction of disputes that may arise from electronic transactions, whether performed or supplied through the Internet.[149] Adoption of this approach would direct GCC or Emirati courts to determine the jurisdiction or choice of law, especially in the absence of a relevant agreement between the contracting parties.

Jurisdictional Approaches concerning B2B Contracts

The first principle or approach needed under the proposed provisions entails recognition of the parties' choice of court agreement. Like the GCC and the UAE approach in recognising the choice of legal agreements, it is essential to extend this approach to also cover the choice of court agreements; however not least the importance of this approach in the scope of e-commerce, and its positive implications to businesses. This approach would also eliminate controversy under the current jurisdiction rules of the UAE and GCC Member States, which recognise the

[148] In the context of technological neutrality *see* footnote 5 at page 2 of this thesis.
[149] Notwithstanding, it is important at the same time to include an exception within these adopted provisions that allows the court seized to refer to the location of hardware, in circumstances where this location is relevant to the jurisdiction or choice of law of a dispute, such as an online contract with regard to hiring servers or processors.

contracting parties' arbitration agreement while failing to recognise their choice of foreign court agreement.[150]

Foreseeing the adoption and applicability of this approach in the UAE is through recognising the choice of court that confers the jurisdiction on the courts of countries that have judicial cooperation agreements with the UAE. Although such limited adoption of this approach may be considered the most likely scenario, the preferable adoption is to extend recognition of the choice of court agreements that afford jurisdiction to the court or courts of countries that have not yet established judicial cooperation treaties with the UAE.

The importance of recognising the choice of court agreement in the GCC and UAE is not in dispute; however, it is also important to identify the specific circumstances in which the choice of court agreement would be restricted or invalid. One of these situations is the choice of court agreement between consumers and businesses or professionals.

Jurisdictional Approaches Concerning B2C Contracts

The European approach toward protecting consumers' rights is instructive and effective in many respects, in terms of protecting their litigation power before the courts of Member States in which they are domiciled, and in defining the concept of consumer in order to embrace those acting with mixed purposes, provided their trade or professional purpose is negligible or insignificant. However, the criteria by which this EU approach applies to consumers' electronic transactions requires further clarification, particularly in relation to the concept of 'directed activities'.

On the other hand, the extent of applicability of the proposed rules in the UAE and the GCC must also be taken into consideration, which adds a further point of differeiation between the GCC and the EU. This is due to the fact that, firstly, the generality overwhelms the provisions governing the issue of determining the law applicable to contractual obligations;[151] secondly, the provisions governing jurisdiction afford the

[150] See section 3.2.1.1, The Approach of UAE's Courts towards Jurisdiction Rules.
[151] See sections 4.2.1, The Applicable Law of B2B Transactions in the UAE, 4.2.3, Summary, and 4.3.1, The Applicable Law of B2C Transactions in the UAE and some Member States of the GCC.

contracting parties very limited freedom, especially in the selection of a competent court;[152] and thirdly, it is likely that the UAE courts would resort to Article 23 of the Civil Transactions Law, which opens to the Emirati court the reference to prevailing principles in private international law.[153] This importantly indicates a preference to provide a margin of discretion to the national courts on matters concerning private international law. Thus, these aspects should be considered when proposing new provisions for this specific area of private international law in the UAE legislations. It is not plausible to ignore these features and to propose new provisions that do not share any of these aspects; this could consequently affect the possibility of adopting these new rules. Therefore, it seems appropriate to propose new provisions for the GCC and the UAE that embrace the most-needed and important approaches adopted under the EU, and at the same time are tinctured with some of the approaches from the old provisions, on the basis that a gradual change is more likely to be adopted than one that is completely different.

Based on this principle, it seems appropriate for the GCC and the UAE to adopt provisions that would protect the consumer's litigation right to bring proceedings, in relation to his contract with a trader or business, before the courts of his domicile. The criterion on which the scope of this protective rule is determined is based on the concept of 'directed activities' by the trader or business. This concept should nevertheless be defined under the forthcoming provisions or amendments under the UAE's legislation, specifically through providing examples and conditions that would clarify this concept to the courts, along with the circumstances in which it would apply. For example, the mere conclusion of a contract between consumer and trader does not entail classifying the trader's activity as being directed to the UAE; however, conclusion of a contract shall be considered one of the main factors in the court's assessment.

Assessment of the trader's overall activity is intended to provide the UAE courts with a margin of discretion; this approach would comply to some extent with the UAE's legislation tendency in providing an area of discretion for judiciary, as is clearly

[152] See sections 3.3.1, Jurisdiction Rules Concerning B2C in the UAE, and 3.3.3, Jurisdiction Rules for B2C in Other Member States of the GCC.
[153] See section 3.4, Conclusion, and section of chapter 4.

apparent in the UAE's private international law provisions and particularly Article 23 of the Civil Transactions Law. Notwithstanding, this discretionary power should, preferably, be tinctured with guidelines provided under the new provisions, which would assist the court seized through overall assessment of the trader's activities in order to determine the extent to which this activity is directed to the State in which the consumer is domiciled.

The consumer protection should also be considered in relation to jurisdiction agreements in the new provisions, both in the UAE and the GCC. Restricting the consumer's right to litigate before the courts of his domicile on the basis of these agreements should be expressly prohibited under these rules, in addition to providing an exception to this rule in circumstances where (1) such an agreement between the consumer and professional or business is made after the litigation held before the courts of the consumer's domicile; (2) this agreement allows the consumer to bring proceedings to more courts and does not restrict his right to litigate before the courts of his domicile; or (3) if an agreement has been made between a business and consumer, who are both domiciled in the same country, to confer jurisdiction to the courts of the latter country.

In addition to the above recommendations, with regard to protecting consumers' jurisdictional rights, it is vital to point out some essential principles that the GCC should adopt; for instance, mutual trust in the administration of justice between the Member States of the GCC should be established, in order to eliminate any special procedures required to recognise judgments from a Member state in the other Member States of the GCC. These principles could be established between the GCC member states through binding legislations or conventions on those states by the GCC. These legislations would govern and harmonise procedural matters concerning the enforcement of judgments between the GCC member states. Accordingly, the judgments or rulings given by the courts of a Member State should be recognised and enforced in another Member State. Furthermore, court rulings that contain orders or measures produced in a Member State should be enforceable in other Member States. If the measure or order is not known to the law of the latter Member State, in order to award these orders or measures, the equivalent effects to those known under the latter Member State should be adapted.

5.3 Online Dispute Resolution

The significance of examining EU private international law instruments is that it will pave the way for the consideration and suggestion of rules on jurisdiction and applicable law for the UAE and the GCC. On the other hand, traditional litigation is often not appropriate or feasible with respect to consumer transactions, which are usually relatively low value transactions. Alternatives to traditional litigation appropriate to B2C ecommerce transactions include online dispute resolution and the notion of e-courts, which is suggested in the last chapter of this thesis.

As a prelude to the consideration of the e-courts idea in the last chapter, the following examination will focus on the EU approach and the relevant instruments on alternative dispute resolution with respect to e-commerce transactions. This examination is with the view of learning lessons that could help in the establishment or implementation of an e-court system in the UAE and subsequently other member states of the GCC. Although the EU instruments concern the online out-of-court resolution of consumer disputes, the rationale that links the following examination and the proposal of e-courts in the last chapter is that the EU model, under the Online Dispute Resolution (ODR) Regulation and Directive on consumer alternative dispute resolution (ADR), may present essential aspects that the UAE could employ in the establishment of its e-courts.

In order to promote the settlement of consumer disputes out of court, and to provide a convenient method for consumers to access justice[154] with a view to boosting confidence and growth in the internal market,[155] the European legislature, on the basis

[154] Effective access to justice is considered 'the most basic requirement of modern egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all', M. Cappelletti and B. Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, (1977–1978), Vol. 27, pp 183–185. For further details on the principle of access to justice and its development from the ADR perspective, see Eva Storskrubb, 'Alternative Dispute Resolution in the EU: Regulatory Challenges', *European Review of Private Law*, (2016), Issue 1, pp 15–17.

[155] Recital 4 of the Regulation on consumer ODR. In the context of confidence, and specifically EU consumer confidence, it is important to mention that 33% of EU consumers believe they would face more difficulties in resolving disputes from cross-border contracts than domestic or national contracts, according to Flash Eurobarometer 298 Consumer Protection in the Internal Market 2008 (available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_298_en.pdf). On the other hand, EU retailers have some concerns or face obstacles with regard to cross-border commerce with consumers in the internal

of Articles 114, 169 (1), and 169 (2)(a) of the Treaty on the Functioning of the European Union (TFEU),[156] promulgated the Directive on ADR for consumer disputes,[157] and the Regulation on ODR of consumer disputes.[158] The Directive aims to harmonise the ADR procedures applied by any ADR entity within Member States of the Union that resolve disputes between consumers and traders.[159] The Directive has also addressed the importance of the ADR entities' independence and highlighted a number of methods to ensure the independence,[160] transparency, and effectiveness of these entities, in order to deliver fair and independent decisions and hence gain the confidence and trust of EU citizens.[161] The Regulation fulfils the need for simple, efficient, fast, and low-cost solutions for resolving disputes arising from online transactions between consumers and traders.[162] The instrument aims to provide a single online platform, which has currently been established,[163] through which

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market, costs of complying with different consumer protection rules and contact law, and potentially higher costs of fraud and non-payment – these were mentioned by 51% and 47% of retailers respectively, according to Flash Eurobarometer 359 Retailers' Attitudes Towards Cross-Border Trade and Consumer Protection 2013 (available at: http://ec.europa.eu/public_opinion/flash/fl_359_en.pdf).

[156] Recital 1 of the Regulation on consumer ODR and Recital 1 of the Directive on consumer ADR. Although Article 81(1) and (2)(g) of TFEU could be a basis for these instruments, the latter provisions would be instructive merely to the area of judicial cooperation in civil matters having cross-border elements, and therefore, would not sufficient to matters in domestic sphere, such as consumer contracts. While Article 114 of the TFEU provides a wide ground for the European legislature to promulgate any measures aimed at 'the establishment or functioning of the internal market'. For further discussion on this issue, see Giesela Rühl, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market', *Journal Consumer Policy*, (2015), Vol. 38, pp. 433–443. Rühl emphasises the appropriateness of Article 81 TFEU as a basis for these two EU instruments, instead of Article 114 and even Articles 169 (1) and 169 (2)(a) thereof, merely in the condition that both instruments were directed to govern cross-border contracts.

[157] Amending Regulation No 2006/2004 and Directive 2009/22. OJ L 165/63.

[158] Regulation No 524/2013 of 21st May 2013 on online dispute resolution for consumer disputes and amending Regulation No 2006/2004 and Directive 2009/22. OJ L 165/1. In brief, the development of regulating ADR for consumer disputes in the EU initially started with the introduction of two recommendations by the European Commission, namely 98/257/EC and 2001/310/EC, in relation to the principles for out-of-court bodies involved in the consensual resolution of consumer ADR. Subsequently, the European legislature promulgated a number of directives aimed at encouraging or requiring the adoption of effective and appropriate ADR procedures by Member States; for example, Directive 2008/48/EC on credit agreements for consumers OJ L 133/66, and Directive 2002/65/EC concerning the distance marketing of consumer financial services OJ L 271, L 271/16. In this context, see Iris Benöhr, 'Alternative Dispute Resolution for Consumers in the Financial Services Sector: A Comparative Perspective', *European Policy Analysis*, (2013), issue 6, pp. 2–3.

[159] Recital 20 of the Directive on consumer ADR.

[160] See Article 6 (1) of the Directive, which obliges Member States to ensure that the ADR entities employ independent qualified practitioners.

[161] Recitals 32–36 of the Directive on ADR for consumer disputes; see Articles 7–9 of the Directive, which requires Member States to maintain the ADR procedures so as to be in line with the principles of fairness and transparency.

[162] Recital 4 of the Regulation on consumer ODR.

[163] The official ODR website managed by European Commission, based on Article 5 of the Regulation, available at: https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage

consumers and traders can resolve their online disputes,[164] besides creating common procedural provisions applicable to ODR procedures that aim to ensure their effectiveness.[165]

The importance of settling consumer disputes through ADR channels lies in the fact that 'The vast majority of consumer disputes involve relatively low-priced goods, services, or credit, where the costs associated with redress substantially exceed the expected benefits associated with recovery.'[166] The Regulation is interlinked and compatible with the Directive on consumer ADR.[167] In this context, the mechanism within the Directive and the Regulation seems to be that the earlier legislation establishes an ODR platform for consumers and professionals, while the Directive engages in the procedures of this platform and the functioning of dispute-resolution bodies.[168] Furthermore, in order to ensure this compliance with the Regulation on consumer ODR, Article 8(a) of the Directive requires online or offline ADR provision in a way that is easily accessible to both parties.

Both the Directive on consumer ADR and the Regulation on consumer ODR provide harmonised definitions of ADR and ODR procedures, which are derived from established definitions of terms such as consumer, trader, and so on. Although both instruments provide definitions of specific and relevant terms,[169] such as ADR entity, ADR procedures, online sales or service contracts,[170] and online marketplace, the EU instruments do not provide a definition of ODR platform, which is the subject matter in the Regulation. On ODR more generally, we can refer to an ODR definition provided by Hörnle, as 'dispute resolution carried out by combining the information-

[164] Recital 12 of the Directive on Alternative Dispute Resolution for consumer disputes, Directive 2013/11 of 21st May 2013 on alternative dispute resolution for consumer disputes and amending Regulation No 2006/2004 and Directive 2009/22 (hereinafter Directive on ADR for consumer disputes).
[165] Recital 22 of the Regulation on consumer ODR.
[166] Peter Finkle & David Cohen, 'Consumer Redress Through ADR & Small Claims Court: Theory & Practice' *Windsor Yearbook of Access to Justice*, Vol. 13 (1993), p. 83.
[167] Recital 12 of the Directive on consumer ADR.
[168] *Ibid*.
[169] See Article 4 of both the Directive on consumer ADR and Regulation on consumer ODR.
[170] The definition of online sale or service contracts, under Article 4 (1)(e) of the Regulation on consumer ODR, seems to be general, in which the legislature avoided specifying further details that could have helped to eliminate confusion regarding online contracts, particularly those involving sales of goods and provision of services through the Internet.

processing powers of computers with the networked communication facilities of the Internet'.[171]

The scope of application of the EU instruments includes both domestic and cross-border transactions within the Union, considering that the EU legislature confined this scope to transactions between consumers domiciled in the EU and merchants established in the EU.[172] Hence, the instruments would not apply to ADR procedures arising from transactions between consumers domiciled in the EU and non-EU merchants;[173] instead, this situation would be subject to the national laws of Member States.

The Regulation on consumer ODR extends to regulating ODR procedures with the aim of protecting consumer interest from various perspectives. From a fairness perspective, for example, delivering expressly the decisions and reasons basing the ODR decision by the ODR platform,[174] providing the parties, within a reasonable time, to examine the documents, facts, evidence, and challenges provided by the other party, or any opinions made by experts, and to comment on them.[175] From an effectiveness perspective, the EU legislature requires the ADR entity to makes its procedures adequate and easily accessible, either online or offline, for both parties, regardless of their location.[176] Furthermore, in order to ensure the time efficiency of ADR procedures, the Directive has a set period of 90 days, which starts from the date on which the complaint file was received, for the ADR to deliver its decision on the complaint, except in complicated disputes, wherein the ADR entity may extend that period, provided that the concerned parties are informed and provided with an expected time within which the dispute will be settled.[177]

In terms of the costs applied to consumers in the process of resolving disputes through ODR, the Regulation expressly orders that such resolution be free of charge;[178] while

[171] Julia Hörnle, *Cross-Border Internet Dispute Resolution* (Cambridge, Cambridge University Press, 2009), p.75.
[172] Article 2(1) of both the Directive of consumer ADR and the Regulation on consumer ODR.
[173] Ibid.
[174] Article 9 (c) of the Directive on consumer ADR.
[175] Article 9(a) of the Directive on consumer ADR.
[176] Article 8(a) of the Directive on consumer ADR.
[177] Article 8 (e) of the Directive of consumer ADR.
[178] According to Article 5(2) of the Regulation

Recital 41 of the Directive of consumer ADR encourages ADR entities to settle disputes between consumers and businesses without applying a fee or charge, or applying only an inexpensive or nominal charge, to consumers.[179]

The question that may arise in this context pertains to the nature of the relationship between the Regulation on consumer ODR with the Directive on consumer ADR and the Brussels I Regulation.[180] Part of the answer to this question can be found in Recital 23 of the Directive, which provides that: '[the Directive] should not apply to attempts made by a judge to settle a dispute in the course of a judicial proceeding concerning that dispute'. With regard to the consumer's right to access courts within their domicile, the ADR and ODR agreements under consumer contract should not hinder the consumer from doing so,[181] provided this agreement was made before the dispute and it does not have the effect of depriving the consumer of their right to settle the dispute before the courts.[182] From the perspective of the law applicable to the dispute, the Directive refers cases that involve conflict of laws to Articles 6(1) and (2) of the Rome I Regulation in order to determine the law applicable to the dispute.[183]

The enforceability, or rather the obligatory nature, of the decisions delivered by ODR (or ADR entities) may be considered one of the weaknesses of ODR;[184] however, de facto, the Directive addresses this matter and requires the ADR entity that provides a solution to the dispute to inform the dispute's parties of the binding nature of its decision in advance and specifically to accept this.[185] The EU legislature, however, has not provided measures to safeguard the legal effectiveness of decisions delivered by ADR entities or through ODR that comply with the Directive and Regulation; hence, the compliance with ADR decisions is not obligatory for businesses, and they

[179] Article 8(c) of the Directive on consumer ADR.
[180] See Eva Storskrubb, *supra* note 152, pp. 7–31. Storskrubb questioned the coherence of the two instruments with EU civil justice as a whole.
[181] It should be noted that an ADR entity's refusal to resolve a dispute on the basis that the dispute in question was previously examined by a court or another ADR entity is possible and permitted, according to Article 5(4)(c) of the Directive on consumer ADR.
[182] Recital 43 and Article 10(1) of the Directive on consumer ADR echoes Article 19 of the Brussels I Regulation.
[183] Recital 44 of the Directive on consumer ADR.
[184] See Lilian Edwards and Caroline Wilson, 'Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions', *International Review of Law Computers*, (2007) Vol. 21, No. 3, pp. 321–323.
[185] Recital 43, and Article 10 (2) of the Directive on consumer ADR.

can choose whether or not to comply.[186] Furthermore, the enforceability of consumer protection law is one of the main concerns highlighted in relation to the Directive,[187] and would appear in the execution of Recital 57 of the Directive on consumer ADR.

The extent of compliance required by ADR entities in the Member States is also one of the main concerns in relation to the effectiveness of the EU instruments. The Directive introduced a number of measures aimed at protecting consumers in the ADR environment, however, crucially, according to Article 2 (1) of the Directive on consumer ADR, the EU legislature has not obliged all ADR entities established in Member States to comply with these measures, and in fact, it requires merely at least one ADR entity within each Member State to comply.[188]

The Regulation has specified a number of procedural and technical matters that ADR entities which are willing to comply and provide/facilitate ODR, have to follow. For instance, the ADR entity should ensure that the physical appearance of the parties is not required (Article 10 (b)) except in the circumstances where its procedural rules require it, and the parties agree to this (Article 9 (3)) or the Regulation has not specified a time for transmitting the complaint to the respondent, but merely required the ODR platform to transmit the complaint in an 'easily understandable way and without delay'.

Finally, the European legislature has not abandoned the role of pre-ADR channels for resolving consumers' complaints and problems through contacting the trader in the first instance, which could be called the 'internal complaints procedure'. Such initial channels of resolving consumers' complaints are governed by the national laws of the Member States of the EU, according to Recital 17 of the Directive.[189] Specifically, the Directive under Recital 50 instructs Member States to encourage consumers to first

[186] In this particular matter, see Andrea Fejős & Chris Willett, Consumer Access to Justice: 'The Role of the ADR Directive and the Member States', *European Review of Private Law*, (2016), issue 1, pp. 33–60.
[187] Eva Storskrubb, *supra* note 152, at 30.
[188] Giesela Rühl, *supra* note 153, pp. 446-447.
[189] Many businesses implement internal complaints procedures and are governed by the national laws of the Member States, for example UK Statutory Instruments such as The Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008, 2008 No. 1898, and The Postal Services (Consumer Complaints Handling Standards) Regulations 2008, 2008 No. 2355.

try to resolve their problems with traders prior to submitting their disputes to ADR entities.[190]

5.3.1 Recommended ODR Approaches for the GCC and UAE

Based on the examination of the EU Regulation on Consumer ODR (in conjunction with the Directive of Consumer ADR), there are several positive points that could be instructive for the UAE and the GCC, while on the other hand, there are also aspects that would not be suitable for adoption by the UAE and the GCC. The first positive aspect pertains to the need to adopt specific measures governing ADR in relation to consumer contracts, due to the lack of such provisions under the current legislations of the UAE and the GCC. In fact, as examined in Chapter 3 of this thesis,[191] the current provisions regulate arbitration merely from a traditional perspective, which suits commercial firms and professional individuals, but do not enhance consumer protection or maintain consumers' rights before the arbitration institutions.

It is highly recommended for the UAE legislature and GCC to promulgate provisions that deal specifically with consumer contracts when brought before ADR entities. This proposal, on one hand, would serve consumer contracts in general and, on the other, could serve electronic consumer contracts in particular, if the ADR legislations have extended their scope to cover ODR for consumers through the inclusion of appropriate provisions that govern and comply with ODR and protect consumer rights. The introduction of effective ADR and ODR rules in the UAE and the GCC is very important for a number of reasons. Firstly, the increased number of ADR entities

[190] Indeed, for instance, UK Statutory Instrument 2015 No. 542 Consumer Protection on the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 provides under Regulation 9(4) that: 'the body [ADR entity] may only refuse to deal with a domestic dispute or a cross-border dispute which it is competent to deal with on one of the following grounds: (a) prior to submitting the complaint to the body, the consumer has not attempted to contact the trader concerned in order to discuss the consumer's complaint and sought, as first step, to resolve the matter directly with the trader.' Such internal consumer-complaint solving in businesses is not, however, classified as an ADR according to the ADR Directive; thus, businesses that provide in-house consumer-complaint solving services must make it clear to consumers that such service is not considered an independent or impartial ADR. See UK Department for Business Innovation and Skills, 'Consultation Response: Alternative Dispute Resolution for Consumers', November 2014, p. 23, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf

[191] See section 3.3.1.2 E-Consumer Contracts with Compulsory Arbitration Clause.

in the UAE in particular and the GCC in general[192] indicates the high reliance on and importance of ADR in these states. Secondly, the adoption of rules governing ODR related to consumer contracts may be considered a proactive step and a motivator for the adoption of online arbitration and mediation by ADR entities within the UAE and the GCC.[193] Thirdly, some e-merchants established in the UAE strive to include binding arbitration clauses in their contracts with consumers, whether they are from the UAE or the GCC, to settle any dispute arising from these contracts before arbitration entities within the UAE,[194] which indicates the popularity of choosing ADR for consumer contracts on the merchants' part.

Although the foregoing discussion signifies the importance of adopting measures governing consumer contracts in ADR and ODR, it is considered that it is equally or even more important for the UAE and for the other member states of the GCC to adopt electronic courts (e-courts),[195] which may able to handle disputes concerning electronic transactions. It should be noted at this juncture that e-courts in this context are not considered as falling within the ADR category when ADR is seen as an essentially private dispute resolution mechanism; this classification also applies to other dispute resolution schemes that may be provided or established by the governments;[196] for example, settlement centres such as the Center for Amicable Settlement of Disputes established under Dubai Courts,[197] and small-claims procedures.[198].

[192] See section 2.5 Overview of the Judicial Systems in the GCC.
[193] Virginia La T. Jeker, Hamna Anwar, Mearl Cabrai and Faiza F. Mannan, 'E-Transaction Law And Online Dispute Resolution: A Necessity in the Middle East', (2006), *Arab Law Quarterly*, Vol. 20, No.1, pp. 44–45.
[194] See section 3.3.1.2 E-Consumer Contracts with Compulsory Arbitration Clause.
[195] See, Thomas Schultz, 'Does online dispute resolution need governmental intervention? The case for architectures of control and trust', (2004), *North Carolina Journal of Law & Technology*, Vol. 6, pp. 102-105, and Lilian Edwards and Caroline Wilson, *supra* note 182, at 329, who both reached the conclusion that the e-courts is a preferable and long-term resort. Further details on the proposal of adopting e-courts are further discussed in the last chapter of the thesis.
[196] Eva Storskrubb, *supra* note 152, at 19.
[197] See section 2.5.1 The Judicial System of the UAE.
[198] For example, 'Courts of one day' in Ras Al Khaimah (one of seven Emirates in the UAE), which established by a Decision of the Head of the Judicial Council of the Emirate in 29 November 2016 and, specialized in examining civil and commercial disputes that do not exceed 20 thousand Dirhams. Once proceedings brought before these new courts, the court in question will call the litigant parties on the same day for the hearing, allowing the parties to provide their judgments and, as much as possible, for issuing its ruling in the same session. Notably, the 'courts of one day' will rely on electronic means in relation to registration and litigation procedures, and it will be for the judge in question, according to his discretion, to determine the obliged party to pay the judicial fees, to postpone or exempt a party

The suggested notion of e-courts, in contrast to ADR, is designed to enforce consumer rights[199] to judicial remedy while ADR is focused on settling disputes[200] privately and, accordingly, could result in waiving consumers' access to judicial remedy.[201] ADR is also more amenable to compromise settlement that may lead to a remedy short of possible full legal entitlement. It is not uncommon in arbitration or mediation for a party to accept a settlement short of its full rights in order to arrive at an expeditious resolution of the dispute. This is not entirely satisfactory in relation to consumer transactions and a scheme with a tendency to provide remedies short of the full legal rights of a consumer lends itself to the likelihood of being contrary to public policy.

An additional consideration in favour of the suggestion of an e-court system is that it may include an appellate procedure, which provides the opportunity to either the consumer or trader to appeal against a first instance decision and thus would enhance the concept of a fair hearing. In ADR (and, more specifically, arbitration), an award is generally final with limited opportunity for review; further, in some cases an ADR hearing is shortened, which may affect the evidence provided.[202] In addition, the common practice is for businesses to select an arbitration entity that is experienced and familiar with that entity's arbitration procedures, which puts the businesses in a position of unfair advantage compared to the consumer, who is experiencing the arbitration procedure for the first time.[203]

A further consideration in relation to e-courts is that they would be able to establish rules and provide principles and useful interpretations with regard to consumer law and rights;[204] on the other hand, this authority is not available in ADR or ODR decisions.[205] Furthermore, e-court rulings, like those of traditional courts, would be

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from paying these fees. Ras Al Khaimah Courts official website, available at: http://www.courts.rak.ae/ar/Pages/NewsDetail.aspx?NewsID=179

[199] Nevertheless, e-courts could also preside over disputes that arise from B2B transactions; this feature will also be highlighted in the proposal for adopting e-courts in the last chapter of this thesis.

[200] Giesela Rühl, *supra* note 153, at 443.

[201] Giesela Rühl, *supra* note 153 at 443, Julia Hörnle, *supra* note 169, pp. 218-219.

[202] Ibid, pp. 183–184.

[203] Ibid, at 185.

[204] Giesela Rühl, *supra* note 153, at 443.

[205] Thomas Schultz, *supra* note 193, at 84.

provided publicly to individuals and firms, which would in turn enhance legal certainty for merchants and individuals.[206]

Another worthy consideration is that e-courts may prove useful in cross-border consumer contracts, especially when the consumer is domiciled abroad, such as consumers involved in cross-border B2C transactions, through accepting proceedings against companies established in the e-court's State. This feature would serve and facilitate the commerce and dispute resolution of e-commerce firms that are located in the GCC member states and especially in the UAE, such as noon.com and souq.com, which transact with consumers from different countries in the Middle East and North Africa regions.

This feature would also specifically serve contracts concluded by tourists in the country in which the e-court is established, which would consequently increase the confidence of tourists and boost the tourism industry in that country. This aspect would be important for other member states of the GCC in general and particularly for the UAE, considering the increasing number of tourists visiting the UAE year on year,[207] and the significant contribution of tourism to its economy.[208] Another advantage is that when a tourist claims his rights through e-court proceedings against a merchant that is located in the UAE,[209] this could in fact shorten the time and lessen the number of procedures compared to the required time and procedures had the complaint been brought before the courts of the country in which the visitor is domiciled.[210]

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[206] Ibid.

[207] The UAE's seven Emirates strive to promote the number of visitors; in particular, Abu Dhabi and Dubai have set governmental strategies to attract more visitors, with Dubai aiming to attract 20 million visitors by 2020. *See*, for example, Abu Dhabi Vision 2030, available at: http://www.upc.gov.ae/abu-dhabi-2030/maritime-2030.aspx?lang=en-US and Dubai's Vision 2020, available at: http://www.visitdubai.com/en/department-of-tourism/about-dtcm/tourism-vision-2020,

[208] See World Travel and Tourism Council, 'The Economic Impact of Travel & Tourism 2015: United Arab Emirates', available at: https://www.wttc.org/-/media/files/reports/economic%20impact%20research/countries%202015/unitedarabemirates2015.pdf

[209] A possible scenario could be when the law of the tourist's country provides and protects his right to bring proceedings before his court of domicile against the foreign trader.

[210] This feature of e-courts could also provide visitors to the UAE who fall victims of misdemeanours such as pickpocketing, theft, or fraud with access to justice and follow-up through e-court proceedings. In this context, it is noteworthy that in 2001 the Dubai police established a Tourist Police Department; one of its objectives was to protect and provide guidance to visitors and to monitor the prohibited activities that tourists encounter, as well as bringing offenders to justice. In a number of cases, the department has coordinated and followed up with visitors in relation to their cases before the courts in

Another aspect where e-courts may be beneficial is in relation to consumer litigations against companies or professionals established in foreign countries. The anticipated role and operation of e-courts, in particular the fact that they would be based online, would benefit both the consumer and the merchant by facilitating judicial proceedings even if the proceedings have to be brought by foreign merchants against consumers domiciled in the county in which the e-court is established. This would save the merchant time and cost required to litigate before the ordinary or traditional court in the country in which the consumer is domiciled; similarly, a foreign merchant who is a defendant in litigation brought by a consumer before an e-court would also obtain this benefit.

The use of an e-court may also engender the benefit of international cooperation on enforcement of judgments, for example if the state in which the e-court is established has judicial assistance and cooperation arrangements with the country in which the litigant wishes to enforce the judgment. The UAE, for example, has in this context singed the Paris Convention with France,[211] the Convention on Judicial Assistance in Civil and Commercial Matters with the Republic of China,[212] the Bilateral Memorandum of Understanding between the UAE and Egypt on judicial cooperation in civil and criminal matters,[213] the Riyadh Convention,[214] and the GCC Convention on Enforcement of Judgments and Judicial Declaration and Rogatory.[215]

In addition to all the foregoing considerations, an e-court system may also be complimentary to, supportive of and operate concurrently with an ODR system. E-courts may play a major role in relation to ODR, in cases where ODR platforms have been established, by providing, for instance, the litigant parties with an option to

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the UAE, even after they have ended their visit and returned to their country. Dubai Police, available at: https://www.dubaipolice.gov.ae/dp/jsps/content/layout_content.do?contentCode=91578

[211] Singed in 1994. The UAE's Ministry of Justice, International Conventions, available at: http://www.elaws.gov.ae/ArLegislations.aspx

[212] Signed in 2004, *Ibid*.

[213] Signed in 2000, *Ibid*.

[214] Signed in 1983 by the UAE and a number of Member States of the Arab League.

[215] See section 2.4.1 The GCC Legislations.

appeal against ODR decisions. This may be essential in situations where parties wish to appeal against unsatisfactory or erroneous decisions made by ODR entities.[216]

Some academics have suggested that both ODR and public courts, including e-courts, should carry out interpretation of procedural and substantive provisions.[217] However, this suggestion does not seem instructive, on the basis that only public courts, or rather e-courts, may carry out interpretations and establish principles and new rules, while ODR is limited to applying the extant rules and following the principles adopted by the public courts. If the ODR entity, or rather the ADR entity, were permitted to establish new principles and interpret legal provisions, it could lead to conflicting interpretations and outcomes. Furthermore, e-courts are representatives of the state;[218] hence, it is essential that interpretation and the adoption of new principles remains in public courts or e-courts.

Another possible task that could be delegated to e-courts is to act as an accreditation body that undertakes assessment of whether entities providing ODR are complying with the procedural and substantive requirements provided by the legislature.[219] In conducting this role, e-courts could issue, for instance, a trust mark to those that are complying with requirements.[220] With regard to this particular principle and its implementation, it seems appropriate for the UAE's legislature to afford e-courts, or the relevant public body, the right to suspend the competency of ADR or ODR entities that fail to meet the conditions over consumer disputes. Criticism of such an accreditation scheme and trust mark, however, could pertain to the fact that the current e-commerce environment is used to such incentives of trust mark that are provided by public and even private firms;[221] as a result, trust marks have become

[216] See also Gabrielle Kaufmann-Kohler, Thomas Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, (Kluwer Law International, 2004), pp. 249–276 and Pablo Cortés, 'Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers', *International Journal of Law and Information Technology*, (2010) Vol. 19 No. 1, pp. 1–28
[217] Pablo Cortés, ibid, at 28.
[218] T. Schultz, supra note 193, at 105.
[219] See T. Schultz, supra note 193, pp. 94–97, see Pablo Cortés, supra note 214, pp. 21–28.
[220] T. Schultz, supra note 193, at 96, defined trust marks as 'a form of recommendation to use the trustmarked providers'. Pablo Cortés, supra note 214, at 6, categorized trust marks as a dispute-avoidance mechanism, which does not seem an appropriate classification. Trust marks cannot be considered as a mechanism aimed at resolving complaints between merchants and consumers; rather, they are more relevant and closer to being a method or indicator of whether a merchant or ADR entity is consumer-friendly.
[221] Lilian Edwards and Caroline Wilson, supra note 182, p. 328

many and varied, leading to confusion and distrust from consumers.[222] Moreover, it is unsurprising that this environment of embracing numerous trust marks leads to exploitation through fraud and duplication of these trust marks to misguide consumers.[223] Possible solutions, which are highly recommended for the UAE and GCC Member States to partially overcome these drawbacks, are to focus on a single trust mark,[224] to harmonise legislative instruments and enforcement procedures,[225] and to consider providing such trust marks free of charge or at a low fee, which would be helpful for small and medium-sized businesses.[226] However, fraud attempts on this single trust mark would still be possible.[227]

These roles and powers of e-courts in relation to ADR and ODR, as a second layer of proceedings appeal, and having accreditation power by which to approve ADR institutions that comply with provisions concerning consumer ADR and ODR, would essentially uphold the importance of establishing these e-courts in the UAE and the other GCC Member States.

Governmental involvement is another factor that might significantly support the establishment of e-courts in the UAE in particular, and also support the notion of affording monitoring authority over ODR entities to e-courts, considering the heightened level of public trust held by the UAE's government.[228] Therefore, on one hand, the trust of the public in the government provides an essential factor for establishing e-courts in the UAE;[229] on the other, the ambition of the UAE's federal government and local Emirates governments to adopt and implement new incentives

[222] Ibid.
[223] Ibid.
[224] Ibid, at 329.
[225] Pablo Cortés, supra note 214, at 23.
[226] Ibid.
[227] Ibid. For further details on fraud in e-commerce, see the European Consumer Centres Network (ECC-Net) Report: Fraud in cross-border e-commerce, available at: http://ec.europa.eu/consumers/ecc/docs/ecc-report-cross-border-e-commerce_en.pdf
[228] The UAE's government ranked first for public trust in government according to the 2016 Edelman Trust Barometer, available at: http://www.edelman.com/insights/intellectual-property/2016-edelman-trust-barometer/global-results/. The UAE also gained the first rank for population's trust in institutions, which include the governmental, economic, and media sectors and non-profit organizations. 2016 Edelman Trust Barometer: The State of Trust, available at: http://edelman.edelman1.netdna-cdn.com/assets/uploads/2016/01/2016-Edelman-Trust-Barometer-Global-_-State-of-Trust.pdf
[229] T. Schultz, supra note 193. Schultz views the matter of trust as a main concern for almost all online activities, including ODR, and suggests that government intervention and control over ODR – namely control that creates trust and provides space for further development – would bring societal trust and confidence in ODR.

in order to cope with the future and its challenges, and to provide better services and experiences to the public, individuals, and firms, in addition to the availability of different factors,[230] provide fertile soil for adopting e-courts in the UAE.[231] The establishment of e-courts under the GCC does not, however, seem to be appropriate as a first step;[232] hence, it seems appropriate for the UAE in the first place, and for the other Member States of the GCC, to adopt and establish e-courts under their national sphere.[233]

5.4 Choice of law

The Rome I Regulation replaced the Rome Convention on 17th December 2009.[234] It governs the law applicable to contractual[235] obligations of civil and commercial contracts.[236] The substantive scope of the Rome I Regulation parallels that of the Brussels I Regulation. This consistency appears from the perspective of matters concerning revenue, customs, and administration,[237] which are explicitly excluded from the scope of the Rome I Regulation. Furthermore, arbitration and choice of court agreements are excluded from the Rome I Regulation and are justified as matters affiliated to procedural law.[238] With regard to the substantive scope of the Regulation,

[230] See Chapter 2 of this thesis.
[231] The UAE has the aspects necessary for establishing e-courts; as T. Schultz (supra note 193) concluded, trust, control, and government are essential pillars for the development of ODR. Hence, the UAE and most of the GCC Member States have the capability to develop and support ODR.
[232] Indeed, beside the wide scope of adopting and applying the notion of e-courts across Member States, the examination in Chapter 2 of this thesis clearly indicates the GCC's delay in producing binding legal instruments for its Member States. Thus, it is likely that the adoption of e-courts would also face prolonged delays in the GCC.
[233] Further details on the adoption of e-courts in the UAE and in the other GCC Member States will be highlighted in the next chapter.
[234] The Convention on the Law Applicable to Contractual Obligations signed on 19th June 1980. The adoption of the Rome I Regulation followed six years of consultation and political debate. See Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law applicable to Contractual Obligations into a Community Instrument and its Modernization, COM (2002) 654 final, 14th January 2003.
[235] The concept of contractual obligations is independent; therefore, it is interpreted by the EU laws and court and is not referred to in the national laws of the Member States. Dicey, Morris and Collins, *supra* note 14, p. 1784, Peter Stone, *supra* note 62, pp. 265–266.
[236] The scope of the Regulation is not limited only to circumstances in which obligations resulted from a valid contract, but in fact extends to situations concerning 'the consequences of nullity of the contract' under Article 12(1)(e) of the Rome I Regulation.
[237] The exclusion of these matters is justified based on the affiliation to public law, rather than civil and commercial law. Volker Behr, 'Rome I Regulation a – Mostly – Unified Private International Law of Contractual Relationships within – Most – of the European Union', *Journal of Law and Commerce*, Vol. 29 (2011), p. 239.
[238] Dicey, Morris and Collins, supra note 14, p. 1794.

most of the excluded matters can be clearly justified, except that the exclusion of agents' power is vague.[239]

Once again, it is instructive to note that the Rome I Regulation is technology-neutral because it is applied in relation to the issue of applicable law in civil and commercial contracts, although provisions reflect and relate to modern electronic contracting and e-commerce.

When examining the application of the Rome I Regulation provisions to transactions made through the internet, it is crucial to consider the interpretation provided and principles adopted by the European courts, particularly those established in the field of determining the jurisdiction of electronic transactions, which may also be applicable and considered in matters concerning determination of the applicable law to e-commerce transactions. One of the important principles to recall in this context is that determination of the applicable law does not depend on the location of the server or other hardware used to facilitate transactions. This approach is deduced from the European court ruling in the *Wintersteiger AG v. Products 4U* case, as examined earlier in this chapter.[240]

5.4.1 Law Applicable to B2B Transactions

In most cases, ascertaining the law applicable to electronic transactions between businesses seems straightforward,[241] particularly in situations where the choice of law is explicitly agreed between the contracting parties.[242]

Express Choice of Law

According to Article 3 (1) of the Regulation, the parties' choice of law must be explicit or demonstrated, whether by the terms of the contract or by the circumstances of the case, essentially in a way that leaves no room for uncertainty.[243] Article 3 (1) has not provided any type of formality required in the parties' choice of

[239] Volker Behr, *supra* note 235, p. 244.
[240] Case C-523/10: *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* [2013] Bus LR 150.
[241] Peter Stone, supra note 62, p. 6, and Faye Fangfei Wang, supra note 43, at 103.
[242] David McClean and V. Ruiz Abou-Nigm, supra note 85, pp. 347–348.
[243] It is essential to mention the Article 3 (1) wording 'The choice shall be expressly or clearly demonstrated by…", which differs the Rome Convention.

law agreement, and this thus opens the possibility of oral choice of law, [244] or choice of law through electronic means. This general principle in the Rome I Regulation reaffirms the contracting parties' freedom to choose the law applicable to their contract;[245] even if their choice is the law of a non-Member State.[246] Nonetheless, there are some conditions or restrictions relating to the selection of applicable law that the parties should consider whenever they intend to agree on choice of law.

Although the contracting parties have the freedom to choose any state law at the time of contracting or after the conclusion of the contract,[247] this choice should also entail the application of subsequent developments and amendments to the chosen law,[248] thus, the contracting parties should not specify or limit the application of the chosen law's content that existed in a certain period,[249] or in other words the "time-fixing of the chosen law". It seems that the possible justification for this principle is to avoid complexity in applying the chosen law and in determining the judicial principles made during such period, besides the possibility of reaching conflicting outcomes, particularly when an approach adopted by the current provisions of the chosen law invalidates terms or actions that were valid under its old provisions.[250]

The European legislature, under Article 3 (1) of the Rome I Regulation, recognises the contracting parties' choice of the law applicable to the whole or part of their contract. Thus, the provisions allow the parties to choose different laws applicable to different parts of their contract, however, these parts must be rationally capable of being subject to different law.[251] Hence, a single matter, such as the formality of the contract or the validity of the contract, must be subject to one law.

The parties may agree on subjecting their obligations to different laws,[252] for instance the seller's obligations being subjected to the laws of Spain while the buyer's

[244] Peter Stone, *EU Private International Law*, (Edward Elgar Publishing, Cheltenham, 2014), Third Ed, at 291
[245] Recital 11 of the Rome I Regulation assures that the freedom to choose the applicable law
[246] Article 2 of the Rome I Regulation.
[247] Article 3 (2) of the Rome I Regulation.
[248] P. Stone, *supra* note 62, p.275.
[249] *Ibid*.
[250] *Ibid*.
[251] Peter Stone, *supra* note 242, at 296
[252] Faye Fangfei Wang, *supra* note 43, at 103.

obligations are subject to the laws of Germany. On the other hand, the obligation that constitutes the essence of the contract must be governed by a single legislation.[253]

Non-state Body of Law

According to Recital 13 of the Regulation, the parties could draw provisions from a non-state source of law into their contract. It seems that the Regulation's approach, which echoes those of the Convention,[254] is not an absolute recognition to the choice of non-state law; considering that the European Parliament has demanded the deletion of references to a non-state body of law in the Rome I Regulation proposal,[255] which was presented by the European Commission.[256] It is suggested, however, that the wording of Recital 13 of the Regulation,[257] i.e. 'incorporation by reference into the contract', indicates that the non-state body of law may merely be recognised through incorporating its terms to form part of the contractual terms and conditions. Therefore, the incorporated terms of a non-state body of law or an international convention into the contract cannot govern the contract exclusively;[258] their applicable extent is limited and they cannot override mandatory rules of the applicable state law.[259]

Examples of non-state bodies of laws are principles and rules adopted by the United Nations Commission on International Trade Law (UNCITRAL), International Institute for the Unification of Private Law (UNIDROIT), Organization for Economic Co-operation and Development (OECD), and Convention on Contracts for the International Sale of Goods (CISG), Incoterms from International Chamber of Commerce (ICC), the Uniform Customs and Practice for Documentary Credits

[253] Dicey, Morris and Collins, *supra* note 14, at 1790. Opposite of this view, *see* Faye Fangfei Wang, *supra* note 43, at 103.
[254] David McClean and V. Ruiz Abou-Nigm, *supra* note 85, p.348
[255] *Ibid*.
[256] The European Commission's Proposal COM (2005) 650, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0650&from=EN
[257] The wording of Recital 13 which has mentioned international convention separately from non-state body of law, which sheds the light on the fact that international conventions are classified as semi-state's body of laws because of the influence of states' governments in establishing or creating these conventions. Olugbenga Bamodu, 'The Rome I Regulation and the relevance of non-State law', P. Stone and Y. Farah (eds.), *Research Handbook on EU Private International Law*, (Cheltenham, Edward Elgar Publishing Limited, 2015) pp. 230-231.
[258] Volker Behr, *supra* note 235, p. 241.
[259] Olugbenga Bamodu, *supra* note 255, at 232.

(UCP), and principles and provisions stemming from Islamic Sharia.[260] In some cases, a convention is considered part of a state's law and in that status it differs from other non-state bodies of law. This is true for example of the Vienna Convention on the International Sale of Goods ('CISG') 1980.[261] Furthermore, parts of CISG provisions in particular have been incorporated into transactions of e-commerce,[262] with the exception of consumer electronic contracts, given their flexible provisions that could be borrowed and adopted for e-commerce transactions,[263] modifying or terminating the contract by any means.[264]

The question that arises in this context is what the court's reaction will be to terms of a contract drawn exclusively from a non-state source of law, in addition to the inclusion of a term under the contract that directs the court to refer to the non-state source of law in the case that provisions drawn in the contract are not conclusive. In this situation, even if it is unlikely to occur, would the court in question refer to this non-state body of law? Considering that the parties had attempted to incorporate such a non-state body of law into their contract, but their attempt were incomplete, the court's response would be either to dismiss the reference to non-state law and apply the provisions of the Rome I Regulation in order to determine the applicable state law of the contract, or to refer to the non-state body of law.

If the court ruled out the chosen non-state law, the question that arises is which law would be applicable in this situation. The first possibility could be that the court decides to identify whether the parties' have made an implied choice of law. Another possibility is that the court references the Rome I Regulation provisions governing lack of choice of law in order to determine the applicable law. A third possible approach could be that the court decides to subject such a contract to its national law.

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[260] Peter Stone, *supra* note 242, at 294. *See Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19 at 48. For a further explanation on Islamic law or "Sharia" *See*, K. Djaraouane and C. J. Serhal, "Choice of Governing Law in Islamic Finance Agreements," *International Business Law Journal*, (2009), vol 2, pp.115-123.

[261] Another example is the United Nations Convention on the Use of Electronic Communications in International Contracts, available at: http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf

[262] Faye Fangfei Wang, *supra* note 43, at 96.

[263] Article 11 of the CISG.

[264] Article 29 of the CISG.

Although the court's recognition of the parties' choice of non-state body of law does not seem likely to occur,[265] considering the fact that the non-state body of law is not related or linked to a sovereign territory of a state,[266] on the other hand, it however seems appropriate for the European Court to recognise the parties' choice and refer to a non-state body of law for the following reasons. First, the Rome I Regulation upholds the parties' freedom to choose the law applicable to their contract,[267] and does not expressly preclude the parties from governing their contract by a non-state law. Second, the situation in question complies with Recital 13 of the Regulation, which enables the inclusion of terms of non-state bodies of law or international conventions.

Third, the reference to a non-state body of law does not seem to be without guidance or a certain path; in fact, the reference to that body of law is merely appropriate and necessary in the case that the contract's terms, which are sourced from the same body of law, are not instructive for the court to rule on the dispute. Thus, the court in question would only conduct, in most cases, a search limited to filling the gap in the contract's terms and at the same reaching a conclusive decision on the dispute.

Furthermore, the Recital 13 Rome I Regulation approach in providing partial-recognition,[268] and partial-application of a non-state body of law does not seem to be complying with parties' expectations,[269] particularly as such law is considered as widespread and recognised internationally and in the commercial environment, such as international commercial conventions. The contracting parties would except and assume the European Court to be familiar with these conventions.

Another controversial feature in relation to the EU's approach towards applying a non-state body of law is in the situation where the laws of a country embrace the

[265] *See* Olugbenga Bamodu, *supra* note 255, pp. 221-247, who concluded that the most likely decision of the European court would be disallowing the recognition of the choice of non-state law; however questioned the justification of this approach considering the fact that such choice would be recognized in international arbitration.
[266] Peter Stone, *supra* note 242, at 294.
[267] Recital 11 of the Rome I Regulation.
[268] The partial-recognition of the non-state body of law appears from confining and subjecting the application of incorporated rules of this law to the laws of state. Peter Stone *supra* note 242, at 294.
[269] See Sixto A Sánchez-Lorenzo, 'Common European Sales Law and Private International Law: Some Critical Remarks', *Journal of Private International Law*, (2013), Vol. 9, Issue 2, pp. 191-217.

provisions of a non-state body of law. An obvious example in this context is the adoption of Islamic Sharia's principles and provisions in the Kingdom of Saudi Arabia.[270] Accordingly, the parties' choice of the law of Saudi Arabia would be recognised by the European Court, which would inevitably apply Islamic Sharia, however on the other hand, the court would not apply Sharia if the parties referred to it as the law governing their contract. It is important to note that the laws of Saudi Arabia are based on or comply with Islamic Sharia;[271] while in other areas these laws refer directly to application of Sharia, which is not codified into laws.[272] This would require the court seized to refer to the original sources of Sharia,[273] and its schools of jurisprudence in order to stand on the provisions and rules that stem from these sources, which would not be a simple task for the court. Although the application of Sharia might eventually be disallowed by the court on the basis of public policy or mandatory rules,[274] the court may find other grounds to rule out application of Sharia law, on the basis that its substance and context cannot be delimited.[275]

Hence, this sheds light on the outcome that the elements of clarity, certainty and delimitation seem to be appropriate and proper criteria, which should be considered in applying the chosen law by the contracting parties, more so than the requirement that entails the chosen law to be a state's law. Furthermore, the doctrine of requiring the choice of law being a state's law could be justified on two bases, which might be some of the reasons underpin the EU's approach in excluding the application of a chosen non-state law. First, the states' laws are connected with a territorial element, and second those laws and their substance are usually delimited and identified. Although the territorial element is not available in a non-state body of law,[276] those grounds do not, however, preclude the recognition of a non-state body of law, especially when these laws provide specific provisions and have delimited and clear

[270] See Olugbenga Bamodu, supra note 255, pp. 232-238. It is noteworthy at this juncture to recall what Rix J said in *Al Midani v Al Midani* [1999] 1 Lloyd's Rep 923: "it seems to me very likely that the applicable law of the agreement is either Sharia law or such law modified by Saudi law . . . . . For these purposes I regard Islamic or Sharia law as a branch of foreign law".
[271] See subsection 2.4.3 Legislations of the Kingdom of Saudi Arabia in chapter 2.
[272] Olugbenga Bamodu, supra note 255, at 235.
[273] The Holy Qur'an and the Sunnah, *see* subsection 2.4.3 of chapter 2.
[274] Olugbenga Bamodu, supra note 255, at 236.
[275] Due to the differences between the Islamic schools of thoughts, *Halpern v Halpern* [2007] EWCA Civ 291, paragraph 33.
[276] The territorial element of state's law, in fact, could be only considered as distinguishing mark, and it does not seem to add a significant privilege to those laws over non-state body of laws.

substance, such as CISG. Hence, it seems appropriate to dispense with the state's law requirement, and to introduce a main condition that requires the chosen law, whether a state or non-state body of law, to be established and its substance determined. This criterion would provide certainty for the courts in applying the law chosen by the parties, and it would serve the contractual parties' expectations, if the chosen law has not been established, such as the law being in its draft version and having been promulgated, or the chosen law consists of for example, customs and unwritten provisions applied between a group of individuals in a tribe or village, and thus the court could preclude the application of that law.

On this basis, the European Court could find plausible grounds to preclude the application of Sharia law which is chosen by the parties, except in the condition that the parties have sufficiently identified specific provisions that stem from Islamic Sharia.[277] Hence, this condition signifies the importance of establishing an international convention that provides a common understanding of Islamic Sharia principles and provides and identifies specific provisions thereof. This would be a helpful and instructive reference for courts that are not familiar with Islamic Sharia, and would give those courts a clear and certain reference to verify whether the incorporation of Islamic Sharia provisions is sufficiently incorporated by the contracting parties.

It is important to note that under the Rome I Regulation, the chosen law is not particularly required to have any particular connection with the contract. This is apparent from the respect given to the parties' freedom to choose the law applicable to their contract,[278] even if their contract is connected to one country and they have chosen the law of another country.[279]

One question that may arise pertains to a context in which an electronic transaction between two parties who are domiciled in state (A) is concluded and executed entirely through the internet, but the server through which the transaction is conducted is located in country (B). Assuming the law of a country other than A is chosen as the

[277] Olugbenga Bamodu, supra note 255, at 237. *Halpern v Halpern* [2007] EWCA Civ 291, paragraphs 31-33.
[278] Article 3(3) of the Rome I Regulation.
[279] Dicey, Morris and Collins, supra note 14, p. 1801.

applicable law, would this transaction be considered to be connected to one country only, and accordingly, trigger the application of Article 3(3) of the Rome I Regulation, which entails application of the mandatory provisions? The application of Article 3(3) is subject to the condition that all elements, other than the choice of law, are connected to a single country. In this particular case, theoretically all of the elements of the electronic transaction are not linked solely to one country, due to the server's location in a different state.

It seems more appropriate and preferable to implement the European Court's approach under the *Wintersteiger AG v. Products 4U* case,[280] which entails disregarding the location of servers or other hardware used to facilitate the transaction. Firstly, this approach would ensure the applicability of Article 3(3) of the Rome I Regulation, which applies the mandatory rules of the state to which (almost) all elements are connected. Secondly, this method complies with the nature of e-commerce and parties' expectations, and maintains the foreseeability of the conflict of law rules in the EU. Nevertheless, the location of servers is still considered one of the elements of electronic transactions, and should not be dismissed in all circumstances. In most scenarios involving electronic contracting, the parties would not require or demand to know the location of the servers through which the transaction is processed, except where the e-contract's subject matter is directly or indirectly related to the servers or hardware through which transactions are processed (for example, transactions concerning services provided through cloud computing,[281] such as processing power or storage [e.g. Dropbox], or provision of a platform for the construction of bespoke applications).[282]

Implied Choice of Law

[280] Case C-523/10: *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* [2013] Bus LR 150.
[281] Cloud computing can be defined as 'an elastic execution environment of resources involving multiple stakeholders and providing a metered service at multiple granularities for a specified level of quality (of service)' (http://cordis.europa.eu/fp7/ict/ssai/docs/cloud-report-final.pdf), or 'A style of Computing where scalable and elastic IT capabilities are provided as a service to multiple customers using Internet Technologies' ('Experts Define Cloud Computing: Can we get a Little Definition in our definitions?', available at: http://blogs.gartner.com/daryl_plummer/2009/01/27/experts-define-cloud-computing-can-we-get-a-little-definition-in-our-definitions/). The latter definition is proposed by Daryl Plummer, who is member of the Gartner Blog Network.
[282] Simon Bradshaw, Christopher Millard, and Ian Walden, 'Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services', *International Journal of Law and Information Technology*, Vol. 19 (Oxford, Oxford University Press, 2011), p.190.

Article 3(1) of the Rome I Regulation has not precluded the possibility of the parties' choice of law being made implicitly. In order to determine the implied choice of law, Recital 12 of the Regulation clearly indicates that the choice of court should not be a decisive factor, but only one of the factors, indicating the choice of law. This principle provided by Recital 12 is instructive considering that the parties' intention to choose the court's law would easily appear through expressly providing this choice of law in addition to the choice of court agreement.[283] This principle, on the other hand, is questionable,[284] as Recital 12 has merely mentioned the choice of court agreement conferring jurisdiction exclusively to one or more courts of a Member State. This indicates the narrow scope of the principle, which embraces only the choice of court of Member States. There is no plausible reason why this principle should not apply to the choice of court of a non-EU Member State.[285]

Apart from the inclusion of a choice of court, an implied choice of law may be found in other circumstances. One example, even in e-commerce, may be when an implied choice of law is based on previous conduct or practice of the parties. For instance, a business located in the UAE frequently purchases products from a German company; in most cases the transactions are concluded through the automated purchasing system on the seller's website, which presents the terms and conditions of the transaction, including a choice of law agreement that entails application of the German laws to any dispute that arises from the contract. On one occasion, however, the buyer makes a request to purchase some products through an email sent to the seller's email address. The seller responds to the buying request and concluds the transaction without the inclusion of terms and conditions. In this situation, it seems plausible to assume that the parties intended that the latter e-transaction would be subject to German law.[286]

[283] Volker Behr, supra note 235, p. 243.
[284] Ibid.
[285] Ibid.
[286] This assumption is supported by Giuliano and Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations', OJ 1980 L282, which provides: 'a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties.'

In this context, it is essential to distinguish implied choice of law from the absence of choice. From a theoretical perspective, drawing a line between those two issues is not difficult; however, for the courts it might be much more difficult in practice.[287] This difficulty is most apparent in the absence of an express choice of law from the contracting parties, and accordingly the court has to consider and examine the terms of the contract and all relevant circumstances, in order to determine the applicable law to a contract.

Based on the wording of Article 3 (1), the determination of implied choice of law is centred on the notion of clear demonstration. Therefore, it seems that the implied choice should be based on a noticeable intention of the parties that stems from the terms of the contract and all circumstances therein. Thus, in the situation where all the relevant factors related to the contract do not provide or indicate a clear intention of the parties towards a particular law, the court would apply the provisions concerning the absence of choice of law under Article 4 of the Regulation.

Nevertheless, it might appear from the circumstances that more than one law is connected to the contract examined. It is suggested that the European Court may in such cases resort to assuming that the parties have impliedly chosen one of the connected laws over the other.[288] For instance, the court might speculate that the parties' implicit choice of law is directed at the law that provides greater certainty to the contract through its developed and detailed provisions,[289] or the law that would partialy invalidate the contract compared with other connected laws that would invalidate the whole contract.[290]

The Absence of Choice of Law

Article 4(1) of the Regulation provides default rules designed to determine the applicable law to certain types of contracts. Specific rules of these default rules will be considered, in particular[291] Article 4 (1)(a), which ascertains the law of the country where the seller has his habitual residence to govern the contract for the sale of goods

[287] Clarkson and J. Hill, *The Conflict of Laws,* (Oxford University Press, New York, 2006, 3ed), at 183.
[288] Peter Stone, *supra* note 242, at 299
[289] *Ibid*, see *Hathurani v Jassat* [2010] EWHC (Ch) (Maan J).
[290] *Ibid*, see *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50
[291] There are further default rules for other circumstances not being the provision of goods or services.

and Article 4 (1)(b), which aims at applying the law of the country where the provider has his habitual residence to the contract for the provision of services.

In cases of absence of choice, an EU member state court is to resort to Article 4 (2) of the Rome I Regulation in two situations: if the contractual elements fall within more than one category under Article 4 (1), or the contract falls outside of these categories.[292] Article 4(2) focuses on the notion of characteristic performance regardless of the element of habitual residence.[293] It guides the court seized of the dispute to search merely for the party obliged under the contract to conduct its characteristic performance, and to apply the law of the country in which that party is habitually resident. The court should consider, in its search for the characteristic performance of the contract, the contract's 'centre of gravity'.[294]

Further, if Article 4(2) has not been instructive for the court to determine the applicable law, the Regulation in Article 4(3) requires application of the law of the country that is 'manifestly more closely connected' to the contract. It is claimed that Article 4(3) of the Regulation is aimed at providing the European national courts with an escape route in the case where the elements of habitual residence and characteristic performance are weaker than the other factors that stem from the circumstances of the contract,[295] while Article 4 (4) provides as a last resort the criterion of most closely connected country to the contract in order to determine the law applicable.

It seems, from paragraphs 1 and 2 of Article 4, that the Regulation has to a great extent eliminated the possibility for the European courts to prefer the place of characteristic performance over the place of habitual residence of the characteristic performer in order to determine the law applicable to the contract.

It is important to note that the ascertainment of the applicable law under Articles 4 (1) and (2) has not relied on the place of performance. In fact it has relied on the determination of the party who has such obligation under the contract. Thus, there

[292] Recital 19 of the Rome I Regulation.
[293] Faye Fangfei Wang, supra note 43, at 110.
[294] Recital 19 of the Rome I Regulation, see in relation to the centre of gravity see the Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde (Guiliano-Lagarde Report) OJ C 282 , 31/10/1980, at 20.
[295] Faye Fangfei Wang, supra note 43, at 110.

would not be any significance in determining the place where the characteristic performance of an electronic contract is conducted.[296] Nevertheless, the determination of the place of characteristic performance is instructive for specific contractual circumstances such as, for instance, to determine whether a contract is 'manifestly more closely connected with a country other than indicated in paragraphs 1 or 2' of Article 4. It seems plausible and rational to ascertain the place of characteristic performance in respect of electronic contracts in such circumstances. Hence, the question in this context is which electronic contracts are considered manifestly more closely connected to a country other than those in which the seller or service provider has his habitual residence?

In most electronic transactions, the place of performance does not possess significant weight, especially in contracts that are concluded and executed through the internet.[297] This is in light of the fact that the seller or service provider could perform his contractual obligation, which is considered the essence of the contract, from his place of habitual residence, whether this is the principal place of business (as for individuals) or the place of central administration (as for merchants).[298] Therefore, it is not impossible but difficult to envision a realistic scenario where an electronic contract is manifestly more closely connected to a country in which neither the seller or service provider nor the buyer has his habitual residence. It seems less difficult, however, to visualise such electronic contract to be more closely connected to a country that does not contain the habitual residence of the seller, service provider or buyer.

An example of these contracts might be a contract between a computing developer habitually resident in Finland, who concludes an online contract with another computing developer in the Netherlands to develop and enhance a number of phone applications owned by the Dutch merchant. The contract contains a provision that obliges the Finnish developer to perform his obligation through a computing lab in

[296] *See* Faye Fangfei Wang, supra note 43, pp. 112-114, who examined the determination of place of performance of various electronic contracts in the course of ascertaining the applicable law in the absence of choice of law.
[297] Still electronic contracts that concluded offline and performed totally online fall within this category, because the place of physical conclusion of the electronic contract does not relate to the essence of that contract. *See* Faye Fangfei Wang, supra note 43, at 112.
[298] Article 19 (1) of the Rome I Regulation.

Germany that is owned by a third party, which is interlinked with the Dutch developer's labs in the Netherlands. The Finnish developer agrees on a minimum advance payment in addition to taking a certain percentage of the sales of the applications developed under the contract.

Although Finland is the habitual residence of the developer, who could be considered a service provider, the question does arise as to whether Germany or the Netherlands can be considered more closely connected to the contract. The Netherlands seems to be closely connected to the contract because it is the place where the merchant who own the applications and facilitated the lab and equipment needed for the other party to perform his obligation under the contract was located. In addition, the technological equipment in Germany are connected with those based in the Netherlands and owned by the Dutch developer. Although it seems proper to state that the role of the Dutch developer, from the circumstances of the contract, was beyond the typical beneficiary of the service, Germany seems to be more closely connected to the contract, mainly because it is the place where the Finnish developer has executed his obligation, which still constitutes the core of the contract. Netherlands might be, however, the most closely connected to the contract, or rather manifestly more closely connected, if the Finnish developer performed his obligation in the labs of the Dutch developer.

On the other hand, the determination of the seller's or service provider's place of habitual residence in these electronic contracts is worthy of consideration, particularly when these parties do not have a physical place of residence and merely conduct their commercial activities through the internet.[299] Such an assumption could be challenged on the basis that any business should usually have a place of establishment, namely the country from which the business is granted official and governmental permissions to enter into commerce;[300] in the development of governmental services that provide such permissions simply through electronic means, such a place of establishment could still be considered as the principle place of business for these electronic

[299] Faye Fangfei Wang, supra note 43, at 113.
[300] It is possible to start business in some countries without any official or government permission and without incorporation, for instances, through using social media platforms, such as Instagram and Twitter, for commercial activities by individuals.

merchants.[301] Even though these type of businesses may use technological equipment, such as servers and processors, located in a different country, these servers still might not be considered as the principal place of business for these merchants regardless of the electronic means used to facilitate their commerce, whether passive or interactive websites or even mobile applications,[302] because these servers are only mediums or channels through which the business conducts its commercial activities.

Moreover, these electronic businesses could use a number of servers located in different countries to support their commercial activities, and hence it is implausible to assume that a single business has a number of different places considered as the place of habitual residence or the principal place of business, based on the location of these servers. Furthermore, it is noteworthy to recall the European Court ruling in *Wintersteiger AG v Products 4U*,[303] in which the court established a principle that seems to be considered also in relation to determining the applicable law of electronic contracts. By analogy of the court principle in the *Wintersteiger* case, the determination of the applicable law to electronic contracts would not consider the place of the server used by the trader to facilitate electronic transactions.

Contrary to the Rome Convention,[304] Article 19 (1) of the Rome I Regulation has defined the principal place of business as the habitual residence of an individual with regard to his business activity, while the habitual residence of a legal person is referred to as the place of its central administration. The Rome I Regulation ignored providing a rule determining the place of habitual residence for individuals not acting in the course of their business, which if provided, would be instructive to apply to consumer contracts.[305]

With respect to business activities conducted by a branch or agency or any other establishment and involving the conclusion of contracts, the place of habitual

[301] On the contrary of this view, see Faye Fangfei Wang, supra note 43, pp. 113-114
[302] *See* Faye Wang, supra note 43, at 112.
[303] Case C-523/10: *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* [2013] Bus LR 150.
[304] C.G.J. Morse, 'Consumer Contracts, Employment contracts and the Rome Convention', *International and Comparative Law Quarterly* (1992) Vol. 41, at 9. For main differences between the Rome Convention and the Rome I Regulation *see* Dicey, Morris and Collins, *supra* note 14, pp. 1781-1782.
[305] Volker Behr, *supra* note 235, p. 236.

residence in this situation is where that branch or agency is located.[306] According to Article 19 (3) of the Regulation, the moment of concluding a contract is the time in which the location of parties' habitual residence would be determined.

Restrictions on the choice of law

Article 3 (3) of the Rome I Regulation addressed the application of rules, 'which cannot be derogated from by agreement', that stem from the law of the country to which all elements of the contract are connected, except for the choice of law. The concept of those is considered as mandatory rules;[307] although this term is not used in Article 3(3) or Article 3(4),[308] while at the same time it is wider than the concept of overriding mandatory rules mentioned under Article 9 of the Regulation.[309] According to Recital 37 of the Regulation, 'the concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively'. The provision under Article 3 (3) seems to overcome the possibility of parties' evasive intent towards the domestic provisions that cannot be derogated from by agreement.

It is suggested that the time the contractual elements are considered as being located in one country is when choice of law is made,[310] thus, the parties' subsequent agreement to change the place of the contract's performance would affect the application of Article 3 (3).[311]

Further, Article 3 (4) of the Rome I Regulation adds another perspective from which provisions that cannot be derogated from by agreement would apply, however the source of these provisions is the EU laws, such as Agency Directive,[312] or rules concerning non-discrimination, monetary issues or anti-trust.[313] Specifically, Article 3 (4) applies to situations where all contractual elements are located in one or more

[306] Article 19 (2) of the Brussels I Regulation. It is noteworthy that Article 4 (2) of the Rome Convention had referred contracts concluded via branches to the principal place of business. Faye Fangfei Wang, supra note 43, at 111.
[307] Peter Stone, *supra* note 242, pp. 292-293. Xandra E. Kramer, *supra* note 95, at 268
[308] Dicey, Morris and Collins, *supra* note 14, p. 1832.
[309] *Ibid*.
[310] *Ibid*, at 1833.
[311] *Ibid*.
[312] Case C-381/98 *Ingmar v Eaton* [2000] ECR I-9305
[313] Xandra E. Kramer, '*supra* note 95, at 276.

Member States of the EU,[314] except that the chosen law by contracting parties is of another Member State. The limited scope of Article 3 (4) is notable, through confining its application to contracts governed by the law of a Member State, while on the other hand, it would have been instructive to extend the application of this rule to contracts in which the chosen law referred to a non-Member State.[315]

Overriding mandatory provisions:

With respect to overriding mandatory provisions, Article 9 (1) of the Regulation defines the concept,[316] or rather highlights the features of those provisions, through indicating two main characteristics therein; firstly, the overriding mandatory provisions are considered as a 'safeguarding of a country's public interest', and secondly, those provisions are applicable to 'any case falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'.

Article 9 (2) establishes an ultimate principle to apply the overriding mandatory rules that stems from the law of the court seized. Because of the strong wording provided in Article 9 (2), which states: 'nothing in this Regulation shall restrict the application …', it may be tempting at first glance to suggest that the European legislature has assured substantially and widely protection of the public interest of the Member States, however in fact, according to Recital 37, the Regulation confined the application of the overriding mandatory provisions of the forum's law to exceptional circumstances.[317] Hence, besides the restrictive interpretation of the overriding mandatory provisions, the national courts of the Member States have to be very cautious towards the circumstances to which the intend to apply the overriding mandatory rules of their domestic law.

[314] According to Article 1 (4) of the Rome I Regulation, the location elements needed to apply Article 3 (4) is not necessarily required to be within Member States in which the Rome I Regulation applies, however, it embraces all Member States of the EU, even those who are not committed to apply the Regulation, such as Denmark. Dicey, Morris and Collins, *supra* note 14, pp. 1833-1834.
[315] Although, the European Commission proposed this suggestion, it is not clear the reason in revoking it; Dicey, Morris and Collins, *supra* note 14, p. 1834, Xandra E. Kramer, *supra* note 95, at 266
[316] Peter Stone, *supra* note 242, at 335.
[317] Recital 37 of the Rome I Regulation states that: "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions"

These exceptional situations must first fall within the scope of overriding mandatory provisions that are considered to be crucial, designed to protect the public interest of the court's country, and cannot be revoked through the contract's terms regardless of the contract being governed by a foreign law.[318] Hence, overriding mandatory provisions have specific characteristics, and are aimed at achieving particular objectives that fall within the national interest of the Member State; therefore, it is no coincidence for those provisions to be far from the principle of mutual recognition.[319] Second, these exceptional circumstances must be capable of being contradictory to the provisions, which are regarded as overriding mandatory rules. The example may be given of a situation where the forum's law provides greater protection to the weaker party in the contract than is provided under the law governing the contract.[320] It should be noted that the overriding mandatory rules should not restrict the free movement of goods and persons that contribute in the functioning of the internal market of the EU.[321]

Article 9 (3) of the Rome I Regulation introduces a further limited perspective in relation to the application of overriding mandatory provisions. Specifically, Article 9 (3) allows the court seized to apply the overriding mandatory provisions of another Member State under the following conditions. First, the contractual obligations have been executed or have to be executed in the other Member State. Second, those overriding mandatory rules should be closely related to those obligations performed or that have to performed, with the view that they could affect the legality or validity of the contract. Hence, besides the requirements addressed in Article 9 (1), namely being crucial for protecting the Member State's public interest, moreover the contractual obligations should not only fall within the scope of those provisions; these provisions should also have the effect of invalidating the contract.

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[318] Peter Stone, *supra* note 242, at 338.
[319] Jan-Jaap Kuipers, EU law and private international law: the interrelationship in contractual obligations, (Martinus Nijhoff Publishers, Leiden, 2012), pp. 327-328.
[320] Case C-381/98 *Ingmar v Eaton* [2000] ECR I-9305, in this case the European Court ruled the application of a European Directive, 86/653 [1986] OJ L382/17, which provides greater rights to the commercial agent than the governing law of non-Member State, in which the principal established. Further, Case C-184/12 *United Antwerp Maritime Agencies (Unamar) v Navigation Maritime Bulgare*, [2014] 1 All ER (Comm) 625, in which the European Court held the application of Article 9 (2) on grounds that the law of the forum provides greater protection to the commercial agent in the case than the law of Member State that governing the contract, even though the later law was complying with
[321] Xandra E. Kramer, *supra* note 95, at 263. *See* the European Court ruling in *Unamar.*

The provision assumes and requires the court's knowledge or information of the other relevant Member State's overriding mandatory provisions. The effect of this provision could also be considered as or could form part of the principle of mutual recognition, in which the Member State's court would, in favour of the interest of another Member State, give effect to such provisions that stem from the law of the Member State in which the contractual obligations are performed or shall be performed.

Public Policy

Article 21 provides that: "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum". Given the scope of mandatory rules, under Article 3 (3-4) of the Regulation, and overriding mandatory provisions under Article 9, that leaves a limited margin in which the national courts could invoke public policy. Moreover, the wording of Article 21 has also affected the probability of invoking public policy because Article 21 requires a clear extent of incompatibility of the applicable law provision with the public policy of the court. Article 21 has expressly indicated the effect of public policy, which merely disallows the application of the contradicting provision of the applicable law.[322]

5.4.2 Applicable Law to B2C Transactions

The Rome I Regulation has provided greater protection to consumers compared to that afforded previously by the Rome Convention, one of whose major weaknesses was its limitation in terms of protecting consumers in their distance contracts.[323] Specifically, Article 6 of the Rome I Regulation has eliminated the requirements or criteria that restrict application of the protective provision under Article 5 of the Convention to certain consumer transactions,[324] and in contrast has

[322] *Duarte v The Black and Decker Corp* [2007] EWHC 2720 (Q.B); [2008] 1 A11 E.R. (Comm) 401, in which the English court held that Article 16 of the Rome Convention (which corresponds Article 21 of the Rome I Regulation) the employee could rely on the English public policy, given the working place of the employee was in England.
[323] See David McClean and V. Ruiz Abou-Nigm, supra note 85, pp. 364–365, and Elizabeth Crawford, 'Applicable Law of Contract: Some Changes Ahead', *Scots Law Times* (2010), 4, pp. 19–20,
[324] Article 5 (1-2) of the Rome Convention provides: '1- This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

extended the protection to cover more forms of consumer contract, particularly those concluded in the form of electronic transactions.

This enhanced protection under Article 6(1) of the Regulation is credited to the inclusion of the concept of 'directed activities',[325] which must be interpreted as compatible with Article 17(1)(c) of the Brussels I Regulation according to Recital 24 of the Rome I Regulation.[326] Thus, The EU national courts' interpretation of Article 17(1)(c) of the Brussels I Regulation also extend to Article 6 of the Rome I Regulation.[327] Thus, The European Courts' interpretation of Article 17 (1)(c) of the Brussels I Regulation also extends to Article 6 (1) of the Rome I Regulation.[328] The criterion required, besides that the individual who is contracting with the merchant should be domiciled in a Member State at the time of concluding the contract, is that the merchant's commercial activities should be considered as being directed to that Member State.[329]

The core protection provided through the Rome I Regulation rules is in preventing application of the chosen law that deprives a consumer of the protection afforded by the provisions that cannot be derogated from by agreement according to the law of the State in which the consumer is habitually resident.[330] These mandatory rules in this context are those aimed at securing social and economic standards in the consumer's Member State.[331] From a practical perspective, identifying mandatory rules by consumers or traders can be fraught with difficulties, especially those applicable to

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2- Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not be have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- If in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- If the other party or his agent received the consumer's order in that country, or
- If the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.'

[325] Article 6(1) of the Rome I Regulation: '

[326] See Recital 24 of the Rome I Regulation.

[327] P. Stone, supra note 62, at 9.

[328] P. Stone, *supra* note 62, at 9.

[329] See above section 6.2.2 Jurisdiction in B2C Transactions

[330] C.G.J. Morse, supra note 302, p.8.

[331] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, COM (2002) 654 final, 14 January 2003, p. 33.

consumer transactions over the internet.[332] Furthermore, there could be divergent interpretations among the national courts with respect to identifying the difference between the concepts of pursuing activity and directing activity to a Member State under Article 6(1) of the Rome I Regulation, and those concepts defined in terms of electronic transactions.[333]

The European national courts might need to refer to Recital 37 of the Rome I Regulation, which states that: 'the concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from the agreement" and should be construed more restrictively'. It seems that those rules must concern consumers' protection and rights; for instance, the traders' obligations towards the consumer. In this context, the European national courts should focus on the areas in which the chosen law can lessen or restrict the consumer protection provided by the law of the country in which the consumer is habitually resident.

The Consumer Rights Directive[334] may provide an appropriate platform for the European courts to rely on in examining whether the chosen law is providing less or more protection to the consumer. Indeed, this approach complies with one of the Directive's objectives; to establish 'standard rules for the common aspects of distance and off-premises contracts'.[335] The Directive could be considered as the main reference for the European national courts when referring to mandatory rules that cannot be derogated from by agreement, in the case of applying the chosen law under the consumer contract. Accordingly, this would provide greater certainty to businesses and consumers with respect to the identity of the mandatory rules, which would promote the internal market in the area of consumer protection.[336] On this

[332] Lorna E. Gillies, *Electronic Commerce and International Private Law* (Aldershot, Ashgate Publishing Limited, 2008), p. 126.
[333] Zhang Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Oxford, Hart Publishing Limited, 2009), p. 73.
[334] Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13 ECC and Directive 1999/44 EC, and repealing Directive 85/577 EEC and Directive 97/7 EC. (Hereinafter the Directive on Consumer Rights).
[335] Recital 2 of the Directive on Consumer Rights.
[336] In this context, Recital 7 of the Directive on Consumer Rights provides: 'Full harmonization of many key regulatory aspects should considerably increase legal certainty for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on

foundation, the Directive on Consumer Rights is also compatible with the Rome I Regulation, according to Recital 10 of the Directive. It seems that the rules laid down by the Directive will play a crucial role when reference is made to the mandatory rules concerning consumer contracts by the European national courts. Hence, this in fact provides greater certainty regarding which mandatory rules the national courts would apply in the case of applying the chosen law under the consumer contract, although the provisions under the Directive harmonise and regulate a number of matters concerning consumers' rights,[337] while other matters would be referred to the law of the Member State in which the consumer is habitually resident.

With regard to the concept of directing activity to the consumer's Member State, it seems obvious, based on its inclusion in the Rome I Regulation and the European Court's interpretation of the term under the Brussels I Regulation, that it aims to cover transactions concluded from a distance, or rather, through the internet.[338] On the other hand, the term "pursuing activity in the Member State of the consumer's habitual residence" seems to be targeted at embracing activities conducted by businesses that are established in, or have a physical existence and transact with consumers of, that Member State. Furthermore, one of the differences between Article 6(1) of the Rome I Regulation and Article 17(1) of the Brussels I Regulation is the absence of the rule that governs determination of the applicable law to consumer contracts concluded with a branch, agency, or other establishment under the latter provision of the Rome I Regulation, while such a rule does exist under Article 17(1) of the Brussels I Regulation. This indicates that the concept of pursuing activity in the consumer's Member State is applicable to situations in which consumers transact with the branch, agency, or other establishments of the business or trader.[339]

Still, there may be various interpretations among the national courts towards identifying the difference between the concepts of pursuing activity and directing

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clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union.'

[337] The Directive regulates and harmonises a number of areas in relation to consumer contracts, such as providing information to the consumer, the right of withdrawal, delivery of goods, fees for the use of means of payment, and the risk of loss of or damage to goods.

[338] The European Commission's Proposal COM (2005) 650, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0650&from=EN .

[339] Faye Fangfei Wang, *supra* note 43, pp.119–120.

activity to a Member State under Article 6 (1) of the Rome I Regulation, particularly in the sphere of electronic transactions.[340] For example, an online business whose website is registered in Member State (A) sells goods to consumers domiciled in a number of Member States, including member state (A). In this situation, the business's activities fall within the concept of both pursuing and directing activities, where its activity in Member State (A) is considered to be pursuing, and its activities towards the other Member States is considered as directing. This is also the case for a business that has a physical presence in the Member State and pursues activity through its website with consumers domiciled in that Member State. Thus, the concept of pursuing activity could overlap with the concept of directing activity.

On this basis, it seems clear that the term "pursuing activity in the consumer's Member State" should be interpreted in a different dimension compared to the concept of directing activities to that Member State; however, the concept and meaning of directing activity is wider than that of pursuing activity.

Article 6 (4) of the Rome I Regulation expressly excluded certain contracts from the scope of the protective provisions under paragraphs 1 and 2 thereof. These contracts, for instance, are for the carriage of goods or passengers (Article 5), insurance contracts (Article 7), contracts related to immovable property such as rights in rem or tenancy contracts, and contracts involving financial instruments.

5.4.3 Recommended Choice of Law Approaches for the GCC and UAE

Recommended Approaches in relation to the Applicable Law to Electronic Contacts:

The above examination shows that the EU measures governing matters of jurisdiction and applicable law are distinct from their counterparts in the laws of the UAE and the GCC member states. This is especially so in terms of the approach in which these matters and related issues are provided for in great detail under the EU regime, while the approaches in the UAE and the other GCC member states are lacking a comparable level of detail. It is noteworthy, however, to point out that the measures of the UAE and the other GCC member states, with the exception of Saudi

[340] Zhang Sophia Tang, *supra* note 331, p. 73

Arabia, seem to comply with the principle of freedom of contract and party autonomy. Arguably, in one sense at least, they even provide a wider scope of respect to the parties' choice of law than under the Rome I Regulation – given the absence of comparable provisions restricting the parties' choice of law in various contracts under the Rome I Regulation, such as consumer, employment and insurance contracts, and mandatory rules and overriding mandatory provisions. It is true, however, that the reason is that the current laws of the UAE and GCC member states, with the exception of Bahrain,[341] have not adopted specific provisions that are aimed at protecting the consumer's rights, which means the parties' choice of law in consumer contracts is restricted. This is in addition to the absence of provisions from the GCC itself, such as those concerning mandatory rules and overriding mandatory provisions in the EU's Rome I Regulation.

From another perspective, the GCC member states' legal provisions and those of the UAE have not limited the parties' choice of law to a state's law or a national law. This is partly because of the general texture that shaped the provisions and also because of the existence and important role of Islamic Sharia that directly or indirectly created familiarity and acceptance for the notion of a non-state body of laws in these states. Therefore, it is not surprising to find the laws of the GCC member states have omitted the requirement that the law be chosen by the contracting parties or the applicable law must be a state or national law. On the other hand, the GCC member states have adopted an approach that entails that the existence and substance of the law chosen by the contacting parties should be capable of being established and determined.[342] Thus, this approach would not refuse the application of parties' choice of non-state law, providing that this law exists and the court would be able to stand on its provisions and denotations. Hence, it is worth exploring and recommended for the European legislature to reconsider the measures concerning the recognition of non-state laws under the Rome I Regulation, and it would seem appropriate to adopt a similar approach to that adopted by the UAE legislature.

With regard to the recommended approaches for the GCC and the UAE in the sphere of the applicable law of B2B transactions, it would seem appropriate and essential to

[341] See section 4.3.3 The Applicable Law to B2C in Bahrain in chapter 4.
[342] See section 4.2.1.1 Express Choice of Law in chapter 4.

adopt the principle that the location of technical means such as servers or other hardware should not be considered in determining the applicable law to electronic transactions between businesses, except where these technical mediums are considered an integral part of the subject matter of an electronic contract.

There are a number of areas in the sphere of applicable law in which the UAE and the other GCC member states need to enhance their provisions. It is noteworthy that improving these provisions and approaches is aimed at enhancing the certainty and predictability of provisions determining not only the applicable law to electronic contracts, but also to ascertain the law governing civil and commercial contracts in general.

Express choice of law is recognised generally by the provisions of the GCC member states, but they do not provide further detail on whether this recognition would extend to choice of law governing part of the contract, or whether the parties would be allowed to change their choice of law. Given the absence of clear criteria that guide the court to determine parties' implied choice of law, it would seem appropriate for the GCC member states to adopt a similar approach to that adopted by the EU, which entails the implied choice of law being recognised in circumstances when it can be demonstrated clearly from the circumstances of the contract.

With respect to the absence of choice of law, the GCC member states essentially need to consider a framework similar to the EU legislature's approach. The current provisions of the GCC member states, which are based on the joint domicile of the parties and the place in which the contract is made, are not adequate and often will not be compatible with electronic contracts.[343] Thus, it is proper for GCC states to adopt more efficient rules for determining the applicable law of contracts in certain situations where the parties have not made a choice. A new approach may, like the EU approach, involve default rules largely from the perspective of applying the law of the country of habitual residence of the party who is obliged under the contract to deliver its characteristic performance. Additionally, as a last resort measure to determine the law applicable in the absence of parties' choice of law, it would seem

[343] See 4.2.2.3 The Absence of Choice of Law

appropriate for the UAE and GCC member states to adopt the doctrine of the law of the country most closely connected to the contract. This seems a logical approach to be deployed not only for offline contracts,[344] but also more importantly for electronic contracts.

A bird's-eye view on the EU approach in introducing different types of provisions that classify various restrictions in effect on the party's autonomy indicates the European legislature's intention to lessen the reliance on the wide, and inconspicuous to some extent, notion of public policy. The justification for such an approach may be established on a number of grounds; however, one essential basis for this is the harmonisation between the Member States of the EU, and the proper functioning of its internal market. Achieving those objectives would have otherwise been fraught with obstacles, given the number of Member States and their differences in the sphere of public policy and its application.

It would be interesting to know how the European Court would apply those provisions, specifically under Articles 3(3) and (4), and Article 9 of the Rome I Regulation, in disputes concerning electronic transactions that are concluded and executed through the internet. It would also be interesting particularly when such contracts do not provide or ascertain a place in which the electronic contracts have been performed. Questions may arise, for example, as to how the European Court would ascertain that such electronic contracts were purely confined to the Member State in which the court in question is located in order to apply Article 3(3); or how it would ascertain that an electronic contract was confined totally to the EU, in the case of applying Article 3(4). Another question is how the European national courts would apply their overriding mandatory provisions to that type of electronic transaction, given the restrictive interpretation of those rules and the exceptional circumstances upon which they apply, especially in the case of applying Article 9 (3) of the Regulation, which is centred on the Member State in which the contract is performed or is to be performed.

[344] Dan J. B. Svantesson, supra note 73, at 383.

In order to appropriately implement the provisions of the Rome I Regulation on electronic transactions, the European national courts might need to consider principles and approaches that stem from other EU legislations that relate to electronic commerce. One of the principles to be considered, for example, is that the location of the server or technical means through which the electronic transaction is processed should not be given considerable weight compared with other elements of the contract, [345] such as the parties' domicile, and the place where the contract is performed or should be performed provided that this place is determined under the contract. On the other hand, the place of such technical means should be taken into account in relation to electronic contracts in which these servers or other technical means are considered the essence of the electronic transaction.

The earlier examination of the current approach towards non-state bodies of law, and the jurisprudence of the European Court of Justice, suggests that courts in Europe are likely to refuse the application of provisions of Islamic Sharia. This is primarily because the Rome I Regulation seems to contemplate only a state law, but also on the grounds of conflicting schools of thought and vagueness in establishing the provisions of Sharia.[346] A different consideration sheds light upon a possible solution for these difficulties faced by courts that are not familiar with the provisions of Islamic Sharia. One of the plausible incentives with regard to Islamic Sharia provisions is through establishing an international convention on common Islamic Sharia provisions with regard to Commerce and Civil matters. The participating states could base the convention on a number of clear and certain provisions and principles which contracting parties could refer to in relation to contract and commercial issues. The participating member states could incorporate this convention into their domestic laws, and judicial or arbitral authorities in non-Islamic states could refer to the convention in the case of contracts governed by Islamic Sharia. Such a convention would be helpful to courts and tribunals that are not familiar with Islamic Sharia principles and provisions and will also facilitate the creation of a common understanding of Sharia provisions. This approach will not necessarily overcome the

[345] Article 2 (c) of the Directive on Electronic Commerce, Case C-523/10: *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* [2013] Bus LR 150, *see* P. Stone, supra note 62, pp. 2-4.
[346] See Esther van Eijk, 'Sharia and national law in Saudi Arabia', *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Jan M. Otto (Ed.), (Leiden, Leiden University Press, 2010)

difficulty of invoking Sharia as an independent body of law other than as part of a national law under current European Union jurisprudence. However, the same consideration applies even in respect of the CISG 1980.[347]

Recommended Approaches in relation to the Applicable Law to Electronic Consumer Contacts:

As has been mentioned earlier, although the current provisions of the UAE and the other GCC member states' laws have succeeded in recognising the parties' choice of law to a large extent, these provisions, with the exception of Bahrain, do not provide adequate protection in the sphere of the applicable law to consumer contracts and, more importantly, with respect to protecting consumers in electronic commerce. Thus, it is highly recommended for the UAE to adopt a protective approach in this respect. This recommendation also applies to the other GCC member states, which lack that approach.

Adoption of the 'directed activity' doctrine seems essential in both the GCC and the UAE dimensions, due to the lack of an efficient approach toward protecting consumers, particularly in the sphere of e-commerce transactions, given the consistency of the concept of 'directed activity' with electronic consumer contracts. Still, it also seems essential at the same time to consider how this protective approach could be adopted or implemented and interpreted from a perspective that suits the UAE's ambitions in terms of attracting foreign investment and promoting commerce with foreign countries.

Among the GCC member states, the adoption of protective consumer rules is also important. In fact, it is still essential for the GCC to adopt legal instruments that regulate consumer protection and rights, judicial enforcement of other member states' court rulings, and electronic commerce. These unified legal instruments would lead the national courts of the member states to receive a harmonised interpretation of concepts and approaches concerning directly and indirectly the GCC provisions protecting consumers in the sphere of jurisdiction and applicable law. The harmonised

[347] *See* Olugbenga Bamodu, *supra* note 255, pp. 232-238, and Case *Ostroznik Savo v La Faraona soc. coop. a.r.l.* Tribunale di Padova Sez. Este 11 January 2005 therein mentioned.

interpretation would be aimed at providing and maintaining coherent consumer protection under the GCC instruments.

Chapter 6: Conclusion and Proposed Legislative Provisions

6.1 Other Matters to be Considered

This chapter considers and proposes possible legislative provisions to address issues of conflict of laws in respect of electronic commerce under the laws of the UAE and the GCC. The chapter focuses particularly on the laws concerning the determination of judicial jurisdiction and applicable law in relation to e-commerce contracts. On the other hand, the proposals will have wider ramifications for determining jurisdiction and applicable law in the broader context of contracts generally. Most importantly, the provisions are put forward in the context of suggestions for reform of existing laws in the UAE and the GCC on jurisdiction and applicable law. In this sense and to this extent there is a technology-neutrality element to the proposed reforms.

6.1.1 The form to implement the proposed provisions

One of the essential questions to be considered when discussing a proposal for provisions to be applicable in the member states of the GCC is whether to promulgate the provisions in the form of a treaty or convention among the member states, or in the form of an edict by the GCC that is compulsory for member states. This question arises similarly in relation to proposed legislative provisions that are drafted and suggested in this chapter.

The reason underpinning the option of enforcing provisions proposed for the GCC through a treaty or convention is due to the GCC's frequent practice of promulgating non-binding legislation; thus, the option to establish a convention consisting of the proposed rules could be viewed as promising and could have a binding effect on the member states. On the other hand, it might be argued that the convention could be rejected completely or opposed with reservations by some member states; thus, there would not be a surety that these proposed provisions would be applicable to all member states. This argument, however, could also be raised against the second method of promulgating a unified law through the GCC, considering that the binding effect of that unified legislation under the GCC must be agreed upon by the member states, and therefore such law may be confronted with objections from some member

states;[1] hence, it would not be enforced in those countries. The progress made in the field of legal and judicial cooperation under the GCC indicates that most of the GCC's unified laws are guiding, and some are mandatory.[2]

The GCC has produced a convention,[3] namely the GCC Convention on Enforcement of Judgments and Judicial Declaration and Rogatory, which has been mandatory for member states. Hence, it seems that provisions related to jurisdiction and choice of law in civil and commercial transactions, including electronic transactions, would be best enforced through a GCC convention or a treaty among the member states. It is also logical that an instrument or instruments on jurisdiction and applicable law would follow(s) the same format as the existing one on enforcement of judgments since these topics are all broadly in the same general sphere of harmonisation on judicial, adjudicatory matters and legal cooperation and coordination.

In spite of preferring the convention option, however, the eagerness in this context is to see these provisions adopted through a binding legislation through the GCC, even if it is by the promulgation of a binding edict. In its own way, this would strengthen the purpose of the GCC and afford the GCC's institutions more major roles and duties or, in other words, would bring more authority to the GCC and its institutions. This could be a major step that would facilitate the promulgation of further GCC legislation in binding forms.[4]

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[1] Article 10 of the GCC Charter states: "Each member of the Supreme Council shall have one vote. Resolutions of the Supreme Council in substantive matters shall be carried by unanimous approval of the member states participating in the voting, while resolutions on procedural matters shall be carried by majority vote".

[2] According to the General Secretariat of the GCC, which states that it promulgated over 40 harmonized laws; most of these are guiding, but some are mandatory.
Available at: http://www.gcc-sg.org/ar-sa/CooperationAndAchievements/Achievements/LegalandJudicialCooperation/Pages/Legalandjudicialcooperation.aspx

[3] The Convention was ratified by the member states of the GCC during the 16th assembly in Muscat in December 1995, GCC legal and judicial cooperation, *ibid*.

[4] In the fifth round, the Permanent Committee of officials of the legislation departments of the GCC member states commissioned a specialist committee from the legislative departments of the member states to inventory all guiding legislation issued under the GCC to classify these laws according to the decisions made upon them, to state the reasons and obstacles that have prevented the transformation of these laws from guiding to binding, and to propose appropriate mechanisms to accelerate the adoption of these laws in mandatory form. The specialist committee is also mandated to prepare a draft on unified legislative terms and legislative encyclopedia. See the GCC General Secretariat's Report on the GCC achievements on the legal and judicial fields, *ibid*.

6.1.2 The Interpretation of GCC Legislations

Another issue that requires consideration in relation to proposals for harmonised legislative provisions under the GCC is the interpretation of the provisions. Naturally related to this is the question of which body shall be the final and authoritative interpreter –the supreme courts of the member states, or a special body to be established under the GCC, such as a GCC court or committee. The latter option seems preferable, because leaving such interpretation to the supreme national courts of the member states may result in different or contradicting interpretations, and lead to conflicting applications of the GCC's unified law. Applying the second option would avoid the result of contradicting interpretations by granting the exclusive authority to interpret the harmonised provisions to a specific body under the GCC, which would open a channel through which to receive interpretive queries from the national courts. Furthermore, this GCC body could provide unified training courses for practitioners and judges from the national courts in order to provide a harmonized understanding of the legislations adopted by the GCC; this would eventually lessen or prevent conflict between the rulings of the national courts when applying GCC provisions. This incentive would eventually enhance and comply with the aims of the GCC, and could also lead to further harmonisation in other matters among the member states. Indeed, at the GCC level, there is room for improvement, for instance, in consumer protection and alternative dispute resolution matters, and other areas that could contribute to improving the internal market of the GCC and justify the existence of the GCC in economic terms.

6.1.3 E-Courts

This section further explores the notion of the introduction of e-courts in the UAE and other member states of the GCC, particularly in relation to electronic transactions and consumer e-commerce transactions. The reason behind proposing the notion of establishing e-courts in this part of the conclusion falls under two axes: first, it could serve as a starting point for future research and widen the perspectives of researchers, particularly those interested in dispute resolution for e-commerce transactions in the UAE and the GCC, and for studies that could embrace legal and technological perspectives in investigating the subject of e-courts. Second, this part will provide some perspectives and suggestions on the e-courts notion, considering

that e-courts could play an even larger role than traditional courts in advancing the type of legislative provisions proposed in this thesis and in this chapter. The idea of establishing e-courts is considered a very positive and potentially vital method for applying the measures proposed in this thesis. Proposing new unified rules among GCC member states would not be enough to get the best practical effect out of these proposed rules through traditional courts, although these rules are aimed to provide a clearer approach to the courts and aim to be compatible with e-commerce transactions among GCC member states. Therefore, the idea of establishing e-courts is proposed and highlighted in the thesis, to bring these e-courts closer to the e-commerce environment, and accordingly to ensure the practical effect of the proposed provisions. Thus, the proposed harmonised provisions on one hand, and the establishment of e-courts on the other hand, would be encouraging components for individuals and merchants to use e-commerce domestically and among GCC member states.

Furthermore, there are potential practical effects that might appear following the adoption of such measures. These effects could be divided into two scopes: the business scope and the consumer or public scope. The first and quickest effect could come from the business sector, especially those involved in e-commerce, in the form of increased shares in the stock market. A subsequent impact might be the growing number of businesses that are involved or have moved to e-commerce, leading to an increase in the number of electronic transactions and expansion of the market value of e-commerce, raising its importance and involvement in the economy. Consequently, that leads to the second scope of these effects, regarding the growing number of consumers involved in e-commerce transactions, increasing consumers' confidence in the services and products provided through e-commerce.

From a realistic perspective, the popularity of non-judicial alternatives for resolving consumers' disputes outweighs the traditional courts' resolution of consumers' disputes, given that disputes arising from B2C transactions are less likely to reach traditional courts and the practical effect of the proposed provisions would not appear

quickly through traditional courts.[5] Various factors may prevent such disputes from reaching these courts, including alternative dispute resolution (ADR).[6]

There are different types of ADR for B2C; however, most share certain features[7] which make them closer and more active in resolving disputes arising from B2C transactions than the traditional courts. Although these features are enjoyed by ADR platforms, there is nothing preventing traditional courts from adopting and implementing the best of these ideas, in order to be closer to B2C disputes and stay informed, and this seems achievable through e-courts. Thus, the focus that underpins the notion of e-courts is activating the role of the judiciary in B2C disputes. Indeed, the implementation of e-courts would allow the courts to keep pace with the evolution of e-commerce, by virtue of their closeness and interaction with the disputes that arise from e-commerce transactions. Accordingly, the courts would be able to identify any flaws concerning the jurisdiction and applicable law provisions in relation to e-commerce transactions; this would consequently give the legislative authority in the member state a closer look at those provisions and hence a quick response in introducing or amending these rules.

The establishment of e-courts does not entail eliminating or preventing alternative methods from resolving consumers' disputes that arise from e-commerce transactions. The objective of these alternatives is to settle consumers' disputes outside the courts, while the path to courts remains open and available for proceedings concerning consumers' e-contracts. Additionally, it does not seem rational to monopolise the authority of resolving such disputes merely through the courts, given that consumer

[5] The proposed provisions which will be provided later in this chapter.
[6] The definition of ADR and which platforms shall be regarded as ADR have received different views from authors and researchers; some have excluded arbitration from ADR. For further details, see Jonathan Hill, *Cross-Border Consumer Contract*, (Oxford University Press, Oxford, 2008), pp. 243–248.
[7] ADR enjoys characteristics that are distinctive from the judiciary and serve the purpose of its existence. These features can be summarized as simplicity, velocity and affordability. In the interest of simplicity, for instance, the procedures required in filing a dispute shall be abbreviated, apparent and limited to few steps. Velocity could be represented in shortening the time scale of dispute age, which begins when the dispute is filed and ends when it is settled, in contrast to the ordinary time needed to resolve matters before the courts. The cost of these alternatives is convenient from the consumer perspective, as it entails lower costs than court fees. In this context, the Organization for Economic Co-operation and Development (OECD) Guidelines for Consumer Protection highlight such characteristics with regard to alternative dispute resolution mechanisms. See OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), available at: http://www.oecd.org/sti/consumer/34023811.pdf

disputes are usually of a low values that does not justify the cost and hassle of litigation; thus most of these disputes are or could be settled through non-judicial alternatives. The existence of these e-courts does not necessarily entail abolishing ADR as a means for consumers to settle their disputes with traders. Indeed, consumers' freedom to choose the means by which they resolve their disputes with businesses shall not be restricted. Providing diverse channels for resolving consumer disputes is a vital feature; it is also an advantage, not only for consumers, but for e-courts because that diversity would reduce the number of cases examined by these courts, and allow consumers to choose their preferred method for resolving disputes with traders. Thus, the importance of ADR in terms of resolving consumer disputes is equal to that of e-courts.

Although ADR platforms enjoy features that are distinct from those of traditional courts, e-courts could adopt and implement most of these characteristics, which would attract the resolution of disputes arising from e-commerce transactions. Some of the principles e-courts should embrace in order to compete with ADR are simplicity, velocity and affordability. Along with adopting these principles, it is vital for these courts, in order to provide a convenient and secure platform for firms and individuals to resolve disputes quickly and efficiently, to implement the best technologies in terms of communication tools, electronic management, and authentication procedures. Perhaps these interrelated elements are worth investigating for those interested in the fields of technology and law, for example, finding the ideal methods for ensuring the authentication process, or establishing a secure system to prevent individuals outside particular countries from entering the e-court service, or against any hacking attacks on the e-courts' system.

A further phase of e-courts, which is preferable, would be allowing these courts to preside over disputes arising from both B2B and B2C transactions. This would facilitate the litigation process, especially where the parties of B2B transactions are domiciled outside of the UAE and do not have a physical presence in the country. Domestic businesses may also find examining B2B disputes by e-courts preferable to litigating through traditional courts, as this may have advantages in terms of time and cost. Hence, the establishment of these courts could be highly important from the consumer perspective, as well as from the business perspective. Furthermore, e-courts

could be implemented with regard to disputes or appeals concerning the public sector; for instance appeals against traffic or municipality fines.[8]

There are a number of grounds on which the notion of e-courts could receive criticism; one of these is that the characteristics and features of e-courts could lead them to receive a massive number of disputes, eventually affecting their efficiency and performance. In response to this criticism: e-courts are not aimed at replacing or eliminating the alternative options for dispute resolution; hence, the ADR platforms will still perform their role in resolving disputes that arise from B2B and B2C e-commerce transactions; this would certainly reduce the number of disputes before e-courts compared with the number of disputes that e-courts would see if they were given exclusive jurisdiction over these litigations. With regard to disputes arising from B2C transactions and brought by consumers, the handling of internal complaints should not be dismissed in the context of resolving consumers' complaints with traders, as these may lead to disputes. The mechanism by which disputes brought by consumers are filed in e-courts should urge consumers to discuss their complaints with traders before filing cases. The governmental body, which is committed to consumer protection, and consumer agencies should encourage businesses and traders to establish internal complaints handling. Considering these measures, businesses' handling of internal complaints could play a major role in lessening the number of disputes filed before e-courts.

Another basis of criticism could be that the establishment of e-courts, which provide simple and cost-free services to consumers, could be abused. Consumers may abuse the system by filing unjust cases against businesses that have fulfilled their commitments to consumers. In response to this criticism: it is possible to allow e-courts to apply a fee to unjust complaints in order to prevent consumers from abusing the system. From the circumstances of each case, the e-courts could ascertain whether the consumer had brought a proper dispute against the business or trader, or was attempting to embarrass the business and affect its reputation.

[8] Susan Schiavetta, Online Dispute Resolution, E-Government and Overcoming the Digital Divide, 20th BILETA Conference, April, 2005, Queen's University of Belfast, p. 3.

One criticism from the jurisdictional perspective is that e-courts could cause confusion, particularly if such courts are given parallel jurisdiction to that of the traditional courts. In response to this point, e-courts are afforded a qualitative jurisdiction on disputes that arise from e-commerce transactions; this classification would not completely eliminate the potential for misunderstanding between traditional and electronic courts. On the other hand, the qualitative distinction between the courts already exists; for example, commercial, civil, real estate and consumer courts. Thus, adding e-courts for specific types of dispute would not cause particular difficulty in the courts system. Other questions that could arise in this context involve what the relationship could be between e-courts and traditional courts, and whether electronic courts would operate as a branch of traditional courts, or as independent courts. It seems appropriate to consider e-courts as an integral part of the national courts for a number of reasons; e-courts are governed by the national laws of the state, and these courts will follow the judicial principles provided by the highest courts in the state with regard to the application of national laws.

The notion of establishing e-courts seems compatible with the UAE from various perspectives: first, from governmental interest in innovation and employing the best practices in public services and technology;[9] second, from the UAE's capability through its infrastructure in general and ICT infrastructure in particular; and finally, the ability of UAE citizens and firms to adapt to technology and the smart services provided. These features, and others, such as the country's financial capacity, make the UAE a fertile environment for applying the concept of e-courts. The success of e-courts in the UAE could be a leading example for the other member states of the GCC to establish e-courts; this would eventually create a path for the GCC to adopt new unified measures concerning e-courts among the member states, which in turn would contribute to the development of the GCC's internal market and the execution of e-court procedures among member states, particularly in the enforcement of e-court rulings. Hence, the establishment of e-courts in the member states of the GCC would introduce a new platform and incentive for harmonisation; it could effectively encourage the member states to collaborate further in other matters under the GCC.

[9] See Chapter 2 regarding the UAE government's interest in developing and facilitating government services to individuals and the private sector.

In the meantime, it would seem preferable as preemptive action on the part of the GCC to introduce a guiding legislation in relation to the establishment of e-courts, which directs member states to the competencies of these courts and their general framework in terms of digital security, documentation, and the importance of providing education courses and programmes to citizens and firms from the private sector on how to use the service provided by e-courts. The establishment of national e-courts, in compliance with the guidelines provided by the GCC, could provide member states with the opportunity to establish these courts under their judicial systems in a manner that complies with their national laws, and the guiding legislation of the GCC. Through this legislation, the GCC would establish member states' e-courts with similar characteristics or features; this would facilitate the adoption of forthcoming harmonised laws among its member states in matters related to e-commerce, such as electronic transactions and data protection.

Furthermore, the GCC could adopt a number of legislations, for example, consumer protection legislation; this would unify definitions concerning consumer protection such as the definition of the consumer and the supplier or professional; it would also harmonise the scope of consumers' rights and suppliers' obligations. A second GCC legislation could be the adoption of harmonised procedural legislation, which, for example, might determine the jurisdiction of these courts, and identify and organise the procedures required to bring proceedings before GCC courts. In addition, this law should expressly protect the litigation power of GCC consumers, whether to litigate before their national or domicile courts, or before the courts where the defendant is domiciled.

6.2 Proposed Provisions and Approaches

Throughout this thesis, recommendations and proposals for addressing some of the conflict of laws issues affecting electronic commerce in the UAE and the GCC were considered and highlighted. Chapter 3 on jurisdiction notes the similarities and differences among the jurisdiction provisions currently extant in the member states of the GCC. It is apparent that there is still a large margin for these rules to be developed and updated in order to provide more certainty through the adoption of appropriate approaches for the determination of the jurisdiction of contractual disputes arising

from electronic transactions, whether between businesses or between a business and consumers. Among the main shortcomings of the current provisions of the relevant laws of the GCC member states are: the failure to recognise the contractual parties' choice of court; the impropriety of these rules in terms of determining the jurisdiction of contractual disputes in case of the absence of a jurisdiction agreement between the parties; and, the deficiency of providing appropriate protection to consumers, particularly with regard to their litigation power or their right of access to the courts of domicile, with the exception of Qatari laws, which protect consumers' litigation power before its national courts.

In contrast to the jurisdiction provisions that are affected by many areas of insufficiency, almost all of choice of law provisions adopted by the GCC Member States, with the exception of the Kingdom of Saudi Arabia, have relied on a significant pillar, namely the recognition of the express or implied choice of law made by the contracting parties.

Although the GCC member states, excepting Saudi Arabia, recognised the express choice of law, this recognition was established on general terms and does not embrace important specifications concerning the express choice of law, which have been presented in Chapter 4; whether the parties are allowed to amend their express choice of law, or to choose laws of more than one states to govern their contract, and whether the parties are confined to choose a law of a state or they can choose a non-state system of law. Thus, the following proposed provisions for the GCC will include a rule aimed at governing express choice of law and its related specifics, while those for the UAE will provide a similar provision aimed at amending Article 19 of the Civil Transactions Law. This amendment can also be considered and adopted by the other member states of the GCC in relation to their provisions that echo Article 19 of the Emirati Civil Transactions Law, namely Articles 20 and 21 of the Civil Transactions Law of the Sultanate of Oman, Article 59 of the Kuwaiti Law of Contractual relations that have a Foreign Element, Article 27 of the Civil Law of Qatar, and Article 4 of the Bahraini Law on Conflict of Laws.

The current choice of law rules still do not provide a proper approach for determining the law applicable to the contract in the absence of choice of law, as they instead

apply the law of the country in which both parties are domiciled; in cases where the parties are domiciled in different countries, the law of the country in which the contract is concluded shall apply. These rules do not lend themselves to the nature of e-commerce, or to providing predictable outcomes for the contracting parties of electronic transactions.

The extent of uncertainty also extends to when the national courts activate a provision, such as Article 23 of the Emirati Civil Transactions Law, which allows courts to search the dominating principles of private international law for appropriate rules in case the current provisions are insufficient. The problem with this provision, which has been highlighted in Chapter 4, is that it does not provide the court with a compass that points clearly to the presumed dominating principles of private international law, whether to prevailing principles in the laws of Arab countries, or in international conventions, or to the principles adopted through harmonised laws among certain countries, such as the EU member states, and neither does it provide a method by which the prevailing principles may be determined. Accordingly, this provision affords the court a wide space in which to search for the dominating principles of private international law. Therefore, this approach lacks clarity and certainty.

Article 23 of the Civil Transactions Law has a positive feature that allows the courts to establish and develop the missing pieces from the current choice of law provisions; this mechanism allows the courts to keep pace with the development of private international law transactions. However, this approach does not provide the courts with the flexibility to amend the current provisions, or to dismiss one of these provisions and instead apply an appropriate approach from the dominating principles of private international law. The existence of Article 23 to fill the gap of missing choice of law provisions is important; on the other hand, it is also important to develop default rules of choice of law, considering that these rules apply in the first place, and to provide appropriate choice of law rules to most types of international transaction, and especially to those concluded electronically.

On the foregoing assessment, the current provisions adopted by the GCC member states, with the exception of Bahrain and Qatar, do not provide proper protection to

consumers in terms of the law chosen in their electronic transactions with businesses or traders. Based on examination, which indicates the shortcomings of the current provisions adopted by the GCC member states and the UAE, Chapter 5 of this thesis highlights the provisions adopted by the EU in relation to jurisdiction, choice of law, and ADR and ODR for consumer contracts. The importance and purpose underpinning the examination of the EU provisions is in drawing lessons when recommending appropriate principles and approaches for introduction and adoption by the UAE and GCC member states. Accordingly, this thesis makes some recommendations and proposed provisions for the UAE and the GCC member states. In this chapter some of the recommendations and proposals are suggested in the draft form of how new legislative provisions may look.

The proposed provisions have two dimensions; the first aimed at the GCC dimension, and the second dimension of these proposals being the UAE. The proposed rules regarding the GCC aim to strengthen cooperation and maintain the Council's accomplishments, particularly in boosting the internal market and enhancing the legal certainty for traders, businesses and consumers. In order to ensure the effectiveness of these amendments, it is crucial to promulgate these provisions in the form of a binding treaty among GCC member states, or possibly in the form of an edict issued by the GCC that is compulsory to member states.

From the perspective of avoiding the lack of uniformity that may be brought about by divergent national interpretations of the provisions and concepts provided under the proposed legislations, it is important to promulgate a unified legislation under the GCC on consumer rights and protection; one of the objectives for establishing such unified legislation is to provide a harmonised reference for the term “mandatory rules” in the sphere of consumer protection. This would allow the national courts to examine the chosen law and determine whether it provides less, equal or more protection to the consumer. This practice would also reduce the scope for divergent interpretations by the national courts regarding the concept of mandatory rules.

With regard to the UAE dimension, two solutions are presented in the conclusion of Chapter 3 dealing with jurisdiction. The first solution aims to comply with the current provisions of the UAE, in the event that the UAE, even as a GCC member state, does

not intend to introduce new developed provisions.[10] Contrary to this assumption, the second solution for the UAE involves the adoption of new and appropriate provisions to ascertain the jurisdiction and law applicable to disputes arising from electronic contracts.

An important final point in relation to the proposed legislations is that while the primary focus and concern of this thesis is electronic commerce and the related rules on applicable law and jurisdictions, the issues highlighted in the thesis provide an opportunity for wider reform of the general law in the UAE and the GCC relating to applicable law and jurisdictions in respect of contracts. To this extent, the thesis reflects the important issue of technology neutrality regarding the rules on applicable law and jurisdiction, while maintaining its focus on the thesis' main concern, which is electronic commerce. This is also reflected in the manner of the suggested drafting of the proposed legislative provisions.

6.2.1 Proposals on the GCC Dimension: Jurisdiction

A. Article 1 *(Recognising the parties' choice of court)*:

1. Parties to a contract may agree that a court or the courts of a member state shall have jurisdiction to resolve any dispute which arises in relation to their legal relationship. The court(s) of the member state chosen by the parties shall have exclusive jurisdiction unless the parties have agreed otherwise.

2. The parties' agreement on the choice of court(s) can be made:

- **(I)** in writing, or evidenced in writing; or
- **(II)** in the form of practices that have been established between the parties; or
- **(III)** in the form of a practice or custom which is widely known, recognised and frequently used between parties who are involved in the particular type of trade or commerce.

3. The parties' agreement on the choice of court(s) shall not be invalidated or denied legal effect on the sole basis that it was made by any means of electronic communication which provides a durable record of the agreement.

[10] This point is examined in detail in Chapter 3.

4. Any agreement on the choice of court(s) which is made as part of a contract shall be treated as an agreement independent of the other terms or conditions of the contract.

5. The courts of another member state, other than that chosen by the parties' agreement, shall normally decline jurisdiction in favour of the chosen member state's court(s) unless the agreement is invalid under that member state's law.

6. A Member State shall recognise and enforce judgments from other member states that resulted from an exclusive choice of court agreement.

7. It shall be possible for parties to a contract to agree, either as a term in the principal contract or by a subsequent agreement, to refer disputes that may arise out of or in relation to the contract, to a particular court or to the courts of a particular place or country. The courts of the GCC (member states) shall ordinarily respect and give preference to the parties' agreement of a court for dispute resolution. However, if one of the parties has commenced action before one of the courts of the GCC despite the parties' agreement on another court, and if the other party does not object by the time of making/filing his substantive defence, the court (in question) can proceed to hear and determine the action.

Explanatory Comment: This Article aims to simplify the recognition and enforcement of contractual parties' choice of court. Thus, promulgating this provision under the GCC umbrella will require the courts of member states to recognise and enforce such agreements. The limited scope of this provision is apparent in recognising only the choice of a member state's court, while the choice of a foreign court is still an issue governed by the national laws of the member states. Paragraphs 2-4 of the Article concern the form in which the choice of court agreement shall be made and consequently be accepted by the courts, with particular attention given to the recognition of the electronic form of such agreements.

B. Article 2 (*Jurisdiction in Absence of Parties' Choice)*:

1. A person domiciled in a member state, regardless of his or her nationality, may be sued in another member state:

(a) Which is the place of performance of the characteristic obligation of a contract. Unless otherwise agreed, the place of performance of the contractual obligation shall be:

I. In the case of sale of goods, the place in a member state where, under the contract, goods were or should have been delivered.

II. In the case of the provision of services, the place in a member state where, under the contract, the services were or should have been provided.

(b) In relation to a dispute arising from the operations of a branch, agency, or other establishment, the courts for the place in which the branch, agency or other establishment is located.

(c) Without prejudice to paragraph (a), the place of domicile of the party whose obligation or obligations under the contract can be regarded as characteristic of the contract, provided that the contract was executed partly or fully through electronic means.

Explanatory Comment: This Article concerns ascertaining the jurisdiction of disputes arising from contractual disputes in circumstances where there is no choice of court by or between the contract parties. The last paragraph in particular focuses on determining the jurisdiction of electronic contracts through reference to the court located in the jurisdiction of the party whose performance under the contract is characteristic. This approach will comply with contracts partly or fully concluded and executed through the internet, in cases in which the internet was the place where the goods were or should have been delivered, or the place where the services were or should have been provided. This rule would not apply to contracts concluded through the internet and executed in reality, or to contracts in which the place of performance has been determined by the parties' agreement.

C. Article 3 (*Jurisdiction over consumer contracts*):

1. The courts of the member state in which the consumer is domiciled shall have jurisdiction in matters relating to a contract concluded between a consumer and a person, who is acting for the purpose of a trade or

profession, and his trade or profession activity is directed to the consumer's member state.

2. The consumer is a person who is acting outside his trade, business or profession, or a person who concludes a contract for dual purposes, partly within and partly outside the trade or profession purpose; however, the trade purpose is limited so as not to be predominant in the overall context of the contract.
3. The consumer has the right to sue the professional in relation to a contract, either before the courts of the member state in which the professional is domiciled, or in the courts of the member state where the consumer is domiciled.
4. Litigation against a consumer may only be brought before the courts of the member state of the consumer's domicile.
5. This Article does not preclude the consumer from bringing proceedings related to a contract with a professional before another court on the basis of an agreement, provided that this agreement:
   - **(a)** Is made after the dispute has arisen.
   - **(b)** Confers jurisdiction on the courts of the member state in which both parties of the contract are domiciled at the time of the conclusion of the contract, provided this agreement does not contradict the law of that member state.

Explanatory Comment: The above Article governs jurisdiction in consumer contracts, and provides a definition of the consumer that does not cover individuals whose intentions fall outside of trade or professionalism purposes; it also extends the consumer concept to embrace dual-purposed individuals acting within both trade or professional purposes and a non-trade purpose, provided that the trade or professional purpose is limited and cannot be considered predominant.

D. Article 4 (*Ascertaining the law applicable to electronic contracts*):

1. Contractual commitments in form and substance shall be governed by the law chosen at any time by the contracting parties. The parties may choose an applicable law for a part of the contract, if this part is capable of being

detached from the other parts of the contract and does not affect the rights of other parties or the validity of the contract.

2. In the absence of express choice of law by the parties of a contract, the law of the country that is manifestly more closely connected with the contract in question shall govern.
3. In circumstances where the contract does not fall within paragraph (1), the law of the country in which the party who has or should have conducted the characteristic performance of the contract has his habitual residence shall govern.
4. A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.
5. A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.
6. 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. In case the place of the auction cannot be determined or is conducted through the internet, the law of the country where the auctioneer has his habitual residence shall govern.

Explanatory Comment: This proposed Article aims firstly to provide greater details and clarity, which are missing under the current rules of the GCC member states, to the rule governing express choice of law, and secondly to enhance approaches concerning the implied choice of law and the absence of choice of law among GCC member states. Furthermore, the above Article includes a specific rule concerning the law applicable to online auctions, while the other provisions under the Article could be considered general rules for choice of law on contracts. At the same time, they comply with the nature of electronic transactions; in contrast to the current provisions adopted by the GCC member states in this respect, which refer to the law of the state in which the parties' domiciles are located, provided that they are domiciled in the same country; otherwise, it will be the place in which the contract is concluded.

E. Article 5 (*The law applicable to consumer contacts*):

1. The law of the country where a consumer has domicile shall govern a contract between the consumer and a professional.

2. A contract between a consumer and a professional may provide, no later than when the contract is made, that the law of a country other than that of the consumer shall apply. However, the application of that other country's law may not have the result of depriving the consumer of the protection afforded to the consumer by provisions that cannot be derogated from by agreement in accordance with the law of the country in which the consumer is domiciled. If the courts find that the law chosen in a contract between a consumer and a professional provides greater rights to the consumer than those provided by the law of the country where the consumer's domicile is located, the chosen law shall prevail.

Explanatory Comment: This proposed GCC provision specifically aims to protect consumers' rights, which are afforded to them through mandatory rules in their countries of domicile, against any restriction or prevention that may result from the application of another law to the consumer contract. The above Article also takes into account the consumer's interest through favouring the application of the chosen law, which is a law other than that of the consumer's domicile, over that of the consumer's country of domicile, provided that the earlier law is more beneficial than the later law. Determining which law is more advantageous to the consumer depends on the relevant provisions to each dispute; hence, the comparison will be limited to the relevant rules, rather than comparing between the legislations' provisions, because the comparison of one whole legislation with another may deprive the consumer of the benefit of applying the favourable relevant rules to the dispute.

This solution or method may face criticism on the grounds of its selectivity in applying provisions from different laws, contrary to the traditional approach of applying different laws to contracts. This method of comparison between the concerned provisions in a consumer dispute is justified on the grounds of providing the most protective and beneficial outcome to the consumer's interest. Furthermore, this method does not seem to be alien in the field of private international law; in fact, some of the approaches, in relation to determining the applicable law in the absence of choice of law, could embrace or include the feature of selectivity; for example, the closest connection approach. Thus, the selectivity feature or measure in comparing between related provisions in a dispute from the consumer's interest perspective

complies with the objective of protecting the consumer, as well as the nature of private international law.

Another criticism that may arise against the process of applying the most favourable provisions to the consumer contract is that the court in question would need to analyse and compare both provisions and their implications on the consumer, or the court in question may refer to the interpretations and applications of these provisions by the national courts of the country in which such provisions were promulgated, all of which may affect the process and pace of settling of cases before the courts, especially consumer disputes that require speedy settlements. Responding to this opinion, the comparison between the relevant rules to the consumer's dispute is likely to be limited to certain provisions concerning the dispute and the consumer's rights simultaneously; hence, it does not appear that the procedure of comparing these provisions would be a heavy burden on the court in question, or a process that would consume a substainal portion of the lawsuit's age, considering the narrow scope of this comparison or procedure; it would appear that the court in question would be capable of completing this procedure in a short time.

6.2.2 Proposals on the UAE dimension

The first part relates to proposed solutions concerning the UAE's current provisions applicable to determining the jurisdiction of electronic transactions and the scope of Article 248 of the Civil Transactions Law:

1. Abolish or deactivate Article 24 of the Civil Procedures Law.

Explanatory Comment: Article 24 of the Civil Procedures Law prohibits any choice of court agreement, which clearly serves as the first obstacle to applying a choice of forum agreement by the Emirati courts; thus, this recommended measure would allow the UAE's courts to recognise the choice of court agreement by the contractual parties, and accordingly this method would bring the current UAE provisions closer to being compatible with the nature of e-commerce transactions, in which choice of court agreements prevails.

1. Consumer contracts shall fall within the scope of Article 248 of the Civil Transactions Law.

Explanatory Comment: On this basis, e-consumer contracts would be regarded as a contract of adhesion; consequently according to Article 248, the court would be allowed to amend or exempt the consumer from the electronic contract terms and conditions, if these conditions have contradicted or restricted the consumer's rights as stated in UAE legislation. This would allow the Emirati courts to exempt the consumer from binding jurisdiction or arbitration clauses provided under their contracts with professionals or businesses. Furthermore, there is no need for proposing a provision that protect the consumer jurisdiction, considering the proposed GCC provisions, which aimed to be obligatory on all member states of the GCC to adopt, have included such matter.

The second part of these proposals will be aimed at providing proposed provisions for the UAE:

1. Article 1 (Recognising choice of court agreement):
    1. Except for disputes arising from contracts related to immovable properties, parties to a contract may agree, either as a term in the principal contract or by a subsequent agreement, that any dispute arising from their contract shall be resolved in the court or courts of a country of their choice.
    2. This agreement shall be:

    (I) in writing or evidenced in writing; or

    (II) in the form of practices that have been established between the parties; or

    (III) in a form which is widely known, recognised and frequently used between parties who are involved in the particular type of trade or commerce.

    3. The parties' agreement on choice of court(s) shall not be invalidated or denied legal effect on the sole basis that the agreement was made by any means of electronic communication, which provides a durable record of the agreement.

4. Any agreement on the choice of court(s) which is made as part of a contract shall be treated as an agreement independent of the other terms or conditions of the contract.
5. The courts of the UAE shall ordinarily respect and give preference to the parties' agreement on a court for dispute resolution. However, if one of the parties has commenced action before one of the courts of the UAE despite the parties' agreement on another court, and if the other party does not object by the time of making/filing his substantive defence, the court (in question) can proceed to hear and determine the action.

Explanatory Comment: This Article is intended to be the second step toward recognising the parties' choice of court agreement before the UAE's courts, after deactivating the effect of Article 24 of the Civil Procedures Law. The proposed provision will establish the UAE courts' recognition of choice of court agreements made by parties of civil and commercial contracts in general, and electronic contracts in particular.

2. Article 2 (*Ascertaining the law applicable to electronic contracts*):
   1. Contractual commitments in form and substance shall be governed by the law chosen at any time by the contracting parties. The parties may choose an applicable law for a part of the contract, if this part is capable of being detached from the other parts of the contract and does not affect the rights of other parties nor the validity of the contract.
   2. In the absence of express choice of law by the parties of a contract, the law of the country that is manifestly more closely connected with the contract in question shall govern.
   3. A contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
   4. Hence, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.
   5. A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.

6. 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. In the case that the place of the auction cannot be determined or is conducted through the internet, the law of the country where the auctioneer has his habitual residence shall govern.

Explanatory Comment: This Article mainly aims to amend Article 19 of the Civil Transactions Law of the UAE, in order to enhance the rules governing the express and implied choice of law and the absence of choice of law. Furthermore, the above Article includes a specific rule concerning the law applicable to online auctions, while the other provisions under the Article may be considered as general rules for choice of law on contracts. At the same time, they comply with the nature of electronic transactions, in contrast to the current provisions adopted under Article 19 of the UAE's Civil Transactions Law, which refer to the law of the state in which the party's domicile is located, provided that they are domiciled in the same country; otherwise, it is referred to the place in which the contract is concluded.

6.3 Conclusion

At the end of this thesis, it turns out that electronic transactions have a different nature from traditional/ordinary contracts and are also changeable due to the influence of technological development. Thus, it may be argued that the earlier solutions and proposals are commensurate with the current nature of electronic commercial transactions in the scope of the GCC and the UAE. It is unknown what changes might occur in the future to these electronic transactions which might therefore cause new difficulties or problems, which may in turn require new provisions in the law or amendments to the approach of the law governing.

The study reached the destination of presenting legislative solutions for the GCC. These solutions will not have an optimal effect, mainly if such proposed provisions and approaches have not been adopted by the Council and laid out in a mandatory format between the member states. The effect of these solutions falls within boosting commerce activities and exchange, especially those conducted electronically, between

the GCC member states, and at the same time will contribute to enhancing and raising the degree of legal and judicial cooperation among those states.

On the other hand, the designed solutions for the UAE serve to facilitate resolution of disputes arising from e-commerce transactions, in addition to being aimed at enhancing legal certainty and judicial predictability. As has been presented through the earlier chapters, these UAE solutions have not been founded only from a legislative perspective, but also from a judicial perspective, in order to provide a comprehensive picture of legislative provisions and approaches in the fields of jurisdiction and applicable law in e-commerce transactions.

Furthermore, the research has not confined its contribution to analysing the current rules of the UAE and other GCC member states and provides appropriate solutions therein but has also proposed an appropriate method that would facilitate the application of these proposed rules and approaches: the establishment of e-courts. Importantly the proposed reforms, while considered initially and primarily from the perspectives of electronic commerce, extend to contracts with a technologically-neutral effect on wider modernisation, effectiveness, and modes of operation and application of the general law, relating to applicable law and judicial jurisdiction.

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