Developing and Modernizing Iranian Law in the Context of Electronic Contracts

by

A Comparative Study of UNCITRAL Rules, English Law, American Law, EU Law and Iranian Law

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III. Abbreviations

- **ARPANET:** Advanced Research Projects Agency Network
- **ATM:** Automatic Teller Machine
- **B2B:** Business to Business Commerce
- **B2C:** Business to Consumer Commerce
- **BIR:** Brussels I Regulation on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters
- **CISG:** United Nations Convention on Contracts for the International Sale of Goods 1980
- **CUECIC /EN:** United Nations Convention on the Use of Electronic Communications in International Contracts/ Explanatory Note
- **CUECIC:** United Nations Convention on the Use of Electronic Communications in International Contracts
- **E-agent:** Electronic Agent
- **ECA:** UK Electronic Communication Act 2000
- **ECD:** European Electronic Commerce Directive 2000
- **E-commerce:** Electronic Commerce
- **EDI:** Electronic Data Interchange
- **E-document**: Electronic Document
- **ESD**: European Electronic Signatures Directive 1999
- **E-sign:** Electronic Signatures in Global and National Commerce Act
- **E-signature**: Electronic Signature
- **HCCCA:** Hague Convention on Choice of Court Agreements
- **HTML:** Hypertext Mark-up Language
- **GATT:** General Agreements on Tariffs and Trade
- **IAP:** Internet Access Provider
- **ICC:** Iranian Code of Civil
- **ICPA:** Iranian Civil Procedural Act
- **IECA:** Iranian Electronic Commerce Act
- **INCOTERMS:** International Commercial terms
- **IP:** Internet Protocol
- **ISP:** Internet Service Provider
- **MLEC/GE:** Model Law on Electronic Commerce/Guide to Enactment

- **MLEC:** Model Law on Electronic Commerce
- **MLES/GE:** Model Law on Electronic Signatures/Guide to Enactment
- **MLES:** Model Law on Electronic Signatures
- **PIN:** Personal Identification Number
- **PKC:** Public Key Cryptography
- **PKI:** Public Key Infrastructure
- **RC:** Rome Convention the law applicable to contractual obligations
- **RIR:** Rome I Regulation on the law applicable to contractual obligations
- **SC:** Solar Calendar
- **SSL:** Secure Sockets Layer
- **UCC:** Uniform Commercial Code
- **UCITA:** Uniform Computer Information Transactions Act
- **UETA:** Uniform Electronic Transactions Act
- **UNCITRL:** United Nations Commission on International Trade Law
- **WWW:** Word Wide Web

Taher Habibzadeh

Developing and Modernizing Iranian Law in the Context of Electronic Contracts: A Comparative Study of UNCITRAL Rules, English Law, American Law, EU Law and Iranian Law

Submitted for the Degree of PhD/ June 2014

IV. Abstract

In the modern world, electronic communications play a significant role in national and international electronic transactions. This issue has forced all legal systems to face up to many emerging legal problems in the context of electronic communications, such as the time and the place of formation of electronic contracts, the validation of e-contracts made by the interaction with e-agents, the legal validity of electronic documents and signatures, consumer protection in contracting electronically in particular in cross-border e-transactions, and the Internet jurisdiction and choice of law. One issue to determine is the place of formation of contracts when contracting electronically, either through email, websites or chat-rooms to see how the notion of 'place' is perceivable in cyberspace; and the way of application of the four traditional theories of *information*, *dispatch*, *receipt* and *awareness* relating to the time and place of conclusion of contracts in contracting by electronic means should be examined. Regarding the legal validity of e-contracts made through *interactive* websites, the legal status of *electronic agents* which play an important role in this process is questionable to see whether they are akin to real agents in the physical world or they are only a mere tool of communication. The responsible person for any mistakes that an electronic agent makes and causes losses or damages to the contracting parties should also be examined. There are also questions regarding meeting the formalities in the formation of some specific contracts in contracting electronically to see whether the electronic documents and signatures legally valid and admissible at the courts of law or not. Their legal weight should also be measured. Moving on the jurisdiction and choice of law issue, some argumentative questions raise. For instance, where the rule of private international law provides that the competent court is the court within which jurisdiction the contract is performed, it is necessary to see that where the place of performance of the contract in which the subject matter is digital goods such as e-books or computer software delivered online is. This is also an important question in providing electronic services such as e-teaching.

Regarding the choice of law issue the same questions of jurisdiction are posed. Furthermore, as consumer protection issue in B2C contracts is important in developing electronic commerce worldwide, it should be considered that whether the consumer party is able to bring an action against the business party in his own place of domicile or habitual residence or not. These are only a sample of questions that the current research tries to analyse based on the traditional legal rules and principles and the statues on electronic commerce.

Discussing the above legal doubts in the context of Iranian law shows that there are a number of legal uncertainties in the Iranian legal system hindering, or at least putting in doubt, the development of electronic commerce in both national and cross-border electronic transactions. Despite the fact that some of them have been addressed by the Iranian Electronic Commerce Act 2004 indirectly, however a detailed legal work is still definitely needed to elaborate the questions and provide solutions developing and modernizing Iranian law in the context of electronic contracts. The author in the current research tries to analyse the questions by a horizontal comparative study of the UNCITRAL Model Laws, the Convention on the Use of Electronic Communications in International Contracts 2005, the EU law, English law, American law and Iranian law. Also, a three-stage roadmap that acts as the guiding principle of this research is employed to develop the Iranian legal system in the context of e-commerce. The first stage focuses on whether the exact application of Iranian traditional law or its expansion can address the emerging legal doubts; the second introduces legal presumptions or rules; and the third theorizes new rules. The research concludes that the Iranian legal system may be modernized and developed in the context of electronic contracts by adopting the legal policy and solutions of other legal systems by both scholarly legal doctrines and legislation.

V. Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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VII. Dedication

I would like to dedicate this thesis to late Ostad Seyyed Ali Ghazi and Ostad Bahjat, two brightening stars in the sky of spirituality, who have opened a divine window into my life (may their soul rest in peace); and, Ostad Foroughi, by whom guidance I follow their way.

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Chapter 1: Introduction

1.1 Development of Communication Methods

In the current era, the impact of the introduction of new methods of communications can hardly be denied. It is not necessary to spend much time providing evidence for this claim. The history of mankind is replete with new technologies that have had an enormous effect on our society; and legislators, policymakers, and lawyers have endeavoured to regulate their behaviours. One of the areas in which the traces of technology are evident is the large and significant world of commerce. When commerce shifted from traditional commerce to electronic, many legal issues emerged and commercial actors began to encounter legal problems which prevented the development of commerce through electronic means.[1]

At one time, commerce flourished mainly through face-to-face communications. Later, the written word began to play a central role and this has remained the case although the format has changed. After that, communication via the telegraph developed and this was superseded by telephone and fax. However, recent developments in the area of technology and communications have been far more technical than previous technologies and could hardly have been imagined in the past. This revolution began with the introduction of the Internet, sparked initially by ARPANET[2] and introduced in the late 1980s to the public. This has transformed daily communications and 'it is not an exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country and indeed the world … has yet seen'.[3] Websites, email and chat-rooms are some common capabilities that can be used to communicate via the Internet. One of the areas in which this technology is evident is the world of commerce as it has created a new space free from territorial boundaries[4] in which both B2B and B2C commerce is able to flourish and flow easier, faster and safer than before.

[1] For more details see: Bill Kovarik, *Revolutions in Communication: Media History from Gutenberg to the Digital Age*, 2011, Continuum.
[2] The Advanced Research Projects Agency Network, US.
[3] *American Civil Liberties Union v. Reno* [926 F. Supp. 824 (E. D. Pa., 1996)].
[4] *Digital Equipment Corporation v. Altavista Technology* 960 F. Supp. 456 (D. Mass., 1997).

1.2 Information Technology and the Related Legal Rubrics

Information Technology is a general term used to refer to the methods of electronic communication, such as the Internet. When considering its legal aspects there are five main related rubrics under the umbrella of the *Law of Information Technology*[5]:

a) *Technology Related Transactions*: these transfer computer technology to the applicants in exchange for a monetary consideration.

b) *Electronic Commerce*: all commercial relations managed by the use of electronic communications, namely electronic transactions between businesses (B2B Commerce); between businesses and consumers (B2C Commerce); and other forms of commerce such as B2G (Business to Government), G2C (Government to Consumer), and C2C (Consumer to Consumer).

c) *Cybercrime*: all crimes such as forgery, fraud and the display of pornographic materials via the Internet and other devices connected to the Internet, such as mobile phones.

d) *Intellectual Property Rights*: protection of trademarks, trade names, patents and other intellectual rights in cyberspace are the main issues in this category. An obvious example is the distribution of an e-book without the permission of its rightful owner.

e) *Privacy and Data Protection*: namely, the data of the persons who are engaged in electronic activities such as consumers who reveal their data when they place orders online.

The current research will only focus on e-commerce in general and will specifically consider the legal aspects of e-contracts as one of the main issues in e-commerce.[6] It is necessary to note that, in contrast to the established divisions in traditional law, such as criminal law, civil law, international law and so forth, there is no unanimous classification under the title of Information Technology Law. However, the writings of legal scholars in this area lead us to the above-mentioned categories. The reason for this may be that the Law of Information Technology is itself an emerging branch of traditional law and not a field of law within traditional law.

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[5] Sometimes they are referred as *Computer Law* or the *Internet Law*. The author employs the most common used term of the *Law of Information Technology*.

[6] The legal issues of e-contracts will be listed with a short explanation later in this chapter in 1.4.1.

1.3 Internet, Commerce and Electronic Commerce

Merchants across the world have welcomed the new technologies and use them in all stages of their daily transactions nationally and internationally, including pre-contractual negotiations, contract formation, and payments. In some cases, they are also used in the performance of contractual obligations. Nowadays, businesses are less keen to arrange face-to-face meetings as these incur financial costs, take up time and can involve long and difficult travel. They prefer to handle their commercial transactions in as fast, inexpensive and secure a manner as possible. With this aim, in B2B transactions merchants benefit from Electronic Data Interchange (EDI) facilities for different purposes including the exchange of commercial documents. Moreover, in B2C transactions, they take advantage of cyberspace to establish electronic markets and advertise and sell their products without any geographical restrictions. Consumers are similarly able to have access to markets which they could not access before. *Electronic Commerce* is the term used for illustrating this new method of commerce and its legal aspects are considered under the rubric of *The Law of Electronic Commerce*.

1.4 Research Scope

1.4.1 The Main Research Question of the Thesis

In the past, economy was only industry based. The coming of the information age brought with it a new way of extending the economy and doing business. It was felt, therefore, that new legal rules were required to help it advance further.[7] In the area of commerce, when commerce shifted from traditional methods to electronic ones, many legal issues emerged and commercial actors encountered legal problems that prevented them from developing commercial activities via the Internet.[8] A significant issue has been the legal aspects of electronic contracts. As electronic contracts are at the heart of electronic transactions, the legal issues surrounding them need to be considered in great depth to be able to address the new legal problems. In this line, the main research question that this thesis aims to answer is '*to what extent Iranian law is able to respond*

[7] Holleyman, R., *Updating Contract Law for the Digital Age*, Society for the Advancement of Education, 2000, P. 52

[8] For example writing on some emerging legal issues see: Kono, T., G. Paulus, G., Rajak, H., *Selected Legal Issues of e-Commerce*, 2002, Kluwer Law International.

the legal questions of electronic contracts'.[9] This focus will be confined to both B2B and B2C contracts wherever it is appropriate for making such a distinction. As a result, in the areas that Iranian law is unable to provide legal certainty, it is a necessity to develop and modernize it. The title of the thesis refers to this fact: *developing and modernizing Iranian law in the context of electronic contracts.*

To address the main research question, this thesis first introduces the legal issues of electronic contracts in chapter of introduction, i.e. the current chapter, and then chooses four most contentious legal questions (which will be mentioned in the next section), as sub-questions, each will be addressed and analysed specifically in one substantive chapter. This means that *if the main research question is seen as a legal puzzle, each sub-question plays the role of its pieces*. Each chapter, in turn, is substantially divided into three parts: a) the precise and concise review of the Iranian law, coupled with other legal systems in question, concerning the legal question at hand; b) the test of the legal question of the chapter within Iranian law demonstrating the extent of its respond-ability, weaknesses and gaps, if there is any; c) The conclusion and suggestions, which build a part of the answer to the main research question of the thesis. Suggestions will be made as to *how* the existing relevant legal rules of Iran is able to or could respond the legal questions of electronic contracts directly, by expansion, revision or new legislation. The examination of the relevant legal materials of other legal systems has an important contribution in this respect. It is recommended that the developments occur both through legislation, such as the issue of conflict of laws, and through scholarly legal doctrines, such as the issue of the legal status of electronic agents.

1.4.2 Sub-questions to Address the Main Question: A Practical Example

Evidently, for the above aim, at first the main legal issues concerning contracts should be recognized in general, and then they should be discussed in the context of electronic contracts. This will lead to the consideration of a number of sub-questions under the umbrella of the one main research question of the thesis. To extract these sub-questions the common process of electronic markets is necessary to elaborate here. Lisa, who does business in the area of cloth under the brand of L&G in England, registers a domain name of www.LandG.comand establishes a website whose server or host is in Canada to

[9] It is necessary to note that the phrase of '*Iranian law*' refers to both the traditional law and current statutes on electronic commerce.

sell her company's products through the website across the world. A given consumer should follow the stages designed on the website to have a successful order. These stages are, in sequence: searching goods, selecting required goods, filling in the page of personal information (name of consumer, country of residence, address, telephone and etc.), agreeing with terms and conditions of sale, making an electronic payment, reviewing the order's detail, and confirming the order. Ehsan, as a consumer whose nationality and place of domicile is Iran, first communicates with Lisa through her e-mail address regarding the order of jeans, and then orders some jeans by following the process of order in a trip to China, instantly receives and email confirming the detail of the order, and comes back to Iran. He does not receive the goods in the due time and brings an action against Lisa before the court of law in the city of Tehran. Iranian judge faces with a case in which some important legal questions should be answered to reach a decision: does it have competence over the dispute? Does the accessibility of website of the seller in Iran mean that she can be sued in Iran? If it is competent, is there any valid contract formed between the parties since one party, Lisa, employs electronic software for the purpose of receiving orders, which seems has no 'will'? And where and when the contract is formed, as the parties locate in different jurisdictions? If there be any dispute on the detail of the order, and Ehsan adduce the content of email received automatically from Lisa once the order made final, is it legally admissible and how much is its legal weight? Similarly, how the electronic contract has been signed by the parties? What about the applicable law, as different countries have involved in the case? The law of which country is applicable to the contract, Iran, England, China, or Canada, if there is no prior agreement on the applicable law? How Iranian law protects Ehsan in this B2C contract with Lisa, as a foreign trader? And many other questions which need legal responses to help the Iranian judge to decide on the case.

Having considered a practical example of electronic selling and buying, the following titles can be put forward as the main legal topics relating to electronic contracts, which relate to pre-contractual negotiations, formation of contract, performance of contact, and any later amendments or modification of contact.[10]

[10] It is necessary to note that here only the main legal issues of electronic contracts are listed. It does not mean that they all are to be considered in this research, since some of them in substance are not capable to be addressed argumentatively in this research. There areas chosen to be considered are mentioned in the next part.

a) Fundamental elements of formation of e-contracts: for example, the way of ascertaining the legal intention of the contracting parties by electronic agents employed in running interactive websites.

b) Rules of offer and acceptance in contracting electronically: for instance, in sending the acceptance by e-mail it is necessary to determine which of the four theories (declaration, postal, reception and information) apply and the exact time and place that a contract is formed in an online sale. The result is also important to determine the time and place of conclusion of e-contracts which decides the moment from which the legal consequences of an electronic contract flows, and Internet jurisdiction and applicable law is determined wherever they are required.

c) Determining the Internet jurisdiction and the choice of law in solving disputes arising from electronic contractual obligations: for example, as a website is accessible across the world, the question arises whether this accessibility can be the basis for applying jurisdiction over the owner of the website anywhere in the world. This issue is linked with the previous issue.

d) Formal requirements: the legal validity of e-signatures and e-documents for the purposes of meeting signature and writing conditions required in physical transactions; and the amount of legal weight of electronic documents compared to paper-based documents.

e) Contractual terms in electronic contracts: this refers to the way of incorporating terms of an electronic contract into the contract. For example, if a buyer puts a tick in a box stating 'I have read and agree to the terms', it is not clear whether the contract is legally enforceable if the buyer has not actually read the terms.

f) The validity of shrink-wrap and click-wrap contracts. For example, in a shrink-wrap contract the terms and conditions are displayed after making the contract. It should be seen that whether the contract is valid or not.

g) Intellectual property issues in the context of electronic contracts, such as cases where the subject matter of the contract breaches copyright.

h) Legal issues of electronic payments. For example, in the case that the buyer pays electronically the price of the goods bought online as his own contractual obligation, the place at which the payment is made has determining role in deciding the jurisdiction.

i) The technical and legal status of electronic agents in electronic contracting and the liable persons when they err.

j) The issue of consumer protection in contracting electronically with a focus on the jurisdiction and applicable law issues in B2C contracts.

k) The way of amending or modifying of electronic contracts.

Due to time constraints and quantitative limitation of the thesis, which do not make it feasible to consider all legal aspects of e-contracts, having taken into account the main issues relating electronic contracts, and most importantly for the purpose of selecting the most contentious and argumentative areas within Iranian law, the four following areas have been chosen for consideration in the context of Iranian law with reference to other legal systems (EU, English and American laws and international regulations) in order to see that to what extent Iranian law is able to respond the emerging legal questions of electronic contracts, and then to what extent it needs to be developed and modernized in the area of electronic contracts. The following sections address these four main areas, their general outlines and what the research seeks to achieve concerning each sub-question, in more detail. Each of them will be addressed in one separate chapter to build the conclusion to the main question of the thesis. Here, it is necessary to note that other issues, such as contractual terms, electronic payments and in particular consumer protection in electronic contracts, will be considered wherever it is appropriate to do so.

1.4.2.1Time and Place of Formation of Electronic Contracts

The determination of the time and the place of the formation of electronic contracts are of great significance. In some cases, due to the use of specific communication methods, such as the postal system for the manifestation of acceptance, a range of discussions and reasoning have been put forwarded; in other cases the legal answer is straightforward, such as when a contract is formed over the telephone.

In the current age, when the modern means of communication, such as email, websites and chat-rooms are employed to form electronic contracts, the complexities of their functions have been conveyed to the legal debates and this has led to a sort of legal uncertainty, at least at first glance. This can be seen in the difference between a communication through a postal letter where the only intermediary between the parties is the post box or the post office which are both located in a certain geographical location, and an email, where a number of intermediaries are perceivable and may be

located in different places geographically, such as the information systems used for dispatching and retrieving the messages, and the allocated and non-allocated electronic addresses for communications.

In the second chapter, the time and the place of formation of electronic contracts through email, websites and chat-rooms will be examined in great depth with reference to the four traditional theories of: information, dispatch, receipt and knowledge in distance contracting. Since there is no direct indication on this issue in statutes on electronic commerce, including the Iranian Electronic Commerce Act 2004 (IECA), then the important question in this chapter is to consider how the traditional rules and the provisions of statutes on electronic commerce can be combined to respond to questions concerning the time and place of contracting issues in electronic contracting. The intention in this thesis is to try to provide a direct and comprehensive approach and simulate the occurrence of any chosen traditional theories in contracting electronically. An attempt will also be made to consider how and to what extent Iranian law can learn from English, EU and American law. In addition to deciding when a contract has been formed and its time and place of formation, the outcome of this chapter is vital in determining Internet jurisdiction and the applicable law if there is no agreement on the jurisdiction and choice of law and disputes arise from a cross-border electronic contract.[11] For example, if the conflict of laws rule sets out that the contract is under the law of the country within which territory it has been concluded, the place of conclusion of the contract is determining. Also, the time of conclusion of an electronic contract is important when it comes to determine the rightful owner if, for example, goods are sold by the seller to different persons at different times.[12]

1.4.2.2 Legal Status of Electronic Agents

The electronic environment is a platform through which commerce can flourish safely, easily, speedily and cheaply. Through websites, traders create electronic markets and customers around the world are able to access them. These websites can be categorised into two types: *interactive* and *non-interactive*. The former are those through which

[11] One of the main results of determining jurisdiction is that the procedural law during the proceedings is the law of the forum. Regarding proper law, it will govern issues such as the interpretation of the contract, the performance of the contract, the prescription and limitation of actions, the consequences of breach of obligations and remedies, and the nullity of the contract.

[12] In the second chapter on the time and place issues the legal significance of determining the time and the place of formation of the contract will be illustrated with more details.

customers are able to place orders and conclude a legally valid contract. The latter are those which play the same role as paper advertisements in the real world: webvertisements. The interactive websites are run by agents, which in the language of electronic commerce are called *electronic agents*. The rationale behind employing electronic agents is that businessmen are not able to negotiate and contract with all their customers individually. Hundreds of buyers across the world could contact them online and it is impossible for the seller (owner of the website) to negotiate with all of them. Electronic agents facilitate this process.

Having regard to the above considerations, the legal status of the intervention of an electronic agent in the process of the conclusion of an electronic contract can be considered in terms of the following issues:

a) The nature of an electronic agent and its role in the process of the conclusion of an electronic contract;
b) Whether electronic agents are the e-version of real agents in the physical world;
c) The legal justification if this is the case;
d) If not, then the real function of an electronic agent;
e) The way that the principle of 'meeting of minds' can be dealt with through e-agents;
f) The party that bears the risks of the interactions of an electronic agent, in particular, when a problem arises. To achieve this, a distinction is made between a 'mistake' and an 'error' and the meaning and the legal consequences of each case will be discussed in the context of electronic contracts.

These issues will be considered in the third chapter. To this end, it is necessary to consider the law of agency in order to make a clear and open-minded analysis of the nature and the legal status of an electronic agent. However, in Iranian law, in contrast to English and American law, there has never been a separate and independent discussion on agency law. Moreover, current Iranian legal materials have not properly addressed the legal status of electronic agents. This makes it difficult to present the Iranian law's approach on this subject. Neither has the role of electronic agents been addressed in the IECA. Due to this, an attempt will be made to try to extract the rules of the law of agency from different Iranian traditional laws and analyse the main issues of electronic agents in the context of both Iranian traditional laws and statutes on electronic commerce, i.e., the IECA.

1.4.2.3 Electronic Documents and Electronic Signatures

In the physical world, in some cases the law provides formalities which require a contract to be in writing and signed by the parties. Information technology has created new forms of documents, such as data messages and signatures in the form of digital signatures. This development has led to some significant legal problems which will be considered in the fourth chapter. These include determining whether electronic documents and electronic signatures are legally valid, admissible and enforceable and, if they are, then to what extent and under what principles.

Moreover, it needs to be determined whether evidential values of all electronic signatures and documents are equal and how electronic documents differ from paper-based documents in terms of legal value. It is also essential to outline whether electronic signatures created in a jurisdiction are recognized as valid in foreign jurisdictions as a means of promoting electronic commerce at an international level.

Finally, it needs to be determined how statutes on electronic commerce tackle electronic materials, in particular in Iranian law, and the extent to which it can learn from other legal systems. In principle, the statutes on electronic commerce have recognized the validity of such documents and signatures. Of course, a number of conditions must be met for this purpose. However, the IECA has not adopted a clear and comprehensive view in this area. It is questionable why it has adopted a two tier approach, while the Model Laws on Electronic Commerce/Signature have not adopted such a policy. In brief the two-tier approach indicates that, on the one hand, electronic signatures are legally valid, and on the other hand, there is a distinction between the legal weight of different types of electronic signatures. This approach seems to go against the fundamental principles of functional equivalence and technology neutrality with the aim of developing electronic commerce. An attempt will be made to clarify the existing ambiguity by making suitable suggestions. Also, Iranian law does not recognize foreign certificates as being suitable for creating e-signatures. This is a substantial problem as it provides an obstacle for developing e-commerce internationally. Recommendations to rectify this must be provided for Iranian law. The chapter on this issue will try to consider this issue in detail and clarify the different

legal aspects of electronic documents[13]and signatures in a way that is useful for both businesses and lawmakers.

1.4.2.4 Internet Jurisdiction and Choice of Law in Disputes arising from Electronic Contractual Obligations

Some challenging issues need to be mentioned in order to illustrate the complexity of the application of the rules of private international law in cyberspace. If, for example, the rule for determining the applicable law is the law of the place at which the contract is concluded, the difficulty lies in pinpointing this place in cyberspace. As the notion of *place* is not perceivable in cyberspace, determining a governing law in electronic contractual obligations is not as simple as in the physical world. Responding to this question, statutory regulations have introduced presumptions based on the place of dispatch and receipt of *data messages* (in the words of the Model Laws) or *electronic communications* (in the words of the Convention on the Use of Electronic Communication in International Contracts (CUECIC), and this simplifies the complexity. However, these issues are not as simple to solve as this suggests. For example, in order to apply jurisdiction over a person in American law, the existence of a connection between the state and the person is required. The requirement of a connection can be met by having a domicile in the state or doing business there. In a case where no such link is evident between the defendant and the state, but the defendant has established a website in the state to display goods and services, which is accessible by all in all states, and through which it is also possible to order goods and services, it is arguable that such a connection is satisfied between the owner of the website and the state. As a consequence of this, it is also arguable that any state in which a website is accessible can apply personal jurisdiction over the owner. Other issues arise, such as whether the nature of the website, i.e., its level of interactivity matters and whether any difference should be apparent between B2B contracts and B2C ones. It is also necessary to evaluate whether the consumer should be permitted to bring an action in his own place of domicile or habitual residence against a business whose base is in another jurisdiction within the country. The same question is posed in the EU, but there it extends to a business located in another member state.

[13] It is necessary to make a distinction between electronic evidence and electronic documents. The latter is under the umbrella of the former. This research focuses only on the electronic document as one main formality of making a legally valid and enforceable contract where the law requires.

The next issue relates to *property*. Article 968 of the Iranian Civil Code states that: 'The law applicable to property is the law of its place of location'.[14]In cases where physical goods are sold electronically or physically, determining the place of its location and the governing law is not difficult; however, determining the same for digital goods such as software or computer games which are delivered online by downloading from the computer system of the buyer is questionable. It must be decided whether the location is the place of location of the server of the website into which the goods have been uploaded and from which the goods are downloaded or whether the place of location of the server does not matter and other presumptions are required.

The next important question relates to the place of performance of obligations arising from the sale of digital goods. For example, in the EU and English law as well, the Rome I Regulations provide that the jurisdiction is related to the place of performance of the contract. In this regard, in cases where digital goods are delivered online the same issue arises over the place of performance of the seller's obligations; whether it is the place at which the goods are downloaded, the place of location of the seller, or even the place of the location of the server of the website. Private international law mainly concerns itself with *jurisdiction*, *choice of law* and *recognition and enforcement of foreign judgments*. In this research only the first two will be examined. To achieve this, the fifth chapter will consider jurisdiction and the sixth chapter will consider choice of law by means of comparisons.[15]

In addition to the above legal issues, there will be a further legal discussion to try to suggest solutions for the gaps in the Iranian legal system with regard to Internet jurisdiction and choice of law in B2C contracts. Similar to the method in the other chapters, precise and concise references will be made to the traditional legal rules and principles, on the one hand, and the statutes on electronic commerce and decided cases in the legal systems in question on the other hand. Finally, suggestions will be made for new rules for the Iranian legal system, such as a rule that allows consumers to bring claims against businesses at their own place of domicile. The outcome of these two chapters will be a recommendation for Iran to create a Draft Proposal for Determining

[14] The term *property* in this article refers to all types of movable and immovable properties.

[15] Due to the predicted volume of the discussion on this title, it is discussed in two separate chapters balancing between all chapters of the thesis.

the Internet Jurisdiction and Applicable Law in Obligations arising from B2B and B2C Contracts 2013.[16]

1.4.3 Thesis in the Current Iranian Literature

Studying official instruments, so far, a number of legal and governmental instruments have been created in the area of e-government and e-commerce in Iran; they are, chronologically as follows, with a brief reference made to the legal issues of electronic environment within them:

a) Third Program Act for Cultural, Social and Economic Development 2000: provide that to promote commerce and enhance the power of competition of domestic goods exported in the international markets the ministry of post, telegraph and telephone together with the ministry of commerce are obliged to run the comprehensive network of notification and communication, which will help e-commerce to develop as well.[17]

b) Electronic Commerce Policy of Islamic Republic of Iran 2003: having taken into account the rapid development of e-commerce in the world, being inescapable from its use, the role of –commerce in keeping, reinforcement and development of the competition position of the county in the globe and also many positive side effects of promoting e-commerce in the economy, this piece of instrument passed. However, in order to achieve this aim, it is necessary to provide legal, cultural and technical infrastructures required to develop e-commerce.

c) Iranian Electronic Commerce Act 2004: With the passage of the Act, Iran made significant progress towards its e-commerce legislation and tried to remove concerns about uncertainties over e-commerce and to clarify some of ambiguities in Iranian legal system. However, it has significant weaknesses and gaps, some of which are the heart of this research.

d) Fourth Program Act for Cultural, Social and Economic Development 2006: provides that the Judiciary branch is bound to devote a branch or branches of the courts of law to review electronic offences as well as offences concerning e-commerce and mobile business.[18]

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[16]This draft is a response to the request of the Comprehensive Program of Electronic Commerce Development 2006 which will be explained in the chapter of seven.

[17] Article 116

[18] Articel 33

e) Comprehensive Program of Electronic Commerce Development 2006: under this instrument any executive parts of the government is obliged to do some specific tasks mentioned in the instrument. As an example, article 3 states that the ministry of commerce with the collaboration of the Judiciary is obliged to provide a bill to address the issue of conflict of laws to solve the disputes arising from e-commerce.[19]

f) Electronic Government Comprehensive Plan 2010:this plan tries to handle electronically all administrative and executive affairs of the country in particular in serving the public such as e-commerce, e-banking, e-learning and e-health.

g) Fifth Program Act for Cultural, Social and Economic Development 2011: This program addressed cultural affairs, scientific and technical affairs, social affairs, economic affairs, and politics; defence and security affairs, to develop the country in all aspects. One way of developing economy of the country is paying great attention to the promotion of e-commerce; and for this aim the legal and technical infrastructures must be provided simultaneously.

Except for the Iranian Electronic Commerce Act 2004 which regulates e-commerce, all of the instruments emphasise on the development of legal requirements and technical infrastructures of electronic commerce, and for this aim put the burden on different governmental sectors to complete a part of the puzzle of development. However, the requests of the instruments, at least in the area of legislation, have not been responded well. For instance, as noted above, while the Comprehensive Program of Electronic Commerce Development 2006 in article 3 provides: '[The Ministry of Business, Mine and Industry with the cooperation of the Judiciary should] complete the codification of new rules of removing conflicts of laws … in solving disputes arising from electronic commerce by the end of 2006.', currently such a codification has not been made after around 8 years.

Specifically, the examination of current legal materials within the Iranian legal system demonstrates that there is only one parliamentary Act in the area of this research, called the Iranian Electronic Commerce Act 2004. However, the emerging legal questions of electronic contracts have not been addressed adequately within the Act and it can be said that, as this research will also show, there is still much room for legal discussions filling the gaps and weaknesses posed by this research. Moving on the judicial cases in Iran, there are no judicial decisions in this area of law. Yes, a limited number of e-cases have

[19] This requirement has not been met so far.

been decided at the Iranian courts of law, but almost all are relevant to cybercrimes, not e-transactions. Furthermore, it is necessary to add that even if there had been judicial decisions in the area in question, they would have not had a determining role at this research, since in the Iranian legal system the only way of creating legal rules has been assigned to the Parliament, not by the aid of the decided judicial cases; this is the main difference between the Iranian legal system and those which are categorized under the umbrella of common law systems, such as the English legal system. Likewise, the amount of legal developments by legal doctrines is not considerable. A few legal texts and articles have been written, which in the eyes of the researcher a considerable amount of them are superficial. That is why the author has endeavoured to write comparative books on different legal aspects of electronic contracts in Iran[20], which makes him able to draw on these experiences to develop the research questions of this thesis by analysing the Iranian traditional laws and the works of other legal writers. However, all these indicate that Iranian law is a poor legal system in terms of legal writings on the areas in question and demonstrates well the importance and necessity of doing this research.

1.4.4 Contribution of the Thesis to the Iranian Legal System

The main contribution in the area in question to the Iranian legal literature was in fact made by the Iranian Electronic Commerce Act 2004. However, its contribution is not comprehensive, as it, on one hand, does not involve with all legal aspects of electronic contracts, and on the other hand, does not adopt direct and straightforward approaches in regulating those legal issues of electronic contracts which it involves with, rather it makes indirect and controversial references to the questions, such as the time and the place of formation of electronic contracts.[21] The Act mainly covers a broad range of electronic legal issues, such as electronic contract issues, cybercrime and intellectual property rights. However, it does not do so in great detail and there is still room for development and modernization. There are also some issues that have not been addressed in the Act, such as Internet jurisdiction and choice of law. Some others have been addressed in part or indirectly, such as presumptions to determine issues of time and

[20] Three volumes of his books in the area of information technology law have been published so far. These volumes have been awarded 3rd place (there was no 1st place) in the group of law, youth section, of the '*Sixth Farabi International Award*' in the late 2012, by the Preface of Pro. Geraint Howells, the supervisor of the current research. The books judged by 8 Iranian top legal figures, chosen by the Ministry of Science, Research and Technology.

[21] This will be seen clearly through the thesis.

place.[22] Therefore, it is hoped that this research will assist in developing and modernising Iranian law so that it becomes able to respond to the needs of current modern commerce. Having taking into account all what said so far, the thesis tries to examine the current approach of Iranian law towards the existent legal doubts and its scope of responsibility, and then provide the best possible legal solution removing legal doubts and helping e-commerce move forward in both national and international level. For this aim, the thesis aspires to comprise a significant source of reference for policymakers and lawmakers in Iran seeking to adopt an appropriate law to regulate the emerging legal issues of e-contracts posed by the involvement of the Internet in both business-to-business and business-to-consumer dealings, and for judges who may need legal guidance on how the current Iranian law could be construed to remove the legal uncertainties. It may also prove useful to players having an interest in dealing electronically.

1.5 Research Methodology

1.5.1 Comparative Research Method

The legal research method followed for the current research can be described as qualitative, library-based and comparative. However, the most important characteristic is the *comparative* aspect. Qualitative research analyses data (mainly words) in-depth in order to provide solutions to research questions. This is in contrast to quantitative which collects data (mainly numbers and statistics) to tests hypotheses, look at cause and effect and make predictions.[23] The nature and the purpose of the current study follow the qualitative research method. Also, like most of legal research this thesis is library-based, which relies on information that already exists in the areas in question in the form of, for example, case reports, statutes, directives, journal articles and text books, which are available mainly through the library, internet, Lexis and Westlaw.[24]

Explaining the comparative method adopted, despite the fact that the general aim of the comparative method is widely to enhance the vision of the legal researcher, this

[22] In the view of the author, the Iranian legislation could have enacted a separate set of rules for each legal aspect of cyberspace. For any reason this did not happen. Therefore, it is suggested that the current Act be developed in all areas providing a comprehensive Act on different legal aspects of cyberspace.

[23]For more information regarding qualitative and quantitative research methods and their characteristics see: Johnson, B., & Christensen, L., *Educational research: Quantitative, qualitative, and mixed approaches*, 2008, Thousand Oaks, CA: Sage Publications.

[24] It is necessary to add that the author has a one-month travel to Harvard Law School, Boston, US, to collect relevant information of American law to this thesis.

research, speaking specifically, reflects the words of Orucu: 'Legislators and courts are looking at other jurisdictions at least for inspiration if not for direct borrowing, in an effort to improve response to shared human problems.'[25], as it takes the advantage of comparative method to develop and improve the national legal system of Iran in the area in question by learning, borrowing, or transplanting from the legal systems in question;[26] the reason is that no legal system can be developed independently and can be limited to its own territories. Even, one to have a better understanding of his own legal system needs to look beyond his legal territories. This is particularly the case with new areas of law. Legal systems learn from each other; however, in this process they are also able to keep their own structure and ways of development. For example, where Iranian law learns from English law, it cannot develop itself by *stare decisis* and must resort to the use of legislation to transplant what it has learnt into the system. This is the main reason for adopting a comparative approach in this research. The approaches of the legal systems in question in respect of the chosen legal questions are considered, and then the best possible approach is adopted to develop the Iranian legal system.

Furthermore, for doing a comparative study there are various methods or techniques, such as historical comparisons, functional comparisons, evolutionary comparisons, structural comparisons, thematic comparisons, empirical and statistical comparisons.[27] This research follows mainly a *thematic comparison* method, which is the most common form of analysis in qualitative research,[28] such as the current work, and focuses on examining themes within data. This means that the act of comparison is done based on the approach of the legal systems in question on the selected sub-research questions and the best approach is adopted. In doing the 'comparison', the approaches of the legal systems in question as regards a specific theme are studied; any similarities and differences are extracted and compared, and finally the best approach is chosen, which may be the approach of one of the legal systems under the comparison, a comprehensive approach inspired from the legal systems, or a new approach posed by the researcher where the systems are silent. Finally, the final selected approach may be transplanted

[25] Studies in Legal Systems: Mixed and Mixing 351.
[26] This can help to the harmonization of laws in the world. For a good old writing on this see: Gordley, T., *Comparative Legal Research: Its Function in the Development of Harmonized Law*, The American Journal of Comparative Law, Vol. 43, No. 4 (Autumn, 1995), pp. 555-567.
[27] Palmer, V. V., *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, Global Jurist Frontiers, Volume 4, Issue 2,2004, P. 2.
[28] Guest, G., *Applied thematic analysis*, 2012, Thousand Oaks, California, P. 11.

into the Iranian legal system or learned from to suggest the suitable approach to the Iranian law-maker. This type of comparison provides an opportunity for the author to see whether the innovations carried out by other legal systems are worthy of imitation to improve the Iranian legal systems or not.

Moreover, in terms of structure of making comparison, in the words of the author, this can be further specified as either *horizontal* or *vertical*. In a horizontal comparative study the research is classified by the subject of the research instead of the legal systems under comparison. A conclusion is then provided at the end. In contrast, in a *vertical* comparative study, the research is classified by legal systems instead of subjects of the research. For example, if a researcher tries to consider the legal issues of X and Y under three legal systems A, B and C comparatively, he may divide the discussions based on the approaches of legal systems (A, B, C), and consider both issues of X and Y under each system separately and reach the conclusion at the end. This is known as a vertical method. On the other hand, he may divide the discussions based on the legal issues (X and Y) and discuss the approaches of all three systems together under each issue and come to a conclusion. This is a horizontal method. The method which is most suitable to follow depends on the breadth of the area of research. The wider the area, the more the vertical approach is suitable; the narrower the area, the more the horizontal approach is preferable. For instance, as the issue of jurisdiction is a wide area of law with different rules for solving conflicts and legal literature from one legal system to another, it seems that the vertical approach is a much better way of bringing the views of the legal systems to the readers. However, this does not mean that a horizontal method of study cannot be adopted in considering wide areas but it can create a burdensome task when analysing different legal perspectives together. Despite this fact, the current research adopts a horizontal comparative study method in all chapters, even for chapters five and six on Internet jurisdiction and choice of law. This is done in order to show the positions of all systems in question cumulatively, to make a better and clearer comparison and to make the discussions easily understandable to the reader.

Two final points must also be stressed. The references to other legal systems will be made to the extent that they are required to develop and modernize Iranian law. Sometimes, it might be felt that a wider reference can be made but if it does not help the aim of the discussion, it will not be done. It should not be thought that in a comparative study there must always be a significant recommendation that can be made. Sometimes,

the outcome of several pages of discussion is a small recommendation that is, nevertheless, still important in itself.[29]

1.5.2 Jurisdictions Selected

Naturally, on one hand, in doing a comparative legal research adopted in this research it is a necessity to involve at least one other legal system in the research to learn from the solutions and policies of other legal systems. On the other hand, as business enjoys the advantages of the new communication developments, any emerging legal issues must also be tackled and resolved. There has been an attempt by lawmakers at a regional, national and international level to remove doubts and provide greater certainty in commercial relations by creating legal frameworks concerning electronic commerce. As a result, several sets of rules have been drafted and enacted which may be learned from to develop a given legal system, which of Iran in the current thesis. However, regarding the jurisdictions selected to compare in this research, attention has been paid to the classification of Iranian law in the world of legal systems, its similarities and difference with other legal systems, the origin of the Iranian Electronic Commerce Act 2004, and also the personal abilities of the researcher and all surrounding circumstances. Historically, Iranian legal scholars at the time of writing the Iranian Codes around 80 years ago studied the French Codes. They noted, for instance in the area of law of contracts, that a contract that was invalid under French law was valid in Islamic law. As they were unable to change the content of Islamic law , then they must accept its validity within Iranian law. In contrast, their hands were open as to the structure of legislation, i.e. in adopting the structure of French legal system. This is true regarding other legal issues.[30]

There were two main reasons for choosing French law as the source of structure at that time: a) almost all Iranian legal scholars of that time had graduated from French universities; and b) French law was codified and thus easy to use as a basis for a new legal system just by keeping the facts and changing the laws. Taking into account this shared legal history and closeness of Iranian law to French law in terms of structure,

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[29] For example, on the discussion regarding the place of occurrence of the acceptance in contracting electronically, it has been suggested to Iranian law to not set the place of location of the information system as a criterion to determine the issue. This is apparently a short conclusion, but is very important in contracting electronically.

[30] For more details see: Owsia, P., *Formation of Contracts: A Comparative Study under English, French, Islamic and Iranian Law*, 1994, London: Graham &Trotman.

French law has nevertheless not been studied in this research. There were a number of reasons. The first was the lack of linguistic ability of the author for studying original French legal materials. This was a big obstacle and not an easy one to overcome in a short time. Furthermore, there are many more interesting debates occurring in the UK and the US in the area of e-commerce law, as the studied case law will prove. Thirdly, EU Directives on different aspects of e-commerce have been incorporated into French law, thus, studying the EU rules, which have considerable initiatives on electronic commerce and played a role in drafting the Iranian Electronic Commerce Act, also shows, to a considerable degree, the French legal position. Also, as Iranian law is categorized under the umbrella of civil law it is useful to compare it to a common law system such as English law, which is the origin and spring of common law, founded upon unwritten customary law and developed through time by a centralised system of courts, and on a system of equity. Moreover, American law is used as it is the origin of information technology and of large amounts of research in this area. UNCITRAL's works are undoubtedly key as it is an instrument used at the international level and has a great contribution in drafting the Iranian Electronic Commerce Act 2004. Finally, the author was studying in the UK so it was felt best to study English law.

In this regard, the United Nations Commission on International Trade Law (UNCITRAL) was the frontrunner with two Model Laws called the Model Law on Electronic Commerce (MLEC) and the Model Law on Electronic Signatures (MLES) introduced in 1996 and 2001 respectively. They were, and still are, regarded as models for national and regional legislators when they tailor their own legal frameworks on electronic commerce. UNCITRAL completed its work with the introduction of the Convention on the Use of Electronic Communications in International Contracts 2005 (CUECIC).[31] Similarly, at a regional level the prime examples are the EU Directives on Electronic Signatures in 1999, and Electronic Commerce in 2000.[32] Both of these have been transposed into the UK legal system.[33] Therefore, the English legal system was not far behind and four legal frameworks have been introduced: the Electronic Communication Act (ECA) 2000, the Electronic Commerce (EC Directive) Regulations 2002, the Electronic Signatures

[31] Available at www.uncitral.org.
[32] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce').
[33] Available at www.europa.eu.

Regulations 2002, and the Consumer Protections (Distance Selling) Regulations 2000.[34] Finally, in American law, three main sets of rules have been provided: the Uniform Computer Information Transactions Act 1999, the Uniform Electronic Transactions Act 1999 and the Electronic Signatures in Global and National Commerce Act 2000.

1.5.3 Method of Development of Iranian Law through the Thesis

It was stated that the thesis tries to develop Iranian law in the area of electronic contracts by a comparative study of other legal systems. The question is that how the outcome of this research will show its impact within the Iranian legal system?

The answer of this fundamental question it can be posed in two parts:

a) From the perspective of doing a comparative legal research, as adopted in this research, any reception from foreign laws may be transplanted in the receiving legal system, here Iranian legal system, in three general ways: a) for the purpose of legislation or the revision and amendments of the current rules; b) for the interpretation of existent rules by the judiciary; and c) providing scholarly works and legal doctrines.[35] From this view, the current thesis tries to create legal doctrines and then suggests them to the Iranian Legislator to either revise the current rules, where there is already any rule created, or create new ones, where no rule on a given legal issue has been created so far and then a legal gap is seen.

b) From the perspective of structure or content developments, the development of any legal system can be viewed from two perspectives: a) their structure, and b) their content. 'Structure' refers to a structural way or ways of creating legal rules. For example, in English law, which is the source of all common law legal systems, despite statutory provisions in the form of Acts of Parliament, judges have a big role in creating legal rules. As such it may be called a judge-made legal system. In these types of legal systems *stare decisis*[36] plays a central role in developing the legal system. This is one of the main features of all common law legal systems. 'Content' refers to the essence and the core of the legal system; in other words, the source or sources from which the legal system has

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[34] Available at www.legislation.hmso.gov.uk

[35] Adopted from: Lirieka Meintjes van der Walt, *Comparative method: Comparing legal systems and/or legal cultures?*, Available at: <http://blogs.stlawu.edu/govt302/files/2012/08/van_der_Walt__Comparative_Legal_Method_-2.pdf>

[36] Black's Law Dictionary defines 'precedent' as a '*rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.*'

originated in nature, not in shape. For example, in English law, *common usages* of different regions of the country had a big role in creating the core of the legal system.[37] Considering Iranian law, in terms of structure, the statutory provisions in the format of the Acts of the Parliament are the main way of creating law, which is a central characteristic of the civil law legal systems such as French law. These kinds of legal systems are known as 'written' legal systems. In Iranian law, the precedent, in theory, is considered as a secondary way of creating laws, but in practice it plays a very minor role. The main reason for this is that, contrary to common law systems, judicial decisions are not published for public consumption or even for the courts of law, and legally there is no mandatory rule to obey the decisions of courts except for those that are decided by the Iranian Supreme Court in particular cases.[38] In terms of content, Islamic laws provide the foundations for Iranian law, and this is reflected in Article 4 of the Iranian Constitutional Act. It states that: 'All civil, criminal, financial, economic, administrative, cultural, military, political laws and regulations set forth must be based on the Islamic principles'. This means that parliamentary laws in Iran are based on Islamic laws and must be fully in compliance with them. To be sure that the required compliance is met, a body called the 'Guardian Council' supervises this task. What then must constitute the bases of judgments and any legal decisions are the parliamentary laws.

This is significant when it comes to developing the legal system in question as it becomes evident where the main burden will lie to achieve this. Thus, it will be necessary to ask the Iranian Parliament to take the required steps as without any parliamentary efforts no development can be expected. An important point to make here is that, despite the fact that Parliament's involvement in law-making only goes back 100 years, it is nevertheless a very rich legal system in the traditional areas of law. This is because it is derived from Islamic law which has meant that developments in Islamic law over the course of centuries have created similar developments in Iranian law. However, regarding emerging areas of law, such as the law of information technology, Iranian law needs to be developed further since Islamic Sharia law does not provide room for new areas, unless some basic legal principles such as the principle of party autonomy can be used.

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[37] Considering the issue of essence and origination of rules of a given legal system in details is one which is mainly discussed in the philosophy of law, and is out of the scope of this research.

[38] In the case that concerning a specific legal issue the courts of law act differently, to provide unity, the Supreme Court issues its decision regarding that case, which must be followed by all courts of law (Article 161 of the Iranian Constitutional Act). Only in this particular instance, the Iranian legal system is similar to the English legal system.

Given its historical background, one might ask how it is possible for Iranian law to learn from English law? It is not helpful to open a discussion on the philosophy of law in this thesis. In order to respond briefly to this, it is clear that there are common features in all legal systems. Concepts such as morality, ethics and justice are notions that are not only inherent in legal systems but are also ones that a lay person can understand, demand and believe in. They are the common foundations of all legal rules in all legal systems. An example will make this issue clear. In a contract between a trader and a consumer, English law has an area of law called consumer protection law which aims to protect the consumer, as a weaker party, against unfair contractual terms imposed by the trader. The logic of the protection is clear and everybody would agree with offering fair protection to a weaker person against a powerful one. This is also true in Iranian law, as its origins in Islam are not only based on fairness, ethics and morality, but also strongly emphasise these concepts in all affairs, including legal relations. Where a foreign legal system has created a sound method, there is no reason not to learn from it.[39] A clear and logical reason for this is that sometimes a foreign legal system is a frontrunner in an area of law. Other systems can learn the facts and legal questions of the new area from that system and provide solutions based on their own foundations, if there is a real contradiction between the legal solutions of the more developed system and the legal foundations of the receiving one, without depriving itself of the legal developments found in the other systems. Similar to the employment of, for example, Internet technology within the domestic territories of the destination country as an imported technology, the legal analyses of its functions by foreign legal systems should also be, at least, paid attention to. Closing the doors of the national legal system to foreign ones is, in fact, closing doors to legal thoughts, an act that is not defensible in any way. In response to those who may believe that learning from a given foreign legal regime is somehow bowing to that legal system, the author is of the view that learning from the legal thoughts of other legal systems is not shameful, but is an invaluable and subtle art with which everyone is not equipped. Despite its richness in the traditional areas of law, Iranian law has a need to learn from the developments of other legal systems in new areas of law if it wishes to modernise. This research tries to take a big step in this direction.

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[39] For more details refer to an article in Persian language written by the author with a topic of: *'Why English law and Islamic law Comply with each other on Some Legal Issues?*', available at: <www.takmeleh.com>

1.5.4 Method of Responding the Main Research Question: A Three-stage Guiding Principles

According to what has been said so far, there is no doubt that in order to help electronic commerce move forward, legal doubts concerning electronic contracts must be removed. One more question regarding the research methodology is that of how the legal questions of e-contracts should be tested within the current Iranian legal literature to see to what extent Iranian law is able to answer the legal questions. In other words, first, it should be considered to what extent the current Iranian law is able to respond; and then wherever it is not able to provide legal certainty, it should be sought to discover how the Iranian law may be developed. This means that the initial emphasise would be on the current Iranian law and considering its ability to respond the legal doubts, then seeking for any developments. For this aim, there is a need for a legal roadmap which shows how the statutes on e-commerce and the traditional laws can cooperate and co-exist, and at which stage there is a need for new legislations. From this perspective, when legal issues in the context of electronic commerce law are analysed to consider how they can reach legal certainties, all possible ways can be categorised in one of the following three-stage guidelines:

Stage 1: exact application of traditional rules or expansion and development of traditional rules;

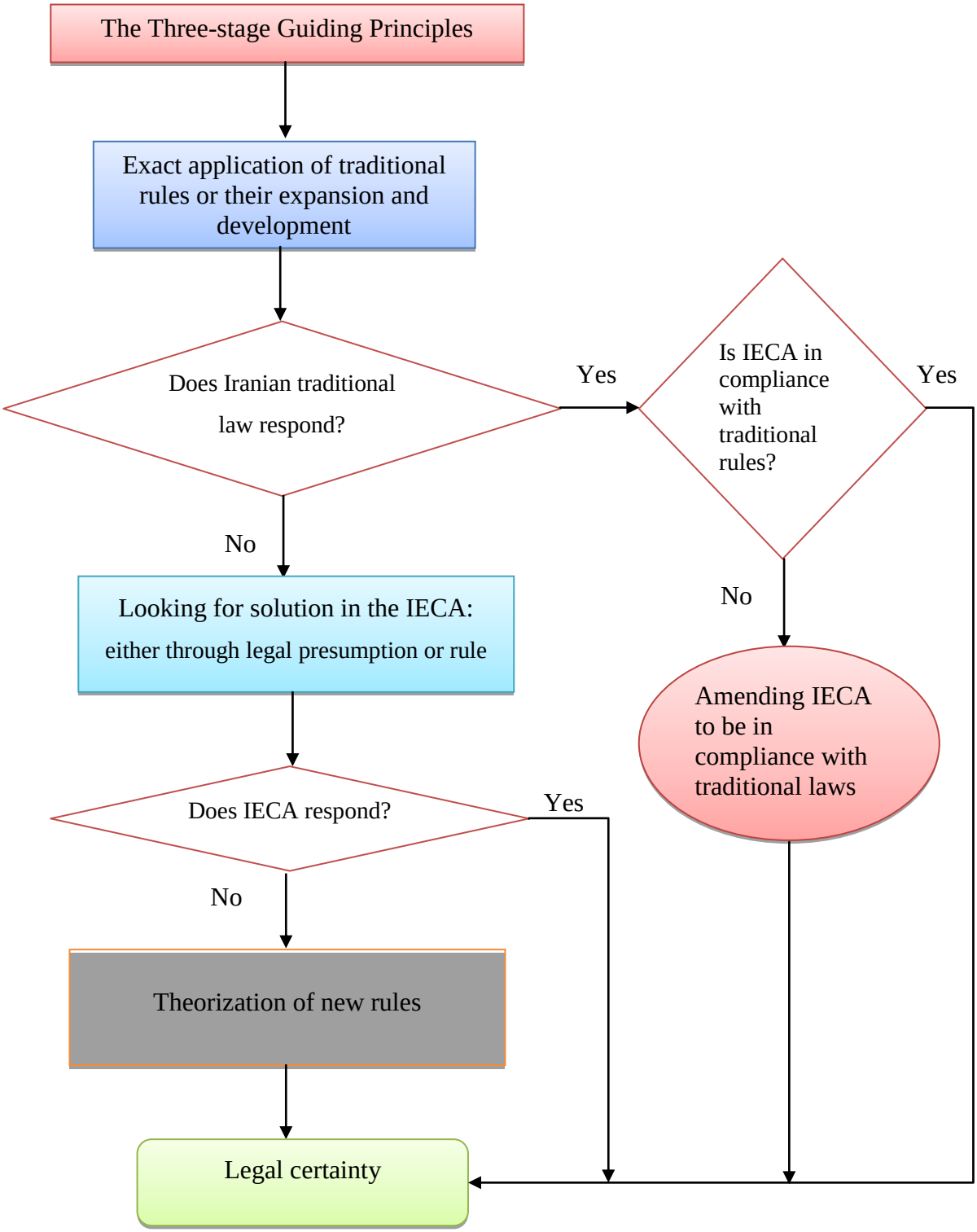
Stage 2: looking for solution in the IECA either through legal presumption or rule; and

Stage 3: theorization of new rules

As the legal problems experienced by Iranian law are not unique, each area of discussion needs to be handled with a separate and special legal method. The general guidelines stated above should be followed one by one in sequence and it should be noted at which stage the possible legal solution can be provided in each case. The stages are illustrated in the following chart and explained in more detail in the next three sections. It should be borne in mind that, in the view if the author, any legal issue concerning cyberspace can be solved by means of these stages.[40]

[40]This three-stage guideline has been presented by the author at a workshop on '*Law in Cyberspace'* in January 2011, held by the University of Tehran (Iran), School of Law under the title of: *'A Roadmap to Remove Legal Obstacles in Cyberspace'*.

Figure: 1.1



Before explaining the stages in more detail, it is necessary to make it clear that in the title of the main research question of the thesis, i.e. *the extent that Iranian law is able to*

respond the legal question of electronic contracts, the phrase of 'Iranian law' is composed of two limbs: a) traditional rules and principles of law of contracts, and b) the Iranian Electronic Commerce Act 2004, as the only Act in the area of electronic commerce. When it is sought to see how and to what extent Iranian law responds to the questions of electronic contracts, these two legal materials are considered as the current legal assets in the Iranian legal systems in the area in question.

1.5.4.1 Exact Application of Traditional Rules or their Expansion and Development

The core policy adopted is to address the emerging legal doubts of electronic contracts in the context of Iranian traditional law of contract and present solutions that provide certainty.[41]This can be termed the *'new wine in old bottle'* approach.[42] The main reasons for this approach may be summarized in two grounds:

a) Contract law has been developed over the centuries through commercial practices and usages, court decisions and statutes in order to meet the needs of both traders and customers.[43] Therefore, it is not necessary to change the traditional foundations sharply following a superficial consideration of the very traditional law; attempts, at first, must be made to find the legal response to emerging legal doubts within the existent traditional law of contracts, as far as it is possible. For instance, the age of legal capacity of the parties is not affected by whether the contract is electronic or traditional - and the same traditional rules apply to both.

b) Cyberspace is not new space in the width of the physical world, believing in new legal regime tailored specifically to that; rather it is a means of communication, but a modern, intelligence and complicated one. In other words, the invention of the Internet, does not mean that now there are two worlds: physical and electronic. There is always only one world in which people live, and take the advantage of electronic environment as a new mean of communication in managing their activities more efficiently and rapidly. Therefore, it must be considered that how the very traditional legal approaches to different methods of communication can be applied or extended to cyberspace. For

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[41] Julia-Barcelo, R., *Electronic Contracts: A New Legal Framework for Electronic Contracts: The EU Electronic Commerce Proposal*, Computer Law & Security Report, 15(3), 1999, P. 157.

[42] This innovation has been taken in some legal writings on e-commerce issues. Such as: Reed, C., *Old wine in new bottles: traditional transactions in the Internet environment*, 2nd ed., 2004, Cambridge University Press.

[43] *Electronic Commerce Part One: A guide for the Legal and Business Community*, 1998, Wellington: New Zealand, Report 50 under Section 16(2) of the law of Commission 1986, available at <http://www.signelec.com/content/download/electronic_commerce_nouvelle_zelande_1.pdf>

example, as regards the legal status of electronic agents in electronic contracting, in the third chapter, it is concluded that an electronic agent has the characteristics of a communication tool between the contracting parties such as a fax, telex and telephone, but an intelligent one, and the concept of agency in traditional law cannot apply to an electronic agent.

However, in some cases, the application of the very traditional rules is not possible. It is only through a wide interpretation of traditional rules and concepts that legal doubts can be removed. This policy hinders derogation from traditional rules, since one main strategy is to keep the traditional bases as they are. For instance, in traditional law it is said that *property* is something that money is paid in exchange for. The question is whether *information property* is to be treated within the traditional concept of property and rules of property that are applicable to physical properties are similarly applied. The answer is that as money is paid in exchange for information, then it is also a type of property. Here, the traditional notion of property is expanded to cover its digital equivalent.

One further task is still required to make the first stage complete. If the Iranian traditional rules, either by their very application or expansion, respond the legal questions of electronic contracts, one further step must also be passed to reach the legal certainty. That step is considering whether the Iranian Electronic Commerce Act 2004 has any rule, in compliance or against the traditional rules, or not. If there is no rule within it, or there are rules in compliance with traditional rules, then there would no problem and the legal certainty is obtained. In contrast, where the IECA provide legal presumptions or rules which are against Iranian legal traditional bases, it is necessary to amend the IECA to make it in compliance with traditional legal rules and principles. The reason is that emerging statues in general and the IECA in particular, must not be codified substantially against the recognized traditional rules. For example, in the third chapter, the thesis considers the legal status of electronic agents in forming contracts through interactive websites. Under the Iranian traditional law of contracts, it is concluded that the electronic agent is only a tool of communication between the contracting parties, not more. Studying on the IECA in this area, it is seen that the Act regards electronic agents as a ‘person’, when it reads in Article 2(m): ‘Any natural or

legal person or the computer systems under their control';[44] and this is while all legal systems of the world recognizes only two types of persons: legal and natural. Therefore, the IECA's position on this issue requires amendment to be in compliance with traditional bases.

1.5.4.2 Looking for Solution in the IECA: Either Through Legal Presumption or Rule

In cases where the use of the above stage is not possible, the second stage of introducing legal presumptions or rules by the Iranian Electronic Commerce Act 2004 must be followed. For instance, in determining the time and the place of conclusion of electronic contracts, Article 15 of the MLEC provides that: it is deemed that a data message is dispatched at the place of business of the seller. However, it is open for the contracting parties to agree otherwise. The IECA has also a similar approach, but needs to be revised in order to provide a comprehensive approach. In the second chapter of this research this stage will be tested.

Likewise, the legal issues concerning electronic documents and signatures are tested by this stage of the three-stage guideline. For example, Article 7 of the IECA states that: 'Where the law requires a signature, an electronic signature may suffice'. As the Iranian traditional law of contracts has no word on these, the Act tries to cover electronic equivalent of traditional signatures and removes the legal doubt as to whether electronic signatures are legally valid or not. In the literature of electronic commerce law, the principle of functional equivalence reflects this stage of the three-stage guideline. Other underlying principles of this stage are the principle of technology neutrality and the principle of non-discrimination and media-neutral environment.[45]

1.5.4.3 Theorization of New Rules

In some cases, it may be necessary to provide new legal rules. The traditional bases can still be maintained, but if there is a legal gap which cannot be filled by any of the previous two stages, then there is a need to provide new legal rules to push e-commerce forward. The words of Lord Goff reflect this view well: 'we are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the

[44] It is evident that the computer systems are under the control of persons as a means of communication.
[45] These principles will be explained in the chapter of four in more detail.

works, or even grit in the oil.'[46] This stage will mainly be tested in chapters five and six. For example, Iranian law provides that in order to make a claim, the claimant must bring a claim against the defendant at his place of domicile.[47] Therefore, when a consumer intends to enter into a B2C contract with a business, he must refer to the court of the place of domicile of the business which may be in another place, different from his own. In order to protect consumers in B2C contracts, he should be able to sue the business at his own place of domicile. This is one of the main legal gaps in the Iranian legal system and it is necessary to suggest a new rule for the Iranian legal system that also protects consumers in e-commerce.[48]

To conclude, upon the above explanations, it is now clear that the way that Iranian law may be developed depends on the stage at which the legal certainty on a given emerging legal issue is reached. This task is determined by following the three-stage guiding principles as illustrated above. For instance, if at the first stage the legal response is obtained, there would be no need for any legal amendments, additions or reforms. However, it is clear that the current traditional law does not remove all legal obstacles and inevitably the next stages must be followed. Sometimes, the underlying principles of the Iranian Electronic Commerce Act 2004 contribute to this aim, such as the principles of functional equivalence and technical neutrality introduced by the modern law of e-commerce (discussed in the fourth chapter). At other times, the theorization of new rules is required either within the traditional law or the IECA. However, all new rules have to comply with the bases of traditional law.[49]

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[46] *Commercial Contracts and the Commercial Court* (1984) LMCLQ 382, 391.
[47] Iranian Civil Procedural Act, article 11.
[48] However, the rule may apply in traditional contracting as well.
[49] One may question that is it possible to have a new rule in the traditional law? The answer is positive. As an example, as will be discussed in chapter of six, in order to protect the consumer in online contracts, it is suggested that he must be able to sue the business party at his own place of domicile. To create a new rule for this aim, if the Iranian Civil Procedural Act 2000, as a part of Iranian traditional law, which speaks about jurisdiction, be revised sooner that the IECA, which currently is under revision by the relevant commission in the Parliament, the said new rule will be incorporated within this traditional Act.

Chapter 2: The Time and the Place of Formation of Electronic Contracts

2.1 Introduction

The time and the place of the formation of electronic contracts are of great significance given that the legal consequences of every contract, traditional or electronic, flow from the moment an effective acceptance occurs and the contract is concluded. For example, as regards time of formation of contract, Article 362 of the Iranian Civil Code provides that: 'The effects of a sale contract which is concluded correctly are as follows: 1. Once the sale is completed, the buyer owns the goods and the seller owns the price.' [1] Similarly, the applicable substantive law is the law which is in force at the time of conclusion of the contract and the legal validity of the contract is determined in accordance with it.[2] Similarly, in determining the applicable law or the jurisdiction issues at both a national and international level, the place of the conclusion of the contract has a determining role. For example, as far as the applicable substantive law is concerned, Article 968 of the Iranian Civil Code which sets out the applicable law in cross-border transactions, traditional or electronic, provides that: 'obligations arising from contracts are subject to the law governing at the place of the formation of contract', unless the contracting parties are foreigners and place the contract under a law other than the law of the place of the conclusion of the contract.[3] Likewise, as far as jurisdiction is concerned, in some cases the dispute must be settled by the court of the jurisdiction within which the contract was formed. This rule has been referred to, *inter alia*, in Article 22 of the Iranian Code of Civil Procedural 2002:'In commercial disputes … the claimant is able to refer to the court of the place at which the contract or agreement has been formed.'

In some traditional cases, the legal answer is straightforward, such as when a contract is concluded over the telephone; however, in others, such as contracting by postal letter, a range of discussions ensue. In the current age, when modern means of communication such as e-mail, websites and chatrooms are employed to form electronic contracts, the

[1] In international regulations, for example, article 68 of the Convention on the Sale of International Goods 1980 (CISG) provides that the risk passes to the buyer at the time of the conclusion of the contract in the sale of goods in transit.

[2]Some other issues affected by the issue of time are: *revocation of an offer or an acceptance* (once the contract is concluded it is binding on the contracting parties, the offeror and the acceptor are then unable to revoke the offer and acceptance); *contractual capacity, death and insanity of the parties* (the contracting parties must have contractual capacity at the time of its conclusion); *limitation (*contractual claims that are subject to a limitation period, the period starts from the time at which the contract is formed); *deadlines* (in some cases, there may be a deadline for performing contractual obligations, such as making payments or performance of obligations. The deadline often starts from the time of the conclusion of the contract).

[3] For more details see the chapter of 6.

complexities of their functions have given rise to some significant legal uncertainties. The only intermediary between the parties in communications by postal letter is a post box or post office established in a certain geographical point known to the sender, whereas when contracting by e-mail a number of intermediaries are perceivable, such as the allocated and non-allocated[4] information systems involved for the purposes of dispatch and receipt of the e-acceptance, that may be located in different jurisdictions unknown to the parties. Technically, in communicating through the Internet, messages are transferred to the other party after being broken up into small pieces. Each piece of data may move through a different path provided by the intermediaries and they then join together when they reach their final destination and create the original message. It is important to decide whether the location of the e-intermediaries is a determining factor concerning the issues of time and place. The following example illustrates the complexities of these issues and shows how the situation is more complicated than if communication is done through the normal postal service:

A person whose place of business is in Iran travels to England and concludes an electronic contract via e-mail with an Italian person whose place of business and the server of the information system are in Germany and Belgium, respectively. In England, the Iranian trader sends the acceptance of the offer through an information system located in the US, to a non-allocated electronic address of the Italian trader. The Italian trader, when travelling to France, retrieves and reads the acceptance message by using an information system located in China. This situation shows the difficulty of selecting the jurisdiction and relevant law in the absence of any agreement to determine the time and place of contract conclusion. In brief, if the traditional postal rule is applied, the contract is concluded in the US and if the traditional receipt rule is applied, the contract is concluded in China. The answer is important, *inter alia*, in determining the jurisdiction and the governing law in cross-border electronic transactions in case the connecting factors to decide the jurisdiction or applicable law are the time and the place of formation of the disputed e-contract.[5]

Having drawn the complexity of determining the issue of time and place in contracting electronically, the issue of time and place of formation of electronic contracts, as a part

[4] A non- allocated information system is which the receiver has not introduced it to the sender for the purpose of the receipt of messages. The importance of a distinction between an allocated and a non-allocated information system will be showed later in this chapter.

[5] For more details refer to the chapters of 5 and 6.

of the main research question of the thesis which is considering the extent of responsibility of the Iranian law to the questions of electronic contracts, selected to see whether Iranian law sufficiently is able to provide legal certainty or it needs changes, reforms or additions, through a comparative study of the selected jurisdictions.

In order to answer the question of this chapter, two stages are required to be passed:

a) At first step, it is to be determined that under Iranian law which of the traditional theories of *information*, *dispatch*, *receipt* and *awareness*,[6]that are traditionally applied in the context of the formation of contracts to determine the time and the place of its conclusion, govern the contracts formed through electronic methods (e-mail, websites and chat-rooms) in order to decide the time and the place issues in contracting electronically.
b) At the second step, it is to decide that when and where any of the chosen theories occur; for example the application of the traditional postal rule in contracting through e-mail, if different information systems are involved in the communications.

For example, when it is concluded that the postal rule is applicable to contracting through e-mail (first step), then the time and place at which the postal rule takes place must be examined (second step); whether that is the time that it leaves the information system of the originator, the time it enters into the information system of the addressee or any other options.

Iranian law has not addressed the content of the first stage, either in Iranian traditional law, because it does not make use of a number of the technological concepts that are involved, or in the IECA. Regarding the second stage at which a chosen theory occurs, there is an indirect reference to this in the IECA in that it provides general indications on the time and the place of dispatch and receipt of data messages which may contain an offer or an acceptance of an offer. Therefore, despite the fact that the IECA was enacted to tackle the emerging legal problems that cyberspace contains, there are still some major legal issues to be solved, such as the indirect and non-comprehensive reference to the issue and the non-simulation of the traditional theories in electronic contracts. As a result, it is necessary to remove the legal uncertainties and bring clarity with a direct and comprehensive reference. For this purpose, two factors must be in mind simultaneously:

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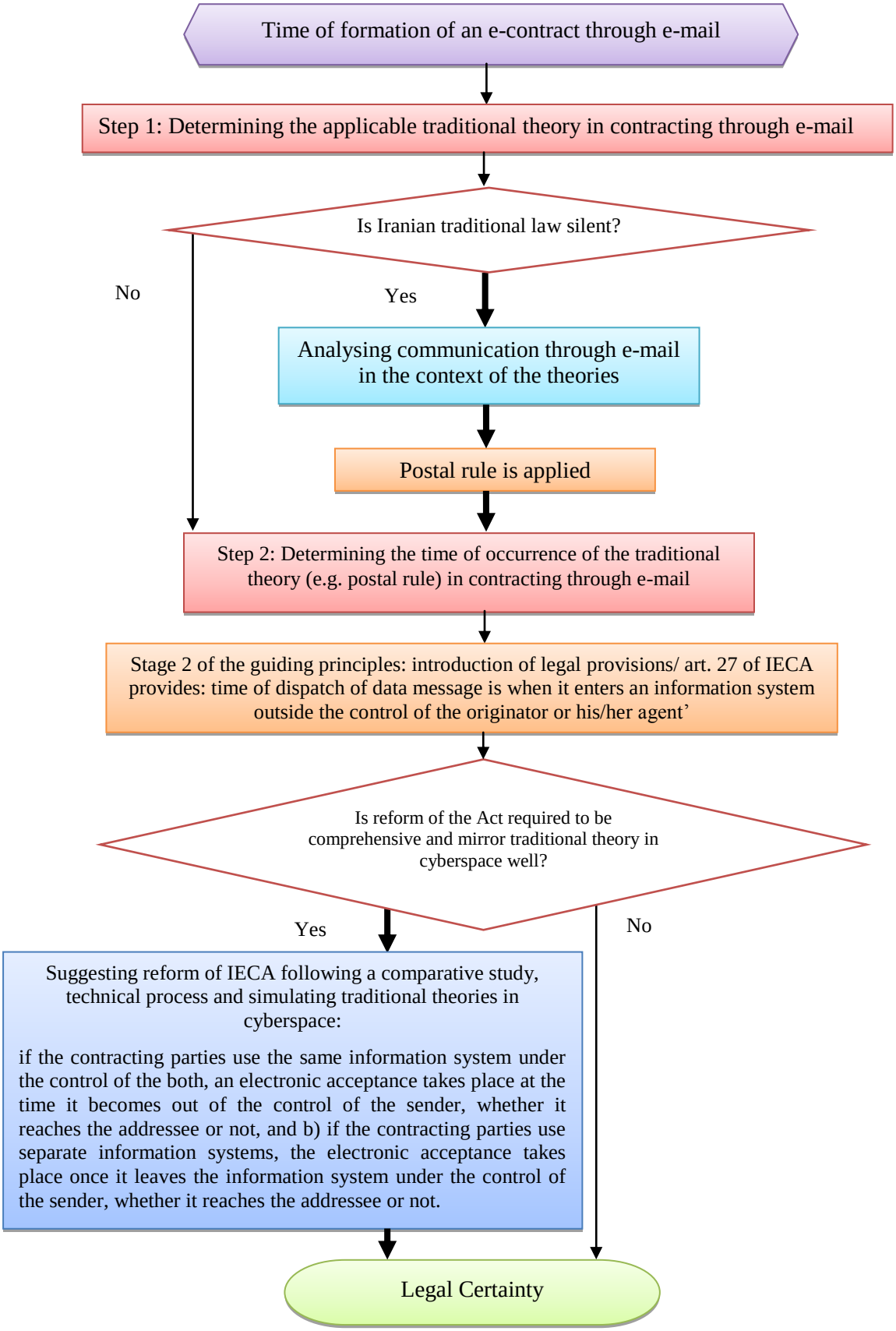
[6] These rules will be elaborated later in this chapter. However, for more details see for example: Owsia, P., *Formation of Contracts: A Comparative Study under English, French, Islamic and Iranian Law*, 1994, London: Graham &Trotman.

a) the technical reality of electronic communications and the process of transmission of data messages, and b) the notion of any chosen traditional theory. *This will help to simulate the chosen traditional theory in cyberspace well* to provide an outcome which is in compliance with the bases of traditional law as stressed before in the introduction chapter. At the end, in order to meet the outcome within Iranian law, it must be tested under the auspicious of the three-stage guiding principles for development of e-commerce in the context of Iranian law to see at which stage the legal certainty is reached whether the current provisions of the IECA needs legal reforms (stage two) or new legal provisions or rules are required to be suggested to the Iranian law (stage three) to meet the outcome within Iranian law.

An interesting question regarding the above questions is that the first step must be considered under the Iranian traditional law and second step will be addressed by the IECA. This means that in order to provide an appropriate legal solution to the issues set out above, both electronic commerce regulations and traditional legal rules and principles play an important role. The following diagram illustrates this cooperation in relation to contracting electronically through e-mail:

Figure 2.1



Bold arrows show the route which should be taken according to current Iranian law

This chapter will analyse the above issues as a part of the main research question of the thesis in two main parts. Firstly, the application of the traditional four theories for contracting electronically through e-mail, websites and chatrooms will be considered to see which of the theories is applicable to these. This part is subject to the first stage of the guiding principles. Secondly, the best approach for ascertaining the time and the place of occurrence of the chosen theory in any of the cases will be analysed together with the statute on e-commerce with the aim of developing the IECA. As the IECA has already provided provisions in this area under stage two of the guiding principles, the aim is to suggest the best approach to reform the existent provisions, not to enact new ones. For the purpose of creating better reform, an attempt will be made to simulate the physical point of occurrence of the chosen traditional theory in cyberspace. In both steps, the comparative study will contribute towards a comprehensive legal solution to Iranian law.

2.2 Determining Time and Place with a Reference to Theories of Information, Dispatch, Receipt and Awareness

In Iranian statutory law, there is no provision indicating the time and the place of formation of contracts through different methods of communication. The Iranian Civil Code only has one article regarding the formation of contracts and does not make any reference to the time and place issues: 'A contract is formed with an intention of creation (of the contract) provided that it accompanies something indicating the intention (of the contracting party to create the contract)'.[7]Academics have developed this Article, drawing inspiration from other legal systems mainly French law, and have incorporated the four main theories of information, dispatch, receipt and awareness into the Iranian legal literature to determine the time of formation of contracts. As for the issue of place, as a general rule, the place of formation of contracts is subject to the same rules as for the time of formation. For instance, if the time of conclusion of a contract is the time of dispatch of the acceptance, the place of conclusion of the contract would be the place of dispatch of the acceptance. What is the centre of discussion as to the place issue in contracting electronically is that it must be examined whether place can be subject to time or not.

[7] ICC, article 191 (The phrases in the brackets added by the author).

2.2.1Determining Time and Place Issues by Virtue of Four Traditional Theories in the Absence of Mutual Agreement

From one angle, in the process of concluding a legally binding agreement four stages may exist: invitation to treat, offer, counter-offer, and acceptance. Among these, the existence of an offer and an acceptance is mandatory; in all legal systems including Iranian law it has been well established that in order to conclude a valid contract, whether electronically or physically, the existence of a valid offer from the offeror and an effective acceptance from the offeree is required.[8]This means that, in order to determine the time and the place of formation of a contract, the time and the place of occurrence of an effective acceptance must be sought.[9]By virtue of the principle of party autonomy, the contracting parties can determine the time and the place of the formation of the contract, whether it is formed traditionally or electronically. As a result, the agreed time and place may be different from the time and the place which would be determined in the absence of the agreement under the governing law of the contract. However, the agreed time and place will be legally effective.

Where there is no agreement on the time and the place of the conclusion of a contract, either traditional or electronic, a reference must be made to the general legal rules and principles. The point is that the rules on the conclusion of contracts *inter praesentes* may be different from the rules on contracts *inter absentes*. The four theories of information, dispatch, receipt and awareness are considered in the context of contracts *inter absentes*. The outcome of this section plays an important role in determining the time and the place of conclusion of e-contracts, as contracting electronically is regarded as concluding contracts *inter absentes*. In the context of electronic contracts, as Iranian law

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[8] Explaining that in some cases, before making an offer, one of the contracting parties may invite the other party to negotiate around the contract, an action which is called an 'invitation to treat'. Such a proposal, should there be one, takes place before making the offer. Furthermore, after making the offer, the offeree may alter the terms of the offer before communicating his acceptance. This action changes the nature of the acceptance to a ‘counter-offer’, which prevents a valid acceptance to come into existence, and needs to be accepted by the original offeror. Counter-offer takes place, if required, before acceptance, and these sequences may occur several times. Again, the time of occurrence of acceptance is determining. Overall, this is true regarding all legal systems.

[9]In some cases, some legal effects of a contract are only specific to the time and the place of occurrence of the acceptance, such as determining the time and the place of the conclusion of contracts. However, some others are specific to the time and the place of conclusion of contract. For example, in the conflict of laws, sometimes the law of the place at which the contract has been concluded is applicable. This place in some legal systems may be different from the place at which the acceptance has been occurred. Furthermore, some of the consequences are considerable in a national level and some others in an international one. Meanwhile, it does not matter whether the contract is concluded electronically or traditionally; in both cases the same consequences flow. Only the way of determining the time and the place of concluding electronic contracts may be different from those which are traditional.

is silent in this regard, it is necessary to consider the exact moment that an effective acceptance is attached to an offer presented through an e-mail, website or chatroom. The approaches of other legal systems can assist in this regard. In examining this, the approaches of traditional rules must be considered to see how they treat the different traditional means of communications, such as telephone and postal letters. Then, the philosophy behind such approaches must be kept in mind while analysing them in the context of e-contracts through e-mail, websites, and chatrooms.

2.2.2 Four Theories for Determining Time and Place of Occurrence of Acceptance in Contracts *inter absentes*

In order to determine the time and the place of formation of contracts *inter absentes*, the methods of distance contracting must be taken into account. These can be either instantaneous means of communication, such as telephone, or non-instantaneous, such as postal letters.

Under English law, in the formation of contracts through instantaneous means the contract is regarded as an *inter praesentes* one and it is formed once the offeror receives the acceptance. The place of the formation of contract is also the place at which the offeror receives the acceptance and the contract is formed.[10] Similarly, in Iranian law if the communication tool of the parties offers instantaneous communication, the time of the formation of contract is the same as a contract *inter praesentes*, i.e., it is the moment at which the acceptance is received. However, the place of formation of the contract must be considered separately.[11] It must be assumed to be a contract *inter absentes*, in which the time and the place of formation of the contract may or may not be concurrent. For example, in contracting through a telephone conversation between Tehran and London, if the acceptance is received in London, the time of acceptance (London) is the same as the place of occurrence of acceptance (London). However, as the place of formation of the contract (London) is the same as the issue of time, i.e., in practice they are linked with each other in contracting through instantaneous means, then it appears that there is no need to separate the place issue from the time issue. However, it seems that in the context of e-commerce, the IECA has adopted a distinct approach which will be considered later.

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[10]*Entores v. Miles Far East Corpn* [1955] 2 QB327; *Brinkibon Ltd v. Stahag Stahl* [1983] AC 34.

[11]Katouzian, N., *Civil Law: General Rules of Contracts*, Vol. 1, 7th ed., 1385 (SC), Enteshar with cooperation of BahmanBorna.

In determining the time and the place of formation of contracts *inter absentes* through non-instantaneous means of communication such as postal letter, where the parties are in different time zones and jurisdiction or are in the same time zone but in different jurisdictions, firstly, the common express or implied intentions of the parties must be discovered. If they do not exist, one of the four theories of declaration, postal, reception and information must be applied. The declaration theory indicates that once the offeree writes his acceptance, the contract is formed at that time and place.[12]The postal theory (or mailbox rule) indicates that once the offeree posts his letter of acceptance, the contract is formed at that time and at the place at which the letter is posted. With regard to the receipt theory, once the letter of acceptance is received by the offeror, the contract is formed at the time and place of receipt, such as the receipt of acceptance by telex during normal office hours.[13]Lastly, the information theory indicates that the contract is formed at the time and the place at which the offeror not only receives but also actually reads the letter of acceptance and becomes aware of the acceptance, such as sending an acceptance by postal letter.

Among these theories, postal and receipt are the most adopted theories for determining the time and place issues in contracting through postal services.[14] All the legal systems in question apply the receipt rule in contracts inter *praesentes* or those formed through instantaneous means of communication, and apply the postal rule when contracting through postal letters or those formed through non-instantaneous means of communication.[15] *The main challenge for Iranian law is to determine which of these theories is applicable in contracting through different electronic methods, mainly e-mail, websites and chatrooms*. Before considering the application of these theories in e-commerce, it is necessary to take an in-depth look at the nature of electronic methods of communications, whether they are instantaneous or non-instantaneous, and also the

[12] It seems that this theory has not been applied so far.
[13] It is necessary to note that the House of Lords in the case of *Brinkibon v. Stahag Stahl* [1983] 2 AC 34 held that a telex message that was sent outside office hours should not be considered to be an instantaneous means of communication and therefore acceptance could only be effective when the office re-opened.
[14] The reasoning behind such adoptions will be discussed soon in the next part.
[15]*Adams v. Lindsell* [1818] 1 B &Ald 681; *Henthorn v Fraser* [1892] 2 Ch 27 at 33; Butler, A., A Practical Guide to the CISG: Negotiations through Litigations, 2007, Aspen Publishers, P 16, available at < http://www.cisg.law.pace.edu/cisg/biblio/butler6-ch3.pdf>

philosophy behind each of the theories. The exact time and place of occurrence of any chosen theory in contracting electronically will be determined according to the IECA.[16]

2.2.3 Receipt Theory: Applicable in Contracting through Instantaneous Means of Communications

As a general rule, English law is in favour of the receipt rule, i.e., where the contract is formed once the acceptance reaches the offeror. However, this rule is applied in cases where the contracting parties use the instantaneous means of communication such as telephone,[17] fax,[18] and also telex[19]. In American law, there is no indication in the Uniform Commercial Code (UCC). However, under American law, in contrast to English law, once the acceptor announces his acceptance by telephone the contract is formed, even if the line goes dead and the offeror does not hear the acceptance.[20] It must be stressed that this rule is applied when both the offer and the acceptance are made by the same means of communication.[21] This implies that the postal rule introduced in 1818 is still in force, even though new means of communications, such as telephone and internet, have been developed since then.

As far as Iranian law is concerned, as stated before, there is no provision in the Iranian Civil Code in this respect. However, one legal commentator has stated that contracting through fax, telex and over the telephone is like contracting *inter praesentes,*[22] i.e., the acceptance and the contract are made once it reaches the offeror and so the receipt

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[16] Meanwhile it is necessary to have a brief look at the theories of 'declaration' and 'information'. The declaration theory means that by a mere manifestation of the internal will to accept an offer, the contract is formed and there is no need that the offeror should become aware of the occurrence of the acceptance. Therefore, once the acceptance is written and signed the contract is formed even though it has not been posted to the offeror and he is unaware about this incident. According to this theory the offeror is not able to revoke the acceptance after its 'declaration'. In contrast, the 'information' theory provides that the contract is formed once the offeror has become aware of the acceptance. In this theory, the acceptor is able to revoke its acceptance before it reaches the offeror. For example, if the acceptance has been sent to the offeror, the acceptor is able to revoke it by an expedited means such as telephone. The offeror, in turn, is also able to withdraw its offer before being aware of the acceptance.

[17] *Entores v. Miles Far East Corporation* [1955] 2 Q.B. 327.

[18] *Schelde Delta Shipping BV v. Astarte Shipping Ltd (The Parnela)* (1995) 2 Lloyd's Rep. 249.

[19] *Entores Ltd v. Miles East Corp.* (1955) 2 Q.B 327; *Brinkibn v. Stahag Stahl and Stahlwarenhandelsgesellschaft mbH.*(1983) 2 A.C. 34.

[20] These two cases are considerable in this regard: *Travelers Ins. Co. v. Workmen's Compensation Appeals Board, 68 Cal. 2d.7* (1964); and *National Furniture Mfg. Co. v. Center Plywood Co.*, 405 S.W.2d. 115 (1966).

[21] Spindler, G. and F. Börner, *E-commerce Law in Europe and the USA*, 2002, Springer Publication, P. 690.

[22] Katouzian, N., *General Rules of Contracts*, Vol. 1, pp. 373-4.

theory is applicable.[23] It must be seen that which of the electronic methods is regarded instantaneous to apply the receipt rule.

2.2.4 Postal Rule: Applicable in Contracting through Non-instantaneous Means of Communications

Under English law, the postal rule applies in contracting through postal letters. According to this rule the contract is formed the moment the letter that contains the acceptance is posted.[24] Because of this, it has been called the postal rule or mailbox rule. It was first established in the case of *Adams v. Lindsell* in 1818, in which the court was to decide the time of formation of the contract by post. The court introduced this rule following to taking into account the fact that in contracting by postal letter the parties are not aware of the exact moment of communication of acceptance due to the time gap between dispatch and receipt, which may create uncertainties that does not happen in face-to-face communications, such as non-delivery of the letter of acceptance to the offeror.[25] By adopting this rule, the court avoided any extraordinary and mischievous consequences which could result if it were held that an offer may be revoked at any time until the actual receipt of the acceptance.[26]

This rule was later developed to be applied in contracting by non-instantaneous means of communications such as post, telegraph[27] and telemessage[28]. Once the letter is placed in a post box or delivered to a post office, the telegraph is written, or the telemessage is stated, the contract is formed,[29] even if it did not reach the other party or reached it with delay.[30] In American law, as stated above, the UCC[31] includes no provision on the time

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[23] In general,the CISG believes in the *receipt* rule. The article 18(2) provides: *'An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror.*'

[24]In English law the postal rule for the first time has been considered in the case of *Adam v. Lindsell* (1818) 1 B. & Ald. 681 E.R. 25 and reiterated in the case of *Byrne v. Van Tienhoven* [1880] 5 C.P.D. 344, 348: when an offer is made and its acceptance is sent in a letter through mail, the contract is formed at the moment that the letter of acceptance is posted, even it never reaches the destination. This decision has been reaffirmed in the case of *Thomson v. James* (1855) 18 D 1as well.

[25] Mikio, Y., The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law' 2004, 37 Cornell International Law Journal, 357.

[26] *Household Fire and Carriage Accident Ins. Co. v. Grant* (1879) LR Ex D 216, 221; *Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App., 587, P.594.

[27] *Bruner v. Moore* [1904] 1 Ch. 305.

[28] Chitty, J., *Chitty on Contracts: General Principles*, 28th, Para. 2- 031.

[29] Bearing in mind the postal rule is only applied to acceptances, and not for the expression of the offer or counter-offer: Stone, R., *The Modern Law of Contract*, 6th ed., 2005, London: Cavendish Publishing Limited.

[30] However, if the delay in receipt of the letter or in its non-receipt is due to the fault of the acceptor, such as writing the address of the offeror onto the letter incompletely, then the acceptance is effective if the offeror receives the letter within a reasonable period: *Getreide-Import-Gesellschaftmbh v Contimar SA*

and the place of the conclusion of the contract. However, in judicial cases it has been held that in communicating through postal letters the postal rule applies,[32] and there is no room to withdraw the acceptance letter once it is dispatched.[33] The main point is that the application of this rule requires both offer and acceptance to be made by the same means.[34] In Iranian law, except in some exceptional cases, the acceptance becomes effective once the letter of acceptance is delivered to the post office.[35] This rule is inferred from Article 191 of the Iranian Civil Code which states that: 'A contract is formed with an intention of creation (of the contract) provided that it accompanies something indicating the intention (of the contracting party to create the contract)'.[36]It is clear that contracting through electronic methods is regarded as non-instantaneous and the postal rule is applicable.

However, it can be argued that the postal rule is an unfair one on the ground that the offeror is obliged to deliver the content of his offer before he receives an acceptance and becomes aware of it, even putting aside the possibility that the acceptance could be lost on the way and not reach the other party. Responding this argument, some views have been put forward in favour of the postal rule. One view is that the postal rule is applicable where the communication is entrusted to a reliable third party and the letter leaves the control of the acceptor.[37] Justifying this view, some believe that the theory tries to put the burden of the probable future risks on the party who is in the best position to control them. Once the acceptance letter is posted, the acceptor has no control over the risks, such as non-delivery of the letter or any other perceivable risks in the way of transmission. In contrast, the offeror is in a good position because the letter is

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Compania Industrial Comercial y Maritima[1953] 2 All ER 223, [1953] 1 WLR 793, CA. This means that the postal rule applies if it does not provide any inconveniences to the offeror: *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155 at 161; S.A. Compania Commercial y Maritima [1953] 1 W.L.R. 793.

[31] It is referred as the UCC hereafter.

[32] The well-known case of *Adams v. Lindsell* (1818) 1 B &Ald 681 is one of the oldest case in this respect.

[33] Murry, J. E., *The Chaos of the Battle of the Forms: Solutions*, Vander-built Law Review ,19986, 39: 1307-1372, P. 1307.

[34] Restatement (Second) of Contracts, Section 67; *Trevor v. Wood*, 36 N.Y. 307 (1867), *Chesebrough v. Western Union Telegraph Co*., 135 N.Y.Supp.583 (1912).

[35] Katouzian, N., *General Rules of Contracts*, Vol. 1, PP. 373-4.

[36] ICC, article 191 (The phrases in the brackets added by the author); Shahidi, M., *Formation of Contracts and Obligations*, Vol. 1., 2nd ed., Majd Publication, 1382 (SC), Vol. 1, P. 153; The postal rule has been approved in most of legal systems such as in French law following by a judgment issued by the Supreme Court in 1981, article 54 of the Spanish Code of Commerce in Commercial Transactions, Article 35 of the Switzerland Obligations Act, and Article 1335 of the Italian Code of Civil

[37] This has been stressed in an English case of *Household Fire Insurance v. Grant [1879] 4 Ex.D. 216, 233*.In this case it was held that once the acceptance letter is posted, it becomes out of the control of the sender (i.e. acceptor). See also: *Brogden v. Directors of the Metropolitan Railway Co.* [1877] 2 App. Cas. 666, 691.

posted to him. Besides this, when the offeror chooses a postal communication, he impliedly gives his consent to receive the acceptance by post.[38]As such, it is not unfair to put the risks on him. However, the view taken in this thesis is that this justification is questionable. In contracting through telex, the acceptance is completed once it is received by the other party, while the telex is out of the control of the offeror. If it were only for this reason that the acceptance through a postal letter has been excluded from the scope of the receipt theory, the postal rule should also be applied in contracting through telex, while the receipt rule is applicable.

There is a further school of thought which considers that the post office acts as the agent of the contracting parties. Any communication with the agent is regarded as a communication with the principal.[39] Under this statement, if the letter is lost in the post the contract must be regarded as formed. In *Household Fire and Carriage Accident Insurance Co. v. Grant*[40], Thesiger LJ suggested agency as a basis for this rule as he affirmed: 'How then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties.' This opinion is also arguable as the post office is unaware of the content of the dispatched letter; it may even contain the rejection of the offer. Bramwell LJ has also argued that it was a flawed idea: 'I am at a loss to see how the post office is the agent for both parties. What is the agency as to the sender? Merely to receive? But suppose it is not an answer, but an original communication? What then? Does the agency of the post office depend on the contents of the letter?'[41]

Moreover, if it is said that the post office is the common agent of the parties, all of the postal communications must benefit from the postal rule not only those which contain an acceptance of an offer.[42] Moreover, the telegram company and the post office are not clearly the agents to which the acceptance may be communicated.

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[38] Gloag, W.M., *Law of Contract*, 2nd ed., 1929, Edinburgh: W.Green& Son, P. 34.
[39] Walker, D.M., *Law of Contracts and Related Obligations in Scotland*, 3rd ed., 1995, Edinburgh, Para. 7.63.
[40] (1879) LR 4 Ex D 216.
[41] Household Fire and Carriage Accident Insurance v Grant(1879) 4 Ex. D. 216 CA, P. 238.
[42] Firstly, in this regard an English case also held that if the acceptance letter does not reach the offeror, there is no contract (Walker, D.M., *Law of Contracts and Related Obligations in Scotland*, 3rd ed., 1995, Edinburgh, Para. 7.63.) Although in another case an opposite view was stated: *Household Fire Insurance v. Grant* [1879]4 Ex.D.216, 233.

One of the main reasons is that the postal rule is applied where the offer indicates the possibility of manifesting acceptance through non-instantaneous means of communications, such as by post.[43] This reason seems to be the strongest, since the offeror has the opportunity to stipulate alternative methods of acceptance.

To conclude, it seems that the reason for adopting the postal rule as an exception to the general rule of the receipt theory, apart from being rational, is due to the practical remarks such as control and risk issues.[44]As the issue of meeting of minds is an essential factor in concluding contracts and they are concluded once the minds meet, it seems that the time of posting the letter of accepting is the best time of meeting of minds. Besides this, in the view of the author, the postal rule provides a fixed date for the formation of contract through postal letters. When a letter is posted three stages of time are perceivable: a) the time of posting which is a certain time, b) the time between the dispatch of the letter of acceptance and its receipt, which is not a exact period of time, and c) the time of receipt of the letter of acceptance, which at the time of posting the letter it is not certain at which time the letter would be received by the offeror. Among these, the time of post of the letter of acceptance is a certain time and suitable for the purpose of determining the time of formation of contracts made by the postal letter, and forms the contract at the earlier possible moment. Also, if the defendants in the case of *Adams v. Lindsell* were not bound by the acceptance until it was received, then the plaintiffs should not be bound until the notice of receipt of acceptance was received by them; this could continue *ad infinitum* and it would be impossible to achieve formation of a contract by post. This has been indicated in the courts statements: '... [if the contract is not formed upon posting], no contract could ever be completed by post. For if [Lindsell] were not bound by their offer when accepted by [Adams] until the answer was received, then Adams ought not to be bound till they had received the notification that [Lindsell] had received their answer and assented to it. And so it might go on ad infinitum.'[45] Furthermore, the offeror in choosing the postal system as his chosen means of communication should understand and bear the risks naturally associated with such a method, such a delayed, damaged or loss mail. In other words, the offeror by choosing

[43] Gringras, C., *The Laws of the Internet*, P.23.
[44] Re Imperial Land Co. of Marseilles (Harris' Case) (1872) L.R. 7 Ch.App., P.594; Brinkibon v. Stahag Stahl and Stahlwarenhandelswgesellschaftm.b.H [1982] 1 All ER 293, 300.
[45] *Adam v. Lindsell* (1818) 1 B. & Ald. 681, p. 683.

the postal communication should bear the resultant risks.[46] This observation was made in *Henthorn v Fraser*, where Lord Herschell held that: 'where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.'[47]On the other hand, the offeree dose all what he can by posting the letter of acceptance[48] and then he cannot be regarded responsible for any problems occurred after posting or if the offeror does not read the letter upon its receipt. Another justification is for the sake of the protection of the offeree, since the postal rule terminates the offeror's power to revoke upon the happening an incident under the offeree's power.[49]Finally, the offeror can decide the method of expressing the acceptance and the time at which the acceptance becomes effective if he is against the application of postal rule, thus avoiding any future unwanted results.[50]

By the application of the postal rule, the offeror cannot generally revoke it before it reaches the other party,[51] which prevents any misuse by the offeror.[52] The postal rule also prevents any abuse by the acceptor as well, as he cannot generally revoke the acceptance before it reaches the offeror.[53] Finally, in case of any delay or loss, normally it is the offeror who is expected to discover why the offer has not received a response, not the acceptor to consider whether the acceptance has been delivered or not.[54]

2.3 Applicable Theory in Determining Time and Place of Acceptance in Contracting through Electronic Methods

Under Iranian law the principle of party autonomy is applicable as regards electronic contracts. This has been expressed in Article 5 of the IECA: 'Any change in the generation, dispatch, receipt, storage or processing of a "data message" is deemed valid

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[46] Dunlop v Higgins (1848) 1 HLC 381 at 398.
[47] *Henthorn v. Fraser* [1892] 2 Ch 27, 33.
[48] Dunlop v Higgins (1848) 1 HLC 381 at 398; In Re Imperial Land Co of Marseilles (Wall's case) (1872) LR 15 Eq 18 at 25.
[49]*Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) LR 4 Ex D 216 at 220; *Re Imperial Land Co of Marseilles* (Harris' Case) (1872) LR Ch Ap 587, at 594;
[50]*Holwell Securities Ltd. v. Hughes* [1974] 1 W.L.R. 155.
[51]*Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App., P.594.
[52]For example, the price of the subject matter of the contract may increase between the time of dispatch and receipt of the acceptance, in which the offeror may benefit by revoking the offer.
[53] For example, due to the fluctuation in the market and the losses that he may incur.
[54]Beatson, J., *Anson's Law of Contract*, 29th ed., 2010, Oxford University Press, Part II, Ch. 1.

upon a mutual private agreement and consent'. Even if article 4 was not included in the Act, under article 5 of the IECA which rules that in the cases that this Act is silent the reference must be made to the other laws such as the Iranian Code of Civil, the applicability of the principle of party autonomy in contracting electronically is proven. Therefore, there is no gap in recognizing this principle in contracting electronically under Iranian law. In the absence of resorting to this principle in contracting electronically through e-mail, website and chatroom, what must be examined is the way that these theories are applied in electronic contracting. Iranian law needs to be developed and modernized in this area as will be shown. To this end, the nature of different methods of contracting electronically (e-mail, websites, chatrooms) will be taken into account to see which of the theories is applicable in each instance under Iranian law.[55]

2.3.1 E-mail

In contracting through e-mail, some believe that the postal rule is most appropriate while others do not. In the following paragraphs both sides of the discussion will be considered.

2.3.1.1 Supporters of the Postal Rule in Contracting through E-mail

Supporters believe that e-mail is a non-instantaneous means of communication and emphasis the similarities between a postal letter and an electronic one. They give a number of reasons for this. Firstly, once an electronic letter is generated and sent it is saved in the mailbox of the information system of the sender and received from this box by the addressee. This means that once the sender clicks on the 'send' button, the message is sent and leaves his control. It is then delivered to the information system by which it reaches the addressee, similar to the postal letter which enters the postal system to reach the addressee. Here, the information system plays the role of the postal service. Secondly, delays in receipt of the letter, it being lost in the process of transmission or non-receipt by the addressee are common difficulties in both postal and electronic communications.[56] Technical problems in communication systems and the Internet, such

[55] Although the main aim of this research is to develop and modernize Iranian law in the context of e-commerce, the outcome of some parts of the research may also help to develop e-commerce law in general. This part seeks to achieve both these goals.

[56] Gringras, C. and E. Todd, *Gringras: The Laws of the Internet*, 3rd Rev. ed., 2008, Tottel Publishing, P. 28-29

as hacking by third parties, or entering the recipient's e-mail address incorrectly may cause a delay or even non-receipt of the e-mail by the addressee.

Thirdly, communication through e-mail is not instantaneous and differs from telephone or fax. From a technical point of view, in contracting through a telephone there is a direct connection between the parties, while such a connection does not exist in communications through e-mail. Moreover, electronic letters are divided technically into several information packages and are then delivered to the other party. At its destination, the packages are joined together and create the original message. Such a division does not happen in communicating over the telephone. Thirdly, in communicating through instantaneous means, the sender is able to be aware of whether the message has been received by the other party; while in communicating through e-mail it is not possible to know whether the other party has received the e-mail.[57] In contracting over the telephone, the sender of the message receives the response of the other side immediately and is sure that the addressee has received the message. Similarly, in communicating by fax or telex, once the message is received the machine provides a report. This facility does not exist in communicating through e-mail and it is not possible to become aware of its successful receipt by the other party unless the addressee himself reveals this. It is only possible to know that the e-mail has been delivered to an electronic address and not to the intended person.

Telephone is as an expedited means of communication as, once the message is received, the response can be given without any delay; while in communicating through e-mail, even if the receiver of the offer intends to answer immediately some seconds will still pass before a reply is received in the inbox, and it is open and read. This is similar to what happens with a postal letter.[58] The reason for this is that the message is saved by the information system and is then transmitted to the other party.[59] Although there is only a negligible time-gap between the time of dispatch and the time of receipt of an e-mail, and the speed of the transmission is similar to a telephone conversation, once the message is received by the addressee its content is not revealed until a further step is taken to open it. As such, communications through e-mail cannot be regarded as

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[57] Gringras, C. and E. Todd, *Gringras: the Laws of the Internet*, P. 39.
[58] Chissick, M. and A. Kelman, *Electronic Commerce: Law and Practice*, 2nd ed., 2000, London: Sweet & Maxwell., Para. 3.43.
[59] Reed, C. and J. Angel, *Computer Law: The Law and Regulation of Information Technology*, 6th ed., 2007, Oxford University Press, P. 201.

instantaneous like telephone conversations. All these issues point towards the conclusion that e-mail is a non-instantaneous means of communication akin to a postal letter.[60]

2.3.1.2 Opposing arguments

Those who believe that e-mail is an instantaneous means of communication base this on custom and commercial practices and offer a number of arguments to support their assertion. When the postal rule was first introduced it was not intended to be applied to other ways of communication. Therefore, the postal rule must be applied with a narrow interpretation, only where the parties contract through postal letters. In the past, people used to communicate mostly by postal letters and this rule was introduced to give certainty to these types of communications; it was not intended that it would be used on other methods of communications. Although it is true that e-mail is not an instantaneous means, like telephone, it can still be regarded as an expedited method since the exchange of messages can take place in a negligible amount of time. It is logical to regard it as an instantaneous means of communication when taking its speed into account.[61]

Moreover, the fact that the message may reach the other party with some delay does not justify the derogation from the general rule of receipt and apply the postal rule. Also, the difference between the nature of communicating through e-mail and postal letter controls the application of the receipt rule.[62] Finally, trade customs have a significant role in determining the rights and obligations of the parties. It is not reasonable to oblige a trader to enter into a high volume contract without the receipt of the acceptance from the other party. This issue has been taken into account in most international instruments, such as the Convention on the International Sale of Goods 1980 (CISG), and there the receipt rule is applied to all methods of communications.

2.3.1.3 Conclusion: Postal Rule is Appropriate in Contracting through E-mail

Having considered the reasoning of both sides of the argument, the receipt rule seems to be the most appropriate one to apply where the method of communication of the parties

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[60] See also: Murray, A.D., *Entering Into Contracts Electronically: The Real W.W.W*, P. 8, available at www.100megsfree4.com; Chitty, J., *Chitty on Contracts, General Principles*, 1999, Sweet &Maxwell, Section 2-046.

[61] Werner, J., *E-commerce.co.uk – Local Rules in a Global Net*: *online business transactions and the applicability of traditional English contract law rules*, International Journal of Communications Law and Policy, Munster, 6:1-9, 2000-2001.

[62] Wang, F.F., *Law of Electronic Commercial Transactions*, 1st. ed., 2010, Routledge, PP. 46-48.

can equate to a face-to-face conversation. In other words, although the parties are not physically in each other's presence, a meeting of minds occurs in the same way as experienced during a telephone conversation. In contracting through e-mail it is not possible to perceive a present and instant exchange of wills of the contracting parties since a very short delay between the time of dispatch and the time of receipt of a message hampers the required immediacy. This means that e-mail cannot be considered an instantaneous means of communication. Developing Iranian law in the context of electronic commerce, as traditionally it applies the 'postal rule' in contracting through non-instantaneous means of communication, therefore the postal rule is appropriate to apply in contracting through e-mail.[63]

2.3.2 Website: Both Rules are Applicable

Materials displayed on the Internet can be classified into two types of websites and examined accordingly. These two types are: interactive and non-interactive websites. Non-interactive websites include e-advertisements in which the information concerning the goods or services displayed is provided, such as the specifications of the goods, price, the method of making an order and payment. In these kinds of websites a direct interaction between the buyer and website is not feasible and any contact with the seller is done by other means of communication, such as telephone and e-mail. On the other hand, interactive websites, such as e-markets, are designed in such a way that direct interaction between the buyer and the website is feasible. The customer is able to choose any goods or services, give an address for taking delivery and pay the price electronically.

This part will consider the time and the place that electronic contracts are formed through interactive websites, since it is not possible to form contracts through non-interactive ones. The interaction between the customer and the website is similar to the interaction between two persons. This is similar to a telephone conversation where, once the message is received from the other end of the line, an appropriate response is given and both parties are aware of the fact once the line goes dead. According to what a customer does, an appropriate reaction is shown by the electronic agent;[64] once the interaction between the customer and the system stops, such as due to the Internet

[63] The time at which the 'despatch' of an electronic mail is taken place will be considered in the next part with a reference to statutory provisions on electronic commerce.
[64] The meaning and the legal status of electronic agents in e-commerce are considered in the next chapter.

becoming disconnected, no response from the system is shown and normally the message: 'Server Not Responding' is displayed. Furthermore, upon receipt of the order, a confirmation message is immediately displayed on the screen. It is often sent to the customer's given e-mail address as well.

Having regard to the above explanation, the application of the receipt rule is appropriate in those interactive websites in which the display of goods or services is regarded as an offer and not as an invitation to treat, and the acceptance by the buyer is shown immediately by a confirmation message.[65] This means that, where there is direct contact between the parties or electronic agents, the receipt rule is applicable.[66]In contrast, if the display of goods or services on the website is regarded as an invitation to treat, the placement of an order by the customer would be regarded as an offer, and the acceptance would occur later by either a) instantaneous means of communications, such as telephone, or b) non-instantaneous means, such as an e-mail confirmation, which is, as an example, the case in the website of amazon.co.uk. In the former cases, the receipt rule should be applied, and in the latter cases the postal rule should be applied as the acceptance is informed by an electronic mail later.[67]

One issue is necessary to raise here. As the offeror is able to determine the method of acceptance, in contracting through websites where the display of goods or services is an invitation to treat and the buyer makes an offer, if he chooses to not be informed the acceptance through non-instantaneous means of communication, such as e-mail, by the owner of the website, then the receipt rule will be applied again, similar to those interactive websites in which the display of goods or services are as an offer. The answer is that this is not normally the case in contracting through websites, since there is not technically an opportunity for the buyer to stipulate the method of acceptance; he only accepts the designed process by the seller for making an offer or leave it all.

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[65] Gringras, C. and E. Todd, *Gringras: the Laws of the Internet*, P. 41-2.
[66] Reed, C. and J. Angel, *Computer Law: The Law and Regulation of Information Technology*, P. 201.
[67] Advertisements on non-interactive websites should be regarded as an *'invitation to treat'* not as an *'offer'*, unless either the advertiser himself indicates expressly that his intention is to make an offer, or the contents of the advertisements imply that it constitutes an offer. Regarding interactive websites, it is suggested that e-advertisements should be treated like displaying goods in shops and regarded as an *invitation to treat* not an *offer* (Murray, A., p.5.) However, some writers are of the view that e-advertisements are a combination of mere advertisements in physical world and display of goods in shops (Gringras, p.14). The author also believes it is not possible to have a definite word in this regard, and the terms and conditions of the website must be seen to decide the nature of such a display.

However, if there be such a possibility, the buyer will be able to determine the method of acceptance.

The above analysis makes it clear that, in contracting through websites, no general rule is applicable. The application of either the postal rule or receipt rule depends on the legal nature of the display of goods or services on the website. This point has not been paid attention in the legal materials on electronic commerce law.[68]

2.3.3 Chatrooms: Receipt Rule

In contracting through a chatroom, in the same way as a telephone conversation, the communication between the parties is instantaneous. The difference between them is that instead of a telephone set, two computers are involved. Once one side sends a message the other party becomes aware of it immediately. Therefore, the receipt rule is the most appropriate one in this case. In communicating through a chatroom, the parties are able to write the messages in addition to a voice or video call. In this method, again, once one of the parties types the message and clicks on the send button, the other party receives it immediately.

Having examined the applicable theory in each method of contracting electronically, in the next part it is to be considered that at which point any chosen theory occurs under Iranian law and whether there is a room for any legal changes and additions to develop Iranian law or not.

2.4 Time and Place of Occurrence of Postal and Receipt Theories in Contracting Electronically

2.4.1 Developing Iranian Law by One Direct Solution

Having considered and decided the applicable theory in each method of contracting electronically under Iranian law, the time and place at which the chosen theory occurs must now be decided. For the postal rule in contracting through email the possibilities are: the time at which the sender (the acceptor in the context of contract formation) clicks on the send button; the time it leaves the control of the sender; the time it reaches the information system of the sender; and the time it enters into the information system of the addressee. This question must be answered by the statutes on electronic

[68] Such as: Gringras, C. and E. Todd, *Gringras: the Laws of the Internet*; Reed, C. and J. Angel, *Computer Law: The Law and Regulation of Information Technology*.

commerce, i.e., the IECA in the Iranian legal system.[69] Comparative study such as this one, helps to determine which legal system provides the appropriate provisions through which Iranian law can develop, if there is such a need.

However, one important policy that this thesis concurs with is that in determining the time and the place of the occurrence of the acceptance in contracting electronically in Iranian law attempts must be made to provide exact, express and direct provisions, taking into account the resultant traditional theory in each case. For instance, the IECA may instead provide that: 'The time of occurrence of the acceptance in contracting through e-mail is deemed to be the time at which the acceptance leaves the information system of the originator and becomes out of his control'. The reason of this approach is clear. When there is a possibility to provide an express, unambiguous and direct legal solution, there is no need to take an indirect way which may open the way for various interpretations and outcomes.

With the above considerations in mind, in the MLEC the UNCITRAL has not adopted the said direct approach. However, there are grounds to justify the non-adoption of such an approach. Different legal systems may apply different rules and, even though the harmonization of trade laws on an international level is the main aim of the UNCITRAL, it is too difficult to harmonize the approaches of all legal systems on such controversial issues. Therefore, it has only provided provisions on the time and the place of dispatch and receipt of data messages or electronic communications which may contain an offer or an acceptance of an offer. In contrast, the national statutes on electronic commerce of most states which have also followed the same policy as the MLEC, are open to criticism since they are not faced with the limitations of the UNCITRAL in providing express and direct legal provisions. For example, the IECA, which is mainly based on the MLEC, only provides provisions regarding the time and the place of dispatch and the receipt of data messages in general, which may contain an acceptance of an offer. Therefore, to develop and modernize Iranian law, the best solution is to adopt a direct and express reference regarding the time and the place of occurrence of acceptance in contracting through different e-methods, such as e-mail, websites and chatrooms, rather than referring to the time and the place of dispatch and receipt of the data message in general.

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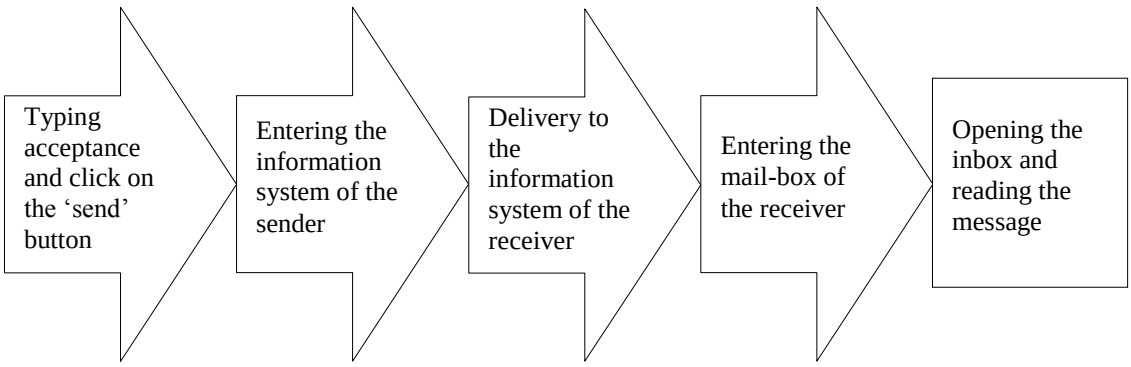
[69] Boss, A. H., *Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment*, North western Journal of International Law and Business, Vol. 13, No., 1992, P. 62.

However, the issue that still remains is to determine the time and place that should be set as the express and direct time and place of occurrence of an e-acceptance. For example, referring to contracting through email in which the traditional postal rule is applicable, it appears that the best solution is to simulate the traditional theories in an 'e-context'. In other words, where the postal rule in the physical world takes place once the letter of acceptance is placed in the post box, the rule also comes into operation once the sender clicks on the send button and it enters into the information system. This thinking must be employed to reform the IECA to provide the most comprehensive provisions within the traditional law. This policy is also recommended for the other legal systems in question as well, which directly regulate the issue of electronic acceptance. In this regard, the criticism regarding the statutes is that some of them have addressed the e-acceptance directly, but there is no compliance between what happens in the physical world and the approach of these statutes, as will be discussed in more details later. For example, regarding dispatch, some rule that the 'dispatch' takes place once the data message of acceptance enters an information system of the addressee, which is not clear whether it is the information system of the sender or the receiver, while in the traditional postal rule the 'dispatch' takes place once the acceptance is out of the control of the sender. Therefore, even the statutes that address the e-acceptance directly should also be reformed to simulate exactly the time of occurrence of, for example, the traditional postal rule in cyber space.

2.4.2 Time of Dispatch of Acceptance in Contracting Electronically Determining Postal Rule

2.4.2.1 Technical Stages of Dispatch of a Data Message

In order to illustrate the postal rule in contracting through e-mail, it is necessary to consider the technical process of dispatch of an e-mail. Once the sender clicks on the send button, the general stages that an e-mail passes through to reach the receiver can be illustrated as follows:



The postal rule in contracting through e-mail occurs once the e-mail of acceptance enters into the information system of the sender (stage 2). Similar to the postal rule in the physical world where once the letter is put into the post box, leaves the control of the sender but is not yet in the hands of the addressee, stage two marks the moment the e-mail is out of the control of the sender but has still not been received by the addressee. Now, it is necessary to determine the stage at which the postal rule comes into operation according to the Iranian Electronic Commerce Act 2004, and whether it is in compliance with the technical reality, and how it can develop if there is any non-compliance. This is so that the legal system with the most comprehensive approach can be pinpointed and used to develop Iranian law. Before doing this, it is necessary to see the effect of the location of the information system.

In the above case, the jurisdiction where the acceptor is located may be different to the jurisdiction where the information system is located. This may mean that another legal system is involved. For example, an English company receives an offer from an Iranian company and accepts it by e-mail. If the information system of the English company is located in France, then the time of the conclusion of the contract is the time at which the acceptance message enters into the French information system (provided that stage two is the correct answer as discussed above). The effect of this issue is considerable in the conflict of laws. If the rule for solving the conflict is 'the place where the contract is formed', the place of the conclusion of the contract would be France and French law would be applicable, even if the Iranian and English parties were not familiar with French law and did not intend to apply French law to their legal relations. The issue is more complicated where the information system has a number of pieces of technical equipment each located in a different territory. In this case, it would be more difficult to determine into what piece of equipment the message containing the acceptance entered.

It would also be difficult to decide the place where the contract was formed. In order to overcome this uncertainty the IECA in Articles 28-29 have set down that the place of location of information systems for determining the time and the place of dispatch and receipt of data messages is immaterial. Similarly, the MLEC in order to determine the place of occurrence of dispatch of a data message provides that the place where the information system is located does not matter and that it is the place of business of the parties that is important. As a result, the number of systems in different territories has no effect in determining the time and the place of occurrence of the dispatch and the receipt of an acceptance. Furthermore, the contracting parties may not know the place of the location of the information systems by which the messages are exchanged. Also, the location of the systems may change without the awareness of the parties. It is, therefore, logical that the IECA has set aside the factor of the place of the location of the information system.

2.4.2.2 Analyzing Approaches of Statutes on Time of Dispatch of Data Message to Develop Iranian Law

Since the place of the location of the information system is regarded as immaterial, it is necessary to decide the criteria upon which the time and the place of formation of electronic contracts must be determined in the Iranian Electronic Commerce Act 2004. Two main options can be put forward:

The first is the straightforward option where the parties by virtue of the principle of party autonomy come to an agreement on the time and the place at which the message of acceptance has legal effect, as discussed before.[70] For instance, the owner of the website can set the time and the place at which they are bound by the contract and inform the other party of this before an order is placed. For example, in B2B contracts, the statutory provisions indicate that the electronic communications are of practical effect once they are received.[71] This is one approach that the trading parties can adopt. However, in B2C contracts, there is no unique practice. Some businesses have chosen the time of the placement of the order, some set the time at the confirmation of the order, others at the time of acceptance of the order, and still others stipulate that it is the time of shipment of the order, such as Amazon.[72] What is notable in B2C contracts is that it is the business

[70] *Holwell Securities Ltd v. Hughes* [1974] 1 WLR 155.
[71] UNCID Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, article 7(a)
[72] Terms and Condition section, band 14.

party that decides the time and the place issue and the consumer party has no opportunity to negotiate; he must accept all the terms or reject the deal completely.

In the absence of any mutual agreements, the second option is to provide provisions in the Iranian Electronic Commerce Act 2004regarding the time and the place of the dispatch and the receipt of a data message. The Act and also other regulations on electronic commerce in question have done this and have provided provisions which are to some extent similar to each other in both content and wording. The application of these provisions simplifies potentially complex scenarios. The remaining space in the chapter will be devoted to examining the approaches of the statutes on this issue and deciding on the most comprehensive one that could develop Iranian law. Before considering the legal approaches to learn from in more detail, they can be summarised as falling into four groups:

a) The first group includes statutes such as the MLEC which set the time of entry of the data message into an information system to be when it is out of the control of the sender in much the same way as the traditional postal rule. This approach seems to be in favour of a technical analysis and of using the time of occurrence of the traditional postal rule in the physical world.

b) Statutes such as the UETA fall into the second group. These set a number of conditions to determine the time issue, such as the entry of the data message into an information system that is out of the control of the sender, and whether it is retrieved and processed by the receiver. This approach is clearly in favour of the traditional receipt theory which is contrary to the technical analysis and the time of occurrence of the traditional postal rule in the physical world.

c) There are other statutes, such as the CUECIC, that set the time of dispatch of a data message as the time of occurrence of the traditional postal rule in contracting electronically which initially seems to be in compliance with the technical analysis and the time of occurrence of the traditional postal rule in the physical world; however, it also emphasises the receipt of the message. This recalls the traditional receipt rule which stands in contrast to the technical analysis.

d) The final group of statutes are those that provide a direct reference to the time of occurrence of an e-acceptance, such as the UCITA, and which emphasise the time of receipt of the acceptance. This provision stands in contrast to the technical analysis and the traditional postal rule but its advantage is that a direct reference has been adopted,

something which this thesis considers to be an important step. The IECA falls within the first group.

2.4.2.3 Entry of Data Message into an Information System out of the Control of the Sender

Article 15(1) of the MLEC indicates that: 'Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator'. Under this Article, unless the parties by virtue of the principle of party autonomy agree to the contrary, a data message is deemed to be sent if it enters into an information system that is beyond the control of the originator. Furthermore, for the entry to take place the data message must be capable of being processed by the system into which it enters.[73]

In this Article, the phrase: 'enters an information system out of the control of the originator' recalls the postal rule in traditional contracts provided that it is not within the control of the other party,[74] unless it recalls the traditional receipt theory. Therefore, this is an ambiguous provision capable of different interpretations, which needs clarification. However, as the message must be capable of being processed for the purpose of entry and for this aim it must be at the disposal of the addressee, then it seems that the approach of the MLEC is the same as the traditional theory of receipt, while it also appears to be in compliance with the traditional postal rule. However, if there is no intermediary between the originator (acceptor) and the addressee (offeror), such as when both parties use the same information system, the data message enters the information system of the addressee once it is sent and the time of dispatch and receipt will be concurrent. Only in such circumstances would there be no difference between the application of either the traditional postal or receipt rules. This Article is open to criticism on the ground that it is against the direct policy which is to be adopted on the issues of time and place. Also, in practice, it is contrary to the technical analysis which simulates what happens in the traditional postal rule in the physical world.

[73] *Ibid*, Para. 103.

[74] If it is not in the control of the party, it is similar to the actual dispatch in the physical world and then it would be the postal rule.

2.4.2.4 Retrieval and Processing of Data Message

In American law, namely, the UETA and the Electronic Signatures in Global and National Commerce Act (E-sign), there is no indication on the appropriate time of effectiveness of an acceptance.[75] However, the UETA has some provisions dealing with the time and the place of dispatch and receipt of an electronic record similar to the MLEC. Its Section 15(a) provides that:

> (a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it: (1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; (2) is in a form capable of being processed by that system; and (3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

As can be seen, in spite of some differences compared to the MLEC, most of the issues discussed earlier regarding the MLEC have been gathered under this provision and, in fact, it recalls the traditional receipt theory in the same way that the MLEC does.

In order to regard an electronic record as a dispatched one it must be sent to the designated information system of the receiver. The dispatch of a record to the public, including the receiver, is not enough to qualify it as a dispatched record. Also, there is a point in the band (3)of the provision above which contains two situations: an electronic record after dispatch must enter either an information system out of the control of the sender or the designated information system under the control of the receiver. This provision seems to be a little vague as it is not certain whether the mere entry into an information system out of the control of the sender suffices or whether its entry into an information system under the control of the receiver is required. In some cases, the actual exit of the record from the control of the sender is not perceivable such as the exchange of information by an internal information system of a company. However, the second provision is meaningful both where there is an intermediary to which the record is sent after entering the information system of the intermediary and it enters the designated information system under the control of person receiving the record; and where no intermediary exists into which the record directly enters the information

[75] Watnick, V., *The Electronic Formation of Contracts and the Common Law Mailbox Rule*, Baylor Law Review, 56, 2004.

system of the receiver. This happens when both parties use the same information system.

All the above considerations imply that, under the UETA, the dispatch of a message does not occur if it enters an information system of an intermediary that is out of the control of the sender but which has not yet entered the designated information system under the control of the receiver to retrieve and process it. This provision clearly brings to mind the traditional receipt theory in contracting electronically. As a result, despite the fact that the postal rule applies in contracting electronically through e-mail, in the context of traditional law the receipt theory as far as this Act is concerned. This is the main ground of objection to the UETA.

2.4.2.5 Emphasis on both Dispatch and Receipt of a Data Message in Determining Traditional Postal Rule

While the MLEC and UETA use the traditional receipt rule, the CUECIC reflects both theories of postal and receipt. Its Article 10 states that:

> The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

The part, which is the initial approach of the CUECIC, exactly reflects the postal rule in the traditional law, since the message must only leave the information system under the control of the originator. This is similar to what happens when communicating through postal letters in the physical world. Therefore, even in cases where the electronic communication does not reach the information system of the addressee after leaving the information system under the control of the originator, or it is delayed in reaching him as can happen in the physical postal rule, the dispatch of the message containing the acceptance takes place.

The second band reflects the scenario where both contracting parties use the same information system, such as e-communications between staff of a university. In this situation, the receipt of the message is important, which reflects the traditional receipt theory. On the one hand, the approach of the CUECIC is admirable as it addresses both situations. However, it can also be criticised since the unity or multiplicity of the information systems have not been expressed in the second band and this may cause

there to be different interpretations. Moreover, it does not provide a direct reference to the time and the place of occurrence of an e-acceptance.

2.4.2.6 A Direct Reference to Time of Occurrence of an E-acceptance with Emphasis on the Receipt Rule

In contrast to the UETA, Section 203(4) of the UCITA expressly provides the time of effectiveness of an acceptance made electronically:

> If an offer in an electronic message evokes an electronic message accepting the offer, a contract is formed: (A) when an electronic acceptance is received; or (B) if the response consists of beginning performance, full performance, or giving access to information, when the performance is received or the access is enabled and necessary access materials are received.

This provision contrasts with what has been considered so far as it does not address the time of dispatch of a data message, an electronic communication or an electronic record. Instead, it directly considers the time at which an electronic acceptance comes into being. Therefore, from the approach of the UCITA which indicates that the acceptance becomes effective once it is received, the application of the traditional postal rule in determining the acceptance by e-mail is ineffective and the receipt theory must be applied in the manifestation of the acceptance through e-mail, websites, chatrooms and other electronic devices. It seems that the adoption of this approach in the other statutes on electronic commerce may prevent any arguments arising and any confusion in determining the postal and receipt rules. However, the approach of the UCITA may also be argued on the ground that it emphasises only the time of the receipt but does not outline when the receipt itself takes place; whether at the time that it enters the information system of the addressee or at the time that it is retrieved and processed by the recipient.

2.4.2.7 Developing Iranian Law by a Direct Provision and Making a Distinction between Unity and Multiplicity of Information Systems Used

As regards the time of dispatch, the Article 26 of the IECA has adopted a similar approach to the MLEC: 'the dispatch of a "data message" occurs when it enters an information system outside the control of the originator or his/her agent'. The previous analysis of the MLEC makes the content of this provision clear. As stated earlier, Iranian law does not determine the time of occurrence of the acceptance directly and only makes a reference to the time of dispatch of a data message which may contain an acceptance of an offer. As a result, the time of dispatch under Iranian law, which is the

time ‘it enters an information system outside the control of the originator or his/her agent’, is similar to the MLEC and recalls the receipt theory in traditional contracts, provided that it is under the control of the other party;[76] otherwise it recalls the traditional postal rule. In contrast to the MLEC, under the IECA there is no need for the message to be capable of being processed to rule that entry has taken place, then none of the theories privileges. Here, it must be seen that whether the message is in the control of the addressee or not, and decide accordingly. As a result, the IECA is ambiguous and flawed if used to determine the time of occurrence of the traditional postal rule in contracting electronically, and it only provides a general rule subject to wide and varying interpretations.

Taking into account all the above discussions, it seems clear that, in order to reach a comprehensive approach to develop Iranian law, two important points must be kept in mind simultaneously: a) the technical nature of the process of dispatch and receipt of an e-acceptance; and b) the process in the traditional postal rule and the time at which it takes place. In traditional communications, the postal rule can come into effect once the letter is posted and is out of the control of the sender, whether it reaches the addressee or not. In transferring this process to electronic communications, bearing in mind the technical process of e-contracting, the postal rule takes place once the data message containing an electronic acceptance enters an information system (the equivalent of the post box or the post office in the traditional postal rule) and is out of the control of the sender, whether it reaches the addresses or not. It seems that the current position of Iranian law is in compliance with the process in the traditional postal rule and hence there is no need for any legal reforms. However, a point that has not been addressed is whether the unity or multiplicity of the information systems used by the parties matters and how.

In order to avoid any uncertainties, it seems that Iranian law could learn from the UCITA in adopting a direct reference to the issue, since an indirect reference may cause conflicts and again make it difficult to determine the time of effectiveness of an electronic acceptance. This could be coupled with the approach of the CUECIC that makes a distinction between the unity or multiplicity of the information systems

[76]If it is not in the control of the party, it is similar to the actual dispatch in the physical world and then it would be the postal rule.

engaged, in order to be clear on the time of effectiveness of an e-acceptance. It may provide that:

> a) In contracting through e-mail or any similar methods of communications, if the contracting parties use the same information system under the control of the both, an electronic acceptance takes place at the time it becomes out of the control of the sender, whether it reaches the addressee or not, and b) if the contracting parties use separate information systems, the electronic acceptance takes place once it leaves the information system under the control of the sender, whether it reaches the addressee or not.

This approach is in compliance with the technical nature of sending and receiving e-messages and also simulates what happens in the traditional postal rule within an e-context.

2.4.3 Analyzing Approaches of Statues on Time of Receipt of Acceptance in Contracting Electronically to Develop Iranian Law

The time of receipt of a data message needs to be considered in order to determine the time at which the traditional receipt rule takes place in contracting through websites and chatrooms. The aim is to suggest a comprehensive, express and direct provision for Iranian law following on from a comparative study of the regulations in question, similar to what has been considered above concerning the time of dispatch of an e-acceptance.

Before considering the legal approaches in more detail, it is necessary to examine the outlines of the regulations in question. They may be categorized into two main groups: a) In the first group, statutes such as the MLEC, the IECA and the CUECIC classify the issue based on the designation or non-designation of an electronic address by the addressee for the purpose of receiving electronic messages. This approach can be termed the ‘designated or non-designated information system approach’. Under this approach, if the addressee designates an information system for the purpose of receiving electronic messages the time of receipt is either the time of entry into the designated e-address, or the time of retrieval from the system if the message has been sent to a non-designated one.

However, in the situation where the addressee does not designate an information system for the purpose of receiving electronic messages, some statutes emphasise the entry of the data message into the non-designated information system of the addressee, such as the MLEC and the IECA, and others emphasise the entry of the data message into the

non-designated information system of the addressee where it is retrievable and capable of being processed, such as the UETA.

b) The second group of statutes provide one straightforward general provision: among the legal systems in question only the UETA in American law follows this approach. It sets the time of receipt of an e-acceptance as the time at which the message enters into the designated information system or which is used by the addressee for the purpose of receiving a message, where it is retrievable and capable of being processed by that system. This approach may be called the 'straightforward approach'.

In order to suggest a comprehensive and straightforward provision for Iranian law which falls within the first group described above, in addition to the approaches of the regulations in questions, the time of occurrence of the receipt rule in the traditional contracts must also be taken into account as a means of transferring the traditional process of the receipt rule into the electronic environment. Traditionally, the receipt rule comes into effect once the acceptance reaches the other party and he becomes aware of it. As such, it is necessary to pinpoint when this takes place in contracting through websites and chatrooms. It seems to be the case that the current provisions are overly-complicated and it is better and more feasible to provide straightforward provisions which are also in compliance with the concept of the traditional receipt rule. To this end, this thesis suggests a '*mixed approach'* inspired by both approaches. In this approach, the classification of the first group is kept, but it is both simplified and made more comprehensive by injecting the elements of the second group.[77]

2.4.3.1 Designated or Non-designated Information System Approach

As a means of determining the time of the receipt of the data message, three situations in two bands have been put forward in Article 15(2):

> Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:(i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

[77] Adding that in the English statutes on electronic commerce or communication and the EC Directive on Electronic commerce, there is no provision regarding the time of receipt. Therefore the reference shall be made to the traditional legal discussions.

In clause a(i), where an information system has been designated, the time of entry of the data message in determining, and in clause a(ii), where there is a designated information system but the data message is sent to a non-designated one, the time of retrieval of the data message is material. Where the originator (the acceptor in the context of e-contracts), contrary to the instruction of the addressee (the offeror), sends the data message to another information system, the data message is deemed as received at the time that it is retrieved by the addressee; naturally, in this situation, the time of retrieval is after the time of entry. This approach seems to go against traditional contract law, where if the offeror designates an address for the purpose of receiving the acceptance the same instruction must be followed by the acceptor, otherwise the acceptance would be invalid. Also, mere retrievability is not material. Under the traditional receipt rule the addressees must become aware of the acceptance. Therefore, the MLEC should be revised to be in compliance with the traditional legal bases. In the situation of (b), the UNCITRAL assumes that the information system into which the data message enters is immaterial, and no specific system has been designated for this purpose. As a result, the time of entry of the data message into any information system of the addressee is the criterion. This provision is also against traditional law, as the addressee must become aware of the acceptance message and the mere receipt of the message does not suffice.[78]

Article 27 of the IECA exactly mirrors the MLEC. Thus, the objections observed above regarding the MLEC are also posed regarding the IECA. The only difference is that the MLEC, in contrast to Iranian law, expressly recognizes the principle of party autonomy and permit the parties to agree on the time of conclusion of electronic contracts. Since the IECA has been inspired by the Model Law, it is not clear why this provision has been omitted. Article 27 provides that:

> The time of receipt of a "data message" is determined as follows: a) If the addressee's information system has been designated for the receipt of the "data messages", receipt occurs when:
>
> - The "data message" enters the designated information system; or
>
> - The "data message" enters an information system of the addressee that is not the one solely designated for such a purpose, and it is retrieved;

[78] Sometimes, in the letterhead of documents an electronic address or a fax number is written. Such a display of information is not regarded as designating an information system in itself; they must be addressed to the addressee specifically.

b) If the addressee has not designated an information system for the receipt, receipt occurs when the "data message" enters an information system of the addressee.

Regarding the time of receipt of an electronic message, the CUECIC provides that: 'The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee'.[79] It continues by stating that: 'An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address'.[80] If the electronic communication is not sent to the allocated[81] electronic address of the addressee, then 'the time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address'.[82]In this Article, being retrievable must be distinguished from being accessible. Being accessible does not necessarily mean that it is retrievable. In other words, when the originator ignores the instruction of the addressee and sends the electronic communication to an information system other than the allocated system accessible by the addressee, the electronic communication has not been sent to the addressee yet, unless the addressee retrieves it.

The next point is that the retrievability of an electronic communication must be defined with regard to the designated electronic address. This means that if the trader has allocated a specific electronic address for his commercial activities and the buyer sends the electronic communication to his personal electronic address, the message has not been regarded as received, even though the message sent is accessible and retrievable by the receiver in his personal electronic address.[83] Finally, in the last part of the Article, the receipt of an electronic communication in a non-designated electronic address occurs subject to two conditions: a) that the electronic communication is retrievable, and b) the awareness of the addressee of the dispatch of the message to that address.[84] This short

[79] CUECIC, article 10(2).
[80] CUECIC, article 10(2).
[81] It is evident that the issue of designation or non-designation of information system or electronic address is posed when there are two or more information systems (in the words of the Model Law) or electronic addresses (in the words of the CUECIC).
[82] Ibid.
[83] Wang, F.F., *Law of Electronic Commercial Transactions*, P. 40.
[84] One may ask that how it can be proved that the addressee has become aware of the entrance of the electronic communication into his other electronic address. The Explanatory Note of the Convention expresses that this issue shall be proved by real and genuine evidence. For instance, the originator may inform the receiver by telephone or letter that the message has been sent to his other electronic address

analysis shows that the approach of the CUECIC is also open to criticism on the ground that it is not in compliance with the traditional receipt rule, as explained regarding the MLEC.[85]

2.4.3.2 The Straightforward Approach

The UETA provides a straightforward provision regarding the time of the receipt of an electronic record:

> (b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system.

The meaning of this provision is clear. The most important point is that it is not necessary for the addressee to be aware of the content of the message, and this stands in contrast to the notion of the traditional receipt rule.[86] The UCITA takes the same approach: 'a) Receipt of an electronic message is effective when received even if no individual is aware of its receipt'.[87]Another objection is that there is no distinction made between the dispatch of the acceptance to a designated information system and to one that is not designated. As stated, the dispatch of acceptance to a non-designated information system cannot be regarded as a valid acceptance traditionally where a system has been designated for this purpose.

2.4.3.3 Developing and Modernizing Iranian Law by Using a Mixed Approach

Similar to the issue of the time of dispatch of an electronic acceptance, in order to provide an express, direct and comprehensive provision regarding the time at which the traditional receipt rule takes place in contracting electronically through a website and chatroom, it is recommended that Iranian law should provide provisions that mirror the traditional receipt rule in the physical world, as follows:

> Unless otherwise agreed between the originator and the addressee, for the purpose of determining the time of occurrence of an electronic acceptance in contracting through website, chat-room or any other similar methods of communications, the acceptance happens as follows:

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and receive his confirmation, unless it would be difficult to prove that the sender has become aware of the message communicated.

[85] The issues such as illegibility and usability of data messages and electronic communications by the addressee have not been addressed and other laws are determining.

[86] UETA, Section 15(e).

[87] UCITA, Section 215(a).

(a) if the addressee has designated an information system for the purpose of receiving the acceptance, it occurs at the time when the data message enters the designated information system of the addressee and he becomes aware of it by processing and retrieving it by the receiving information system; the entrance of the acceptance into a non-designated information system is not a valid acceptance.

(b) if the addressee has not designated an information system for the purpose of receiving the acceptance, it occurs when the electronic acceptance enters any information system of the addressee, and he becomes aware of it by processing and retrieving it by the receiving information system.

Regarding paragraph (a), where the addressee designates an information system for the purpose of receiving the acceptance, the sender cannot send the message of acceptance to a non-designated information system as it would be contrary to the method stipulated in the offer by the offeror and, hence, it would be an invalid acceptance. In contrast, if there is no designated information system, the sender is free to send the acceptance to any information system of the addressee. However, ruling that acceptance has taken place according to the traditional receipt rule, he must be aware of the acceptance and the mere processing and retrieval does not suffice for this purpose, as the message may contain the rejection of the offer made or any other thing.

2.4.4 Place of Dispatch and Receipt of Acceptance in Contracting Electronically

2.4.4.1 Place is not Subject to Time in Contracting Electronically

Early in this chapter, it was stated that under Iranian traditional contract law, the place of formation of a contract is generally subject to the time of formation of the contract. Therefore, in contracting through e-mail where the time of dispatch is the time at which the e-mail of acceptance leaves the information system and is out of the control of the sender, the place of formation should be the place of location of the information system. However, the IECA provides to the contrary, since it do not pay any attention to the place of location of the information systems, neither in determining the issue of time nor in determining the issue of place. Instead, it emphasizes the traditional factors, such as the place of business, which is a clear concept in traditional law. This is the case as regard other statutes in question. This approach seems to be contrary to the traditional rule which puts the issue of place as being subject to the issue of time, however, it is logical on the ground that determining the place of location of an information system may be difficult or even impossible, as discussed before concerning the time issue.

As a result, in determining the questions of jurisdiction and applicable law, where the rule for solving conflicts is the place of conclusion of the contract, the place issue must be determined independently from the time issue. Another result is that, compared with the issue of time where the statutes have set the real time that the data message leaves or the awareness of the addressee of the content of the data message as the criterion, in terms of the issue of place they have derogated from the said traditional rule and have deemed a place, such as the place of business of the sender, as the place of formation of the contract. This is a logical approach as time is recorded in contracting electronically, while the place cannot be determined exactly. However, in Article 29 the IECA refers indirectly to the technical issues. This adds no useful information and also causes confusion in understanding the Article. Iranian law should express the immateriality of the place of location of the information systems in determining the issue of place, in the same way as the issue of time. A further point is that, apart from the factor of the place of business, Iranian law has adopted other factors, such as the place of work, which has never considered in Iranian traditional law and is an unfamiliar concept to it. The statutes in question show that the IECA's approach can be developed on the issue of place as well, but it seems big reforms are not required. This is to be considered as follows.

2.4.4.2 Place of Dispatch of Electronic Acceptance: Linked with Recognized Traditional Factors

From a comparative approach, the MLEC has set the place of business of the sender as the place of dispatch of the data message, not the place of location of the information systems involved. Article 15(4) states that: 'Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business'.[88] If the originator has more than one place of business, 'the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business.[89] The phrase 'underlying transaction' includes both those transactions that have been made and those transactions that the parties have contemplated.[90] If there have been no transactions between the parties, the principle place of business will be

[88] MLEC, article 15(4)
[89] MLEC, article 15(4)(a).
[90] MLEC/GE, Para. 106.

applied, and where there is no place of business, reference is to be made to the habitual residence.[91]

The CUECIC follows the same approach as the MLEC but provides more detail. Article 10(3) states that 'An electronic communication is deemed to be dispatched at the place where the originator has its place of business'.[92] This does not give effect to the place of location of the information system in determining the place of business:

> 4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.[93]

Moreover, the registration of a domain name in a country cannot be regarded as a definite criterion for ruling that the place of business is in that country. However, a party to a contract is not always a legal person with a place of business. Therefore, if a natural person does not have a place of business, reference is to be made to the person's habitual residence. It is necessary to note that if an entity has no place of business, the Convention, as per Article 1, would not be applied to the electronic communication as the condition of applying the Convention is the existence of a place of business in different states. As far as American law is concerned, the UETA, similarly to the MLEC, has set the place of business as a criterion, not the place of the location of the information system.[94]

Contrary to all of the above laws, the IECA provides different criteria that are open to criticism and this should be revised in order to create a comprehensive provision. The first part of Article 29 provides a similar provision to the MLEC, but with one significant difference:

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[91] MLEC, article 15(4)(a).

[92] Contrary to the Model Law, the Convention without stating the way of determining the place of business in this article leaves it to article 6 which speaks about the way of determining the place of business. Under article 6 '*a party's place of business is presumed to be the location indicated by that party*'(CUECIC, article 6(1).) However, when one of the parties determines his place of business, he cannot introduce a fictional place of business, as it is against the definition of the *place of business* in article 4(h): '*(h)"Place of business" means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.'*

[93] CUECIC, article 6(4).

[94] UETA, Section 15(d): *'(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business'.*

> In the event the location of the information system is different from that of the receipt of the "data message", the following conditions are to be effective: a) Unless otherwise agreed between the originator and the addressee, a "data message" is deemed to be dispatched at the place where the originator has its place of business or work.

One positive point is that this Article has recognized the parties' agreement on the place issue, contrary to Articles 26 and 27 regarding the time of dispatch and receipt of data message. It is not clear why this possibility has not been stressed in Articles 26 and 27. The first part of Article 29 is a little vague. This states that: 'In the event the location of the information system is different from that of the receipt of the "data message", the following conditions are to be effective.' It is not clear what would be the criterion if the location of the information system was the same as the place of receipt of the data message. Due to the immateriality of the place of location of the information system, as emphasised on several occasions, it is recommended that this phrase should be omitted from Article 29 as this would remove the ambiguity and provide certainty. One more criticism is that this Article sets two criteria: the place of business or the place of work. The meaning of the former is clear, but the latter concept does not exist in the Iranian traditional legal literature and so it is recommended that it should be omitted from this Article. Moreover, paragraph (b) provides that:

> b) If the originator has more than one place of business, the closest one to the place of transaction is considered his place of business or work; otherwise, the principle place of the company (headquarter) is considered as the place of business or work.

What is arguable in this part is that the concept of the closeness to the place of transaction is not obvious. Moreover, the provision only mentions the originator without any reference to the addressee, while in paragraph (c) both the originator and the addressee are mentioned: 'if the originator or addressee is of no place of business or work, their legal domicile is applied as criteria.' If the addressee has different places of business or work, it is not clear what the criterion is. Furthermore, the last part which states that: 'the principle place of the company (headquarter) is considered as the place of business or work' means that the legislator has only taken legal persons into account, even though natural persons may also be involved. Furthermore, there is no reference to the role of domain names and technological equipment which have been addressed in the CUECIC.

The IECA's approach is more open to criticism on this issue and significant changes are suggested. In order to create a comprehensive and straightforward provision, it is

recommended that the IECA provisions on the issue of place be rewritten in the following way:

> a) Unless otherwise agreed between the originator and the addressee, an e-acceptance is deemed to be dispatched at the place where the originator has its place of business.
>
> b) If the originator has more than one place of business, the closest one to the principle transaction is considered as his place of business;
>
> c) If the originator has no place of business, his legal domicile is applied as criteria.
>
> d) In determining the place of business in electronic transactions the place at which the equipment and technology supporting an information system used by a party in connection with the formation of a contract is immaterial and the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

The above proposed article includes the provisions found in the other regulations in question. The focus is on the place of business of the sender, his closest place of business to the principle transaction if he has more than one place of business and, finally, his place of domicile if there is no place of business. The place of location of the information system, the technology supporting it, the domain name and any other technology issues are irrelevant. These are straightforward provisions with no room for any confusion or different interpretations.

2.4.4.3 Place of Receipt of Electronic Acceptance: Linked with Recognized Traditional Factors

Learning from other legal systems, similar to the issue of the place of dispatch of a data message, the MLEC has set the criterion of the place of business of the addressee for determining the place of receipt of the data message. This is the approach of almost all the statutes in question. Article 15(4) of the MLEC provides that: 'Unless otherwise agreed between the originator and the addressee, a data message is deemed … to be received at the place where the addressee has its place of business.'

As stated in the discussion on the place of dispatch, the parties' agreement is of priority to this provision, and if the addressee has more than one place of business, the place of business which has the closest relationship with the principle transaction is the criterion. Finally, where there is no place of business, the habitual residence is applicable.[95] The UETA also provides that: 'Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be …

[95] MLEC, article 15(4).

received at the recipient's place of business.'[96] Similarly, the CUECIC provides that: 'An electronic communication is deemed to be … received at the place where the addressee has its place of business'.[97]

However, regarding the IECA the same criticism can be posed in terms of the place of dispatch. Article 29 of the IECA provides that:

> In the event the location of the information system is different from that of the receipt of the "data message", the following conditions are to be effective: a) Unless otherwise agreed between the originator and the addressee, a "data message" is deemed to … be received at the place where the addressee has its place of business or work.

This Article could be transformed into the following:

> a) Unless otherwise agreed between the originator and the addressee, an e-acceptance is deemed to be received at the place where the addressee has his place of business.
>
> b) If the addressee has more than one place of business, the closest one to the principle transaction is considered as his place of business;
>
> c) If the addressee has no place of business, his legal domicile is applied as criteria.
>
> d) In determining the place of business in electronic transactions the place at which the equipment and technology supporting an information system used by a party in connection with the formation of a contract is immaterial and the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

[96] UETA, Section 15(d).
[97] CUECIC, article 10(2).

2.5 Conclusion

Drawing the legal importance of determining the time and the place of formation of contracts, the legal consequences of every contract flows from the moment the contract is formed, and the place of formation of contracts plays a significant role in solving conflicts of laws. Therefore, the time and the place of formation of contracts through modern means of communications namely e-mail, website and chatroom became the base of the current chapter to consider a part of the main research question of the thesis which analyses the extend of ability of current Iranian law to respond the legal questions of electronic contracts. Due to the technical complexities of the said methods, it proved that Iranian traditional law is unable to solve these complex legal questions, since it does not make use of a number of the technological concepts that are involved. Also, it discussed that the Iranian Electronic Commerce Act 2004 as the only statute on e-commerce in Iranian legal system, has not direct and comprehensive reference to the issues. Responding the questions of the chapter, the policy taken was composed of two stages. At first, it was discussed that, in the absence of any agreement between the parties on the issues of time and place, which of the traditional theories (information, dispatch, receipt and awareness) is applicable in contracting electronically through e-mail, websites and chat-rooms under the first stage of the guiding principle. This task was done by the Iranian traditional law of contracts. Then, it was tried to determine that where and when the chosen theory in each case occur, for example the 'postal rule' in contracting through e-mail, occurs under the IECA. It seen that Iranian law has not addressed these issues, in particular the first one, either in Iranian traditional law or in the IECA, which led to analysing the current legal literate of Iran and also the legal system in question to provide certainty as to the legal doubts and develop Iranian law.

As regards the way of application of the four theories in contracting electronically as contracts *inter absentes*, the central point of discussion was determining whether the postal or receipt rule is applicable in either of the case. Having taken into account the technical nature of communications through e-mail and its comparison with telephone and postal communications, the supporters and opposing arguments, and the policy considerations underlying the postal rule, it was concluded that e-mail may be regarded as a non-instantaneous means of communication, and therefore communicating the acceptance through email should be put under the postal rule. As for non-interactive websites, as a direct interaction between the buyer and website is not feasible and any

contact with the seller is done by other means of communication, such as telephone and e-mail, the appropriate theory is applied according to the method of communicating the acceptance. However, regarding interactive websites, where there is a direct interaction between the electronic agent of the website and the buyer to receive orders, the application of the receipt rule is appropriate if the display of goods or services on the website is regarded as an offer and not as an invitation to treat, as the acceptance is made by the buyer and shown immediately by a confirmation message. In contrast, if the display of goods or services on the website is regarded as an invitation to treat, the placement of an order by the customer would be regarded as an offer, and the acceptance would often occur later by an e-mail confirmation. In such websites the postal rule should be applied as the acceptance is informed by an electronic mail later. Finally, it concluded that in contracting through a chatroom, in the same way as a telephone conversation, the communication between the parties is instantaneous and then the receipt theory is suitable.

Having decided the applicable theories in each case, the time and the place of occurrence of the chosen theory was the final discussion. The main policy in this part was trying to simulate the chosen traditional theories in contracting electronically. From this point of view, it was showed that the approach of IECA is not comprehensive and needs amendment to be developed. At the same time, it was discussed that two options are available to develop Iranian law in this context. One option is following the said two-step policy, i.e. determining the time and place issues first by traditional law (determining the applicable traditional theory in each case) and then by the IECA (determining the time and the place of occurrence of the chosen theory in communicating through data messages), and another is providing one direct solution which contains both stages without any need for referring to the Iranian traditional law and for the ease and simplicity of providing straightforward comprehensive provisions within the IECA as to the issue of time and place. It was decided that the one-direct solution is appropriate not only for Iranian law but also for other legal systems and international regulations; where there is a possibility to provide an express, unambiguous and direct legal solution, there is no need to take an indirect way which may open the way for various interpretations and outcomes. However, for this aim it was still required to examine the second stage of determining the time and place of occurrence of the chosen theory in each case with simulating the traditional process of

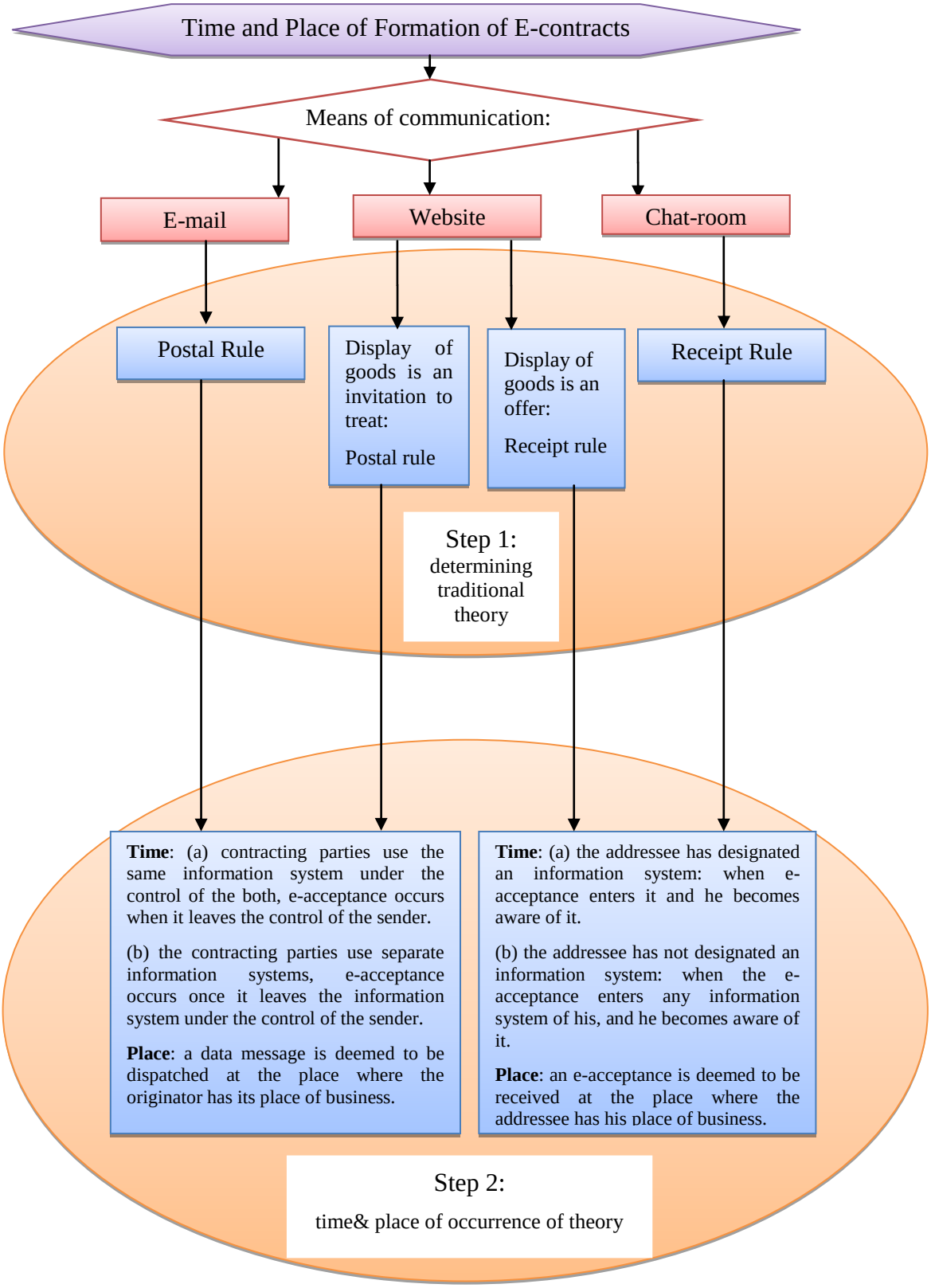
the theory in cyberspace. As under the postal rule acceptance takes place once the letter of acceptance is put into the post box and becomes out of the control of the sender, extending this reality to e-mail communications and making a distinction between the unity or multiplicity of information systems involved, it was concluded that if the contracting parties use the same information system under the control of the both, an electronic acceptance takes place at the time it becomes out of the control of the sender, and if the contracting parties use separate information systems, the electronic acceptance takes place once it leaves the information system under the control of the sender. As to determining the time of occurrence of receipt theory in contracting through interactive websites on which display of goods or services is an invitation to treat and chatroom, it must be taken into account that under Iranian traditional law of contract for the purpose of the receipt theory it is important to receive and be aware of the acceptance by the offeror, and also whether the offeror has provided a specific method for acceptance or not; such a distinction must be made in cyberspace with relevant concepts, then it is required to see whether any information system has been designated for this purpose or not. Based on this it concluded that if the addressee has designated an information system for the purpose of receiving the acceptance, it occurs at the time when the data message enters the designated information system of the addressee and he becomes aware of it by processing and retrieving it by the receiving information system; the entrance of the acceptance into a non-designated information system is not a valid acceptance as the acceptor does not send the acceptance into the designated one; and if the addressee has not designated an information system for the purpose of receiving the acceptance, it occurs when the electronic acceptance enters any information system of the addressee, and he becomes aware of it by processing and retrieving it by the receiving information system.

Moving on the issue of place, although traditionally under Iranian law it is said that issue of place is subject to the issue of time, however, it was discussed that in contracting electronically it is required to derogate from this traditional rule. Therefore, in contracting through e-mail where the time of dispatch is the time at which the e-mail of acceptance leaves the information system and is out of the control of the sender, the place of formation should be the place of location of the information system. But as under the statues on e-commerce the place of location of information systems used for communication has no role in deciding the time and the place of dispatch and receipt of

data messages, therefore, the appropriate approach is determining the place issue by traditional connecting factors such as the place of domicile and the place of business. In this view, it was demonstrated that despite the fact that the IECA has adopted this approach, however, it still is in need of amendments to be developed comprehensively.

As the concluding lines, it can be said that in this area of law current Iranian traditional law needs developments as to the way of application of the traditional theories in contracting electronically as discussed through the chapter; this task can be done by legal doctrines. Also, the IECA as the only statue on e-commerce in Iran should be revised and reformed to be in compliance with the Iranian traditional law, and comprehensive by learning from other legal systems and international regulations in question. This part in vested to Iranian Parliament as the only body of enacting and reforming of statues.

Figure 2.2


Time and Place of Formation of E-contracts
Means of communication:
E-mail
Website
Chat-room
Postal Rule
Display of goods is an invitation to treat:
Postal rule
Display of goods is an offer:
Receipt rule
Receipt Rule
Step 1:
determining traditional theory
Time: (a) contracting parties use the same information system under the control of the both, e-acceptance occurs when it leaves the control of the sender.
(b) the contracting parties use separate information systems, e-acceptance occurs once it leaves the information system under the control of the sender.
Place: a data message is deemed to be dispatched at the place where the originator has its place of business.
Time: (a) the addressee has designated an information system: when e-acceptance enters it and he becomes aware of it.
(b) the addressee has not designated an information system: when the e-acceptance enters any information system of his, and he becomes aware of it.
Place: an e-acceptance is deemed to be received at the place where the addressee has his place of business.
Step 2:
time& place of occurrence of theory

Chapter 3: The Legal Status of Electronic Agents in the Formation of Electronic Contracts

3.1 Introduction

It is more than a decade since traders began to conduct commerce by establishing interactive websites that were accessible everywhere. Through these electronic markets, customers have been able to place orders and conclude legally valid contracts. These interactive websites are run by 'electronic agents'. The rationale behind employing electronic agents is that, due to the high volume of requests from across the world, businessmen are unable to negotiate and contract with all of their customers individually. Electronic agents facilitate this process.[1] However, before electronic agents were used, software programs were used for the purposes of exchanging information, placing orders and even electronic contracting through Electronic Data Interchange (EDI).[2] There are three main differences between contracting through an electronic agent compared to the traditional method of EDI which justifies the need to analyse its role in legal terms: a) in contracting through an electronic agent, the contracting parties are less likely to know each other; b) in contracting through an electronic agent it is less likely that there is a prior agreement between the parties; and c) one of the parties (such as would occur when contracting through amazon.co.uk) or both of them (such as would occur when contracting through ebay.co.uk) would be a consumer, and this individual needs protection against the business party.[3] In terms of Iranian law of contracts, a number of questions must be analysed to provide answers to the legal problems arising from the use of electronic agents for the purpose of making electronic contracts. This chapter will focus on this matter as a part of the central research question of the thesis which tries to examine that to what extent Iranian law is able to respond the legal questions of electronic contracts.

Under Iranian traditional contract law, a contract is legally formed if a number of essential elements are met. One of them is the existence of an intention to create a legally binding agreement. Therefore, it is necessary to justify the existence of the intention of a contracting party who sets an electronic agent up to conclude the

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[1] It is necessary to note that there are different types of agents in e-commerce including agents that support need identification, agents that support product brokering/merchant brokering and comparison, agents that support buyer-seller negotiation, agents that support purchase and delivery and agents that support after-sale service and evaluation.

[2] Wright, B., and Winn. J., *The Law of Electronic Commerce*, 3rd ed., 1998, Aspen Law & Business, section 2.05.

[3] Middlebrook, S., and Muller, J., *Thoughts on Bots: The Emerging Law of. Electronic Agents*, The Business Lawyer, Vol. 56, No. 1, 2000, P. 348.

contract and also the way that the meeting of the minds occurs between the electronic agent and the other party, normally the buyer who is a human. The consequence of this discussion is that if the existence of the intention in contracting through electronic agents is not justified, it results in the contracts formed by them being invalidated and this, in turn, leads to the destroy of electronic markets, such as amazon.co.uk. This is not an ideal outcome in practice. In contrast, legally justifying the role of electronic agents to validate electronic contracts is in step with the transformation of the commercial community and backs up the rationale behind creating electronic markets. This policy leads to the development of electronic commerce; however, for this purpose it must be sought that how it is legally possible to justify the validity of contracts of these markets under Iranian law.

Moreover, traditionally where there is an intermediary between the parties, such as an agent, the intermediary may make mistakes; as a result, the issue of liability because of these arises. Transferring this discussion into e-commerce, apparently as an electronic agent acts as an intermediary between the contracting parties, the question of who is liable in the eyes of Iranian law must also be considered when an electronic agent errs,, as another sub-question of this chapter. To do this, it is necessary to analyse the status of electronic agents in contracting electronically to see whether they are the e-version of human agents in the physical world or if they have any other characteristics. The outcome of the discussion of the previous paragraph helps to determine the legal answer of this question as well.

Showing the weakness of current Iranian law in responding the above questions, traditional English and American contract case law have already dealt with the formation of contracts through machines and these may be extended for use in cyberspace. In English case law, in *Thornton v. Shoe Lane Parking Ltd*[4] it was held that the contracts formed by vending machines were legally valid. In American case law, a similar case exists. In the 1933 case of *McCaughn v. American Meter Co*,[5] it was held that a slot-vending machine which automatically fulfils the process of selling is capable of forming a valid contract without 'human control, agency, work, and exercise of will power'. However, in Iranian traditional law there are neither relevant traditional legal materials to extend into cyberspace nor modern legal considerations. Likewise, the

[4] [1971] 2 Q.B. 163, P. 169.
[5] 67 Fed. (2d) 148, 149 (US Court of Appeals, 3rd Cir).

Iranian Electronic Commerce Act 2004 as the only statues on e-commerce has not directly addressed the issue of electronic agents. Therefore, in order to provide legal certainty under Iranian law, the guiding principles to develop e-commerce law will be followed to see at what stage the legal certainty is reached and to what extent current Iranian law is able to respond the questions, needs development and how it may be obtained.

For the above aim, this chapter will examine how the Iranian legal system analyses: a) the status of electronic agents in contracting electronically to justify the legal validity of electronic contracts formed by them; and b) the issue of liability for mistakes made during the operation of an electronic agent to contract electronically. In order to achieve this, this chapter will deal with three areas: electronic agents in the context of the Iranian traditional law of agency; electronic agents in the context of the IECA; and determining the liable party when a mistake is made in contracting electronically.

In terms of the first part, it is necessary to consider the relevant rules of the Iranian law of agency in order to give a clear analysis of the nature and the legal status of an electronic agent. This will also help when analysing and criticising the theories put forward that justify the status of electronic agents in contracting electronically. For example, where Iranian traditional law provides that there must be an agreement between the principle and the agent in order to create agency, this means that an electronic agent cannot be regarded as the e-version of a real agent as no such agreement exists between the person who sets it up and the e-agent. It seems that under the first stage of the guiding principles, i.e., either the exact application of the traditional rules and principles or their expansion and development, electronic agents must be regarded as a ‘means of communication’, and the theory of ‘instrumentality’ (i.e. the tool theory) is in compliance with Iranian traditional contractual rules and principles. However, the theories put forward by several legal scholars justifying the status of electronic agents and the validity of electronic contracts formed by them should be analysed and criticised under the auspices of Iranian traditional law, to see whether they can be defended by Iranian traditional law and whether they develop e-commerce law. This will reinforce the analysis of the issue under made Iranian traditional law. The main theories are as follows:

a) The electronic agent is merely a tool of communication between the parties and

nothing more.

b) Unilateral offer theory, this does not pay attention to the status of electronic agents but rather it analyses the nature of display of goods and services on a website.
c) Ignorance of the satisfaction of a particular intention for each contract without any need for intention.
d) Applying the objective test to justify the existence of a legal intention in contracting electronically.
e) An electronic agent is considered to have a legal personality.
f) An electronic agent is the agent of the user under the law of agency.
g) An electronic agent is the agent of the user without a legal personality: theory of slavery.

The outcome of this part is important in two respects. Firstly, it will be used to adjust the approach of the IECA so that it is in compliance with Iranian traditional law. Secondly, it will help to determine the liable person when the electronic agent makes an error.

As for the second part, the IECA makes no direct reference to electronic agents. However, two opposing views are deducible from the content of the Act in this regard. On the one hand, it grants a personality of computer systems composed of, *inter alia*, electronic agents, which is against the traditional legal basis since nobody but humans can be the subject of duties and rights ascribed to persons. On the other hand, it attributes the acts of information systems to their owners which conflicts with its legal personality. Considering the approaches of the statutes on e-commerce discussed in this thesis shows that although they have clearer references to electronic agents which can be used to develop the IECA, they have not addressed the legal nature of electronic agents, specifically whether they are a tool of contracting or possess some other nature. This can be regarded as a weakness in them. This part tries to choose the best approach to develop the IECA, one that is not in conflict with the outcome of Iranian traditional law as discussed in the previous part.

Finally, in terms of determining the liable party under Iranian law, it is necessary to distinguish between input errors made by the buyer, such as where he mistakenly types 100 instead of 10; the traditional notion of mistakes made by the buyer, such as where he does not choose his intended website; and errors made by the e-agent, such as where he mistakenly reads 100 as 10. Once these mistakes have been pinpointed, it will then

be possible to find the liable person or persons. Moreover, the legal ways of avoiding the unwanted legal consequences of mistakes should also be considered, such as the right of withdrawal which has not been addressed properly in the IECA. This illustrates the different types of mistakes made by the buyer as a human, and the approach of the IECA in this regard which shows there is room for development. Where the e-agent of the website makes a mistake, liability should also be apportioned correctly: whether it falls on the owner (runner), the e-agent, or any other person. With this aim in mind, the functions of e-agents are distinguished based on the way goods or services are displayed on the website, whether it invites to treat or offers goods or services; and the aim of the establisher of the website, whether he takes advantage of the website to do business for himself, such as amazon.co.uk, or only creates a space for other people to engage in e-commerce with each other, such as ebay.co.uk. Thus, the outcome of the first part regarding the legal status of electronic agents in contracting electronically has a determining role in this part.

The above-mentioned parts are to be considered comparatively, as far as it is required and helps, with reference to the traditional laws and electronic commerce statutes of the legal systems in question. Before considering the research questions, it is necessary to examine the types and technical nature of electronic agents as this will be helpful in analysing the legal issues.

3.2 Definition of an Electronic Agent

3.2.1 Electronic Agent in Computer Sciences

In basic terms, an electronic agent is the software of a computer system, not its hardware. The difference between software and hardware can be stated as follows: 'Those parts of the system that you can hit with a hammer (not advised) are called hardware; those program instructions that you can only curse at are called software.[6] Therefore, an electronic agent is a computer program which has been written to perform a special act in accordance with the aim of its user in a digital environment. In the current discussion, it is one that is used for commercial purposes.

[6]In addition to'software' and 'hardware', a third type of ware has been introduced which is called 'malware' and is used by e-thieves to obtain e-data illegally such as the private data of people. McAfee says the production of malwares over the first six months of 2010 has reached the highest rate over its history (available at www.stuff.c.nz, last visited Oct. 2010).

3.2.2 Classifying Different Types of Electronic Agents and Choosing the Appropriate Term

In the context of electronic commerce, an electronic agent can be used for several purposes: to support identification, to support product brokering/merchant brokering and comparison, to support buyer-seller negotiation, to support purchase and delivery, and to support after-sales service and evaluation.[7] In this thesis, an analysis will be made of the status of those electronic agents that are involved in forming electronic contracts. Under this concept, electronic agents usually operate transactions 'formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as a routine step in forming the contract'.[8]

There are a number of terms used to refer to electronic agents in the legal and technical literature. In a general sense, electronic agents may be referred to in four ways: electronic agent, intelligent agent, most intelligent agent and super intelligent agent. The level of intelligence increases in the said order. An 'electronic agent' is a computer program written to perform certain tasks in cyberspace automatically and is not necessarily self-organizing.[9] As its level of complexity is not so high, its mistakes are fewer. Examples of this agent are a Microsoft Outlook system used to exchange e-mails or the computer program employed by amazon.co.uk to guide customers through each step of their orders. An 'intelligent agent' is an electronic agent which still demands human intervention to perform its duties.[10] Therefore, it does not have a high level of self-organizing. However, as its level of complexity is more than a simple electronic agent, it has a high level of probable fault functions. In contrast, a 'most intelligent agent' in addition to being automatic possesses a high capacity to self-organise.[11] Finally, a 'super electronic agent' is a product of artificial intelligence and is not currently used in commerce. The term 'electronic agent' is the most appropriate one to

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[7] Turban, E., et al., *Electronic Commerce: A Managerial Perspective*, 3rd. ed., 2003, Pearson Education.

[8] UCC, Article 2B. For more details see: Froomkin, M., *Article 2B as Legal Software for Electronic Contracting – Operating System or Trojan Horse?*, 1998, available at <http://osaka.law.miami.edu/~froomkin/articles/2b.pdf>.

[9] The concept of self-organizing means an electronic agent acts according to the written program not independently. It is also seen that some writers have used the adjective of *autonomy* to describe the nature of an electronic agent's activities, while 'will' only belongs to human beings and cannot be generalised and used for physical things.

[10] It is evident that an electronic agent is in need of human intervention as well. If you do not click on the 'send' button when the e-mail is complete, it will not be sent. However, avoiding assuming that an intelligent agent is totally self-organising, a reference has been made to the human intervention.

[11] Some useful websites in this area are: www.research.ibm.com; www.grailsearch.com; www.ksi.cpsc.ucalgary.ca; www.comp.lancs.ac.uk ; www.opensesame.com

describe the computer software employed to run e-markets, given the above explanations, the nature of cyberspace, the functions of common electronic agents in selling and buying online, their manifest descriptions, and also having regard to the terms of the statutes on electronic commerce, such as the CUECIC.[12]

3.2.3 Perceivable Traditional Agents in E-commerce

In modern commerce, the employment of an agent is often unavoidable. Agency is principally based on the division of work and distribution of goods or services and is a recognised factor in almost all legal systems. There are plenty of examples to illustrate the role of an agent in different activities. In non-commercial affairs, the heirs of a deceased person appoint an agent to execute his will and administer the estate. Under age orphans need agents to administer their legal affairs. In international relations, agents of states sign treaties. Moreover, given the complexity of commerce the appointment of agents is unavoidable. Companies, as legal persons, fulfil their activities through the managers who act as the agents of the company. In all cases, the main function of agents is the same: to transact on behalf of a person, to his instructions.

There are different terms used for the types of agents and the extent of their rights and duties.[13] Under all three legal systems in question, a broker acts as an intermediary between the seller and the buyer and brings them to the table to negotiate. In general, the contract concluded between the principal and the third party does not ascribe any obligations to the broker.[14]A commission agent is another concept in the law of agency. He contracts in his name on behalf of another and in return receives a commission. He is liable to the third party but not the principal and he must have the contractual capacity to perform.[15] Sometimes, the agent contracts under the authority given to him by the principal. This issue can be considered in three situations.

a) *Disclosure of agency and principal*: under all three legal systems in question the

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[12] Noting that in the view of the author, even this phrase does not inspire the real function of an electronic agent. This issue will be elaborated later.

[13] One may believe that there is no need to have a look to different types of agency here, as some of them are not really agent. The answer is that it is intended to see which of them can be discussed in contracting electronically and is considered within this chapter.

[14] Article 335 of the Iranian Commercial Code; Beatson, J., Anson's Law of Contract, 29th ed., 2010, Oxford University Press, P. 683; Bouvier, J. and D.A. Gleason, *Institutes of American Law*, Vo. 1, 1999, Law book Exchange Ltd, P. 317.

[15] Article 357 of the Iranian Commercial Code; *Armstrong v. Stokrs* (1872) L.R. 7 Q.B. 598; Bouvier, J. and D.A. Gleason, *Institutes of American Law*, P. 317.

contract is for the principal, unless the agent has acted out of the agency mandate.[16]

b) *Disclosure of agency and non-disclosure of principal*: under Iranian and English laws the contract is for the principal not the agent; but under American law the contract is for both the principal and the agent.[17]

c) *Non-disclosure of the agency*: under Iranian and English laws the contract is for the agent, while under American law it is for the principal.[18]

There are other concepts of agency, such as a distributor, a person who buys goods and sells them in his own name and account with no involvement from the principal; an auctioneer, a person who sells other's goods at an auction; and a franchiser, a modern concept in commerce under which the owner of the trade name or trademark gives permission to another in the form of a license. The franchisee must sell the goods or services in compliance with the terms and conditions of the license and the franchiser must assist the latter in a number of other ways, for example, by running media campaigns and providing consultancy services.[19]

3.3 Electronic Agents in the Context of Iranian Traditional Law of Agency

The key questions of this chapter are to consider the status of electronic agents' contractual intention when contracting through them and the way to determine the liability of a person where mistakes are made during that process within the Iranian legal system. This part will consider how Iranian traditional law deals with electronic agents and whether it is fully able to respond to the above questions.

As an introduction in the Iranian law of contract principally every 'person' is obliged by his own 'will'. The principle of privacy of contracts implies a claim. As a result, when

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[16] Article 196 of the Iranian Code of Civil; *Montgomerie v. United Kingdom Steamship Association* [1891] 1 QB 370 at 372; *Ireland v Livingstone* (1872) LR 5 HL 395; Restatement (Third) of Agency, Section 2.01; *Montgomerie v. United Kingdom Steamship Association* [1891] 1 QB 370 at 372; *Fairlie v. Fenton* (1879) LR 5 Exch 169; *Paquin v. Beauclerk* [1906] AC 148.

[17] Derived from Article 196 of the Iranian Code of Civil; *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525.

[18] Derived from the Article 196 of the Iranian Code of Civil; Katouzian, N., *General Rules of Contracts*, Vol. 2, P. 59.; Beatson, J., *Anson's Law of Contract*, PP. 701-719; *Sims v Bond* (1833) 5 B & Ad 389; *Saxon v. Blake*(1861) 29 Beav 438; Rasmusen, E., *Agency Law and Contract Formation*,American Law and Economics Association, 6(2): 2004, P. 402.

[19] For more details see Bogaert, G. and U. Lohmann, *Commercial Agency and Distribution Agreements: Law and Practice of the Member States of the European Union*, 3rd Revised ed., 2000, Kluwer Law International.

person A concludes a contract with person B, the former cannot impose the resulting contractual obligations on person C; but if person A concludes a contract with person C on behalf of person B, then the legal relationship between A and B is called 'agency' and the obligations arising from the contract must be borne by person A. Therefore, if it is accepted that an electronic agent is the e-version of a real agent, the electronic agent must be a 'person' and must display a 'will'.

Before addressing the above questions in the light of Iranian traditional contract law, it is necessary to specify the extent of the reference to the traditional law. These two characteristics, of being a 'person' and displaying a 'will', are the requirements of being an agent and creating an agency relationship.[20] These requirements will be discussed concisely below, and the conclusion will be used to analyse the legal status of electronic agents.[21]

3.3.1 Is an Electronic Agent a Person with a Will?

There is no definition of 'agency' in the Iranian Civil Code. However, an eminent legal scholar, Naser Katouzian, by using the provisions on proxy in the Code, has stated that: 'Agency in a legal relation, by which the agent is able to conclude a contract for his name and for the account of the principal, and its consequences are directly imposed on the principal'. This means that the agent is an intermediary by whose 'will' the contract is concluded, and its consequences are put on the 'principal' not on the 'agent'.[22] Similarly, in English law some scholars have stated that: 'agency is a comprehensive word that is used for describing the status of a person who is appointed for acting on the other's behalf'.[23] A simple definition has also been provided by Treitel: 'agency is a relation that arises when a person, who is called principal, empowers another person, who is called agent, to act on the former's behalf and the

[20] In the law of agency there are some main discussions: the conditions of creating an agency relation, the relation between the agent and the principal, the relation between the agent and the third party, the relation between the principal and the third party, the extent of rights and liabilities of the parties involved, and the termination of the agency. Here, only the first issue is discussed. Regarding the next issues the traditional law applies identically.

[21] Bearing in mind that under English law and American Law the law of agency constitutes a distinct rubric within the law of contract, but in Iranian law there is no such a straightforward discussion and the law of agency is derived from the Iranian Code of Civil, mainly the articles on the proxy, and the Iranian Commercial Code.

[22] Katouzian, N., *General Rules of Contracts*, Vol. 2,1st ed., Enteshar Sahami Co. Publication, 1388 (SC), p. 63.

[23] Furmston, M., *Cheshire, Fifoot & Furmston's Law of Contract*, 16th ed., 2012, Oxford University Press, PP. 597-618.

latter accepts'.[24]Such a contract between the agent and a third party performs the principle of the privacy of contracts between the principal and the third party, and the principal bears all contractual obligations, as if he himself had formed the contract.[25]Likewise, under American law agency is 'a fiduciary relation arising from the manifestation of consent by one person [principal] to another person [agent] who acts on his behalf and under his orders, and the consent of the other [agent] to do so'.[26]

What can be derived from the above discussion is that, under Iranian law, in order to create an agency relation an agreement between a principal and an agent, who is a person with *will*, is required. This means that if we want to regard an electronic agent as the e-version of a real agent and apply the same traditional rules and principles, there must be an agency agreement between the person (principal) who sets it up, and the electronic agent(as a person); even though there is no such agreement between them. This is true regarding other legal systems as well. In this regard, the only agreement is made between the person who establishes the electronic agent and the person who writes the programme of the electronic agent. This consideration results in the conclusion that an electronic agent is not a 'person'. This statement has two outcomes. Since an intermediary should be either a person or a tool of communication, and given that an electronic agent cannot be a 'person', then in contracting electronically by it, it should be regarded as a 'tool'. Furthermore, since an electronic agent cannot be a person, it cannot have any 'will' as only a person has 'will'. However, the nature and role of its intelligence must be analysed.

Having established that an electronic agent is not a person with will, it cannot then be subject to rights and duties and also cannot be regarded as a real agent. Therefore, where an electronic agent makes a mistake the other person must be liable.[27] The conclusion that can be drawn is that under the Iranian traditional law an electronic agent is a tool of communication and any of its acts, whether mistakes or not, must be ascribed to the person who sets it up to create e-markets. However, following this analyse, it is unclear how the meeting of the minds takes place in contracting through electronic agents. This issue will be considered in the following part.

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[24] Treitel, G., *The Law of Contract*, 13th ed, 2011, Sweet & Maxwell, P. 752.; Chitty, J., *Chitty on Contracts, Specific Contracts*, 29th ed., Vol. 2, 2004, London: Sweet & Maxwell.
[25] Furmston, M., *Cheshire, Fifoot & Furmston's Law of Contract*, P. 603.
[26] Restatement (Second) of Agency (1958).
[27] This issue will be considered later in this chapter.

3.3.2 An Electronic Agent Transfers the Intention of its Owner to Create a Legal Relation: Emphasis on the 'Tool Theory'

As concluded above, in Iranian traditional law an electronic agent is regarded as a tool of communication. Now, it must be explained how the intention of the contracting parties, in particular of the person who runs the electronic agent, is manifested in contracting electronically and the principle of meeting of minds is met. It may be said that the situation is nearly the same as contracting over the telephone except that in contracting over the telephone, the contracting parties exchange their wills directly over the telephone as if they were in each other's presence, whilst in contracting through an electronic agent at least one party (the owner of the e-market), is not aware of the interactions of the agent when it interacts with the buyer. In order to tackle this legal problem, it is necessary to consider the traditional law of contract again. Article 191 of the Civil Code provides that: 'A contract is formed by an intention to create a legal relation provided that it is accompanied by something that indicates the existence of the intention'. This statement is composed of two parts. The first part means that only natural or legal persons are able to conclude legally binding and valid transactions, as 'intention' is only ascribed to human beings. Therefore, as an electronic agent does not have this characteristic it cannot be regarded as a person and a contracting party. In terms of the second part, traditionally it is said that 'words', 'conduct' and 'any indications' can imply the existence of an intention to create a legal relation. This requirement can be met by employing electronic agents. An electronic agent is, in fact, a tool which is employed to transfer the intention of its owner without creating an intention independently as it is not a person with a will. This emphasises the 'tool theory' as regards the status of electronic agents in contracting electronically.

As stated before, some legal theories have been put forward to justify the status of electronic agents. Each of them will be analysed to show the strength of the outcome resulted under the Iranian traditional law that an 'electronic agent' is a 'tool of communication'.

3.4 Criticizing the Theory of Meeting of Minds in Contracting through Electronic Agents

At the outset, it must be emphasized that where an electronic agent is only used to place

offers such as the website of 'amazon.co.uk', the acceptance is made by natural persons by, for example, the shipment of the goods offered and confirmation of this by an e-mail.[28] Here, the contract is not concluded by the electronic agent but it merely acts as an electronic tool to receive offers, like a fax machine. In this type of case, there is no need for justifying the validity of the e-contract although the e-contract is concluded by the intervention of electronic agents. In contrast, the core argument is directed at those e-contracts formed by an electronic agent, such as the website of 'megabus.com', in which there is no need for human intervention to complete a contract; the offer is made by the website (the electronic agent) and the acceptance is made by customers. The contract is formed once the order is made, and its initiative and intelligence are greater than normal means of communication, such as a telephone or a fax machine, as it reacts purposefully and appropriately to the intentional acts of the customers.

Considering the theories in terms of the second case, on the one hand, one theory states that an electronic agent is a mere tool of communication between the contracting parties and nothing more, such as a telephone. On the other hand, others believe that, as an electronic agent lacks a personality, then if they wish to confirm the validity of such contracts they must be granted legal personality. The argument continues that, as their functions are complex and they are capable of innovating, it is not logical to consider them as mere communication tools, such as telephones.[29]One other theory is that an electronic agent must be regarded as the agent of the person who has set it up, such as the owner of megabus.co.uk. As stated earlier, it appears that the tool theory fits best with Iranian law. The following sub-sections will discuss this theory and some others which appear to be weaker and less suitable.

3.4.1 Electronic Agent as a Mere Tool of Communication

In this theory, it is assumed that all functions of an electronic agent are issued directly by the person who has control over it or uses it. Therefore, the electronic agent acts as a communication tool between the contracting parties and through it the parties exchange their intentions to create a legal relation. By accepting this theory, the argument around the legal status of electronic agents is removed and the issue of intention of parties is

[28] Terms and condition section of amazon.co.uk, band. 14.
[29] Tom, A. and R. Widdison, *Can Computers Make Contracts?*, Harvard Journal of Law and Technology, Vol. 9, No. 1, 1996,P.25

solved. As a result, a more exact term for it would be 'electronic instrument' or 'electronic tool', rather than 'electronic agent'. This approach is in compliance with the Iranian traditional law as discussed previously, and has been adopted in some statutory laws, which will be adopted to develop the Iranian Electronic Commerce Act 2004 in the next part of the chapter. As an example, the UCITA in American law states that the term electronic agent means:

> [A] computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance.[30]

Similarly Section 107 indicates that:

> A person that uses an electronic agent that it has selected for making an authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations.[31]

The other main outcome of adopting such a theory is that the burden of all contractual obligations would be on the person who sets up the electronic agent. Moreover, the consequences of any mistake and wrongful acts of the agent must be put on its owner, since its acts are presumed to be the acts of the principal.[32]However, this approach may be objected to on the grounds that it is not fair to regard the owner of the electronic agent as responsible for all the acts of the electronic agent as he is unable to be aware of the activities of the agent in all cases. It cannot be said that he has consented to all concluded contracts. In addition, under this theory the scope of his liability would be wider than the cases where he appoints a natural agent in the physical world. The reason for this is obvious. The real agent is himself responsible for acts or omissions which are outside his mandate, while under this theory the owner of the electronic agent is liable for all acts of the electronic agent, even if he had known them, he would not have affirmed them. It is not logical to regard him as bound to a contract which he has not agreed to.[33] Additionally, the electronic agent is not always used as a mere tool of communication. It follows the instructions of the owner as written by

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[30] UCIRA, section 102(27)
[31] *Ibid*, section 107(d)
[32] Lerouge, J.-F., *The Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level*; Weitzenboeck, E.M., *Electronic Agents and the Formation of Contracts*.
[33] Andrade, F., et al., *Contracting Agents: Legal Personality and Representation, Artificial Intelligence and Law*, Artificial Intelligence and Law, Vol. 15, Issue 4, 2007, PP. 357-373.

him or a programmer according to his orders. Where the electronic agent acts within the pre-agreed mandate, there is no doubt that the contracts are valid even if the user is unaware of the other party or parties to the contract. This is similar to the acts of a real agent in the physical world where it is immaterial who the buyer is and whether the principal is aware of his identity. However, this is not always the case. Let us assume that the owner of an electronic agent, such as the owner of amazon.co.uk, has written the following instructions for the electronic agent with a view to attracting more customers: 'for each item search the lowest price in all electronic markets and offer the same with an additional 5% discount'.[34] In this scenario, it is unclear whether the electronic agent acts as a mere tool of communication or if its function is beyond the capability of a simple tool. Moreover, in this scenario not only is the owner unaware of the customers, but he is also unaware of the final sold price. It is even possible that, due to the daily fluctuations in the market, an item might be sold for a different price on the same day. Also, in some cases the final offered price may be too low to assume that the user of the agent would be happy with it. For instance, an electronic market may put an item which costs £100 on sale with a 90% discount, i.e., the final price of £10. According to the given instruction, the electronic agent must sell the item for £9.50 (5% discount on the lowest price). In this example, it is debatable whether it can be said that the owner of the agent is pleased to sell the item, which normally costs £100, for only £9.50. In such cases, it is highly likely that a real agent with the same instruction will not sell the item for such a low price, while an electronic agent due to its lack of will and understanding would complete the deal.

In rejecting the objections and emphasising the instrumental nature of the electronic agent, some issues must be borne in mind. The person who employs an electronic agent for the establishment of an e-market must accept any resulting risks of the operation of the agent. Even in the cases mentioned in the above example, what the e-agent does is within the instructions of the person who established the agent and he should be aware of the risk of some detrimental results. If he is to be regarded as irresponsible in such situations, he may escape from the contractual liabilities for any reason, such as the malfunctions of the electronic agent, if he finds a given bargain unfavourable.[35]

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[34] The production of electronic agents which are capable of dealing for various prices is noteworthy for experts. See Kephart, J.O., J.E. Hanson, and A.R. Greenwald, *Dynamic Pricing by Software Agents, Computer Networks*,32(6), 2000, PP. 731-752.

[35] This issue will be considered in more details later in this chapter.

Furthermore, in contrast to the real agent in the physical world who is granted a general power to perform a specific activity and is able to perform the order of the principal in various ways by his independent decisions within the mandate, the electronic agent is not so flexible, not just carrying out the wishes of the user but doing so to his exact specifications. In brief, the electronic agent operates 'automatically' not 'autonomously'. All these issues lead towards the adaptation of the tool theory found in Iranian traditional law. This theory clearly justifies the way that contracting parties experience their meeting of the minds. The mind of the owner of the electronic agent in different situations is what has been written in the computer program of the agent, and the mind of the other party, i.e., the customer, is what he shows during the interaction with the e-agent.

3.4.2 Unilateral Offer Theory

In analysing the role of electronic agents in contracting electronically, some writers, such as Chopra and White, have looked at the legal nature of goods being offered on the Internet and regard the electronic agent as a tool for offering goods electronically.[36] Under this theory, an offer is made by the seller (the owner of the website in question) to the public (anybody in the world who has access to the Internet), and the contract is made following an acceptance by a person who consents to the terms of the offer.[37] This theory is effective in validating click-wrap contracts. These types of contracts are not new in cyberspace. In the case of *Thornton v. Shoe Lane Parking Ltd*[38]an offer was made once the owner made the machine available and the acceptance was made once a given customer put money into the slot. The terms and conditions of the contract are those that were printed on the machine or on a board by it. If this scenario can be generalised to the usage of electronic agent, there would be no question regarding the role of the electronic agent in contracting electronically since it shows the terms pre-written by the user and the customer makes a contract by clicking on an 'I agree' or any other similar box. In this process, the agent acts as a tool for manifesting intention.

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[36] Chopra, S. and L. White, *Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis*, University of Illinois Journal of Law Technology & Policy, 85(2), 2009, P. 20.
[37] A good example of this type of offer has been illustrated in the cases of *Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256; *Great Northern Railway. v. Witham* (1873) LR 9 CP 16.
[38] [1971] 1 All ER 686

In contracting through an electronic agent, a similar scenario is repeated as the one when contracting through a machine where the seller does not manifest his legally binding intention to each contract separately and only makes a general offer. The only difference is that the machine is a simple means of selling with a limited number of options, while an electronic agent has greater capabilities and can be regarded as a developed form of the machine. Even where the agent displays an appropriate reaction, it is, in fact, following the instructions of the user and is not making any independent decisions. In other words, instead of several selling machines each with a different instruction, there is an electronic agent which fulfils all their functions on its own and reflects the desire of the principal. Nonetheless, the unilateral offer is only defensible in cases where all terms and conditions are provided beforehand and the electronic agent acts as an intermediary between the seller and the buyer and guides the latter to complete the contract. In such cases, it acts as a tool as discussed in the first theory.

Objecting this theory, an argument may be raised *regardless of a given legal system*. Offering goods on the websites is not always regarded as an 'offer' in the legal sense, rather it may be an 'invitation to treat' as is the practice of some electronic markets such as amazon.ac.uk. An offer is made by the buyer and the acceptance is given by the seller in turn. The terms and conditions section of the website often indicates this. For instance, according to the terms and conditions of *amazon.co.uk*, the acceptance takes place at the time at which the buyer, after placing the order, receives an e-mail confirming the packaging and dispatch of the goods sold.[39] It is obvious that *amazon.co.uk* staff, who are human beings, dispatch the goods and send the e-mail. This means that the contract is finalised by a human being not an electronic agent. The role of the electronic agent is only to help the buyer to place his order. This implies that the electronic agent has no effective and independent role in the process of contracting electronically but acts as a mere tool for receiving orders from customers, in which the placement of an order is regarded as the intention of the customer to contract, and even where the agent plays an active role, such as by adjusting the prices.

3.4.3 Ignorance of the Meeting of a Particular Intention for Each Contract

This theory approaches the issue from the angle of neglecting meeting an intention in

[39] See amazon.co.uk, section on terms and conditions.

contracting through electronic agents, which is a fundamental requirement in Iranian law and other legal systems in question. Under this view, the courts, in order to validate such electronic contracts and rather than looking for a particular intention for making an offer and acceptance in each contract to observe the meeting of minds, should neglect the requirement of satisfaction of a particular intention for each contract and rule the validity of electronic contracts by assuming a general intention of the person who sets the electronic agent up to conclude e-contracts.[40]

The theory can be objected to because traditional principles of contract law in all legal systems, including Iranian law, rule that for each contract a particular intention to create a legal relation must be met, a requirement that cannot be ignored, unless the contract is void. Furthermore, while there are other reasonable solutions which do not prejudice the foundations of traditional principles, such a belief is strongly recommended to be put aside.

3.4.4 Objective Approach Justifies the Existence of the Legal Intention

Common law systems, such as those found in England and the USA, apply an 'objective approach' rather than a subjective one to recognize an intention to be legally bound by the process of forming a contract. According to this approach, the legal intention of the parties can be inferred by what a 'reasonable person' concludes from their words and conduct, regardless of their actual state of mind.[41] In contrast, in Iranian law as a civil law system, the subjective approach has priority over the objective one.

This theory states that the legality of a contract made by the intervention of an electronic agent can be justified by the objective approach, as the functions of the electronic agent are in fact the external manifestation of their owner's intention. In other words, this theory implies that an electronic agent works as a tool indicating the intention of the owner. Therefore, if the functions of the electronic agent in the eyes of a reasonable bystander can be regarded as the legally binding intention of its owner to the contract concluded, it will be valid legally, even if the owner had no intention of concluding such

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[40] Lerouge, J.-F., *The Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level*, The John Marshall Journal of Computer & Information Law, 2000, XVIII (2); Weitzenboeck, E.M., *Electronic Agents and the Formation of Contracts*, International Journal of Law and Technology, 9(3), 2001.

[41] *Smith v Hughes* (1871) LR 6 QB 597, 607.

a contract. Relating to this discussion, Lord Prosser observes an important fact in the case of *Dawson International plc v. Coates Paton plc*:[42]

> In considering whether there is a contract between the parties, in any particular case, it will always be essential to look at the particular facts, with a view to discovering whether these facts, rather than some general rule of thumb, can be said to reveal consensus and an intention to conclude a contract.[43]

This perception regarding the electronic agent's role is different from what has been mentioned in the previous theories. Several objections can be made to it. Firstly, in the objective approach the internal intention and its external manifestation are both contained within one person, and if his conduct indicates an intention to be bound by the contract in the eyes of a reasonable bystander, it suffices to validate the contract. However, in contracting through electronic agents the intention and its manifestation are found within two factors: a) the buyer, and b) the electronic agent (on behalf of the seller), respectively. This is different from the way that the objective theory is applied.[44] This means that the person who has established it is not aware of its performance at the time at which it starts contracting automatically; whilst in applying the objective test, the doer is aware of his own acts even though they are against his real intention. Secondly, assuming that this theory is acceptable it is not a comprehensive one since it works only in justifying the question in common law systems, which pay more attention to the objective approach rather the subjective one. This is not the case in Iranian law as a civil law system which apply the subjective approach. Furthermore, this theory is the other side of the tool theory as the electronic agent is employed to manifest the intention of the owner.

3.4.5 Electronic Agent has Legal Personality

Another theory which is supported by a considerable number of writers, such as Allen, Widdison, Andrade and Wetting, but is against Iranian law, states that the electronic agent has 'legal personality' and, as such, a contractual capacity to conclude a valid

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[42][1993] SLT 80.

[43] In this regard the Principles of European Contract Law (PECL) in article 2.102 states: *'The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.'*

[44]Chopra, S. and L. White, *Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis*, P. 21. Nonetheless, the author is of the view that the acts of the electronic agent is a part of the owner's act and such a distinction between their acts to regard them as two separate factors, seems to be objectionable. The reason is that the agent is meaningful when there is an owner and its existence is totally dependent on the owner.

contract since it creates an intention to create a legal relation in itself.[45] Under this theory, three main reasons have been put forward in support of granting electronic agents legal personality.[46]

1. *Moral entitlement:* this means that any existence which is capable of understanding must be granted a legal personality. [47]

2. *Social capacity:* in some cases, according to the social reality a large number of legal persons in a non-legal sense have been regarded as persons as well, such as an association composed of individuals to follow a certain purpose. The personality of the association is distinct from the personality of its founders.[48]

3. *Legal convenience:* one of the main reasons why a commercial company is granted a legal personality is so that it can be sued independently, since it has a distinct personality and separate assets of its own.

A substantial number of objections have been made to this theory, which shows that Iranian law cannot adopt this approach. Firstly, the type of understanding and consciousness ascribed is inherent in its nature but an electronic agent lacks such an inherent characteristic. Any degree of intelligence and an ability to perform innovative actions is the result of the technology used for their creation and the data employed to program their functions. Also, this capability is changeable through technical manipulations to either reduce or increase it, which is not possible in something with an inherent consciousness, such as a human being. Secondly, a legal person performs its legal rights and duties through natural persons, not by itself. Therefore, if the electronic agent is granted such a personality, another person must perform its functions. However, in the current discussion, it is not only the functions of the electronic agent that are not performed by others, but also it is the electronic agent which performs the tasks of

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[45]Allen, T. and R. Widdison, *Can Computers Make Contracts?*; Kerr, I.R., *Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act*, Paper Presented at Uniform Law Conference of Canada, 1999, P. 23; Andrade, F., et al., *Contracting Agents: Legal Personality and Representation*, Artificial Intelligence and Law, 2007, PP. 357-373; Wettig, S. and E. Zehendner, *The Electronic Agent: A Legal Personality under German Law?* Available at: www.acm.org.

[46]Allen & Widdison, PP. 28-30; Kerr, I.R., P.18; Karnow, C.E.A., *Liability for Distributed Artificial Intelligence*, Berkeley Technology Law Journal, 11, 1996, PP. 161-162; Barfield, W., *Issues of Law for Software Agents within Virtual Environments, Presence: Teleoperators and Virtual Environments*, 14(6), 2005, PP. 747-54, available at <http://dl.acm.org/citation.cfm?id=1160024>

[47]For instance, some writers are of the view that as whales are of ability to understand and emotion, they have the right to live. See D'Amato, A., and Chopra, S., *Whales: Their Emerging Right to Life*, American Journal of International Law, 21, 1985, available at <http://anthonydamato.law.northwestern.edu/Papers-1/A911-whales.html>

[48] Weitzenboeck, E.M., *Electronic Agents and the Formation of Contracts*, P. 212.

others. Thirdly, granting legal personality to the electronic agent necessarily means that it has rights and duties like natural persons, i.e., it is capable of enjoying a benefit or bearing a loss. However, in electronic transactions, its success or failure has no bearing on an electronic agent, only on the contracting parties.

Fourthly, under the law of agency in all legal systems there is a relationship between the principal and the agent and they have rights and duties towards each other. If it is said that an electronic agent has a legal personality, then it must perform the duties assigned to it and it must also be held responsible against the loss that the principal suffers if it malfunctions. However, it is clearly not possible to hold an electronic agent liable or take it to court.

Moreover, assuming that the electronic agent has a legal personality, the issues which will be raised are that legal persons own assets and their legal existence may end at any time in the future. Therefore, the property of an electronic agent and the time when its legal personality comes to an end are problematic. Furthermore, it is certainly unclear who its shareholders could be and whether it could hold any assets.

A further objection is that a legal person's affairs, such as those of companies, are wholly organised by natural persons and they do not behave independently, while electronic agents enjoy a level of initiative and independence in their tasks even though this is also controlled by natural persons.

The final matter which requires attention is the way to identify non-natural persons. For instance, every commercial company has a commercial name and brand which are registered in the registry office according to legal formalities. This process facilitates its identification if necessary. If it can be said that an electronic agent has a legal personality, it is not clear how it can be identified, particularly in cases where the control rooms of the agent are based in several states, and a part of its tasks is regulated and controlled by a distinct state.[49] In brief, granting such a legal personality to an electronic agent to justify the legal validity of electronic contracts concluded through it is not logical and is also against the stringent traditional legal rules and principles of

[49] It is possible to establish some registry offices for this purpose, where the users of electronic agents are able to register their identification like a company, and also their own identification as the users. However, this is not the only requirement for granting legal personality to electronic agents, and all of the other characteristics discussed must be met.

Iranian law. Under the traditional law, personality cannot be granted, but is obtained inherently through existing qualities.

3.4.6 Electronic Agent as the Agent of the User under the Law of Agency

Some writers, such as Fischer, apply the same legal rules and principles which regulate the status of real agents in the physical world to electronic agents and regard the latter as the e-version of the former with a capability of having intention to create a legal relation.[50] Their justification is that, similar to a real agent who acts within the powers assigned to him by the principal, an electronic agent works within the pre-written program ordered by its owner.

This theory can be argued against on a number of grounds and cannot be favoured under Iranian law. To grant agency to an electronic agent, as discussed above, the intention of both the principal and the agent to create a legal relation is mandatory, while the electronic agent has no such intention and it only belongs to human beings, as discussed previously.[51] However, it may be said that in granting agency under common law systems, the full capacity of the agent is not necessary; then the electronic agent's status can be discussed under the law of agency.[52] Responding to this opinion, it should be said that although it is true that in some legal systems, such as English and American ones, the full capacity to accept the agency is not needed, a partial capacity is still required. This is in contrast with Iranian law which rules that an agent must have full capacity to contract.[53] In common law systems, a lunatic person with a major level of lunacy cannot

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[50]Fischer, J.P., *Computers as Agents: A Proposed Approach to Revised U.C.C. Article*, Indiana Law Journal, 72(2), 1997, PP. 545, 570.

[51]Even the writer of this theory, Fisher, has criticised it and suggested that in order to grant agency to an electronic agent and apply the rules of agency the existence of consent is deemed. See Fischer, J.P., *Computers as Agents: A Proposed Approach to Revised U.C.C. Article*, P. 569. However, this suggestion has been argued by another author. See Lerouge, J.-F., *The Use of Electronic Agents Questioned under Contractual Law: Suggested Solutions on a European and American Level*, P. 408.

[52]Kerr, I.R., *Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act*.

[53]In Iranian law the agent must be of *full capacity* to contract on behalf of the principal, and he is not a mere intermediary between the principal and the third party. It is his will that conclude the contract. However, the persons without capacity are able to act as the tool of manifesting wills, such as the case that a minor delivers the letter of acceptance to the offeror on behalf of the acceptor (Katouzian, N., *General Rules of Contracts*, Vol. 2, 1st ed., Enteshar Sahami Co. Publication, 1388 (SC), p. 63.). In this regard, English law rules that the full capacity of agent is *not* required as long as he knows and understands what he does (Chitty, J., *Chitty on Contracts, Specific Contracts*, Para 31-35.). This means that a minor or lunatic person of low level of insanity is able to contract as an agent if he understands what he does. American law states that the principal can appoint an agent for doing any task that he (principal) himself has a legal capacity to do it. For example, a minor cannot contract for non-necessities, and, as a result, he cannot appoint an agent to contract for the necessities for him (Bouvier,

act as an agent as he is not able to understand the nature of his own acts. Even in these systems that have a significant flexibility regarding the legal capacity of the agent, if a minor, who has no contractual capacity and does not understand what he does, the role of the minor is as a physical tool of manifesting the will, not as an agent under the law of agency, regardless of the fact that he is a human being not a man-made device such as an electronic agent. This means that while a human being in some cases cannot be liable, such as minors, it is not possible to put liability on an electronic agent and instead it must be treated as a tool.

3.4.7 Electronic Agent as the Agent of the User without a Legal Personality: Theory of Slavery

In Ancient Rome, all proprietary rights belonged to the head of the family. All members of the family, as well as the slaves, acted as the arms of the head of the family. Slaves had no power but were able to conclude legally binding contracts with the permission and on behalf of the head of the family. The consequences of such a contract were borne by the head of the family.

Supporters of this theory have analysed the nature of electronic contracts formed by electronic agents by referring back to the law on slavery.[54] They state that the existence of an intermediary in commercial relations is not a new issue. What an electronic agent does is analogous to tasks performed by slaves who had no legal personality. Both of them have some skills, are used by their owners to form contracts, and are not merely tools of communication.

There are some objections to this theory which proves that it cannot be adopted by not Iranian legal system. Firstly, the owners of slaves were bound by contracts concluded by their slaves subject to the power granted to them by the owners, i.e., they were not under any contractual obligations arising from the contracts formed without their permission. This issue cannot be raised in respect of an electronic agent and its owner. Electronic agents have neither a real intention to conclude contracts, nor can they be assigned an

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J. and D.A. Gleason, *Institutes of American Law*, Vol. 1/2, 1999, Law Book Exchange Ltd., P. 315.). In contrast, there is no need for the agent to be of full capacity. This means that a person without capacity for concluding specific contracts can be an agent for another in that types of contracts. Therefore, minors can transact as agents of others (*Bunker v. Miles*, 30 Me, 431; *Walker v. Palmer*, 24 Ala. n. s. 358; *Moore v. Mandle Baum*, 8 Mich.), i.e. they can be as intermediaries in the exchange of wills (Bays, A.W., *American Commercial Law Series*, 2nd ed., 1920, Callaghan and Company).

[54]Kerr, I.R., *Providing for Autonomous Electronic Devices in the Uniform Electronic Commerce Act*; Fischer, J.P., *Computers as Agents: A Proposed Approach to Revised U.C.C. Article 2*; Middlebrook, S.T. and J. Muller, *Thoughts on Bots: The Emerging Law of Electronic Agents*, Business Lawyer, 56 (1), 2000.

affair. Secondly, essentially it can be said that there was no difference between the slaves and their owners. Both were human beings, it was simply the social contract and the culture of discrimination that placed one section of society under the control of another. This makes any comparison between slaves and electronic agents problematic. Thirdly, the law of slavery is not currently in force and because this practice has been banned it is not a good solution to resurrect abolished rules. Finally, it is not acceptable to have an agent without a legal personality. At most, what can be said of this theory is that the electronic agent must be regarded as a communication tool and nothing more, in the same way as slaves were mere intermediaries between their owners and third parties. This is what is concluded by applying Iranian traditional law without resorting to any particular theory.

3.5 Electronic Agents in the Context of Iranian Electronic Commerce Act 2004

It has been concluded that under Iranian traditional law of contract an electronic agent acts as a mere tool of communication between the contracting parties, which is called 'tool theory'. Now, it should be considered that what is the position of the IECA towards electronic agents and to what extent it reflects the outcome resulted under Iranian traditional law of contract, and whether it can be developed with taking into account the approaches of other legal systems in question. There are two possibilities: either it regards an electronic agent as a tool of communication similar to the Iranian traditional law or takes any other approach. If it takes the same approach concluded under Iranian traditional law, i.e., it favours the tool theory, then there would be no problem; if it takes any other approach, the conflict must be resolved in favour of the traditional law and suggestions should be put forward to develop and modernize it.

In considering the provisions of the Act related to the electronic agent it appears that the IECA implies that electronic contracts can be formed by the use of electronic agents.[55]However, there is a contradiction which needs to be resolved in favour of the traditional law and this can be developed through a comparative study of the statutes in question. The issue is that the IECA regards an electronic agent as a 'person' which, as a result, can have rights and duties, and at the same time it indicates that it is a tool of

[55] IECA, article 18(2). This will be considered in more details later in this part.

communication as Article 18 of the IECA provides that the data messages issued by an electronic agent are attributed to the originator, i.e. the owner of the electronic market.

Moving on the statutes in question, although they indicate the legal possibility of contracting through electronic agents, they provide different wording on the rules of attributions. Some of the statutes attribute an electronic communication or a data message containing an offer and an acceptance communicated by an electronic agent to its originator, such as the MLEC; some other attribute them to the legal entity which operates the electronic agent, such as the Explanatory Note of the Convention; and some others, such as the UCITA, attribute them to the person that set it up. Statutes such as the UETA and UCITA in American law directly recognize contracting through electronic agents. They have similar approaches but use different wording. Other statutes, such as the EC Directive on Electronic Commerce and English law, have no provisions regarding this issue. The gap that can be found in all statutes, including the IECA, is that *none have expressly addressed the status of an electronic agent in contracting electronically, although they have ruled that contracts made by electronic agents are legally valid*. Furthermore, the statutes in American law have not elaborated on the rules of attribution and this may result in difficulties in determining the issue of liability.

The aim of this part of the chapter is, therefore, to suggest the best direct provision to the Iranian Electronic Commerce Act 2004, which covers the legal validity of contracts formed by electronic agents and also the status of electronic agents in contracting electronically, bringing to an end any legal controversies. The content of the provision must be provided by taking into account the relevant provisions of the statutes in question.

The following lines will first consider how the statutes in question view electronic agents and then decide how the IECA should be developed.

3.5.1 Electronic Agent is the Tool of Communication in the Context of Statutes on Electronic Commerce

An examination of the statutory regulations on electronic commerce shows that it is legally possible to conclude a valid contract through electronic agents. Although they have not made express provisions on the status of electronic agents, it can be understood that they are in favour of the ‘tool theory’.

To begin with, Article 11(1) of the MLEC provides that: 'offer and acceptance may be expressed by means of a data message'. It is obvious that the data messages which bring together offer and acceptance may be communicated by means of electronic agents. However, the role of the electronic agent should be considered. In this regard, although the MLEC does not directly consider the issue of manifestation of wills by means of automatic message systems such as an electronic agent,[56] neither does it provide obstacles to the use of electronic agents and addresses, as the rules of attribution imply:

> (1) A data message is that of the originator if it was sent by the originator itself. (2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent: … (b) by an information system programmed by, or on behalf of, the originator to operate automatically.[57]

This Article determines that the data message sent by an electronic agent is regarded as sent by the originator himself. To explain this, according to the Model Law the manifestation of wills is prescribed by the exchange of data messages,[58] and under clause 2(b) above, the data messages can be produced and sent by an information system that has been programmed by the originator or his agent[59] to operate automatically.[60] The Guide to Enactment of the Model Law provides that the data messages created by computers and without the direct intervention of human beings must be regarded as data messages of a natural or legal person on whose behalf the computer has operated;[61] the MLEC attributes the manifestation of wills through an information system to its owner. This means that the contracts concluded by computer systems and without the intervention of human beings are enforceable and attributable to those who have set them up and the agent is only a tool of communication between the parties. However, the objection that can be made is that a direct reference to the role of

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[56] MLEC, article 13(1)(2).
[57] MLEC, article 8.
[58] MLEC, article 12.
[59] That a person has sent the data message on behalf of the originator was of an authorisation under the law of agency or not is beyond the scope of the Model Law. This issue must be considered under the applicable legal system.
[60] If it be accepted that one of the clear examples of information system is electronic agent (although theUNCITRAL was not of such belief in the stage of preparation of the Model Law (ECC/EN, para. 212), then the possibility of manifesting will through electronic agent would be prescribed. This means that from the prospective of the Model Law on Electronic Commerce an electronic agent can concluded a legally valid contract. But as to the legal status of electronic agent whether it is a mere tool of communication or of another nature there is no indication therein. The reason may be that the Model Law never intended to address substantial issues and such issues have been assigned to the applicable law to the relation of the parties.
[61] MLEC/GE, para.106 and 107.

electronic agents would remove any legal uncertainties without deriving the result from different provisions.

The CUECIC also has a clear provision on the validity of electronic contracts: 'A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication'.[62] This provision means that in order to form a legally valid contract, an intention to be legally bound may be manifested by automatic data systems such as electronic agents.[63] However, apart from this general provision, it has an express reference to the possibility of concluding valid electronic contracts by electronic agents employed by one or both of the contracting parties:

> A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.[64]

This provision reflects the principle of non-discrimination[65]as one of the underlying principles of the Convention and does not give effect to the intervention of human beings in the process of forming contracts electronically,[66] regardless of whether the message system is fully automatic or semi-automatic and a part of its function requires the intervention of human beings to be completed.[67] However, the status of electronic agents has not yet been clarified. In this regard, the Explanatory Note of the Convention adds that: 'Electronic communications that are produced automatically by message system or computer and without the intervention of human beings must be regarded as a message sent on behalf of the legal entity that has operated the message system or computer'.[68] However, the criticism is that the status of electronic agents has still not been addressed, although what can be inferred from the above-mentioned provisions and the Explanatory Note of the Convention is that the Convention supports the tool theory.

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[62] CUECIC, article 8(1).
[63] CUECIC/EN, Para. 208.
[64] CUECIC, article 12.
[65] The principle of non-discrimination is one of the four main underlying principles of almost all statutes on electronic commerce. In this regard, for instance, the MLEC in article 5 provides: *'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.'*
[66] CUECIC/EN, Para. 210.
[67] CUECIC/EN, Para. 213.
[68] *Ibid*, P. 70.

In American law, the UETA recognizes the validity of contracting through electronic agents and provides that a contract can be formed by the interaction between: the electronic agents of the parties, and an electronic agent and a person. It expressly approves the possibility of contracting through electronic agents and provides a definitive response to all arguments about the lack of a legally valid intention in contracting through electronic agents:

> (1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements. (2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.[69]

In another of its provisions, when discussing attribution rules it provides that: '(a) An electronic record or electronic signature is attributable to a person if it was the act of the person'.[70] This means that the acts of an electronic agent including any errors resulting from its malfunction are attributable to its operator. However, a clear distinction has not been made between the conditions of attribution and the type of non-attributable acts in the UETA and this is a ground for objection. Furthermore, there is no clear reference to the status of an electronic agent in contracting electronically. The UCITA also recognizes the conclusion of electronic contracts by means of electronic agents: '(a) A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.'[71] Similar to the UETA, it goes on the attribution rules without referring expressly to the status of electronic agents:

> A person that uses an electronic agent that it has selected for making an authentication, performance, or agreement, including manifestation of assent, is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations.[72]

The Electronic Signatures in National and Global Commerce also endorses the use of electronic agents:[73] 'A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or

[69] UETA, section 14.
[70] UETA, Section 9.
[71] UCITA, Section 202 (a).
[72] UCITA, Section107(d).
[73] E-sign, Section101 (h).

enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents'.[74] But being effective of these consequences it has provided a condition: 'so long as the action of any such electronic agent is legally attributable to the person to be bound'. This means that if the acts of an electronic agent are not attributable to its user legally, the contract concluded will lack any legal validity. However, as an objection, the requirements of what is 'legally attributable have not been explained and this may cause difficulties in determining the issue of liability.

In the EU and the UK, statutes have not focused enough attention on the position of electronic agents. Despite Article 9 of the EC Directive on the Electronic Commerce, recognizing the legal validity of contracts made by electronic agents,[75] this provision has not been incorporated into the UK's Electronic Commerce Regulations 2002. The reason may be that Section 8 of the Electronic Communications Act 2000 has been regarded as sufficient to remove the conflicts between the conditions of statutory laws and the EC Directive without any need for its repetition. This Section indicates that the relevant minister of each area of law is able to modify the traditional law to meet the needs of electronic commerce. For instance, if an Act requires a document to be evidenced in writing, the minister can modify the law to satisfy the requirement by the use of electronic documents.[76] However, this short consideration shows the need to make the status of electronic agents clear in these regulations.

3.5.2 Developing the Iranian Electronic Commerce Act 2004 with a Direct Reference to the Status of Electronic Agents

In the IECA there is no explicit mention of electronic agents. The reason seems to be that the Model Law, from which the IECA was mainly adopted, has not addressed this issue.

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[74] 15 U.S.C. ss7001 (h).

[75] The EC Directive on the Electronic Commerce has no express provision on contracting through electronic agent. However, it encourages the Member States to recognise the possibility of contracting by electronic agents. The section 3 under the rubric of 'contracts concluded by electronic means' in its Article 9 (1) provides that: *'1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall ensure in particular that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.'* This provision has nothing more about the attribution rules and autonomous agents. It only tries to remove the obstacles to concluded contracts thought electronic agents. A number of states such as Belgium, Germany, Spain, France, Finland and Luxembourg have incorporated rules in their national laws grating the same level of validity to the contracts made by electronic means that the contracts concluded through traditional device benefit from.

[76] For more detail see the chapter four.

However, two opposing approaches can be inferred from the IECA and these are discussed below. It will be examined that, having considered the approaches of the statues in question, how the IECA can remove the contradiction and be developed in this area.

a) Definition of Person that Views an Electronic Agent as a Person

A subtle point can be extracted from the definition of 'person' in Article 2(m): 'Any natural or juridical person or the computer systems under their control'. In contrast to Iranian traditional law where only two types of natural and legal persons are recognized, this law indicates three types of persons: 'natural', 'legal' and 'computer systems under their control'. This implies that an electronic agent should be regarded as a person and also means that, although the Act does not entertain the possibility of contracting electronically by electronic agents, the definition of 'person' confirms such a possibility. However, the criticism is that it does not regard an electronic agent as a mere tool of communication, but rather grants it a legal personality. As a result, it can have rights and duties and can be regarded as the e-version of real agents in the physical world - a theory that has already been rejected in the previous part.

b) Attribution Rules that View an Electronic Agent as a Tool of Communication

Similar to the MLEC, Article 18 of the IECA implies the possibility of contracting by electronic agents and attributes its actions to the originator. It provides that: 'In the following cases, a "data message" is attributed to the originator … If it is sent by a programmed information system or automated agent on behalf of the originator'. Although similar to the other statutes in question, there is no clear indication of the status of electronic agents; however, it does imply the use of the tool theory.

In comparing the two approaches, the first approach is striking but it can be countered strongly and so should be rejected. It would be better if the legislator omitted the phrase 'the computer systems under their control' from the definition of 'person' in Article 2 as this would avoid any conflict with the basic rules of traditional law. Therefore, the reform of the IECA is necessary in this regard. This reform could take the shape of a direct provision stating that an electronic contract can be formed by communicating data messages such as what was adopted in the MLEC: 'Offer and acceptance can be expressed by data messages'.

Besides this, it is also recommended that a reference should be made to the legal validity of contracts formed by electronic agents, such as the ones contained in the

CUECIC and the UETA. However, the status of the electronic agent has not yet been clarified. In this respect, firstly, it is highly recommended that the definition of 'person' be reformed in Iranian legislation and that the term 'information systems' be omitted since it is against the obvious traditional principles of law. Secondly, taking into account the importance of electronic agents, a direct provision relating to its role in contracting electronically could remove any uncertainties. However, it must be in compliance with the Iranian traditional law as discussed in the previous part.

One further point needs to be addressed which none of the statutes have focused on. The statutes in question, including the IECA, attribute the acts of the electronic agent to the originator, without making any distinction between a contracting party using his own electronic agent or one established by another. When one or both parties benefit from their own electronic agents, such as the website of amazon.co.uk, it is clear that the functions of electronic agents can be attributed to its owner. However, sometimes the electronic agent is designed by one person and is used by others. A clear example of this is ebay.co.uk. The owner of the website does not deal through the electronic agent for himself; he only provides a facility by which third persons can deal with each other and the owner obtains a percentage as a commission. Here, it must be noted that the persons liable for the acts of the electronic agent are the contracting parties, not its establisher, as they are the ones who must bear the legal consequences of their interactions through an intermediary called the electronic agent.

Responding to all these issues, the following comprehensive provision is recommended to be included in the IECA:

> Offer and acceptance can be expressed by data messages produced by an automated data message system, such as an electronic agent, as a tool of communication between the parties, and they are attributed to the person who employs it for the purpose of making electronic contract for himself.

This provision will help to clearly set down the liability for the errors that an electronic agent makes during electronic communications, as will be discussed in the next part.

3.6 Mistakes and Errors in Contracting through Electronic Agents and the Liable Person

It has been concluded that in contracting though electronic agents, the role of an electronic agent is no more than a tool of communication between the parties. The question to consider here is who is liable for the consequences of an error made by an

electronic agent in the process of forming an electronic contract. Before doing so, it is useful to distinguish terminologically between a 'mistake' and an 'error'. A 'mistake' is discussed in the traditional law of contract as a vitiating factor of the intention of the contracting parties and is the act of a human being. An 'error' is a malfunction of an electronic agent as a tool of communication. This is a technical term rather than a legal one. This part will consider the liability for errors made by an electronic agent, not the issue of mistakes. In terms of mistakes, the basic rules are the same, whether the contract is formed electronically or traditionally, and only a passing reference will be made to them.

Before commencing the legal discussions, it is necessary to determine the parties involved in contracting through electronic agents. Where only one of the contracting parties employs an electronic agent there are, at least,[77] four parties involved: the owner of the website (the person who sets it up), his electronic agent, the programmer of the electronic agent, and the other party (i.e. the customer). Where both of the parties employ electronic agents, at least five or six parties are involved: the owner of the website, his electronic agent, the programmer of this agent, the other party, his electronic agent, and the programmer of his agent.[78] In cases where the programmer of both electronic agents is the same person, five parties are involved. Obviously, where one of the contracting parties makes a mistake, its legal consequences will be determined by the traditional rules of mistake as will be considered shortly.

3.6.1 Human Mistakes in Contracting through Electronic Agents

In Iranian law, a mistake at the time of conclusion of contract[79] has one of two legal effects depending on the type of mistake: if the mistake occurs regarding 'the main aim of the contract' such as the subject matter of the contract or a 'fundamental characteristic of the subject matter of the contract', or 'the other party of the contract

[77] The phrase 'at least' means that there may be other elements. For instance, the owner of a website may contract with a programmer to provide software for running the website. This programmer may conclude a sub-contract with another programmer. As it is not feasible to consider the status of all factors, then only the abovementioned elements are discussed.

[78] In cases that the acts of the electronic agent are attributed to the programmer, such as the case that he does not write the program in compliance with the professional conditions of programming or writes it beyond the agreed terms and conditions which leads error it the electronic agents operations and loss. In this example the programmer must be held liable. What is discussed in this part, is determining the liable person of the loss among the involved parties. For example, if there is a link between the resultant loss and the function of the programmer, he can be held liable.

[79] Any mistake before or after making of the contract has no legal effect.

where his personality does matter', it makes the contract 'void' unless the contract is 'voidable' by the party who has made the mistake, such as a mistake in the price and secondary characteristics of the subject matter.[80]

Under English law, only 'operative mistakes'[81] make the contract void; otherwise, the contract is considered sound. Operative mistakes may occur regarding the 'nature' of the subject matter of the contract, the 'existence' of the subject matter of the contract, or the 'identity' of the other party to the contract.[82] All types of mistakes can be categorized as follows:

a) Common mistake: this type of mistake exists where both contracting parties make the same mistake. There are three different types of common mistakes with changes in 2004:

i) *Res extincta*: means a mistake as to the existence of the subject matter of the contract). This kind of mistake makes the contract void, since the subject matter of the contract does not exists at the time of formation of the contract.[83] Here, the contract will be held to be void due to the mistake. Section 6 of the Sale of Goods Act 1979 reflects the relevant judicial decisions where the goods have perished: 'where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.'

ii) *Res sua*: means a shared mistake as to the ownership of the subject matter of the contract. In other words, one party of the contract buys something which in fact belongs to him. Here, the contract is rendered void.[84]

iii) Mistake as to the quality: this type of mistake is only capable of rendering a contract void if the mistake is as to the existence of some quality that renders the subject matter of the contract essentially different to that what it was believed to be,[85]otherwise the contract is valid.[86]

b) Mutual mistake: this type of mistake exists where the contracting parties are at cross-purposes. To determine the validity of the contract, the courts apply an objective

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[80] Iranian Code of Civil, Articles 200 and 201.
[81] Operative mistakes must be in fact not in law. Mistakes in law have no legal effects as ignorance of law is not excuse.
[82] Here only a concise and precise consideration is poses.
[83] *Scott v. Coulson* [1903] 2 Ch 439; *Couturier v Hastie* [1856] 5 HL Cas 673.
[84] *Cooper v. Phibbs* (1867) LR 2 HL 149.
[85] *Great Peace Shipping v. Tsavliris (International) Ltd* [2003] QB 679.
[86] *Bell v. Lever Bros* [1932] AC 161; *Leaf v Int Galleries* [1950] 2 KB 86.

test. If a reasonable person believes that the parties of the contract has a single meaning of the contract, it is valid on that mining; otherwise, the contract is set aside because of the mistake.[87]

c) Unilateral mistake: in this type of mistake only one parties is mistaken and the other in aware of the mistake. This type of mistake can be considered under two main titles:

i) Mistake as to the terms of the contract: is where one party makes a mistaken statement of intent and the other party knows it; here the mistake is operative and the contract is void.[88]

ii) Mistake as to the identity: if there is a unilateral mistake as to the identity of the person contracted with, it was the rule that the contract will only be void for mistake where the identity of the contracting person is of *fundamental* importance to the contract[89]; and this is made clear by the party who is mistaken *before* or *at the time of* the contract.[90] However, since 2004, an important rule has been made on this rule by the case of *Shogun Finance v Hudson*[91]. The court draw a distinction between contracts made *inter absentes* (at a distance) and contracts made *inter praesentes* (face to face transactions). Where the parties contract at distance, e.g. through the post, it was the rule that the contract will only be *void* for mistake where the identity of the contracting person was crucial to the contract[92]; However, where a contract is made *inter praesentes* (face to face), the contract is considered to be formed with the actual person irrespective of the identity assumed by that party.[93]

Furthermore, in 2004 the role that equity can play in common mistake changed. In 1950 in *Solle v. Butcher*[94] Denning LJ identified an equitable jurisdiction under which the court are able to intervene where the parties have concluded an agreement that was binding in law under a mistake. In other words, in some cases even where the contract is valid at law it may nevertheless be voidable in equity on the ground of mistake. This position indicated two separate jurisdictions over more than half a century. However, following the case of *Great*

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[87] *Raffles v. Wichelhaus* (1864) 2 H & C 906; *Scriven Brothers*& Co *v. Hindley*& Co. (1913) 3 KB 564.
[88] *Hartog v. Colin & Shields* [1939] 3 All ER 566.
[89] *Cundy v. Lindsay* (1878) 3 App Cas 459.
[90] *Boulton v. Jones* (1857) 2 H & N 564.
[91] [2003] 3 WLR 1371.
[92] *Cundy v. Lindsay* (1878) 3 App Cas 459.
[93] *Boulton v. Jones* (1857) 2 H & N 564; *Lewis v. Avery* [1971] 3 WLR 603;*Ingram v. Little* [1961] 1 QB 31; *Phillips v. Brooks* [1919] 2 KB 243.
[94] [1950] 1 KB 671.

Peace Shipping v Tsavliris International[95] the appeal rejected the notion that there is a separate equitable jurisdiction to rescind the contract on the ground of common mistake. Now, equity does not provide relief from mistakes where the common law does not provide relief. In other words, the case concludes that there is no equitable jurisdiction to set aside a contract for mistake. This is a very significant change in the role of equity in discussing issue of mistake. Also, the Court of Appeal in *Brennan v. Bolt Burden*[96] in which the key question was the effects of mistake as to law since it was argued that a compromise agreement had been made under a common mistake of law, held that in principle a mistake as to law can create a right to set aside a transaction entered into in reliance on the common mistake, but come to the decision that, on the facts, the claimant was not entitled to relief because she had not entered into the transaction as a result of mistake. Ultimately, if one party signs a document under a complete misapprehension as to its affects, the signed document is fundamentally different to what was believed at the time of signing and the signatory was not careless in signing, a type of mistake called *non est factum* (it is not my deed) may be raised.[97]

American law has a different approach. It only has one general rule: if there is a mistake regarding an essential issue in the minds of the parties, the contract is voidable by the person who made the mistake.[98] However, as stated before, the rules on mistakes in contracting electronically are the same as in the physical world. As such, there is no need to reconsider them here. Due to this, the statutes on electronic commerce have not addressed this issue as well and have left it to be decided by the traditional laws.[99]

Before considering the issue of error, the issue to be considered is the 'way' that the buyer, a human being, made the mistake in contracting through websites. This will show, for example, how the mistakes about the identity of the seller or the buyer may have taken place, since neither the seller knows the buyer nor vice versa. One important instance is the case where a person intends to buy goods from the website of A and this is a material issue for him, but mistakenly buys from the website of B, for example, because of the similarity between the domain names of the two websites. The question

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[95] [2003] QB 679.
[96] [2004] EWCA Civ 1017; [2004] 3 WLR 1321.
[97] *Saunders v. Anglia Building Society (Gallie v Lee)* [1970] AC 1004.
[98] Restatement Second, Sec. 152 cmt a.
[99] It may be necessary to add that a void contract is a like a contract that has not been formed at all and then has no legal effects. However, a voidable contract is a contract that has been formed but there are vitiating factors such as mistake, which gives the person who suffers from that to cancel the contract if he wants.

that arises is whether there is any valid contract in this case. In the view of the author, in online commerce a mistake in identifying the intended website can be regarded as the same as a mistake in establishing the identity of the other party in a physical environment. The reason for this is that the owner of the website reflects his identity through his website; any contract agreed through it is, in fact, a contract with him. Therefore, any mistake in choosing the intended website has the same legal effect of a mistake as to the identity of the other party. This means that, following to the traditional rules, any mistake relating to the identity of the other party, in contracting through website, makes the contract void under Iranian law; and upon meeting the requirement mentioned above in distance contracts, i.e. where the identity of the contracting person was crucial to the contract and this is demonstrated by the claimant, which is the case here as contract is formed through website, the contract is also void under English law, and voidable under American law, and

Another common[100] mistake[101] is the incorrect display of prices. There are many examples of this type of mistake. In 2003, *Amazon* put a particular TV set on sale for $99.99 instead of $1049, and received around 6000 orders in a very short space of time. Similarly, the website of *Argos* put a Sony TV on sale for £2.99 instead of £299. Normally the displayed price can be regarded as the main reason for the buyer wishing to enter into a contract and, as a consequence, it can be regarded as a fundamental characteristic of the sale which is affected by a mistake. The above traditional legal effects of a mistake in choosing an intended website also apply in these cases, as such a drastically low price can be regarded as an obstacle to the existence of an intention to create a legal relation. These types of mistakes also lead to the contract being void. However, to avoid such a mistake being controversial and even binding on the sellers, they can incorporate a term into the terms and conditions section of the sale on the website where the contract was formed at the time that the goods ordered are dispatched. In this way, the seller has time to review the order and check if any mistakes have occurred. As a practical example, the policy of *Amazon* is helpful in this regard, where the terms and conditions of sale include the following:

> When you Place an Order to Purchase a Product from Amazon.co.uk, we will Send you an E-mail Confirming Receipt of your Order and Containing the Details of your Order.

[100] Here ‘common’ means ‘usual’.
[101] Here, the word ‘common’ means ‘usual’, not that ‘common’ in the meaning of one of the general types of mistake under English law.

> Your Order Represents an Offer to us to Purchase a Product which is Accepted by us When we Send E-mail Confirmation to you that we've Dispatched that Product to you (the "Dispatch Confirmation E-mail"). That Acceptance will be Complete at the Time we Send the Dispatch Confirmation E-mail to you. Any Products on the Same Order Which we Have not Confirmed in a Dispatch Confirmation E-mail to have been Dispatched do not form Part of that Contract.

One more common mistake occurs when the buyer mistakenly orders the wrong number of goods. For example, instead of 1 the customer enters 11. These types of mistakes are called 'input mistakes'. Iranian traditional law of contract has no rule regarding any mistake on the quantity of goods ordered. Then, it simply regards it as a valid and enforceable contract. It is also hard to prove whether the alleged buyer of the mistaken number of goods has really made a mistake at all, or has ordered the purported quantity at that time and then claimed that a mistake had occurred in order to avoid the contract. What is interesting in electronic commerce is that where the buyer makes any mistake regarding the quantity of the goods ordered, he can still avoid the contract in two ways: through the right of cancellation or through withdrawal of the offer.

In terms of the right of cancellation, Article 37 of the IECA permits the consumer to cancel the order for any reason:

> For any distance transaction the consumer shall have a period of at least seven working days in which to cancel the contract (right of cancelation) without penalty and without giving any reason. The only charge that may be made to the consumer is the cost of returning the goods.

Regarding the start of the cancellation period Article 38 continues:

> The cancellation may be exercised as follows: a) In case of sale of goods, from the day of delivery of goods to the consumer and in case of sale of services from the day the contract is effective.

It is clear that when the buyer receives the goods ordered and finds out that there is a mistake regarding the quantity of the goods, he can apply his right of cancellation to release himself from the contractual liability of the unwanted quantity of goods. It is necessary to note that this option is only available for consumers in B2C contracts due to consumer protection policies.

The buyer can also seek to withdraw the order altogether. This option has mainly been addressed in the CUECIC by developing the concept of 'withdrawal of input errors'. Article 14 of the CUECIC states that:

> 1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made.

The IECA has no direct provision on this. However, Articles 19 and 20 of the Act imply that if the data messages have been mistakenly issued by the originator, then it is deemed as a non-sent data message. This provision is open for abuse as it is difficult for the originator to prove that the data has been sent mistakenly. Also, the originator may have sent the data intentionally and knowingly without any mistake but he may resort to Articles 19 and 20 in order to avoid the content of the data. Because of this, it is suggested that the IECA adopt a policy similar to that provided by the Convention where mistaken orders cannot be withdrawn completely as if there was no order at all, but only partially. It is necessary to note that this option is available for the mistaken party in both B2C and B2B contracts. The website owners must provide the technical infrastructures for such a withdrawal by the customers.

3.6.2 Errors of the Electronic Agent and the Person Liable

Where both parties to the contract are natural or legal persons, once a mistake in made on one side, the other party warns him. In contrast, in contracting electronically where at least one of the parties employs an electronic agent, the probability of correcting the error made by the electronic agent is not high and this may cause a substantial loss.[102]The sources of these errors vary. In some cases, an electronic agent performs an action in an unexpected way. For instance, if the pre-written rules are not comprehensive enough, their application may lead to errors. Sometimes, the rules may have been written correctly, but their performance does not provide the desired outcome for the owner of the electronic agent. In some cases, errors occur when the operations of the electronic agent are disturbed, for example, due to electrical power surges. In other cases, external factors lead to errors, for example, commercial rivals

[102] The consequences of error have not been discussed in the MLEC, as it does not address the substantial issues. The CISG also has not considered issues on the validity of contract and regards them out of the scope of the convention (Article 4(a)). Other international documents such as the Principles of International Commercial Contract (UNIDROT) have considered the effects of error on the validity of contract limitedly (Article 3.5 and 3.6).

may infect the information system with a virus.[103] This raises the matter of security in contracting electronically through an electronic agent.

Determining the persons liable for errors caused by the operations of an electronic agent may be considered in three separate parts: where the electronic agent makes an invitation to treat; where it makes an offer; and where it is employed by persons other than its owner.

3.6.2.1 Electronic Agent Makes an Invitation to Treat on behalf of the Owner of the Website: amazon.co.uk example

In some cases, the electronic agent acts as an intermediary to make an invitation to treat on behalf of the person who employs it and interacts with the customer. The website amazon.co.uk is a clear example of this. The following diagram shows the relation between the electronic agent and the owner to make an invitation to treat of behalf of the owner on the one hand, and the relation between the electronic agent and the customer to receive his offer on the other.

It has already been concluded that under Iranian law the electronic agent acts as a mere tool of communication between the parties and, therefore, the consequences of any errors, such as the incorrect display of prices and an error in calculating the total price, made by the electronic agent must be borne by the owner of the website.[104] However, he may, in turn, look to discover the reasons for the error, for example, due to poor programming by the programmer of the website. Another approach, put forward by Rasmusen, which comes to the same conclusion as the tool theory, is that the owner of the website is in the best position to control the errors, thus avoiding its detrimental consequences.[105] According to this theory, the customer should be held liable where he is aware of the malfunctions of the electronic agent and is able to avoid contracting and making losses.

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[103] Malcolm, B., and B. Subirana, *Legalising Autonomous Shopping Agent Processes,* Computer Law & Security Report, 2003, P. 379.

[104] For example, if the theory of *'electronic agent is of legal personality'* is chosen, then the electronic agent itself must bear the consequences of errors. However, it would be impossible to follow the electronic agent.

[105] Rasmusen, E., *Agency Law and Contract Formation,* American Law and Economics Association, 2004, P. 380.

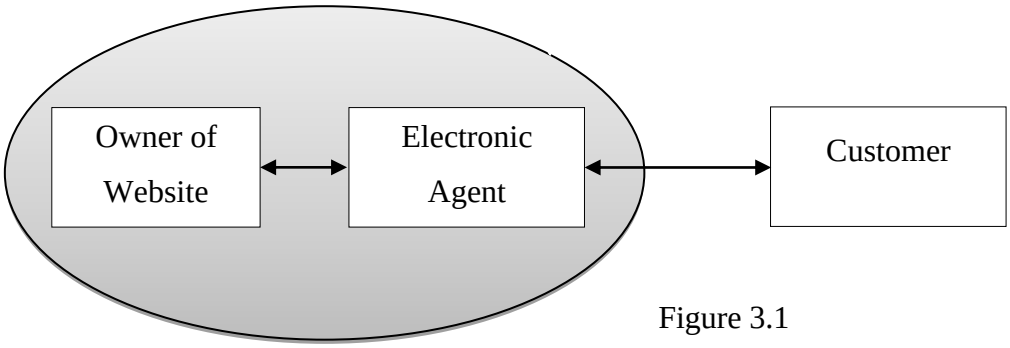

Figure 3.1

However, as the placement of the order by the customer is an offer and the acceptance is performed by a member of staff (a human being) of the website, this provides a time gap for the seller to find out the error and avoid concluding an e-contract. However, if for any reason the contract is fulfilled, the above consideration is applied.

3.6.2.2 Electronic Agent Makes an Offer on behalf of the Owner of the Website: megabus.co.uk example

In some cases, the electronic agent is used by the owner of the website to make an offer. The sale of bus tickets on megabus.co.uk and the display of goods on websites that are regarded as an offer are good examples of this. If the electronic agent in the process of contracting makes an error, for example, if it displays the price at less than the actual price, here again the above consideration is applied. The only difference is that there is no time gap between the time of placing an order and the time of its acceptance by the staff for the error to be checked by a human being, since once the order is placed by the customer the contract is concluded.

The following diagram shows the relation between the owner of the website and the electronic agent to make an offer on the behalf of the owner, plus the electronic agent and the customer to receive his acceptance.

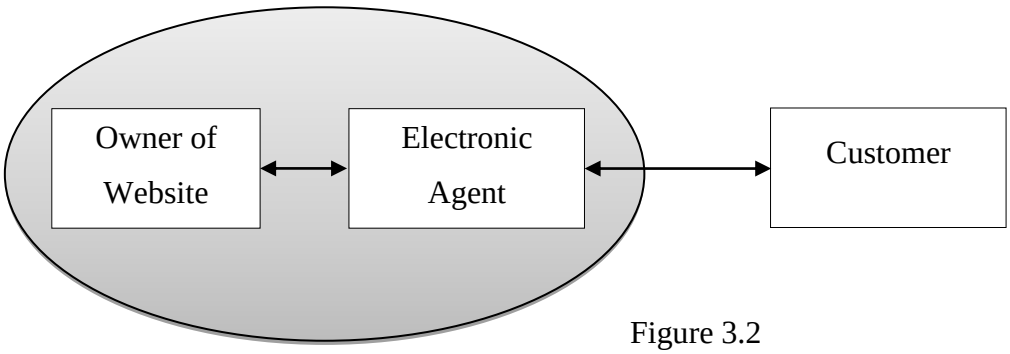

Figure 3.2

3.6.2.3 Electronic Agent employed by Persons other than its Owner: ebay.co.uk Example

There are cases where the electronic agent is designed by the owner of the website but is used by other persons. A clear example of this is ebay.co.uk. On this website, the electronic agent is not used by the owner of the website for making contracts for himself, rather, the person who intends to sell his goods on the website provides the required information of the goods to the electronic agent, and it bids and sells them to a third party according to the given data. The owner is not a party to the contract formed but rather, through the electronic agent, provides a contracting space in which others are able to contract with each other. He acts as an electronic broker and only receives a percentage of the price of the goods sold as commission. As the following diagram illustrates, the electronic agent acts as an intermediary between the seller and the buyer and there is no relation between the owner and the parties to the contract.

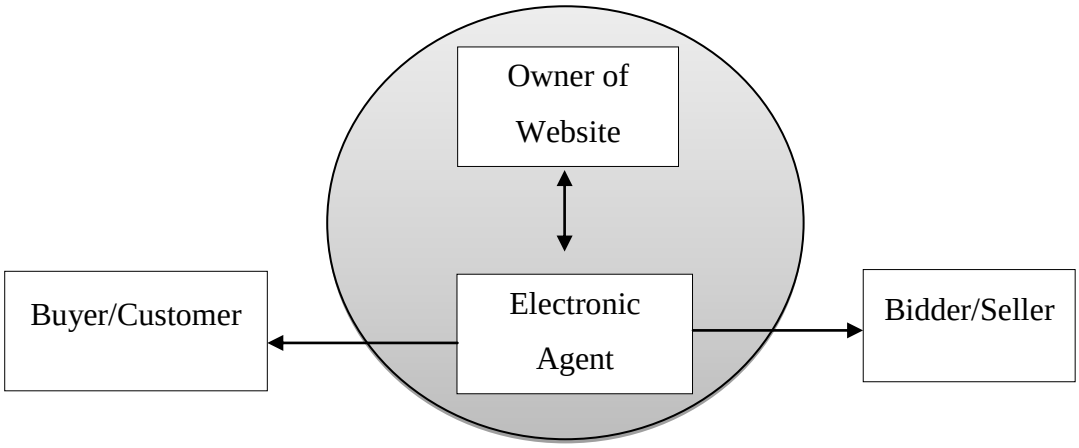

Figure 3.3

Again in this situation, having regarded to the 'tool theory' in Iranian law and what recommended to the IECA in the second part of this chapter, principally the employer of the electronic agent, i.e. the bidder or buyer must bear the consequences of the errors, unless otherwise provide such as the case that the source of the error is the lack of accurate programming of the software of the electronic agent in which the owner of the website must be held liable, and he can in turn sue the programmer. This is true in the case where the owner of the website knowingly and intentionally operates wrong doer electronic agent. The operation of the theory put forward by Rasmusen, mentioned

above, leads to the same result.

3.6.2.4 Interaction of Two Electronic Agents

In some cases, both of the parties may use electronic agents for the purpose of contracting electronically. In this situation, each of them is responsible for the errors of their own electronic agent. However, in some cases it may be difficult to determine which of the electronic agents has erred. In these situations, the assistance of computer experts is helpful to determine which of them has erred and decide on the liable person under the 'tool theory'. The following diagram shows that the interaction is between two electronic agents and their owners have no direct intervention.

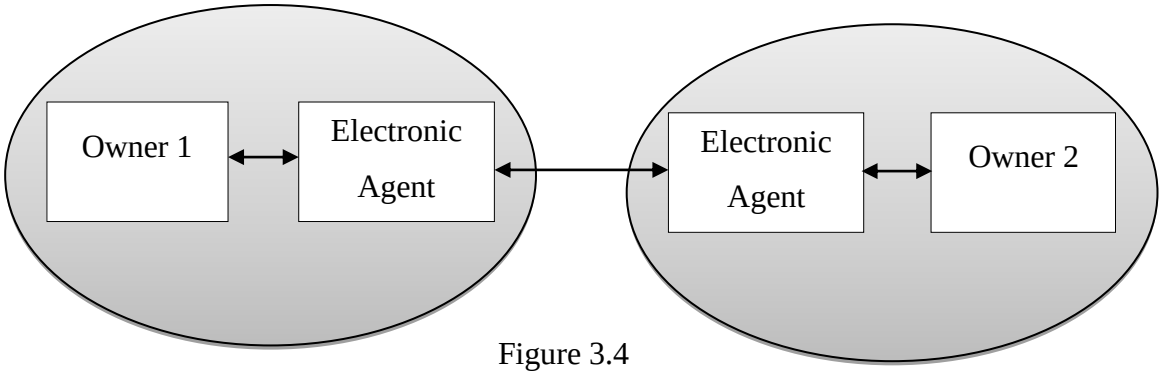

Figure 3.4

From the above, it is clear that an electronic agent is provided by a computer software expert who writes its programme under the mandate of the owner of the website. As a general rule, the user of an agent is responsible for any loss caused by it and must bear the risk of its use. However, the question is the extent to which the programmer is responsible. The user of the electronic agent may approach the programmer claiming damages for any loss occurred following the operation of the electronic agent. The programmer may, in turn, exclude some grounds from the scope of his liability.[106] Therefore, it seems that appropriate rules must be provided having regard to the technical nature of these issues. Over the period of drafting the MLEC, it has been stated that in some cases the theory of 'the attribution of the error of the system to the person who uses it' should not be applied, such as where the user of the system is not able to predict the sending of an error message by the automatic message system. Therefore, the scope of the liability of the user of the automatic message system for its errors depends on several factors, including the level of control that the user of the

[106] Weitzenboeck, E.M., *Electronic Agents and the Formation of Contracts,* P. 232.

system has on the computer program of the system and other technical issues. Finally, it was difficult for the UNCITRAL to draft uniform rules to be applied at an international level and because of this it has deferred these sorts of decision to domestic legislators.[107]

3.6.2.5 Suggestion to Establish an Independent Verification System of Electronic Agents in All Legal Systems

As a general rule, taking into account the instrumentality of electronic agents, it can be said that an error arising from the use of an electronic agent should ultimately be attributed to the person who employs the agent unless the error can be effectively attributed to another person, such as the programmer of the electronic agent.

Due to the wide use of electronic agents and the probability of errors arising from their operations, the trust of businessmen and customers must be maintained by providing security. Several policies may be considered to do this, including security classification and granting of licences to electronic agents with reference to specific security standards. In this way, the electronic agent can satisfy a number of conditions according to the level of security needed to perform the particular activity that the agent is used for. A system is, therefore, required to supervise the functions of the electronic agent, whether it works in compliance with the required terms and conditions or not. This may lead to the establishment of an independent verification system which supervises and controls the security characteristics of agents.[108]

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[107] ECC/EN, para. 230.

[108] Stuurman, K. and H. Wijnands, *intelligent agents: A curse or a blessing? a survey of the legal aspects of the application of intelligent software system*, P. 95. This solution is similar to the method of labelling electronic agents. Furthermore, another solution has also been put forwarded and it is the system of granting licenses to electronic agents. In this method, those electronic agents are usable that have been accredited previously. These agents are only able to interact with the agents that have obtained activity license. The body of granting the license considers the level of risk in using each electronic agent: Karnow, C.E.A, *Future Codes: Essays in Advanced Computer Technology and Law*, Artech House Publisher, 1997, P. 178.

3.7 Conclusion

The active presence of websites in the modern commerce, in particular the interactive ones run by electronic agents, was the cause of discussions of this chapter. The main research question from Iranian law's perspective was the consideration of the legal status of electronic agents in forming electronic contracts through websites; the answer of which had a determining role in justifying the legality of electronic contracts made by the electronic agents, deciding some other secondary questions mainly the issue of the liable person where a mistake or error is made by the contracting parties or the electronic agent as an intermediary between the parties, and also the way of amending and developing the IECA in the context of e-commerce.

Since these questions were a part of the main research question of the thesis, i.e. the extent to which Iranian law is able to respond the legal questions of the electronic contracts, then first the main question of the chapter, i.e. the legal status of electronic agents in contracting electronically, was seen from the Iranian traditional law's approach. It was showed that the English law in *Thornton v. Shoe Lane Parking Ltd* and American law in *McCaughn v. American Meter Co*. have already dealt with the formation of contracts through machines, in which a slot-vending machine that automatically fulfils the process of selling is capable of forming a valid contract without human control. As a result, as an electronic agent can be looked as a machine, but a digital and complex one, their traditional approach may be extended for use in responding the legal doubts of electronic contracts formed by electronic agents. However, under Iranian traditional law, due to the lack of relevant traditional legal materials and the non-direct consideration of the question in the IECA, the issue was examined based on the legal rules and principles of the formation of contracts in general, following the first stage of the guiding principles to develop e-commerce. In this view, a contract is formed by the meeting of minds of two entities, both of 'will', whether directly, or indirectly through a real agent which has a will, in turn. Having a 'will' is the core requirement to grant a legal personality for the contracting party, which is only vested to human. Having taking into account the technical nature of an electronic agent which is computer software written by an IT man following the mandate of the owner of the website, it can definitely be claimed that an electronic agent has no legal will to have a legal personality, rather it is an intelligent tool of communication. This leads to the outcome that, among the theories posed for justifying the role of electronic

agent and the legality of contracts formed by the use of them and criticised through this chapter, the Iranian traditional law believes in the 'tool theory' as to the legal status of the electronic agent in the process of forming electronic contracts, which operates 'automatically' not 'autonomously'. Therefore, justifying the way of satisfaction of the principle of meeting of minds and then the legality of electronic contracts made by electronic agent, it was concluded that the mind of the owner of the electronic agent in different situations is what has already been written in the computer program of the agent, and the mind of the other party, i.e., the customer, is what he shows during the interaction with the e-agent through which they meet.

Based on the above outcome and the approaches of the statues of the legal systems in question, it was showed that the IECA's approach on the electronic agents must be amended to be in compliance with the Iranian traditional law of contracts, since in defining the meaning of 'person' in article 2, apart from the legal and natural persons which are two main divisions of persons in the traditional law literatures, it also regards an electronic agent as a person; since only a person can have a will, rights and duties, which lack in the electronic agent, then its provision is contrary to the legal foundations of the Iranian traditional law of contracts. Also, it was suggested that the attribution rules of the IECA can be developed based on the distinction made between where the owner of the agent employs it for contracting, such as amazon.co.uk, and the case that a person other than its owner uses it for contracting, such as eBay.co.uk; the suggestion could be: 'Offer and acceptance can be expressed by data messages produced by an automated data message system, such as an electronic agent, as a tool of communication between the parties, and they are attributed to the person who employs it for the purpose of making electronic contract for himself.' This provision makes it straightforward to determine the liable person against any errors that the agent makes.

Finally, as for the issue of mistake, as an act of a human which is a vitiating factor of his intention, and error as a malfunction of an electronic agent, it was concluded that in terms of mistake the basic rules of mistake in contracting electronically is applied identically in contracting electronically. The only difference is the way that the buyer as a human makes the mistake in contracting through websites. It was discussed that, in the view of the author, making mistake in identifying the intended website can be regarded as the same as a mistake in establishing the identity of the other party in a physical environment. The reason for this is that the website reflects the identity of its owner; any

contract agreed through it is, in fact, a contract with him. Therefore, any mistake in choosing the intended website has the same legal effect of a mistake as to the identity of the other party and renders the contract void under Iranian law. Incorrect display of prices on the website as another type of occurring mistake leads to the contract being void due to the lack of an intention to create a legal relation for the displayed price. Also, regarding the order of wrong number of goods, for example, 11 instead of 1, as an 'input mistake' as another type of mistake, as Iranian traditional law of contract has no rule regarding any mistake on the quantity of goods ordered and then simply regards it as a valid and enforceable contract, protecting the mistaken party in online commerce, it is suggested to the IECA to adopt the concept of 'withdrawal of input errors' from article 14 of the CUECIC under which mistaken orders cannot be withdrawn completely as if there was no order at all, which is the current position of the IECA and creates scope for abuse.

As regards the liable person against errors made by electronic agent, based on the 'tool theory' achieved by the Iranian traditional law as regards the legal status of electronic agents, different involvements of electronic agents in e-contracting distinguished and it was concluded that:

a) where the electronic agent makes an invitation to treat, the consequences of any errors, such as the incorrect display of prices and an error in calculating the total price, made by the electronic agent must be borne by the owner of the website;

b) where the electronic agent makes an offer and an error in the process of making contract, for example, if it displays the price at less than the actual price, the owner of the website must bear the consequences, similar to the case of (a). The only difference is that there is no time gap between the time of placing an order and the time of its acceptance by the staff for the error to be checked by a human being, since once the order is placed by the customer the contract is concluded, then it must be fulfilled and the owner of the website cannot reject the order;

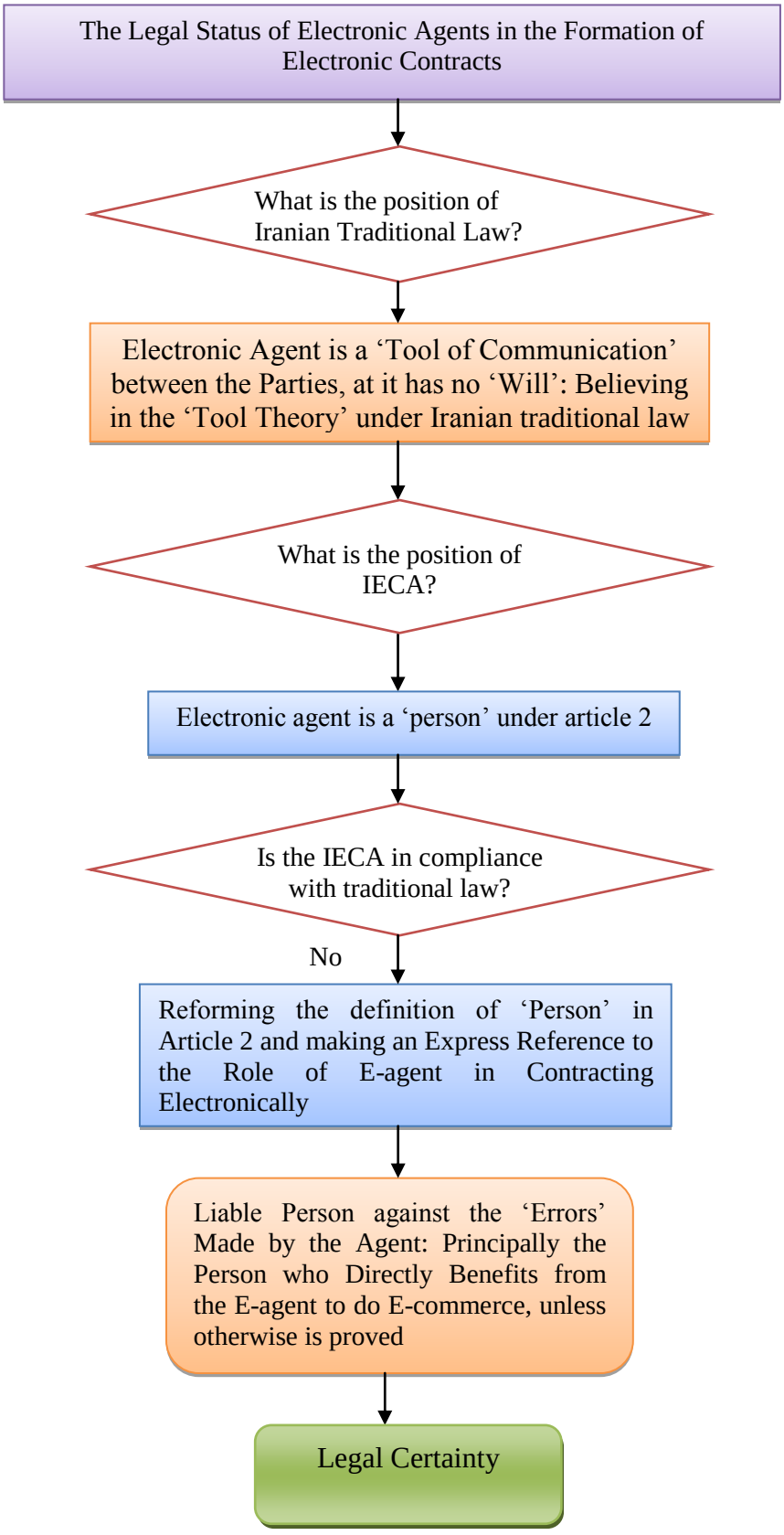
c) where the electronic agent makes an error in the case that it is designed by the owner of the website, but is used by other persons, such as eBay.com, principally the user of the electronic agent, i.e. the bidder or buyer must bear the consequences of the errors, not the owner of the website which is not a contracting party and acts as an electronic broker; and

d) where both of the parties use electronic agents for the purpose of contracting electronically, each of them is responsible for the errors of their own electronic agent.

In either of the cases, if it is proved that the source of error can lie on another person, such as the programmer of the electronic agent, the final liability must be put on him. However, due to the probability of errors arising from electronic agents operations, and the need for maintaining the trust of businessmen and customers in e-commerce it was suggested that policies including security classification and granting of licences to electronic agents with reference to specific security standards can be taken. In this way, the electronic agent can satisfy a number of conditions according to the level of security needed to perform the particular activity that the agent is used for. A system is, therefore, required to supervise the functions of the electronic agent, whether it works in compliance with the required terms and conditions or not. This may lead to the establishment of an independent verification system which supervises and controls the security characteristics of agents.

As the concluding lines, it can be said that in this area of law current Iranian traditional law responds to the question of the legal status of electronic agents in contracting electronically. In contrast the IECA which provides two opposing views should be revised and reformed to be in compliance with the Iranian traditional law, and comprehensive by learning from other legal systems and international regulations in question. This part in vested to Iranian Parliament as the only body of enacting and reforming of statues.

Figure 3.5


The Legal Status of Electronic Agents in the Formation of Electronic Contracts
What is the position of Iranian Traditional Law?
Electronic Agent is a 'Tool of Communication' between the Parties, at it has no 'Will': Believing in the 'Tool Theory' under Iranian traditional law
What is the position of IECA?
Electronic agent is a 'person' under article 2
Is the IECA in compliance with traditional law?
No
Reforming the definition of 'Person' in Article 2 and making an Express Reference to the Role of E-agent in Contracting Electronically
Liable Person against the 'Errors' Made by the Agent: Principally the Person who Directly Benefits from the E-agent to do E-commerce, unless otherwise is proved
Legal Certainty

Chapter 4: Formalities in the Formation of Electronic Contracts: The Legal Validity of Electronic Documents and Signatures

4.1 Introduction

In terms of formalities, Iranian contract law classifies contracts into two categories: 'contracts by mere consent', and 'contracts by deed'. The former contracts are concluded merely with a meeting of minds of the parties and there are no formalities. The latter contracts require specific formalities. These formalities often take two forms:[1] the contract must be in 'writing' and it must be 'signed' by the parties. The former acts as evidence of the contract for future reference, in particular, when a dispute arises from the contract; the latter acts as confirmation of the intention of the signatories to consent to the content of the contract. In other words, 'writing' is for the purpose of legal certainty and 'signature' is for the purpose of authentication.[2] As a general principle, Article 190 of the ICC emphasizes the formation of contracts merely by a meeting of minds, i.e. 'contracts by mere consent': 'A contract is concluded by mutual consent and needs no specific form'. However, article 22 of the Iranian Documents and Estate Registry Act 1931 provides an example of a law that requires more specific formalities where it requires that the transfer of a registered estate be made only through registration in the estate registry office.[3] Naturally, registration needs the agreement to be in writing and signed by the parties. If the formalities are not met, the agreement is ineffective.[4]The legal systems in question, similarly, require some contracts to be formed by meeting formalities. In English law, while Section 4 of the Sale of Goods Act 1979 provides that: 'a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties',[5]however, in some contracts it is mandatory to fulfil some formalities. For example, a contract of lease for more than three years must be made by deed;[6] unilateral gratuitous obligations are enforceable provided they are made by deed. In this regard, as a general rule in common law, non-compliance with the formalities

[1] It is necessary to note that there are other formalities in specific contracts such as consumer credit contracts. See for example, the Consumer Credit (Agreements) Regulations 1983 regarding what documents embodying regulated consumer credit agreements must contain.
[2] Eiselen, S., *Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980*, The E.D.I. Law Review, Vol. 6, No. 21, 1999, P. 35.
[3]Documents and Estate Registry Act 1931 (Iran), article 22.
[4] Katouzian, N., *General Rules of Contracts*, Vol. 1, P. 88.
[5] An example of a contract implied form the conduct of the parties has been considered in the case of *Brogden v. Metropolitan Rail Co.* [1877] 2 AC. 666.
[6] Law of Property Act 1925, section 52, 54(2).

does not void the contract, but it makes it unenforceable.[7] Also, at EU level, Article 17 of Brussels I Regulation gives the contracting parties the right to agree on the court which is to have jurisdiction over any disputes arising from the contract and stipulates formalities which must be met in order to accept it under the Convention. One of these states that the agreement should be: 'in writing or evidenced in writing'. Likewise, in American law Article 2-201(1) of the UCC requires that any contract of sale of goods over $500 must be in writing.[8]

Moving on modern trade by means of electronic communications mainly in the format of electronic records, as illustrated above, it is obvious that it cannot develop further without the recognition of the legal validity and enforceability of electronic documents and signatures. They play a prominent role in daily communications at both national and international levels and in both commercial and non-commercial activities. Therefore, as a part of the main research question of the thesis, i.e. the extent that Iranian law is able to respond the questions of electronic contracts, this chapter focuses on the issue of formalities from the eyes of Iranian law in the electronic context. In the context of electronic contracts, the way to meet these formalities has been addressed by the Iranian Electronic Commerce Act 2004, since without the legal recognition and enforcement of electronic documents and signatures, electronic transactions will not have legal effect

[7] An unenforceable contract is one that meets all principle elements but where the formal requirements have not been met. Here, one important point is useful to be mentioned. In the past, in some cases under the rule of equity, it was possible to enforce a contract where some requirements had not been met. This is because, as a general rule, the rule of equity overrides common law rules. A clear example of this is the case of *Wakeham v. Mackenzie* [1968] 1 WLR 1175, where the contract was made verbally and not in writing. However, the doctrine of part performance under the rules of equity allowed the enforcement of the contract. Having said this, currently the doctrine is not invoked due to the enactment of later statutes, such as the Law of Property (Miscellaneous Provisions) Act 1989 (LPA). Judge Peter Gibson, in the case of *Firstpost Homes Ltd v. Johnson* [1995] 1 WLR 1567, 1576, states that: '*The Act of 1989 seems to me to have a new and different philosophy from that which the Statue of Frauds 1677 and section 40 of the Act of 1925 had. Oral contracts are no longer permitted. To my mind it is clear that Parliament intended that questions as to whether there was a contract and what were the terms of the contract, should be readily ascertained by looking at the single document said to constitute the contract.*'Section 2 of the LPA altered the legal forms required for contracts for the sale or other disposition of an interest in land. If the requirements are not met, the contract is not valid. Although such a strict approach has come under some criticism, however, amending the Act is a task for Parliament and not for judges (Mckendrick, E., Contract Law, 10th Rev. ed., 2013, Palgrave Macmillan, PP. 66-67).

[8] It is necessary to note that in American law there is no general rule requiring contracts to be made in writing and signed by the parties in order to be legally binding and enforceable. However, in each state an equivalent to the English Statute of Frauds 1677 has been enacted, and this provides that certain contracts must be drawn up in writing and signed. To meet the writing requirement it is not necessary to have a formal document and any memorandum or document referring to the transaction is sufficient. The point is that due to the stringent requirements of the statutes, similar to English law, the courts have created some doctrines, such as the doctrine of part performance, under which a non-written contract is still enforceable (Morrison, A.B., *Fundamentals of American Law*, 1998, New York, Oxford University Press, PP. 211-212).

and will act as a substantial obstacle to the development of electronic commerce. However, apart from this general consideration of formalities in the IECA, which will be examined later in more detail, when new technology is involved in the formation of electronic contracts, in particular, in providing evidence of the agreement and signature of the parties, a number of specific issues must be addressed. The main issues that need to be considered are, therefore, the extent of the legal validity, admissibility and enforceability of 'electronic documents' and 'electronic signatures' within the Iranian legal system in the context of electronic transactions. For this aim, the technological and legal requirements for the above purpose as well as their weaknesses will also be discussed.

Extracting the legal questions of this chapter, under the second stage of the guiding principles for the development of electronic commerce in the Iranian context, the IECA recognizes the legal validity of electronic documents and signatures in principle. However, it treats different types of them differently. On the one hand, it grants the legal validity to electronic documents and signatures in general and, on the other hand, it grants different levels of legal validity to them. This is called a 'two-tier' approach and it is an approach that seems contrary to the principles of non-discrimination and functional equivalence as foundation principles for the development of electronic commerce. In order to provide certainty, this approach needs to be either reformed or analysed and justified under the foundations of Iranian traditional law.

Another question for consideration is the admissibility of foreign certificates issued by foreign certificates authorities (CAs) for the purpose of creating digital signatures in cross-border electronic commerce under Iranian law, to see whether electronic signatures created by certificates issued in a jurisdiction are enforceable legally in other jurisdictions under Iranian law. It seems that Iranian law is faced with a large legal gap in this regard and the last stage of the guiding principles must be resorted to, i.e., the theorization of new rules for the purpose of developing cross-border electronic commerce.

Responding the above questions, firstly, the functions of formalities will be reviewed. Then, the legal questions on 'writing' and 'signing' within electronic transactions will be put forward under the auspicious of the main research question of the thesis. The consideration of the foreign certificates will be done in the last discussion. Finally, some concluding remarks will be made.

4.2 Legal Admissibility, Validity and Enforceability of Electronic Documents

4.2.1 Underlying Principles of Statutes on Electronic Commerce

The statutes on electronic commerce including the IECA are based on four underlying principles: party autonomy, functional equivalence, technology neutrality and non-discrimination. These principles, in particular the principle of functional equivalency, facilitate the analysis of legal questions on e-documents and e-signatures and, as such will be discussed in more detail below. The MLEC will be used in order to illustrate each principle.

4.2.1.1 Principle of Party Autonomy

This principle allows the contracting parties in an electronic transaction to agree on the mode of communication, applicable law, jurisdiction and so forth. Article 4(1) of the MLEC provides that: 'As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement'.

4.2.1.2 Principle of Functional Equivalence

This principle states that the form of evidence and the signature do not matter; what is important is its function. If an electronic document fulfils the functions of a paper-based document, it is legally valid and the same legal weight given to the paper-based document is given to the electronic documents as well. Similarly, if an electronic signature, such as a digital signature fulfils the functions of a manuscript signature, the same legal effectiveness of the latter is given to the former. Therefore, for the purpose of this principle it is necessary to consider the functions of formalities to see whether they can be achieved when contracting electronically. Formalities fall into two categories: 'general' and 'specific'.

a) General Functions

General functions point to the final aims of formalities. In this view, two important functions are perceivable for the formalities. Firstly, they serve as 'evidence'. In case of any dispute, documents clearly show the rights and duties of the parties and facilitate the process of settling disputes. Secondly, they draw the attention of the parties to the importance of the contract and that is why it is necessary to meet formalities in specific

contracts, but not in all of them. For instance, Iranian law rules that for the transfer of real estate to occur a formal deed must be drawn up. Also, English law, in Sections 60 and 61 of the Consumer Credit Act 1974, provides that consumer credit agreements are enforceable provided that a number of formalities are met. These allow the consumer party to be aware of the nature and consequences of the contract before finalising it.

b) Specific Formalities

Apart from the above general functions, each of the formalities plays specific functions. The main, non-exhaustive functions of writing, which are emphasised in national law and some international sets of rules, are set out in the Guide to the Enactment of the UNCITRAL MLEC as follows:

> (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the "writing" and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes.

The main function of a signature is that 'it shows the intention of the signatory to be bound by the content of the agreement as signed', whether he reads and then signs or signs without reading. In addition to the functions stated above, the Guide to Enactment of the MLES states that:

> [A] signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.[9]

It is clear from the Iranian Electronic Commerce Act 2004 that, in general, it recognises the legal validity of documents in the format of a data message or an electronic

[9] MLES/GE, Para. 29.

communication. However, the specific question of the extent and weight of their validity needs to be analysed.

4.2.1.3 Principle of Technology Neutrality

This principle treats all electronic documents and signatures the same in legal terms, without making any distinction between them solely because of the technology used for their creation and without specifying any technology in particular. For instance, it does not matter whether an electronic signature is formed by scanning a manuscript signature or by writing a name under an e-mail. By recognising this principle, a statute on electronic commerce will encompass future technologies.[10]

4.2.1.4 Principle of Non-discrimination or Media-neutral Environment

Under this principle there is no difference between, for example, a piece of information created and transferred onto paper or communicated by a data message. In other words, all types of electronic or physical means used for creating, saving and transferring information are treated equally. In this regard, the MLEC provides that: 'Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message'.[11]

4.2.2 Meeting Writing Requirement in the Context of Electronic Contracts

4.2.2.1 Meaning of Writing in Traditional Law

Article 1284 of the Iranian Civil Code states that: 'A document is any writing capable of being invoked for the purpose of litigation or defence'. Regarding this Article, an Iranian legal scholar defines writing to mean:

> any line or symbol that appears on a plate, whether they are common lines or non-common such as secret keys and marks which are agreed by two or more people for their own communication purposes. It is also immaterial whether the plate is made from paper, cloth, wood, stone, brick, metal or any other materials. The line appears on the plate may also be written by a colourful material or by a copy machine or a printed one. It is also immaterial whether the line is inscribed on the plate or created as a raised line by an instrument.[12]

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[10] Spyrelli, C., *Electronic Signatures: A Transatlantic Bridge? An EU and US Legal Approach towards Electronic Authentication*, Journal of Information, Law and Technology, Issue 2, 2002.
[11] MLEC, article 5.
[12] Imami, H., *Civil Law*, Vol. 4, Aboureihan Publication Organisation, 1364 (SC), P. 65.

However, in a legal term 'writing' is regarded as a record that is of the signature, fingerprint or personal seal of the person to whom the document is attributed.[13] This means that a signature attached to writing creates a legally acceptable instrument as it is attributable to the signatory, unless merely writing it has no legal effect although it is in a written format.

In English law, Schedule 1 of the Interpretation Act 1978 defines 'writing' as: 'typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form'. In this provision the main requirement is that it is visible, while the process of creating e-documents by electronic methods is not visible. The last part of the provision, 'other modes of representing or reproducing words in a visible form', may encompass digital formats that create documents as well as instruments such as e-mail and websites. In this regard, the Law Commission states that:

> 'we believe that e-mails and website trading will generally satisfy the Interpretation Act definition of writing ... We believe that e-mails and website transactions fall within the natural (updated) meaning of writing if on no other basis than by falling within the category of "other modes of representing or reproducing words in a visible form".'[14]

Along the same lines, for example, Section 2 of the New Zealand Copyright Act 1994 contains a broad definition of writing which encompasses electronic documents: 'writing includes any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium, it is recorded'. However, if the 'writing' requirement matters only for the evidential purposes regardless of its format, then there is no difference between physical and electronic writing.[15] In American law, a federal law called the Dictionary Act - the name for Title 1, Chapter 1, Section 1 of the US Code - defines some of the words in the Code, including writing. This guides legal interpretations and eliminates the need to explain those words. The final provision of the Act states that writing includes: 'printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise'. In this definition, there is no express mention of Braille, or photocopying, or computers

[13] Shams, A., *Evidence Law: Substantial and Procedural law*, 2nd ed., Drak, 1387(SC), P. 80.
[14] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, 2001, P. 8, available at <http://lawcommission.justice.gov.uk/docs/Electronic_Commerce_Advice_Paper.pdf>.
[15] Reed, C., *Digital Information Law Electronic Documents and Requirements of Form*, 1996, Univ. London, Queen Mary Coll. Centre for Commerce. Law Studs, PP.94-102.

and mobile phones which now seem to be the common means of producing and transmitting texts. However, they can be placed under the phrase 'or otherwise'.[16]

The above considerations show that under all legal systems in question 'writing' can be anything meaningful between the parties, in any format and created by any device. As electronic communications created by electronic methods, such as the text of an e-mail, are meaningful and understandable for the communicating parties, therefore, electronic communications are able to fulfil the requirement of 'writing' in Iranian law. This issue will be considered under the Iranian Electronic Commerce Act 2004.

4.2.2.2 Writing in the Format of a Data Message or Electronic Communication and Suggestions to Develop Iranian Law

It has already been stated that a writing requirement is mandatory in certain contracts under Iranian law and the legal systems in questions. It needs to be ascertained how this requirement can be met in electronic communications under Iranian law. As electronic communications are made by the transmission of data messages or electronic communications, the statutes on electronic commerce have addressed this question by recognising the legal validity of communications made by data messages. In this regard, Article 6 of the IECA provides that: 'When the existence of a written document is deemed legally requisite, a "data message" can be used as a replacement'. This reflects the principle of functional equivalence. However, there are three exceptions to this Article:

> a) Ownership documents of immovable property; b) Sale of medical materials to the final consumers; or c) Announcements, notifications, warnings or the like statements issuing a particular provision on the use of goods or prohibiting the use of certain methods or their omission hereto.

Similarly, the MLEC states that: 'Where the law requires information to be in writing, that requirement is met by a data message' provided that 'the information contained therein is accessible so as to be usable for subsequent reference'.[17]The CUECIC likewise provides that: 'Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of writing, that requirement is met by an

[16] There are other dictionaries in American literature that provide a more comprehensive definition of 'writing', such as Noah Webster's, an American Dictionary of the English Language, New York: 1828. Here is the definition from Webster's Third New International Dictionary, Springfield, MA, 1961: '*the act or art of forming letters on stone, paper, wood, or other suitable medium to record the ideas which characters and words express or to communicate the ideas by visible signs.*' Also the Oxford English Dictionary provides '*writing'* as '*The process of causing an item of data to be entered into a store or recorded in or on a storage medium.*'

[17] MLEC, article 6(1).

electronic communication' provided that: 'the information contained therein is accessible so as to be usable for subsequent reference'.

This issue has also been addressed in English law but in a slightly different way. Without recognising the principle of functional equivalence, Section 8 of the ECA empowers the relevant ministers to amend the legal instrument within their own ministry in order to confer legal validity to electronic documents.[18] However, it seems that the amendment of all legal instruments is a time-consuming task and it would be better to obtain the same result by providing a general rule, such as the one adopted in the MLEC, that the writing requirement can be complied with by electronic documents.

Focusing on Iranian law as the aim of this thesis, it is clear that the IECA has adopted a broad and clear approach and any electronic document in the format of a data message can fulfil the writing requirement. If electronic documents are legally equivalent to paper documents or any other traditional methods of documentation, there is no need for a discussion on their evidential weight, since, following the principle of functional equivalence they can be regarded as valid and admissible evidentially in the courts or by any other dispute settling bodies, unless their equivalence to the traditional documents is questioned. In this regard, Article 12 of The IECA provides that:

> 'Evidence and any supporting document may be in the form of a "data message". The evidential value of a "data message" can by no means be repudiated solely due to its form and framework at any court or governmental office'.

However, it is suggested that Iranian legislation should remove the three exceptions of Article 6 as well, as they are seen as obstacles to the development of e-commerce. The MLEC, from which the Act was inspired, does not provide such limitations.

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[18] Paragraphs 1 and 2 of the section 8 provides*: '(1)Subject to subsection (3), the appropriate Minister may by order made by statutory instrument modify the provisions of—(a)any enactment or subordinate legislation, or (b)any scheme, licence, authorisation or approval issued, granted or given by or under any enactment or subordinate legislation, in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications or electronic storage (instead of other forms of communication or storage) for any purpose mentioned in subsection (2). (2)Those purposes are— (a)the doing of anything which under any such provisions is required to be or may be done or evidenced in writing or otherwise using a document, noticeor instrument;(b)the doing of anything which under any such provisions is required to be or may be done by post or other specified means of delivery;(c)the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed;(d)the making of any statement or declaration which under any such provisions is required to be made under oath or to be contained in a statutory declaration;(e)the keeping, maintenance or preservation, for the purposes or in pursuance of any such provisions, of any account, record, notice, instrument or other document;(f)the provision, production or publication under any such provisions of any information or other matter;(g)the making of any payment that is required to be or may be made under any such provisions'.*

In terms of the legal weight of electronic documents, the question is whether all electronic documents are of the same legal evidential weight. Similar to the physical world in which the evidential weight of documents vary, such as the difference between an informal piece of writing and a notarized document, there seems also a difference between electronic documents. The IECA in Article 13 when discussing the different levels of evidential weight it is stated that:

> 'In general, the evidential value of a "data message" depends on the methods used to guarantee its security such as selecting a security measure that corresponds to the subject and purpose of the "data message"'.

The criticism that can be levelled at this Article is that it is not feasible to infer the level of evidential weight and value of data messages from their wording. However, two main criticisms can be posed. The Act does not make it clear what it means by the said condition and it opens it up to a wide and varying interpretation. It is also against the principles of functional equivalence and non-discrimination. Responding to this criticism regarding the legal weight of electronic evidence, it is suggested that the Iranian law should follow the policy of the traditional law of evidence which is a straightforward approach. In the traditional law of evidence, the types and evidential weight of evidence are classified in exact terms. Documents are divided into two types: 'usual' (created by the parties themselves in an unofficial way); and 'official' (created with the involvement of an official person such as a public notary and the Office of Land Registration). Official instruments have more legal weight than 'unofficial' instruments.[19] It is recommended that the IECA should include the same type of provision rather than a vague or general statement. This is recommended to other legal systems as well.

4.4 Legal Admissibility, Validity and Enforceability of Electronic Signatures

4.4.1 Recognizing Legality of Electronic Signatures by Traditional Laws

The common feature of a signature is that it is handwritten and that it is a full name with or without creating a lined-shape. In English law, a number of cases have approved

[19] For the rules on documents see: the Iranian Code of Civil, article 1284 onwards.

creating signatures by stamping,[20]printing[21] or typewriting[22] and in other ways that are not personalised. Also, a signature can be simply an 'X'. This was illustrated in the case of *Morton v. Copeland*[23] where Maud J pointed out that 'a signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identifies it as the act of the party'. There is no reason to say that an electronic signature cannot have the same legal effect that a mark has in identifying the party's act. In Iranian law, there are no restrictions on the types of handwritten signatures. However, in practice the full name and a lined-shape around it constitutes a signature. One of the legal commentators, Jafari Langrodi, states that: 'in general, a signature is created by the surname of the person, whether accompanying his name or not'.[24] This means that in Iranian law, in contrast to English law, stamping, printing and typewriting are not recognized as acceptable forms of a signature. The current practice also follows this approach. But what I aimed is the legal issues of electronic signatures. Regarding the legal validity of electronic signatures, Iranian traditional law does not imply the legal validity of electronic signatures; however, having taken into account the decided cases it seems that under English and American traditional laws there is no reason not to recognize the legal validity of electronic signatures. This result may be adopted by Iranian law. For instance, in the case of *Goodman v. J Eban Ltd*,[25] the judge in the Court of Appeal held that where the Solicitors Act 1932 provided that bills must be signed, a solicitor satisfied the requirement by a rubber stamp. He continued by stating that: 'The essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as personally to authenticate the document'.

These statements indicate that, given that a rubber stamp is able to fulfil the requirement of a signature, there is therefore no reason not to recognize the use of electronic signatures which are encrypted messages. This argument receives some support from Laddie J in *Re a Debtor*[26] in 1996. He observed that a document with a signature might be faxed to another party: 'The fax received at the remote station may well be the only hard

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[20] *Ex parte Dryden* (1893) 14 NSWR 77; *Goodman v J Eban LD* [1954] 1QB 550; and *British Estate Investment Society Ltd v Jackson (HM Inspector of Taxes)* [1956] TR 397.
[21] *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215.
[22] *Newborne v Sensolid (Great Britain)* LD [1954] 1QB 45.
[23] [1855] 24 L.J.C.P. 169.
[24] Jafari Langrodi, M., Advanced Legal Terminology, Vol. 1, 1386, Ganj Danesh Publication, P. 137.
[25] [1954] 1 QB 550.
[26] [1996] 2 All ER 345, 351.

copy of the document. It seems to me that such a document has been 'signed' by the author'. Furthermore, the Law Commission has stated that:

> A manuscript signature may be scanned into a computer, stored in electronic form and incorporated into an e-mail or other document … We do not believe that the position is any different if an alternative form of electronic transmission is used.[27]

Also, in the case of *Standard Bank London Ltd v. Bank of Tokyo Ltd*,[28] the first English case regarding the validity of electronic signatures, it was held that the tested telex messages (telex messages that have been authenticated by a secret electronic code that the intended receiver party can recognize),[29] were a clear representation that the letters of credit were legitimate and Standard Bank was able to claim performance of the letters because of this. Furthermore, in the American case of *Doherty v. Registry of Motor Vehicles* it was also held that an e-mail message was 'signed' and constituted 'writing'.[30]

As it was seen above, contrary to English and American laws, the legal admissibility, validity and weight of electronic signatures must be sought within the IECA. Before considering the issues, a number of forms of electronic signatures should be considered.

4.4.2 Different Forms of Electronic Signatures

The term 'electronic signature' is a general one that encompasses different types of signatures created by electronic means. What is important here is that some statutes, such as the IECA and the European Community Directive on Electronic Signatures (hereafter ECDES),[31] treat different types of electronic signatures unequally and have introduced a distinction between a 'simple electronic signature' and 'advanced electronic signature'. Before elaborating on this issue and seeking the grounds for drawing such a distinction, the different types of electronic signatures must be reviewed. In this part, the main focus will be on digital signatures. Before that, it is necessary to note that under Iranian law all of the following methods of creating electronic signatures can create valid signatures as there are no specific limitations on the methods of creating

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[27] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, 2001, P. 14.
[28] [1995] 2 Lloyd's Rep. 169.
[29] The advanced version of this method is now used to create digital signatures.
[30] No 97/CV0050 (Dist. Ct., Suffolk Co., 1997).
[31] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, available at < http://europa.eu>

signatures in Iranian law provided that the signatory and his intention to assent to the contract under signing are met. However, this deduction has not been expressed in the IECA to be invoked before a court of law, since Iranian law is a civil law system and the provisions of statutes are the main determining factors. This issue will be considered within the IECA later in this part.

a) Typing a Name

Typing a name into an electronic document is a common way of creating an electronic signature. The name may be typed into an electronic document and sent by e-mail or fax. In either case, it is treated as a valid electronic signature in legal terms. Furthermore, the judicial practice demonstrates that a name in an e-mail address is regarded as an electronic signature. In some cases, the name of the sender does not appear in the electronic address, rather the name of the company or the legal body is written. In this case, the e-mail address should be regarded as the electronic signature of that company.[32] The suggestion put forward in this thesis is that this should also be the case where the domain name of the website of the sender is written in the address as each domain name is linked with a specific person who has registered the name.

b) Click-wrap Method

In doing business through websites, a way of showing an intention to be legally bound by the terms and conditions displayed is by clicking on icons containing a phrase such as 'I agree' or 'I have read the terms and conditions and accept them'. The contract concluded by this method is called a click-wrap contract. Thus, clicking on the icon can act as an electronic signature. In this regard, the Law Commission has stated that:

> We do not believe that there is any doubt that clicking on a website button to confirm an order demonstrates the intent to enter into that contract. That will satisfy the principal function of a signature: namely, demonstrating an authenticating intention. We suggest that the click can reasonably be regarded as the technological equivalent of a manuscript 'X' signature. In our view, clicking is therefore capable of satisfying a statutory signature requirement (in those rare cases in which such a requirement is imposed in the contract formation context).[33]

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[32] *Hall v. Cognos Limited* (Industrial Tribunal Case No 1803325/97). A number of similar cases brought before the courts in the United States of America between 2001 and 2005 and have reached identical conclusions in relation to the name typed at the end of an email. For more details on electronic signatures, see Mason, S., *Electronic signatures in law*, 3rd ed., 2012, Cambridge University Press;

[33] Law Commission, *Electronic Commerce: Formal Requirements in Commercial Transactions*, 2001, P. 15.

Similarly, in the judgment of *Specht v. Netscape*[34] it was stated that:

> Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet. Formality is not a requisite; any sign, symbol or action, or even wilful inaction, as long as it is unequivocally referable to the promise, may create a contract.

More explicitly, the courts in the case of *Groff v. American Online Inc.*[35] and *Hotmail v. Van Money*[36] held that clicking on the 'I agree' button on a website amounted to signing the document and the signatory was bound by the agreement.

c) Scanned Version of Manuscript Signature

The scanned format of a manuscript signature is also regarded as an electronic signature since it is both created and then transmitted by electronic means, such as by attaching it to an e-mail. This type of electronic signature creation is employed in commerce where the creator wishes to address thousands of persons by catalogues or any other marketing materials.

d) Biodynamic Version of Manuscript Signature

Another format of electronic signatures is a biodynamic version of a manuscript signature in which the signatory creates his signature by using a special pen on a computer screen. One common example is the device that postmen use to get the signature of the receiver of postal parcels. Another example is when students apply for a UK visa; the electronic version of their manuscript signature is recorded by using a pen and a pad. In this method, the characteristics of the signatures are measured, recorded and used whenever and wherever they are required. The measurements include the speed, rhythm, pattern, habit, stroke sequence and dynamics that are unique to the individual when they write their signature.

e) Personal Identification Number (PIN)

PINs are widely used in daily electronic transactions. Withdrawing cash from ATMs and making payments by using debit or credit cards online or offline are the most common occasions when PINs are used. Every PIN is linked with a unique person and so it can play the role of his signature and, as it is done electronically, PINs are regarded as electronic signatures.

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[34] Civ. 4871, (N.Y., July 5th 2001).
[35] No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998), 2.03[A][1].
[36] 1998 WL 388389, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998).

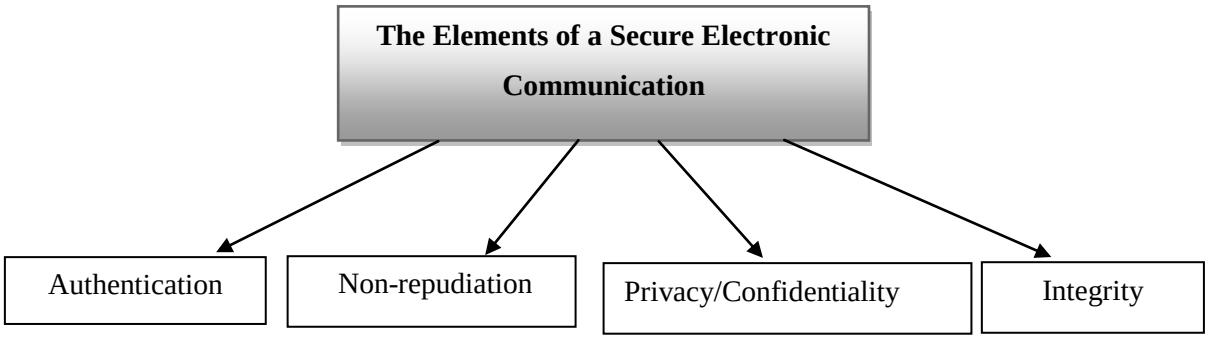
f) Biometric Characteristics

Biometric characteristics of individuals may be used as their signatures for authentication purposes. Examples of biometric traits include fingerprint, face, iris, palm print, retina, hand geometry, voice and gait. Today, these characteristics are recorded by electronic means and can be used as authentication methods for future reference.

g) Digital Signatures

Digital signatures are the main type of electronic signatures. They play a significant role in electronic commerce. In order to illustrate the role of digital signatures, reference needs to be made to the role of security in electronic communications. The security of electronic communications may be affected by interference in the communication, modification of messages during transmission, the fabrication and dispatch of messages without the awareness of the purported sender, and an person gaining unauthorized access. Therefore, security in the context of electronic communications can be discussed under four rubrics.

Figure 4.1

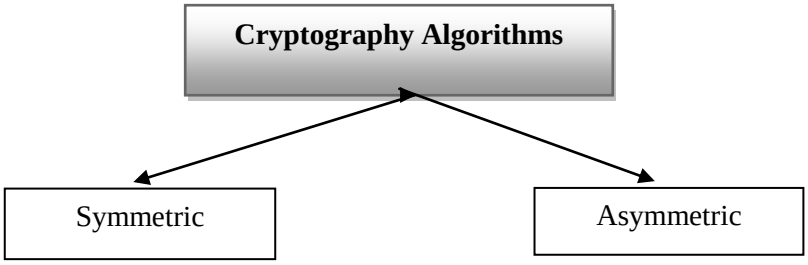


a) *Authentication*: this means that the sender of the message can be verified.
b) *Non-repudiation*: this means that the sender of the message is not able to deny its attribution to himself unless authentication of the message can be denied. Involving a trusted third party can avoid this problem.[37]
c) *Privacy*: this means that, except for the parties involved in the communication nobody else can become aware of the content of the communication.
d) *Integrity*: this means that the receiver of the message receives the very message that the sender sent without any alterations or modifications during transmission.

[37] In some writings this characteristic is referred under the umbrella of *authentication*.

In order to provide secure communications, different methods have been adopted over the history of distant communications. These attempts all fall under the term cryptography. Cryptography algorithms are categorised into two main groups:

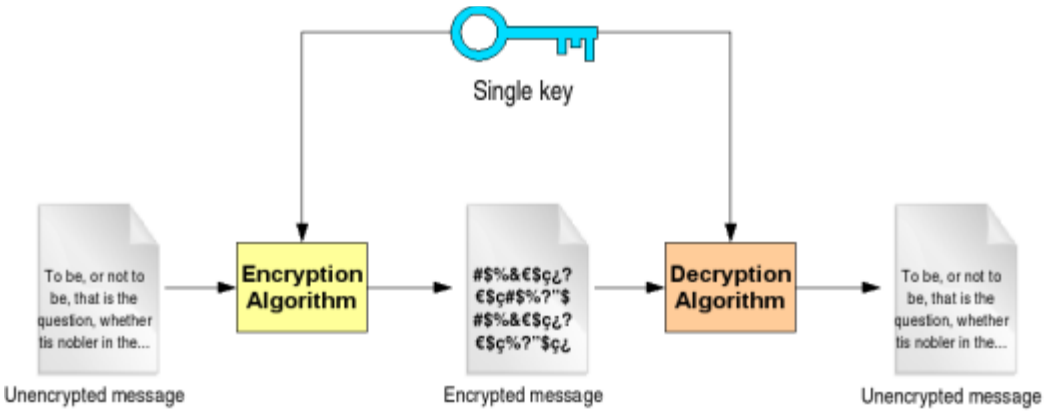
Figure 4.2



1. Symmetric Method: A Single Key Cryptography

In simple cryptography, a message is encrypted by a key (for example, a series of numbers or symbols or a combination of both) by the sender. The key is agreed between the sender and the receiver prior to the communications. Nobody except the receiver is able to understand the content of the message. He understands it by decrypting the message by using the same key. This type of cryptography is based on a single key called symmetric cryptography. The following diagram illustrates this method:

Figure 4.3



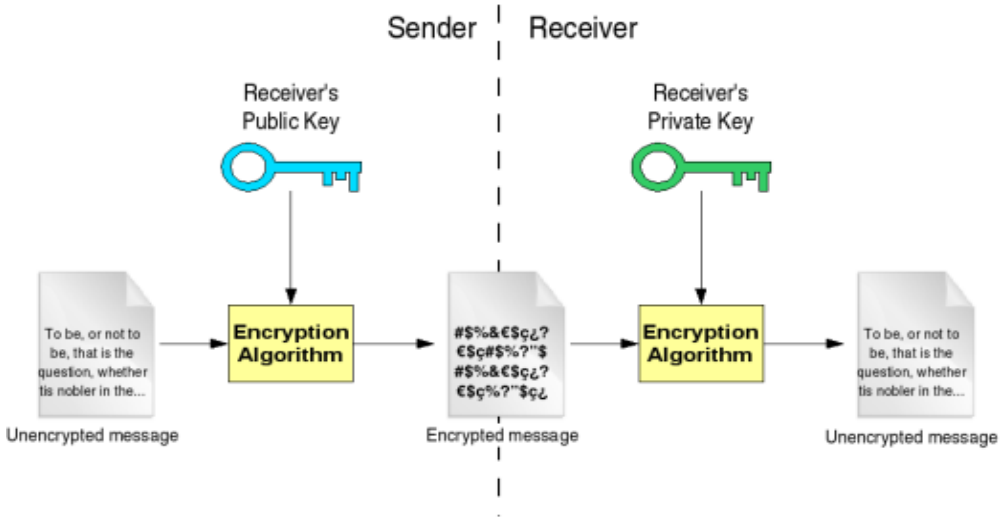
The main weakness of this type of cryptography is that it only ensures the privacy of the message; the authentication and integrity of the message are not ensured.

2. Asymmetric Method as the Basis of Digital Signatures: Public and Private Keys

To ensure the authenticity, integrity and privacy of messages, a developed method of cryptography based on two keys has been introduced. The keys are called public and

private keys. They are linked with each other in a unique way, such as by an e-mail address and password. The creator of the message encrypts it by using the public key of the receiver. This key is available for the public, such as an e-mail address of a company. The receiver decrypts the message by using the private key which corresponds with his public key. This key is only recognised for the sender, such as the password of an e-mail address. This method is called asymmetric cryptography and can be illustrated by the following diagram:

Figure 4.4



This method ensures that all the characteristics of privacy, non-repudiation, integrity and authentication of messages are met. The main use of this method is in the creation of digital signatures.

4. Technical Foundation of Digital Signatures

A digital signature is a piece of digital information attached to the original message which prevents any changes to it over the period of dispatch and receipt. The technical foundation of digital signatures is based on asymmetric cryptography. However, further steps are taken to create a digital signature. The stages of creating a digital signature are as follows.

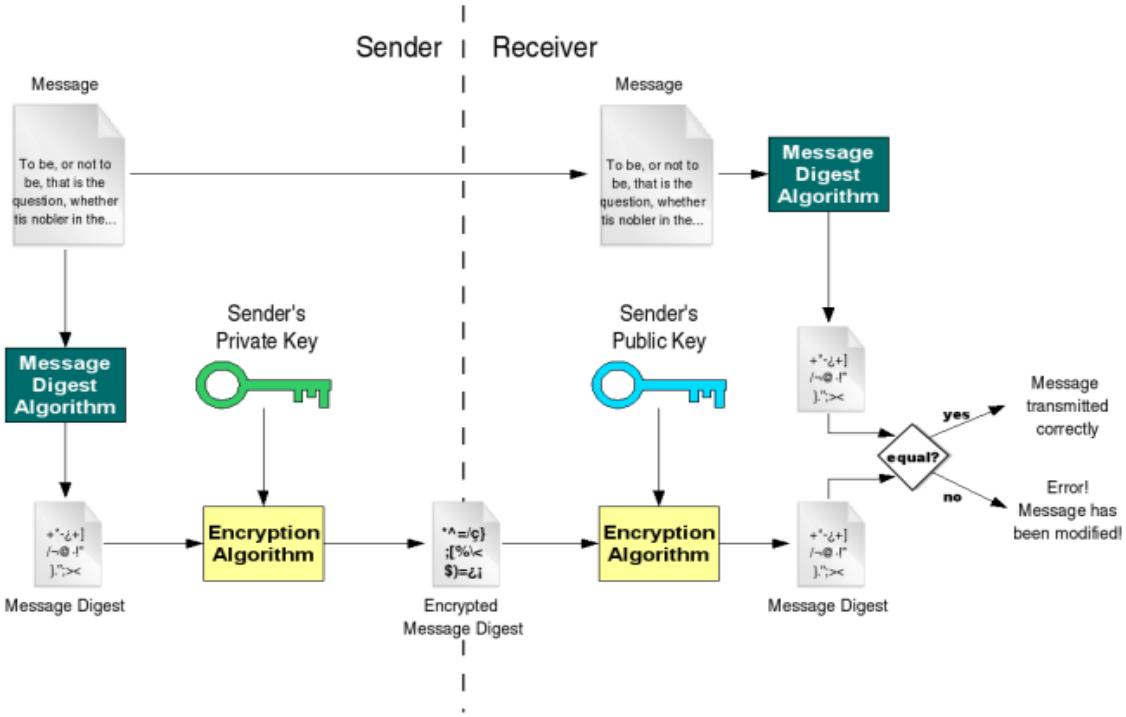
1. The message digest is created by a one-way hash function[38] of the message which is to be sent. If a small change occurs in the message even by changing a dot, the message digest will also be changed.

[38] A hash function usually makes the output data shorter than the input data. The values returned by a hash function are called hash values, hash codes, hash sums, checksums or simply hashes. Often, such a

2. The message digest is encrypted by the private key of the sender; the result is called the digital signature.
3. The digital signature is attached to the message and sent together. The receiver has two pieces of digital information: the message and digital signature.
4. The receiver decrypts the digital signature by the use of the public key to access the message digest created by the sender.
5. The receiver creates the digest message of the original message by the use of the same algorithm employed by the sender to create the message digest.
6. The receiver compares the two message digests. If they are exactly the same, it means that the message reached him without any changes on the way.

It should be noted that the digital signature cannot be created by any other persons than the sender, unless the private key has been revealed and used without an authorization from the rightful holder. The following diagram illustrates the function of a digital signature:

Figure 4.5



function takes an input of arbitrary or almost arbitrary length to one whose length is a fixed number, like 160 bits. Hash functions are used in many parts of cryptography, and there are many different types of hash functions, with differing security properties. For more analyse of hash function see: Computer Science and Engineering (affiliated to the University of Washington), an electronic chapter on *Hash Function*, available at < http://cseweb.ucsd.edu/~mihir/cse207/w-hash.pdf>.

One important issue is that in this method the privacy of the message is not guaranteed as the message itself is not encrypted. If the sender intends to maintain the privacy of the message, he must encrypt the message as well. This task may be done by the use of the public key of the receiver.[39]

4.4.3 Legal Issues of Electronic Signatures under Iranian Electronic Commerce Act 2004

It is possible to confirm the legal validity and effectiveness of electronic signatures in two ways. The law can either provide a list of acceptable electronic signatures by classifying the 'forms' that they may take, or the signatures can be treated on the basis of their 'functions'. The latter approach is based on the principles of technology neutrality and functional equivalence.[40] The legal systems in question have opted for the second policy. In this regard the MLES provides that: 'Where the law requires a signature of a person, that requirement is met in relation to a data message'. However, some conditions need to be met for such a recognition to occur:

> 'if an electronic signature … is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.'[41]

In Article 9(3) the CUECIC states that: 'Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication'.[42]Similarly, in Article 7 of the IECA it is stated that: 'Where the law requires a signature, an electronic signature may suffice'.

Given the civil law nature of Iranian law, the legal validity of electronic signatures must be sought within its statutes, in particular within the IECA. Again, the IECA has adopted a two-tier approach and this needs special consideration.

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[39] It is necessary to note that in this diagram the e-signature is created by using the sender's private (for encryption) and public key (for decryption); but in the previous diagram the e-signature is created by the receiver's public (for encryption) and private key (for decryption).

[40] Reed, C., *What is a Signature?*, Journal of Information Law and Technology, 2000(3), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed/>.

[41] MLES, Article 6(1).

[42] Similar to other statues there are a number of conditions to grant such an effect. In the eyes of the CUECIC those conditions are: *'if: (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and (b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.'*

4.4.4 Analyzing Two-Tier Approach of the Iranian Electronic Commerce Act 2004

The aim of a signature in contract formation is clear: it manifests the intention of the signatory to consent to the content of the document which is being signed.[43] In traditional methods, different types of signing exist, including drawing a mark, writing a name, or attaching a fingerprint.[44] The equivalent e-versions of the traditional ways have been considered above. As the first aim is to give legal validity to electronic signatures, it is necessary to consider the definition of an electronic signature in relation to statutes. The EC Directive on Electronic Signatures provides that: '"electronic signature" means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication'.[45]With only a slight alteration in the wording, the MLES states that: '"Electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message'. The definition exactly reflects what is meant by a signature in traditional law. As stated before, the different modes of electronic signature are legally valid if they fulfil the main functions of traditional signatures, i.e., if they are: a) logically associated with the data message (which is a technical issue); b) identify the signatory; and c) indicate the signatory's approval of the information contained in the data message. With similar wording, the IECA provides that an '"Electronic Signature" … is any sign appended or logically affixed to a "data message" which may be used to identify its signatory'.[46] Furthermore, regarding the legal validity of an electronic signature it states that: 'Where the law requires a signature, an electronic signature may suffice.'[47] *This means that Iranian law explicitly confirms the legal validity of electronic signatures*. This is a positive point in the Act as it removes any uncertainty in this regard and any need for further legal debates regarding the validity of electronic signatures. However, in English law, Section 8 of the ECA gives ministers the power to amend legislation where it is necessary to

[43] For a considerable work on '*signature'* see: Reed, C., *What is a Signature?, Journal of Information Law and Technology*, 2000 (3), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_3/reed/>
[44] For the history of making signature and its different forms see: Hawkins, Ch., *A History of Signatures: From Cave Paintings to Robo-Signings*, 2011, Create Space Independent Publishing Platform.
[45] ESD, article 2(1).
[46] IECA, article 2(j).
[47] IECA, article 7.

validate electronic signatures. Until such amendments are made, the contracts which are required to be in writing and signed cannot be formed electronically.[48] Therefore, this thesis may suggest that English law should adopt the position of the MLES in this regard.

Having recognized the validity of electronic signatures under Iranian law, one of the important research questions of this chapter is whether all electronic signatures have the same legal validity under the IECA. The MLES does not differentiate between them. In the UK, the ECA also recognises the validity of electronic signatures but as there is no provision regarding the degree of their admissibility the evidential weight of an electronic signature has been left to be decided by the courts.[49] It is clear that different levels of security of signatures may affect the weight given in evidence even if no formal distinction can be drawn. Naturally, a digital signature which has a high level of security has more evidential weight compared to a scanned handwritten signature. It can be said that the more secure the signature, the more evidential weight it has, and this will be noted by the courts.

Moving on the IECA as the hart of discussion, it recognises the validity of electronic signatures in general in Articles 7 and 2(a), but differentiates between two types: simple electronic signatures[50] (Article 7), and secure ones in Article 10, at the same time distinguishing between their evidential weights. It states that:

> A secure electronic signature must contain the following requirements: a) Be unique to the signatory. b) Identify the signatory of "data message". c) Be signed by the signatory or under his/her sole intention. d) Be affixed to "data message" in a way that any change in data message can be detected and identified.' And '"advanced electronic signature" means an electronic signature which meets the following requirements: (a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable.[51]

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[48] Crichard, M., *UK Electronic Communication Act 2000 – Take-of Time for Business or a Missed Opportunity?*, Computer Law & Security Report Vol. 16, No. 6, P. 398.

[49] It is necessary to note that the Electronic Signatures Regulations 2002 which implemented the Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures into English law, has no provision in this regard; provisions in the Directive relating to the admissibility of electronic signatures as evidence in legal proceedings were implemented by section 7 of the Electronic Communications Act 2000.

[50] The specification of '*simple'* has been named by the author to distinguish it from '*secure'* electronic signatures.

[51] ESD, article 2(2).

The notion of secure or advanced electronic signatures in the IECA has been derived from the ECDES. Similar to the issue of e-documents and given that the IECA recognizes the legal validity of electronic signatures, it is not clear why such a distinction has been made between different types of electronic signatures.

The other articles of the statutes in which the two tier approach has been adopted, such as the ESD, illustrates that the main reason for adopting such a policy is to grant a different level of evidential value to the different forms of electronic signatures. This policy seems rational. For example, it is not logical to give the same legal weight to a digital signature with a high level of security and a scanned manuscript signature. Thus, in order to grant a different level of legal value, secure electronic signatures have been introduced. In terms of their high evidential weight, Article 15 of the IECA provides that: 'The validity of a … secure electronic signature may not be questioned or denied; only a claim of forgery of a "data message" or a proof of its invalidity on a legal basis may be considered'. This means that electronic signatures and electronic documents, in spite of being legally valid, are treated as 'unofficial' or 'usual' and 'official' documents classifications in the traditional law of evidence considered in the ICC.[52] In providing the same legal weight, it would be better if the IECA employed the same terms of 'unofficial' or 'usual' and 'official' electronic signatures and documents, thus harmonising the terms in both the IECA and the ICC.

4.5 Cross-border Recognition of Certificates and Electronic Signatures

4.5.1 Legal Effects of International Recognition of Certificates

In order to develop electronic commerce at national and international levels, two important infrastructures are needed: 'technical' and 'legal'. The former is present in all states. However, the latter may be different from one legal system to the next. Therefore, to provide harmonization at an international level in the context of electronic commerce some international bodies need to be involved. For example, the UNCITRAL has provided two Model Laws. Without international legal harmonization, electronic commerce cannot continue at an international level. In the context of electronic signatures, in order to create a secure electronic communication, a digital signature is used. If the certificate used for the creation of the digital signature issued in a country is

[52] ICC, article 1286.

not recognized in other countries, the electronic communication, which may be an electronic contract, will not be valid if it is necessary to sign the contract electronically. The Iranian Electronic Commerce Act 2004, in general, does not recognize the validity of certificates issued in foreign countries. As a result, international trade will be hampered since electronic commerce plays such an important role in it.

In this part, the way and the level of recognition of foreign electronic certificates are considered through the statutes on electronic commerce with the purpose of developing Iranian law and also any possible solutions.

4.5.2 Recognition of Foreign Certificates in the Statutes on Electronic Commerce with a Focus on Developing Iranian Law

Article 12(2) of the MLES provides that: 'A certificate issued outside [the enacting State] shall have the same legal effect in [the enacting State] as a certificate issued in [the enacting State] if it offers a substantially equivalent level of reliability'. In defining what is meant by 'a substantially equivalent level of reliability' as the only condition of the above legal effectiveness, paragraph 4 provides that: 'In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability … regard shall be had to recognized international standards and to any other relevant factors'. The Guide to Enactment states that the notion of a recognized international standard should be interpreted broadly to cover international technical and commercial standards (i.e. market-driven standards), standards and norms adopted by governmental or intergovernmental bodies, and voluntary standards. These may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sectors (or both) of a normative or interpretative nature, which are generally accepted as applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms.[53] Also, 'other related factors' are those mentioned in Articles 6, 9 and 10.

Of importance is that the Model Law provides for the recognition of agreements between interested parties regarding the use of certain types of electronic signatures or certificates as sufficient grounds for cross-border recognition of such agreed signatures

[53] MLES, Para. 159.

or certificates.[54] All what is understood from the Model Law is that it adopts a wide approach regarding the cross-border certificates and electronic signatures. Moreover, by a reference to the principle of technology neutrality and without taking into account 'the geographic location where the certificate is issued or the electronic signature created or used; or … To the geographic location of the place of business of the issuer or signatory',[55] the Model Law recognizes the same legal effects for foreign certificates that the national ones benefit from.

In terms of EU and English law, the ECDES in Article 2(10) recognizes those certificates issued by foreign certificate providers as 'qualified' certificates, legally equal to those issued within the EU. However, compared to the Iranian approach the Directive takes a wider approach. This can be seen in the way that Iranian law does not recognize foreign certificates at all, and compared to the Model Law takes a narrower approach since while it recognize]]' foreign certificates it does not recognize the agreement of the parties on a specific certificate. In this regard, Article 7 of the ECDES provides that:

> Member States shall ensure that certificates which are issued as qualified certificates to the public by a certification-service-provider established in a third country are recognized as legally equivalent to certificates issued by a certification-service-provider established within the Community if: (a) the certification-service-provider fulfills the requirements laid down in this Directive and has been accredited under a voluntary accreditation scheme established in a Member State; or (b) a certification-service-provider established within the Community which fulfills the requirements laid down in this Directive guarantees the certificate; or (c) the certificate or the certification-service-provider is recognized under a bilateral or multilateral agreement between the Community and third countries or international organizations.'

Although there is no provision like this in the IECA, the Bylaw of Article 32 of the IECA 2008 provides that:

> The validity and acceptance of an electronic certificate issued by a foreign certificate provider depends on a bilateral agreement between the root certificate provider of the country and the foreign certificate provider with the application of the principle of counteraction and the ratification of the council.[56]

It is clear that there is no general indication, like the Model Law, regarding the requirements under which a foreign certificate is recognised in the country and, instead,

[54] MLES, article 12(5).
[55] MLES, article 12(1).
[56] BA 32, article 18.

the existence of a prior agreement between the country and the relevant foreign authority is compulsory. This policy is narrower than the approach of the Model law and hinders the development of electronic commerce in international law. For example, even among the members of ECO[57] in which only Iran and Turkey issue certificates, there is, as yet, no such agreement between Iran and its commercial partners even though in the First Iranian Regional Conference on the Facilitation of Electronic Commerce and Work it was suggested to the members of the ECO that barriers to trade should be relaxed between members. Therefore, currently foreign certificates are not recognised in Iran as there is no such a bilateral agreement. In the current environment, it seems clear that the Iranian approach should be developed and a wide approach is required to be adopted by Iranian law to help the development of electronic commerce internationally or at least at a regional level. This can be achieved by widening the strict scope of Article 18 of the Bylaw and by the recognition of all foreign certificates under the principle of technology neutrality and the standards provided by the ECDEC and also by the recognition of the parties' agreement as recommended in the Model Law. For this purpose, the following provision is suggested to the Iranian legislation:

> A certificate issued abroad shall have the same legal effect in Iran as a certificate issued in Iran if it offers a substantially equivalent level of reliability. The geographic location where the certificate is issued or the electronic signature created or used and the geographic location of the place of business of the issuer or signatory are irrelevant.[58]

The universal solution for removing uncertainty of the international recognition of foreign certificates may be proposed by establishing a certificate provider under authority of an international body, such as the ICC and recognising certificates issued by it internationally by all states. In this way, there would be no need for any national legal requirements to give legal effect to foreign certificates. As such, the certificate provider must act based on the non-discriminatory principle. Also, it must keep the data of the applicant private, without revealing them to other national or international private or public bodies.

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[57] ECO members are: Afghanistan, Azerbaijan, Islamic Republic of Iran, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

[58] The standards of validity of foreign certificates are those provided by the EC Directive on Electronic Commerce. Avoiding the long repetition of the standards they are not mentioned here.

4.6 Conclusion

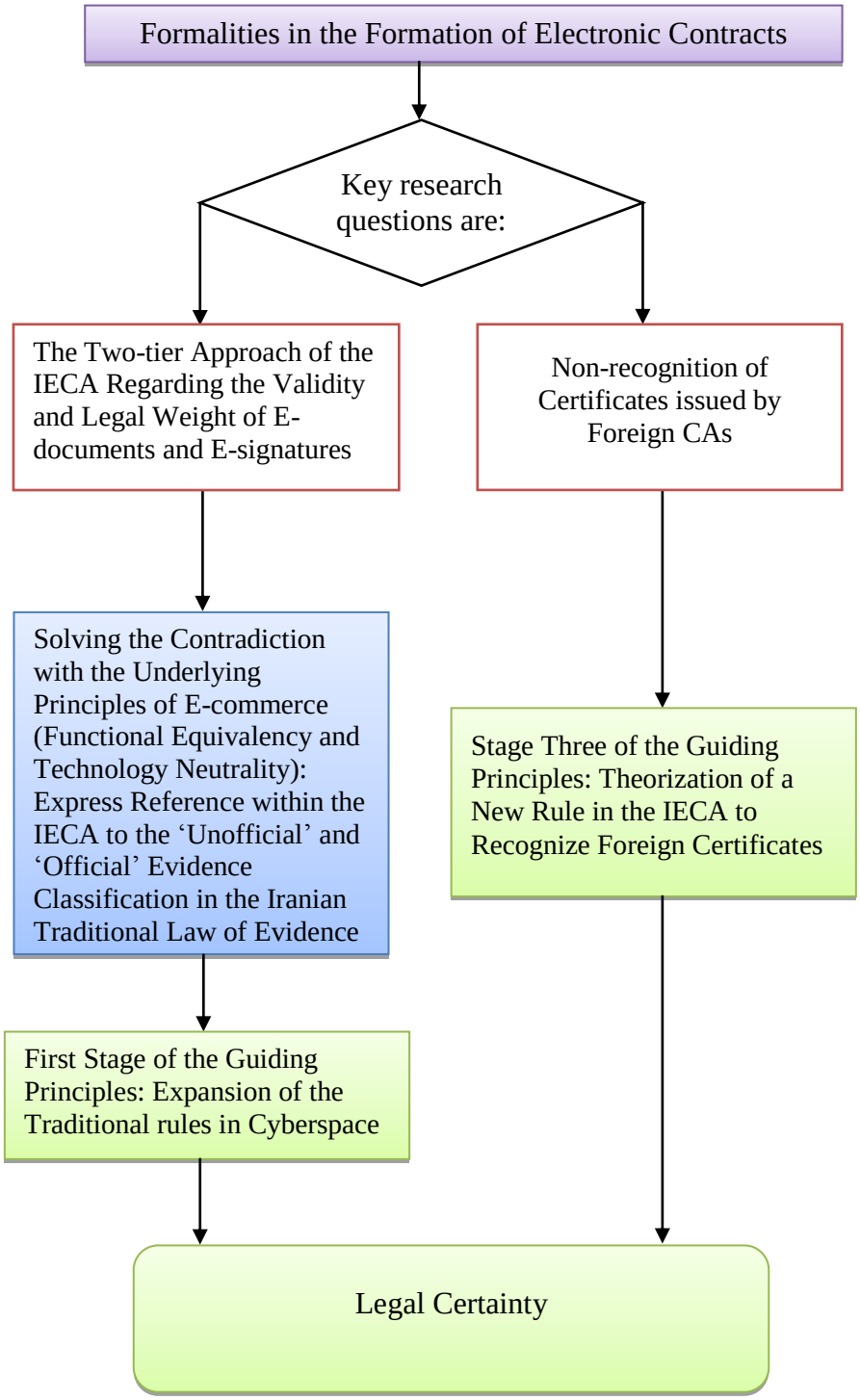
The necessity of meeting formalities of formation of legally valid contracts in some types of contracts in all legal systems including Iranian law cannot be denied; without meeting them, i.e. where the contract is not in writing and signed, the contract is not granted the required legal effects. Having taken into account these legal requirements, the way of meeting them in the process of making electronic contract, their legal validity, admissibility and also value were the main questions. Therefore, this chapter tried to consider these issues under Iranian law in the context of electronic contracts to see to what extent Iranian law is able to answer the legal questions of electronic contracts.

It was shown that all the legal systems in question recognize the legal validity of electronic documents and signatures in general, and grant legal admissibility to them by virtue of the principles of functional equivalence and technology neutrality. Likewise, Iranian law recognizes the issue of validity of electronic documents and electronic signatures in Article 7 of the IECA. However, the two tier-approach of the IECA as one of important research questions was necessary to be addressed, since this policy 'apparently' goes against the principles of technology neutrality and functional equivalency. In seeking for the aim of Iranian legislator in adopting a two tier-approach and justifying it, it was concluded that as it may show that, by taking into account the legal effects of each type of 'secure' and 'simple' electronic documents and signatures (the former is only forgeable), the Act tries to simulate the traditional classification of 'unofficial' and 'official' paper-based documents in cyberspace, hence, such a distinction seems logical since, in cyberspace, similar to the physical world, the level of security and integrity of data messages (whether e-signatures or e-documents) differs. By adopting this view, this uncertainty would be removed and the legislation would be improved. Although on this question there is no definite need for any legal changes or reforms, however, it is suggested to make an express reference to the traditional classification of 'unofficial' and 'official' documents in the relevant articles of the IECA avoiding any misinterpretation.

Regarding another important legal uncertainty surrounding the legal validity and recognition of foreign certificates, it was seen that Iranian law neither recognizes the general validity of foreign certificates, nor does it provide standards by which a foreign certificate can be legally admissible in Iran where there is special agreement for this

purpose between the issuers of the certificates. This approach is clearly regarded as an obstacle to the development of cross-border e-commerce. Therefore, it has been suggested that the IECA can be developed to remove this legal hindrance by taking into account the approaches of the MLES, EC Directive on Electronic Signature and the recognition of the parties' agreement on foreign certificates. This development should be made by reforming of IECA on the issue of foreign certificates and addition of new rule which recognize such certificates.

Figure: 4.6


Formalities in the Formation of Electronic Contracts
Key research questions are:
The Two-tier Approach of the IECA Regarding the Validity and Legal Weight of E-documents and E-signatures
Non-recognition of Certificates issued by Foreign CAs
Solving the Contradiction with the Underlying Principles of E-commerce (Functional Equivalency and Technology Neutrality): Express Reference within the IECA to the 'Unofficial' and 'Official' Evidence Classification in the Iranian Traditional Law of Evidence
Stage Three of the Guiding Principles: Theorization of a New Rule in the IECA to Recognize Foreign Certificates
First Stage of the Guiding Principles: Expansion of the Traditional rules in Cyberspace
Legal Certainty

Chapter 5: The Internet Jurisdiction in Disputes arising from Electronic Contractual Obligations

5.1 Introduction

Generally speaking, the term 'having jurisdiction' means that a court has the power to settle disputes brought before it. By virtue of having jurisdiction, courts apply their power to persons who reside within the country or to any transactions and events which take place within the borders of the country.[1] However, jurisdiction may extend beyond borders. Private international law speaks, in part, about this type of jurisdiction as its principles are applied in cases where there is a foreign element, such as nationality and domicile, in a legal relationship.

In electronic commerce, it is not hard to find such a foreign element as the Internet is a world without borders and with only a few clicks the consumer may travel thousands of miles from his own physical location. The difficulty of applying private international law increases when its principles and rules are applied in electronic commerce.[2] The reason for this is clear; when the contracting parties remain in the same country and transact by traditional means, the courts of that country have jurisdiction. However, when the parties transact over the Internet and, in particular, if they are located in different jurisdictions, it is necessary to see how the traditional connecting factors discussed in private international law can be applied to determine the jurisdiction with the aim of developing Iranian law in the context of the Internet jurisdiction.[3]In order to show the significance and complexity of the discussion, some examples are useful to be mentioned from Iranian law's perspective as the central aim of this thesis. Articles 13 and 23 of the Iranian Civil Procedural Act 2000 provide that any disputes arising from a contract can be brought before the court of the place of conclusion of the contract.[4] In contracting electronically, because the notion of place, in contrast to the physical world, is not perceivable in cyberspace and electronic transactions over the Internet do not require the traditional physical acts within a physical geography to determine

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[1] Oberding, J. & Norderhaug, T., *A Separate Jurisdiction for Cyberspace?*, 2002, available at <http://jcmc.indiana.edu/vol2/issue1/juris.html>

[2]In the words of Judge *Van Graafeiland*, at the appealed court in America, the difficulty of consideration of legal questions related to the Internet is *'somewhat like trying to board a moving bus*.' See: *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

[3] It may be necessary to note that although determining jurisdiction is material in itself and is the main of the current chapter, however, when jurisdiction issue is solved, it, in turn, determines the procedural law applicable to the proceedings, as procedural law often vary from one jurisdiction to other. Even the substantive law may be affected by jurisdiction.

[4] Iranian Procedural Code of Civil, article 13.

jurisdiction,[5] then determining the competent jurisdiction where the place of conclusion of electronic contract is necessary is not as simple as it is in the physical world. As another example, in Iranian law, for a court to apply jurisdiction over a person a connection between that jurisdiction and the person is required. This requirement of connection is met by, for example, having a place of domicile in that state or doing business there. In the case where no such link is evident between the defendant and the jurisdiction, but instead a website established by him in another jurisdiction to display and sell goods and provide services is accessible by the claimant in another jurisdiction, the question is to see whether or not such a connection is met between the owner of the website and the jurisdiction in which it is accessible. In this respect, it should also be considered whether and how the nature of the website matters, i.e., its level of interactivity.

The next uncertainty is related to 'property'. Article 968 of the Iranian Civil Code states that: 'The law applicable to a property is the law of its place of location'. Where physical goods are sold electronically or physically, it is not difficult to determine the place of their location and the governing law; however, determining the place of location of digital goods, such as software or computer games which are delivered online by downloading them from the computer system of the buyer is challenging due to the digital nature of the goods sold.

The next important question is related to the place of performance of the obligations arising from the sale of digital goods and provision of electronic services. For example, under Article 23 of the Iranian Civil Procedural Act 2000 determining the jurisdiction depends on the place of performance of the contract. In the case of an online delivery of digital goods, determining the place of performance of the seller's obligation is also challenging. This is true regarding the provision of electronic services and making e-payments.

It is also necessary to consider the differences between B2B contracts and B2C contracts in each case as in any legal system, in particular, in distance selling contracts, consumers benefit from particular protections which may vary from one legal system to another. In discussing this issue within the jurisdiction of the Internet, with a focus on Iranian law, it should be seen how the consumers are protected in the context of

[5] *Digital Equipment Corporation v. Attavista Technology* [960] F. Supp. 456 (D. Mass., 1997).

jurisdiction; it is a significant matter to see whether they are able to sue the defendant in their own place of domicile, in which the website of the businessman is accessible. The aim of this question is in fact to legally materialize in legal the statement of the court in *Hanson v. Denckla* within Iranian law: 'As technological progress has increased the flow of commerce between the states, the need for jurisdiction over non-residents has undergone a similar increase'.[6]If the website being accessible has any determining role, as it is normally accessible from anywhere, the position of the business party must also be taken into account in order to build fair trade by protecting it from being sued anywhere in the world.

As illustrated above, the key research questions may be presented and discussed mainly based on the connecting factors of place of electronic delivery of digital goods, electronic provision of e-services, and the making of electronic payments. Specific attention must be paid to the consumer protection issue in B2C contracts. The Iranian Electronic Commerce has been unable to respond to questions of conflict of laws, however, the provisions provided by it regarding the place of dispatch and receipt of data messages or electronic communications are helpful in simplifying some of the complexities, as discussed in the chapter two.[7]Also, Iranian traditional law has weaknesses in this area, as viewed above, since it is not familiar with technical concepts involved in the Internet jurisdictions. Therefore, as a part of the main research question of the thesis which is to examine the extent that Iranian law is able to respond the questions of contracts in the electronic context, questions concerning the Internet jurisdiction in solving disputes arising from electronic contractual obligations set as the aim of this chapter. It is necessary to provide appropriate solutions for the legal questions posed by taking into account the current legal materials, the technical nature of the Internet and studying the initiatives and legal developments made by EU, English and American laws, with the ultimate aim of developing and modernizing Iranian law. For this aim, this chapter examines the Iranian traditional rules of jurisdiction[8] and the provisions of the Iranian Electronic Commerce Act 2004to see to what extent they are applicable to the emerging legal issues in the electronic environment in both B2B and

[6] 357 U.S. 235, at 250, (1958).

[7]Adding that neither the UNCITRAL Model Laws nor the Electronic Commerce Convention has paid attention to this area of law. Of course, the presumption provided by them, such as the time and the place of formation of electronic contract, the location of parties and their place of habitual residence and business, are helpful in solving the complexity of the questions.

[8] Also the outcome of the next chapter on the *Internetapplicable law* will be incorporated in the draft.

B2C contracts. As regards B2C contracts, it aims to find out how to protect consumers in B2C contracts in the context of the Internet jurisdiction within Iranian law, since B2C contracts are a main part of e-commerce and consumers need a reasonable level of legal protection to trust in e-commerce. The outcome[9] of this chapter will be put forward as part of a suggested draft[10] to be incorporated into the IECA by the way of legislation.

5.2 Internet Jurisdiction in Disputes arising from Electronic Contracts

As regards new legal doubts related to the Internet as a jurisdiction in disputes arising from electronic contracts, the Iranian traditional legal bases have no clear rules, as shown in the introduction. It is necessary to take a precise and concise look at the core rules of jurisdiction in Iranian traditional laws to illustrate the emerging legal questions of the Internet jurisdiction in more detail.

5.2.1 Background of Iranian Jurisdiction Rules with Reference to the Internet

As pointed out before, there are no indications about jurisdiction over the Internet, either in the Iranian traditional law or in the IECA. As such, the current rules must be tested in cyberspace and the weaknesses and gaps should be filled by the results of the comparative study.[11]

Almost all rules for determining jurisdiction in Iranian law in the context of contracts have been provided by the Iranian Civil Procedural Act 2000.[12] Under Article 11 of this

[9] To see this draft, refer to the chapter 7 of conclusion.
[10] The proposed draft considers both internet jurisdiction and choice of law. The latter is examined in the next chapter.
[11] The legal systems in question do not all treat the issue of jurisdiction in the same way. Iranian law has straightforward provisions. English law, however, applies a set of rules and some of these are similar to Iranian law. For example, the place of domicile of the defendant is a main rule in both legal systems. American law has differences with both of Iranian and English law in terms of legal literature and the way of approach to the issues of conflict of laws, and also relies on a large number of cases and statutes. This is in contrast to Iranian law which only relies on statutes. However, in two ways all three are the same: a) the courts of the place of domicile of the defendant have jurisdiction over him; and b) the courts of the place of location of properties are competent in any disputes relating to them.
[12] In English law, the rules on jurisdiction over persons derive from three legal regimes. They are: the Brussels regime, including the Brussels Convention 1968, the Lugano Convention 1988 and the Brussels I Regulations 2000, the traditional rules and Section 4 of the Civil Judgments and Jurisdiction 1982 (as amended). The place of domicile of the defendant determines which of the regimes should be applied. For instance, the Brussels I Regulation is applied where the defendant domiciles in one of the Member States, and the Lugano Convention is applied if the defendant domiciles in Island, Norway, or Switzerland. Later, The Brussels Convention 1968 replaced by the Brussels I Regulation 2000. It became enforceable from

Act the general rule of jurisdiction is that: 'A claim must be brought before the court that the defendant's domicile is located within its jurisdiction'.[13]The domicile of a natural person is his place of residence and also where the main centre of his affairs is located; unless the main centre of his affairs is regarded as his domicile.[14] The domicile of a legal person is located in its place of administration.[15] The Article adds that where the defendant is not domiciled in Iran, the claimant is able to bring an action at the court of his temporary place of residence, unless the place at which his immovable property locates has jurisdiction over him. This is normally applied when the defendant is a foreigner. Furthermore, the court of the place of location of immovable properties has jurisdiction in disputes arising from them.[16] Regarding a claim on movable properties arising from contracts and also business claims, Article 13 states that, 'the claimant is able to bring an action either at the court of the jurisdiction within which the contract has been formed or the obligation must be performed there'. Finally, Article 23 of the Act provides that: 'Claims arising from the obligations of a company against a person out of a company must be brought at the place where the obligation has been made, the goods should have been delivered or the money should have been paid'.[17]

As it can be seen, there are a number of solid connecting factors to determine jurisdiction and to solve disputes arising from contractual obligations under Iranian law.

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the 1st of March 2002. The consideration of the traditional rules and the Section 4 of the Civil Judgments and Jurisdiction 1982 (as amended) are excluded from this chapter. The main focus of the chapter is on the rules of the Brussels I Regulations. The reason is that Brussels I Regulations have been incorporated in the national legal systems of all EU Member States, and compared to other set of rules have addressed the nature of electronic commerce to a good extend. In the current research, the Brussels I Regulation (The Council Regulation on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 2000) is referred to as it has been incorporated into the national legal systems of the different EU members and reflects well the needs of modern commerce. In American law, each state has legal autonomy and the question of jurisdiction is posed by asking whether the courts of a state can apply jurisdiction over a person or a property. The approach of American law will be referred to, similar to English and EU laws, the extent that it is required in terms of comparative study.

[13] ICPA, article 11.

[14] ICC, article 1002.

[15] It is necessary to note that amongst the Iranian legal scholars there is no consensus as regards the domicile of legal persons.

[16] Article 12 of the Iranian Civil Procedural Act 2000.

[17] Explaining that jurisdiction is divided into two categories by the legal scholars: *inheritant* and *local* or *relative*. *Inheritant* jurisdiction is mandatory and never can be changed, such as the jurisdiction of initial courts over the appeal courts. However, local or relative jurisdiction refers to the jurisdiction of one of the two initial courts within a province. The determination of *inheritant* jurisdiction is not difficult. However, local or relative jurisdiction in some cases faces with difficulty to determine and is decided by connecting factors such as domicile, habitual residence, location of property, place of conclusion of contract, place of performance of contract and other circumstances. Articles 11 to 25 of the ICPA examine the local jurisdiction.

These have been tailored to the physical world and are characterized[18] under contract and property classifications. They are: a) place of domicile; b) place of residence; c) place of administration; d) place of location of immovable properties; e) place of conclusion of the contract; f) place of delivery of the goods; and h) place of making the payment. Among these factors, there is no rule in Iranian law as to the competent jurisdiction in disputes arising from contracts for the provision of services in the physical world, let alone cyberspace. However, the relevant factors to determine the Internet jurisdiction in disputes arising from e-contracts are: a) the place of conclusion of the contract; b) the place of delivery of the goods (as the obligation of the seller); c) the place of provision of services (as the obligation of the provider); and d) the place of making the payment (as the obligation of the buyer). In the legal literature on Iranian traditional law, there have been no discussions that could be used as guidelines to see how these factors could be determined over the Internet and neither have any judicial cases yet been decided.[19] Moreover, no distinction has been made between the types and the parties of contracts under Iranian law, such as consumer contracts, to grant a special protection to the weaker party and find a balance between the rights and duties of the parties. In contrast, other legal systems in question such the EU through its Brussels I Regulation have paid attention to this issue. Considerable efforts have also been made in American law.

As the solid rules of jurisdiction in Iranian law are not tailored to be applied to the Internet, then the guiding principles for the development of e-commerce law must be tested stage by stage. In some cases, the first stage (either exact application of the traditional rules or their expansion or development) can be used as a determining factor, such as the case where the domicile of the contracting parties determines the Internet jurisdiction; in other cases, the second stage (introduction of legal presumptions or rules) is helpful, such as the case where the place of conclusion of the e-contract is determining;[20] and in some other cases, the last stage (theorization of new rules) provides legal certainty, such as over the consumer protection issue.

[18] The aim of characterisation or classification is putting the legal issue within one of the categories of personal characteristics such as matrimonial issues and inheritance, property, contracts or torts. After characterisation, connecting factors of each group determine the jurisdiction and the applicable law.
[19] By July 2013.
[20] Here it is necessary to add that this factor has been considered in the chapter of two.

5.2.2 Recognizing Electronic Jurisdiction Agreement to Remove Complexities of Determining Internet Jurisdiction

In order to avoid the difficulties of determining the jurisdiction of courts in some cases,[21] which arise due to the differences between the jurisdiction rules of the legal systems involved in a case,[22] parties are strongly recommended to agree on the jurisdiction by incorporating a jurisdiction clause into the e-contract. For example, in concluding click-wrap contracts made through interactive websites established by the owner of the website as one party of the contract (and run by an electronic agent), and the buyer as the other party of the contract who concludes the e-contract by interacting with the electronic agent,[23] it is strongly recommended to determine the competent jurisdiction by incorporating a jurisdiction clause into the contract. This avoids any future difficulties, in particular, in cross-border electronic commerce. In this type of e-contract, such as the example of sale on Amazon.co.uk, the terms and conditions of the seller are displayed to the buyer and by ticking the box confirming that the terms and conditions have been read and agreed to, the buyer shows his consent to them.[24]

In this case, the important question is whether under Iranian law a jurisdiction agreement is enforceable legally or not; in other words, whether the contracting parties of an e-contract are allowed to agree on the competent court for any future disputes arising from the contract. The answer to this question must be sought in traditional law, as the first stage of the guiding principles rules. At an international level, the Hague Convention on the Choice of Court Agreement 2005 prescribes such a possibility.

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[21]By 'in some cases' it means that jurisdiction rules are not different in any legal areas. For example, under all legal systems immovable properties are under the jurisdiction of the country within which the property is located.

[22] One may ask that why the jurisdiction rules of different legal systems vary. It is not a case with direct relevance to this research. However, in brief, it can be said that each legal system follows its own benefits in laying down private international law rules. For example, Iranian law provides that the personal relations of persons such as marriage, inheritance, and divorce are subject to the law of their nationality not the place of domicile. In contrast, English law sets the law of domicile as the competent law. This is the case in jurisdiction matter. Although in the view of the author it is suggested to have an internationally agreed private international law rules to harmonize this important area of law in an international level, harmonizing private international law internationally, but in practice it is a hard task to reach a consensus in international community, as legal systems have different legal, ethical, historical, cultural, social, and political backgrounds which make harmonization a difficult matter. Some international efforts have been made, such as Convention of 30 June 2005 on Choice of Court Agreements which focus on B2B contracts, but have not found much successfulness.

[23]For more information as regards interactive websites and the legal status of electronic agents refer to the chapter of 3.

[24]Adding that, the jurisdiction agreement may be made separately, not within the contractual terms. In these instances, its validity is considered like a normal contract and the consequences of issues such as forgery, mistake, misrepresentation and duress are the same as a usual contract.

Similarly, at the regional and national level, Article 23(1) of Brussels I Regulation permits any jurisdiction agreement:

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.

It also expressly recognizes the parties' electronic agreement on jurisdiction matters where it states that: 'Any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing'.[25]Likewise, American law recognizes the validity of jurisdiction clauses.[26]

In contrast, Iranian law does not allow any agreement on the jurisdiction. This is a substantial problem and is detrimental to both parties as they are unable to protect themselves through the contract. The reason given in Iranian law is that the rules for determining jurisdiction are mandatory not optional - the parties cannot agree to the contrary. This means that the principle of party autonomy in agreeing on the jurisdiction has not been recognised in Iranian law. This approach hinders the development of international trade, including cross-border e-commerce, since the permission of an agreement on jurisdiction is a pre-requisite to giving traders freedom from any legal limitations and encouraging them to trade freely.[27]By virtue of the last stage of the guiding principles for the development of Iranian law in general and in the context of electronic commerce in particular, a rule is required to be drafted by the Iranian legislators that would recognize the validity of jurisdiction agreements made in the form of either a clause in the main contract or a separate agreement. This should be done either by amending the Iranian Procedural Act 2000 or the IECA.

It is necessary to note that the mere recognition of the validity of the electronic jurisdiction agreement does not necessarily mean that the agreement is enforceable. It is

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[25] BIR, Article 23 (2).

[26] *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)*; *Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)*; *Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991)*.
Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991).

[27] However, there is an indirect way to agree on the jurisdiction in national level. Under Iranian law the competent court is the court of the place of domicile of the defendant (Iranian Civil Procedural Act, Article 11). If claimant domiciles in the jurisdiction A, and the defendant domiciles in the Jurisdiction B, the claim must be brought before the court in the jurisdiction B. But, if the parties want to claim in the court of jurisdiction C, they can agree that there are domiciled in jurisdiction C, as it is permitted to change the place of domicile willingly (Iranian Code of Civil, Article 1010)! By this way, the competent court can be the court that the parties want to be. However, such an agreement between the parties is too far to reach.

only enforceable if the general conditions to validly incorporate a jurisdiction clause are met. One important requirement is that the term must be displayed to the other party. For example, in the case of *Estasis Salotti v. RUWA*[28] considered by the European Court of Justice, it was held that where the terms of a contract are written on its reverse side and only the front side is signed by the parties, the contractual terms are only valid if they are signed as well, or if reference has been made to them, indicating the consent of the parties to the terms on the front side.[29] This is also true regarding electronic contracts. Where the buyer is asked to agree to the terms and conditions, they must be displayed in a way that all terms are able to be seen, unless they will not be regarded as part of the e-contract. For example, if a hyperlink needs to be clicked on[30] in order to provide the party with details of the contract terms on a separate page but that page is not responding, then the terms will not be applicable even if the buyer informs his consent to them by clicking on the box provided or by any other means. Obviously, this is different to the case of a buyer intentionally not reviewing the terms which are accessible. Furthermore, for the purpose of the validity of the terms of electronic contracts in general, and jurisdiction clauses in particular, they must be kept securely in a durable medium so that they are accessible, downloadable and printable for any future reference as a record.

It has been shown that a jurisdiction agreement removes any future complexities in determining jurisdiction. Where there is not any jurisdiction agreement, or such an agreement is not enforceable legally as it is the current position of Iranian law, it is necessary to apply the rules of determining the jurisdiction. The following sections examine this aspect based on the connecting factors in the absence of any jurisdiction agreement to see the extent that Iranian law is able to respond the questions and it should be developed.

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[28] Case 24/76, [1976] ECR 1831.

[29] In this case the defendant put a term in its own standard contract form under which the German courts where of jurisdiction upon any disputes. But, the European Court of Justice by virtue of Article 17 of the Brussels Convention, now Article 23 of the Brussels I Regulation, commented that the terms are enforceable only if the contract signed by the parties has made a reference to the general terms of the contract.

[30] This action is called the 'incorporation by data message' which is legally valid. See for example, article 17 of the IECA.

5.2.3 Selling Physical Goods and Immovable Properties Online

Contracts for physical goods, such as books may be formed via electronic means through websites, e-mails and chatrooms. In these cases, in the absence of any valid jurisdiction agreement, it is easy to use the physical place of delivery of goods as a determining factor; the fact that the contract has been made electronically has no effect. For instance, in an online order in a B2C contract, the postal address of the buyer for receipt of the goods is the place of delivery, i.e., the place of performance of the seller's obligation. Likewise, in a B2B contract, the place of business as a physical criterion is a determining factor and is not affected by the fact that the contract is electronic.[31] It is evident that, in selling immovable property, such as land, through electronic means the delivery is done in the same way as through traditional means. Therefore, the first stage of the guiding principles, i.e. either the exact application of the traditional rules or their expansion, clearly responds to the question of jurisdiction and there is no need for any further improvements in Iranian law.

5.2.4 Electronic Delivery of Digital Goods: Uncertainties and Solutions

Digital goods, such as computer software and games, which are sold electronically may be delivered in two ways: a) delivery in a physical carrier such as a CD; or b) delivery by downloading the goods into the computer system of the buyer. In the case of (a), digital goods are delivered to the buyer after their transmission to a physical carrier such as a CD or a flash memory which can be processed by a computer. In this case, the place of performing the obligation is in the physical world and so no issues need to be addressed. Again, the first stage of the guiding principles responds to this situation.

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[31] For further explanation, in B2B contracts, the contract may be concluded under one of the trade terms (INCOTERMS) such as 'FOB' or 'CIF'. In such a case, the term itself will determine the obligations and their place of performance. Besides this, the parties may agree on a different place. In this regard Iranian law in Article 375 provides: '*The subject matter of the contract must be delivered at the place at which the contract has been concluded unless custom and usage purports delivery at another place or a special place has been stipulated in the contract for the purpose of the delivery*.' In English law, in the lack of express or implied agreement on the place of delivery, the place of business of the seller is the criterion (Sale of Goods Act 1979, Article 29(2)). In American Law the rule is somehow different. Under the Uniform Commercial Code (UCC) in the lack of agreement on the place of delivery, in the case of certain goods located in a certain place at the time of conclusion of contract and the parties were aware of it, the delivery must be made there; unless, the delivery must be made at the place of business of the seller, and in the lack of it, his place of habitual residence is the criterion (Uniform Commercial Code (UCC), Section 2-309).

However, this is not the case with (b). After making a payment electronically by using a credit or debit card, a page is displayed containing a link which allows the buyer to download the goods to their computer. Through the successful completion of the downloading process, the delivery of the digital goods occurs. It is because of this that the place of electronic delivery needs to be analysed for the purpose of determining jurisdiction.

Although this problem is to be addressed within Iranian law, but it is one that needs to be tackled by all legal systems. Moreover, there is a need to provide a definite solution to this issue as the volume of digital goods, such as e-books, music and films, delivered electronically increases daily. Furthermore, this question is not only limited to cross-border electronic commerce, it has also appeared at a national level in cases where the contracting parties are located in different jurisdictions within a country. Two potential solutions come to mind. The first is determining that the place of electronic delivery is the place of the location of the buyer's computer system. If this is the case then that would mean that a person who buys and downloads digital goods during travel to another country must bring an action in that country in case of a dispute. The second is deciding that jurisdiction falls to the place of the location of the server of the website into which the digital goods are uploaded and from which they are downloaded. This could be located in a third country. If neither of these solutions is convincing then perhaps new legal rules are required.

As has been stated previously, the IECA has no provisions in this regard and this has resulted in uncertainties in determining the place of delivery of digital goods. As the guiding principles state, the first stage must be tested first, i.e., the exact application of traditional laws. Regarding the place of delivery of goods in general, Article 375 of the Iranian Civil Code provides that: ‘The subject matter of the contract must be delivered at the place at which the contract has been concluded unless custom and usage purports delivery at another place or a special place has been stipulated in the contract for the purpose of the delivery’. The issue is that this provision is limited to physical goods not digital ones. One reason for this is that at the time of drafting this Act, around 90 years ago, the drafters had no notion of digital goods. Secondly, in practice, this provision is not applicable to digital goods. For instance, in contracting electronically, if the place of formation of the contract between a party based in England and another in Iran is England, then it is not clear how digital goods must be delivered in England

electronically. This means that the traditional law, either through its exact application or after broadening its scope, cannot respond adequately to this issue. Thus, the first stage of the guiding principles fails. It seems that the second stage, that of introducing new legal presumptions, is the only one likely to provide a solution. The possible theories to achieve this will be examined in the following sections.

5.2.4.1 Place of Receipt as Place of Delivery of Digital Goods

This theory states that, in the electronic performance of an obligation, the process of download is like a prompt postal system which delivers the goods from the seller to the buyer. Thus, the place of performance of the obligation is the place at which the buyer receives the digital goods.

Some objections can be made to this theory. When delivery is made in a traditional postal system, the buyer has a definite postal address, however, in downloading, the buyer has no clear address and receives the goods at the place where he is located at the time of downloading. The buyer may, by chance, be in a third country and if the place of the electronic receipt of the digital goods is the place of performance of the obligation, it can be difficult to ascertain the place where the receiver, i.e., the buyer, was located at the time of downloading. If a buyer domiciled in country A travels to country B for any reason and electronically downloads computer software in country B and then returns to country A, it may be difficult to prove that the place of performance of the contract was country B and that any claims must be brought before the courts there. Rather than provide a solution, this theory complicates the problem further.

If the place of receipt of digital goods is regarded as the place of performance of the contract, it may not be logical to accept the resultant jurisdiction. For instance, if the Iranian buyer travels to France and buys digital goods from an Iranian seller's website with a server in Germany, the place of performance will be France and the buyer must sue the seller in France. It is not logical to ask the Iranian seller and buyer to attend a French court for any dispute arising from the contract. Furthermore, if the place of downloading is regarded as the place of delivery of the digital goods, a conflict will arise with Article 29 of the IECA which regards the place of location of the information systems as immaterial in determining the place of receipt of the data messages. This means that from the perspective of the IECA the place of download is not the place of business itself. Therefore, setting the place of electronic receipt of the digital goods as

the place of performance cannot provide certainty and remove doubts. A firmer criterion is required.

5.2.4.2 Delivery of Digital Goods as a Collection of Data Messages

This theory takes into account the technical nature of digital goods and regards digital goods as a collection of data messages. As a result, the place of electronic delivery of digital goods is the place where the data messages are received, for it is at this place that the buyer is able to benefit from the goods and it can be said that the delivery has occurred there. To clarify, digital goods are composed of data messages. Even if only a small amount of them is not delivered, the goods are not usable. A clear example of this is that installing 99 percent of a piece of computer software will render it unusable and it can be said that the goods have not been delivered since the buyer is not able to benefit from it. In this theory, the presumptions set in the statutes on electronic commerce regarding the place of receipt of data messages or electronic communications considered in Chapter two will be applied.[32] For instance, Article 29 of the IECA sets the place of business or work of the addressee as the place of receipt of data messages. This means that the place of delivery of digital goods is the place of business or work of the buyer. Therefore, analysing digital goods according to their technical nature, as being composed of many data messages, helps to reach a clear and reasonable criterion, which also has a statutory basis.

However, this theory can be objected to on the ground that it does not offer any certainty as to the place of receipt of data messages as discussed in Chapter two. In a similar way to the previous theory, this theory is based on unclear provisions which cannot solve the problem.

5.2.4.3 Setting a Presumed Place as the Place of Electronic Delivery of Digital Goods

Under this theory it seems that, having taking into account the nature of digital goods, the 'place' should be presumed as the place of electronic delivery. This is the result of applying the second stage of the guiding principles, i.e., the introduction of legal presumption or rules, since the first stage cannot remove the uncertainty due to the non-physical nature of the notion of 'place' to be determined in an electronic performance.

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[32] The issue of the time and the place of conclusion of electronic contracts will consider comparatively in the next chapter.

There are several options for determining place: a) the place of location of the server of the website; b) the legal place of location of either of the parties; and c) the place of receiving the digital goods by the buyer. The place of location of the server cannot be regarded as the presumed place since it may be unknown to the parties. Furthermore, the statutes on electronic commerce regard this factor as immaterial. Similarly, the place at which the buyer receives the digital goods cannot be regarded as the presumed place, as the buyer may receive goods in a third country by chance. Ultimately, there are no effective factors remaining except for the legal place of the parties; therefore, the presumed place should be connected to either of them.

Choosing the appropriate place can be done by examining the connecting factors related to the parties, normally: nationality, domicile, habitual residence, and place of business. Amongst these, nationality is not a suitable option since in international regulations it is normally not a determining factor, such as the approach of the CISG and that taken by the legal systems in the area of contract which do not pay attention to the nationality of the parties.

The location of the buyer would appear to be the most preferable way of determining place because the act of delivery logically includes a series of actions which normally start from the seller and end at the point of location of the buyer; this place could be the place of domicile, habitual residence or place of business of the buyer. Moreover, the aim of the contract on the eyes of the buyer is to benefit from the performance of the contract. In defining the meaning of delivery, Article 367 of the Iranian Civil Code provides that: 'Delivery means putting the subject matter of the contract at the disposal of the buyer as such he is able to have any types of possessions and benefits from them'.

In an electronic delivery, the buyer is able to benefit from the performance at the place where he is located and fully receives the digital goods, not the place of location of the seller where the delivery may start but does not come to an end. This is because delivery of digital goods must be done fully - the non-delivery of a small percentage renders it unusable. Therefore, it should be deemed that the goods are delivered at the place of domicile, the place of business or habitual residence of the buyer.

In B2C contracts, as the consumer party has no place of business, his place of domicile or habitual residence should be presumed. In contrast, in B2B contracts, the place of

business of the buyer should be presumed.[33] As can be seen, this theory is based on traditional, recognized factors and removes any uncertainty properly.

5.2.5 Internet Jurisdiction when Providing Electronic Services in Cyberspace

In e-contracts for e-services, such as e-banking and e-marketing, the service provider is obliged to perform a task through or within cyberspace. Again, the issue is to locate the place of performance of the contract under Iranian law. It seems that two categories may be distinguished; cyberspace as either the tool or the place of performance of the obligation.

5.2.5.1 Cyberspace as the Tool of Performance of the Obligation

Its role as a tool can best be illustrated through an example. A physician located in London enters into an agreement with a patient located in Tehran, to visit and give him advice online. In this case, cyberspace plays the role of a communication tool, in the same way as a telephone. Therefore, similar to the issue of e-delivery of digital goods, it cannot be said that the place of performance of the obligations is cyberspace. Here, the question is to see which physical place is the place of performance of the obligation, whether that is the place of location of the service provider (the physician) or the place of location of the service receiver (the patient).

The answer is that it is true that the starting place of provision of e-services is the physical place of location of the service provider, but unless the receiver benefits from the services it cannot be said that the obligation has been fulfilled by the service provider. The place where the benefit is received is also the place where the receiver is located. The receiver may be located in different places, for example, in e-teaching the student may receive the teaching of a session in Manchester and in the next session it may be in London. This is similar to the previous discussion on e-delivery of digital goods. As such, a certain place should be presumed as the place of receipt of services, thus removing any uncertainties under the second stage of the guiding principles. Applying the previous discussions, in B2C contracts, this is the place of domicile or habitual residence of the consumer and, in B2B contracts, it is the place of business of the trading receiver, unless otherwise agreed between the parties.

[33] However, where the businessman has several places of business, the principal place of business must be taken into account; and if he is of no place of business, the permanent place of domicile would be the criterion. This policy has been adopted by various national and international documents.

However, it is possible that the service provider fulfils his obligation but the receiver is not able to benefit from it. For instance, in e-teaching the teacher may be ready at the agreed time to present the course but because of technical problems the quality of teaching may not have been satisfactory or due to the disconnection of the Internet it may have become impossible to receive the teaching. In these cases, it cannot be said that the teacher has not fulfilled his obligation. Here the cause of not benefiting must be detected and the person responsible must be sued.

5.2.5.2 Cyberspace as the Place of Performance of the Obligation

Cyberspace as the place and tool of performance can be illustrated in the following way. A company located in London enters into an agreement with a company located in Tehran to advertise the products of the latter on its website. In contrast to the previous case, here cyberspace is both the place and the tool of electronic performance of the obligation. Again, it is true that the place of performance of obligations is cyberspace, however, as the notion of 'place' is not perceivable in cyberspace and it is the service receiver that benefits from the performance of the obligation in cyberspace, then it is appropriate to link the presumptive place with the receiver of the obligation, not the performer. In B2B contracts, the place of business of the buyer should be regarded as the criteria, whereas in B2C contracts, it is the place of domicile or habitual residence of the consumer. In comparing the two categories, it can be seen that there is no difference in the results that emerge.

5.2.6 The Place Where Electronic Payments are Made

In electronic contracts, similar to traditional contracts, the obligation of the buyer often amounts to making a payment. However, in contrast to traditional contracts in which the price is paid in cash, by cheque or by some other paper instrument, in electronic contracts electronic payment methods are used. It is important to ascertain the place where an electronic contract is made. Under Article 23 of the ICPA, the court of the place at which the payment was due to be paid may be the jurisdiction. To have a clear understanding of this issue, it is necessary to see what technically happens in an electronic payment.[34]

[34] The common methods are making payment by payment cards. For example, in the US by 2000 around 700 million payment cards has been issued and about 12 billion electronic payments has been made annually (Evans, D., and Schmalen, R., *Playing with Plastic: The Digital Revolution in Buying and Borrowing*, 2000, The MIT Press.).

5.2.6.1 Parties Involved in Making an Electronic Payment

Making payment by credit card is one of the most common ways of paying for online services.[35] In this method, five groups are normally involved: a) a customer (payer or buyer) who makes the payment; b) a businessman (payee or seller) who receives the payment; an c) issuer, the bank or non-banking body which issues tools, such as credit cards for making e-payments; d) a regulator, which is normally a governmental body that controls the process of e-payments; and, e) an automated clearing house (ACH), which is an electronic network that transfers money between bank accounts.

In successful electronic payments, the issuer plays a much greater role than the other players. This is because a customer must open an account and receive any required instruments, such as a card, from the issuer. The issuer must also provide confirmation of electronic transactions and the amount payable, in particular, if the amounts are large. This is done after contact with the consumer, normally by telephone or, if it is an online payment, by asking some security questions or passwords.

5.2.6.2 Determination of the Place of Making an E-Payment

It is necessary to examine what happens in an electronic payment by means of credit cards to determine the place of making an e-payment. After a buyer makes a payment the information is transferred to the seller and is then conveyed to the acquirer[36], with a reference number, who transfers the information to the issuing bank for the confirmation. The issuing bank sends its response to the acquirer, stating whether it confirms that the payment is to be made. The result is conveyed to the buyer.[37]

If the buyer transfers the money via the normal banking system to the bank account of the seller, the place of performance of the obligation is clear: the bank through which the payment is made. Where the payment is made through the Internet, the place of performance of the contract is again clear. For example, a person located in Tehran orders some goods through a website based in the UK and pays for them by using his credit card, issued by a bank located in Tehran, to the account of the seller that was opened in a bank located in Switzerland. In this example, when the buyer enters the

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[35] The consideration of other methods of payment is out of the scope of this section.

[36] An acquiring bank (or acquirer) is the bank or financial institution that processes credit and or debit card payments for products or services

[37] All of these processes are done within only some seconds. For every $100 sale, the seller $96, the acquirer $1.34, the confirmation network $0.16 and the issuing bank $2.50 receives. See: Turban, E., King, D., Lee, J., Viehland, D., *Electronic Commerce 2004: A Managerial Perspective*, 3rd ed., 2004, Pearson Prentice Hall, PP.499-500.

required information and clicks to confirm payment or place the order, what he is in fact doing is ordering the issuing bank to transfer the amount into the bank account of the buyer. This action is similar to the issuance of a bill of exchange which results in the application of the first stage of the guiding principles. Then, the payer is in fact the issuing bank of the buyer and the place where it is located is the place of performance of the obligation of the buyer; as a result, the court of this place has jurisdiction and the place of location of the seller or the buyer is immaterial. There are several reasons for this. Firstly, the buyer may be located in another country, for example if travelling abroad, at the time of making the payment by his credit card issued in his own country. In this case, it is not rational to grant jurisdiction to the court of this country. Secondly, once the buyer orders the payment to be made, it is not done immediately and the issuing bank must confirm the order. This means that the main role in making the payment is not played by the buyer but by the issuing bank whose place of location is easy to establish in the current banking system.

5.3 Protecting Consumers in B2C Contracts in the Context of Internet Jurisdiction

5.3.1 A Need for a Binary Distinction between B2B and B2C Contracts

The issue of consumer protection is one of the fundamental questions of the law of contracts. In the context of this thesis, the issue of consumer protection may be raised in considering the internet jurisdiction and choice of law. For this aim, it is required to make a binary distinction between B2B and B2C contracts. The main traditional reason of this distinction is the inequality of bargaining power between the consumer party and the business party in B2C contracts, which requires a special protection of the consumer against the business, while in B2B contracts such an inequality does not exist.[38] The latest regulations have also paid attention to this issue. For example, the Brussels I Regulation to protect consumer in the commercial context, in terms of jurisdiction matter, gives him a permission to sue the business party at his own place of domicile,

[38] One may argue that in B2B contracts there may also be an inequality between the parties, such as the case that one party is stronger than the other in terms of the wealth and wideness of the commerce. A clear example is the case that Microsoft Company enters into a contract with the new established small company. This is true; but the weaker party still has a bargaining power, which lacks in B2C contracts for the consumer party, and may overcome to a powerful business party by benefiting from experienced legal consultants.

while in a contract in which both contracting parties are of business nature, such a permission has not be granted. This is true as regards electronic contracts as well, and the same protection should be extended to electronic contracts, since the classic reasoning of inequality of bargaining power of the sides of contract still exists in the electronic transactions, coupled with some more reasons as will be listed shortly. That is why the Iranian Electronic Act 2004 in article 45, to protect Iranian consumers against foreign business party, states that, in terms of applicable law, if the foreign applicable law provides less protection of Iranian consumer in comparison with this Act, the rules of this Act will still be applied to protect the national consumers against foreign traders. Most legal writes have also emphasized on this matter as well. For instance, Rothchild, as a member of the OECD Working Party on the Guidelines for Consumer Protection in E-commerce, stated that 'inherent international nature of electronic commerce presents both an opportunity and a challenge to consumer protection policy.'[39] Where, on the basis that the consumer party is the weaker party in contracting with a business party, consumer protection is a significant issue in a national level in which only one jurisdiction is involved in the transaction, it must be definitely a significant issue in a cross-border transaction in which different jurisdictions are engaged.

In e-transactions, apart from the inequality of bargaining power, there are further perceivable benefits and advantages for business party, which justifies a need for better consumer protection. Some of them are as follows:

a) In doing commerce through the internet, the business party is able to target consumers in different jurisdictions; as a result, he is able to improve his economy easily and with incurring low costs. One ground is that 'automatic decision making'[40] system in dealing electronically diminish any middleman in the chain of selling between the consumer and businessman and also is able to contract at the same time with several consumers across the world.
b) Similar to the tradition transactions, business party is able to impose his own terms and conditions to the consumer on a 'take it or leave it' basis 'at the click of a mouse'.[41] That is true that the consumer party is protected against any unfair trade

[39] Rothchild, J., *Protecting the Digital Consumer*, The Limits of Cyberspace Utopianism, 1999, Ind LJ 74, P. 896.
[40] Reed, C., *Internet Law, Text and Materials*, P. 5.
[41] Puurunen, T., *The Legislative Jurisdiction of States Over Transactions in International Electronic Commerce*, 2000, John Marshall Journal of Computer and Information Law, P. 692.

terms, but there are still terms which can be imposed by the business party to the consumer party out of the scope of unfair terms.

c) By electronic markets, the business party is able to compete with other businessmen in other jurisdictions, while in the physical world such a possibility is perceivable by spending much money, establishing agencies and employing staff in different jurisdictions.

d) Electronic payment is the other advantage of e-transactions for the business party in which the payment, as the obligation of consumer, is made electronically prior to the dispatch of goods or provision of services, as the obligation of business, by him.

e) The risk that the consumer party in electronic commerce sustains, in particular when he deals electronically with a foreign business party, is more than the risk that is perceivable for him in visiting the seller's physical shop.[42] The main risks associated include the lack of previous contact with the business party, his reliance on the information on the website regarding goods and services, and also revealing his personal data which may be misused by the seller, and also reliance on the identity and contact detail of the seller[43], which has a determining role in deciding the jurisdiction and applicable law in solving the parties' dispute.[44]

f) If it be said that suing a foreign trader at the place of domicile of the consumer is expensive and burdensome for the trader, the answer is that logic and fairness rule that the strongest party must sustain greater inconvenience and expense. Furthermore, if the business party proves to be the innocent party, he may recover any costs he incurred from the consumer.

Having justified the need for consumer protection in B2C contracts, it is to be discussed that how Iranian law protects consumers in the context of electronic contracts with business party. Before this, the background of discussion within Iranian law is helpful to be illustrated.

5.3.2Comparative Background of Consumer Protection with a Reference to Iranian Law

As showed above the protection for consumers in B2C contracts in e-commerce is a welcome development. In English law, in order to protect consumers, Articles 15 to 17

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[42] Rothchild, J., *Protecting the Digital Consumer*, P. 896.
[43] The EC Directive on Electronic Commerce has good notes in this regards.
[44] Nordhausen, A., *Distance Marketing in the European Union*, in Edwards, L., *The New Legal Framework for E-Commerce in Europe*, Oxford, 2005.

of the Brussels I Regulation address consumer contracts and provides good consumer protection. Under this Regulation, a consumer contract is defined as a contract concluded by a person for the purposes of his trade or profession,[45] provided that one of the conditions of Article 15(1) is satisfied:

> (a) it is a contract for the sale of goods on instalment credit terms; or (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.[46]

The main point regarding a consumer contract is that, under Article 16, if the goods or the service provider is domiciled in a member state or is deemed to be domiciled in a member state because of the existence of his branch in that state,[47] the consumer is able to sue the provider at the courts of either his own place of domicile or the provider's place of domicile. However, if the provider intends to sue the consumer, he is only able to bring an action at the consumer's place of domicile.[48] Under Article 15(1)(c) what may be arguable in the context of electronic contracts is the meaning of 'directing commercial or professional activities' by a business party towards the member state of the consumer's domicile through an electronic environment. In brief, as a website is accessible anywhere, the owner of the website may be regarded as directing his activities at all EU states. Then the Regulation would cover all e-transactions concluded through websites by consumers.

American law has also focused some of its attention on the consumer protection issue in jurisdiction matters. The judicial cases provide that if a businessman intentionally addresses his commercial activities towards a state in which a consumer is domiciled or resides, the consumer is able to sue the business party in his own place of domicile. Other than judicial cases, recent attempts by the Inter-American Specialized Conference on Private International Law (CIDIP) in this area resulted in *The Draft of Proposal for a*

[45] *Standrd Bank London Ltd v. Apostolakis* [2000] IL Pr 766.
[46] BIR, Article 15(2).
[47] BIR, Article 16(1).
[48] BIR, Article 15(2).

Model Law of Jurisdiction and Applicable Law for Consumer Contracts in May 2008. This aimed to introduce rules on solving conflicts in cross-border B2C contracts.[49]

The IECA makes no comment on this and its Article 4 has referred the issue to the traditional law which, in turn, has no provision regarding consumer protection either in the physical world or in cyberspace. Therefore, the consumers are treated like normal claimants and defendants accordingly: 'A claim must be brought within the jurisdiction of the court where the defendant's domicile is located'.[50] This causes some difficulties to consumers when disputes arise from electronic B2C contracts and the contracting parties are located in different jurisdictions, such as the time and costs involved in bringing actions in the place of domicile of the business party as well as the difficulties involved in travel. Furthermore, they may be reluctant to sue the business party because it would be too onerous.

Having taken into account the above considerations, *the key research question is, where a company, foreign or domestic, establishes a website to sell goods and/or provide services that are accessible across the country and even across the world, whether the Iranian consumer is able to sue the company at his own place of domicile or habitual residenc*e on the ground that, for example, the establishment of the website accessible at the place of domicile or habitual residence of the consumer is like the seller having an agent there. The answer to this will help to develop e-commerce law both in general and in the context of Iranian law.

The answer also depends on three important sub-questions regarding the extent to which Iranian traditional law is able to respond: a) the subject matter of the contract, b) whether the business party is located in Iran or abroad, and c) who claims against who. If the business party brings an action against the consumer, Article 11 of the above rules

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[49] The Inter-American Specialized Conference on Private International Law (CIDIP) is working to harmonise jurisdiction and applicable law. One of the main agenda of the conference in 4th of May 2009 was consumer protection (Agenda of the Seventh Inter-American Specialized Conference on Private International Law, available at www.oas.org). To this aim, harmonising the private international law concerning consumers is one of the aims of the working group of the conference in the form of a Model law or Convention. The first draft of *the model law on jurisdiction in consumer contracts proposed* by Canada in October 2006 (Draft Model Law of Jurisdiction for Consumer Contracts, October 2006, available at www.oas.org). The first draft on *the model law on applicable law* was also proposed by Canada in November 2006 (Draft Model Law for Choice of Law Rules for Consumer Contracts, November 2006, available at www.oas.org). These two drafts later merged and proposed under the title of '*The Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts'* in May 2008 to introduce rules on solving conflicts incross-borderB2C contracts. However, as this draft is not in fore, there will be made no reference to at this discussion.

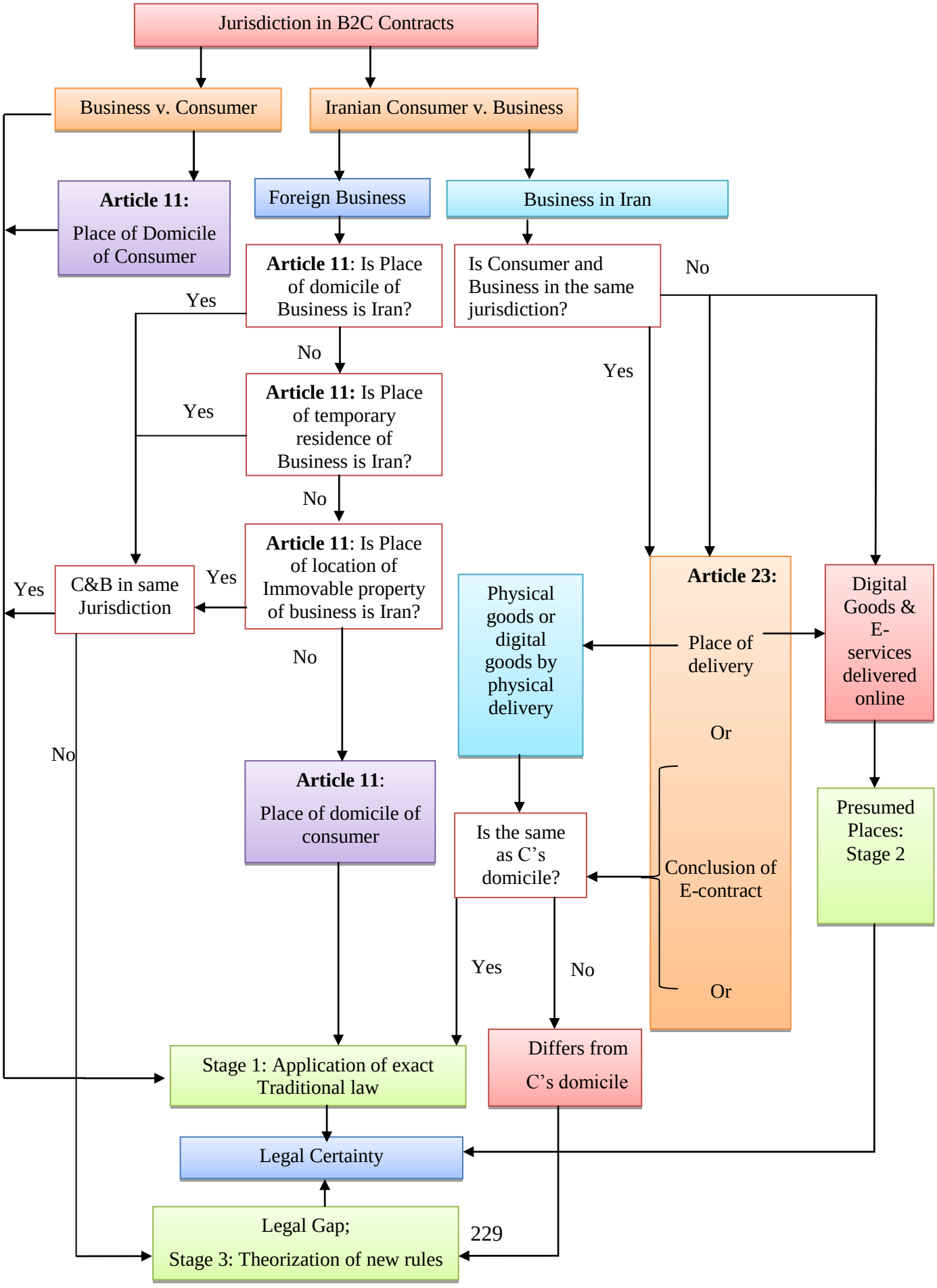
[50] ICPA, article 11

states that the competent jurisdiction is the court of the place of location of the consumer. This is in compliance with the notion of consumer protection in the context of jurisdiction. However, where the consumer claims against the business party and a foreign element exists in the legal relation of the parties, if the business party has its place of domicile in Iran, then, under Article 11, the court of the place of domicile of the business party is competent. However, this may or may not be the same as the place of domicile of the consumer. If they are the same the consumer is able to sue the business party in his own place of domicile; if they are not the same the legal gap is to see how the consumer can be allowed to bring an action in his own place of domicile against the business party who contracts electronically through a website and is not located at the place of domicile of the consumer. This scenario is true in relation to the other factors of Article 11: 'if the defendant has … no domicile … and … no place of temporary residence … and … no immovable property in Iran, the claimant must bring an action at the court of his own place of domicile'. Here there is the possibility for the last stage of the guiding principles to introduce a new rule. It is clear that, under current Iranian law, in B2C contracts the consumer party is able to sue the foreign business party at his own place of domicile if the business party is a foreigner and has no links with Iran (no domicile, no temporary residence or no immovable property) or has a link with Iran and the link is the same as the place of location of the consumer.

In contrast, where the consumer brings an action against the business party with no foreign element in the legal relations of the parties, Article 23 of the ICPA applies: 'Claims arising from obligations of a company against persons out of the company must be submitted at the place at which the obligation has been made or at the place at which the goods must be delivered or at the place at which the money must be paid'. Under this Article, three possibilities are available in the context of the Internet jurisdiction: a) place of delivery of goods (ether physically or digitally); b) place of conclusion of electronic contract; or c) place of making an e-payment. The case of (a) has been considered previously, taking into account the meaning of 'delivery', and it was concluded that stage two of the guiding principle provides certainty. However, regarding the cases of (b) and (c), they may be the same as the place of domicile of the consumer or they may be different. If they are the same then no further arguments need to be considered. If they are different, it must be decided how the consumer can sue the

business party at his own place of domicile in contracting electronically. The following diagram illustrates the above discussion:

Figure 5.1


Jurisdiction in B2C Contracts
Business v. Consumer
Iranian Consumer v. Business
Article 11: Place of Domicile of Consumer
Foreign Business
Business in Iran
Article 11: Is Place of domicile of Business is Iran?
Is Consumer and Business in the same jurisdiction?
No
Yes
No
Yes
Article 11: Is Place of temporary residence of Business is Iran?
Yes
No
Article 11: Is Place of location of Immovable property of business is Iran?
Yes
C&B in same Jurisdiction
Yes
No
No
Article 11: Place of domicile of consumer
Article 23:
Place of delivery
Or
Conclusion of E-contract
Or
Physical goods or digital goods by physical delivery
Digital Goods & E-services delivered online
Presumed Places: Stage 2
Is the same as C's domicile?
Yes
No
Differs from C's domicile
Stage 1: Application of exact Traditional law
Legal Certainty
Legal Gap;
Stage 3: Theorization of new rules

The above diagram shows that the first two stages of the guiding principles for developing e-commerce laws are unable to provide an appropriate solution to the key legal questions. Therefore, the research will consider the last stage as a means of introducing a new legal rule, taking into account the nature of the Internet, the advantages that business parties benefit from and the issue of consumer protection in electronic commerce. The result will provide better protection for consumers and enhance their trust in cyberspace, thus developing electronic commerce. This is important as the B2C contracts hold a considerable share of e-commerce. The aim of using a comparative study to achieve this is to allow consumers to avoid any uncertainty with regard to suing businessmen at their own place of domicile in all cases, regardless of whether the business party has any links with Iran, or whether the link is connected with the place of domicile of the consumer.

5.3.3 Conditions for Permitting Consumers to Sue Businessmen in their Place of Domicile in Contracting through a Website

Before considering the conditions of suing business party in the place of domicile of consumer party in B2C contracts, one doubt is necessary to be removed. One may argue that there is no need to permit consumers to do this. Therefore, before considering the conditions upon which the consumer party is able to sue the business party, it is necessary to prove the necessity of such permission in principle. In this regard two approaches may be proposed:

a) No-permission to sue the businessman in the place of location of the consumer: the Iranian Civil Procedural Act 2000 excludes some instances from the general principle of brining an action before the court of the place of domicile of the defendant. Amongst these instances there is no reference to the possibility of suing the business party at the place of domicile of the consumer by the consumer. .[51] Therefore, to avoid any

[51]Apart from the general binding rule of the place of domicile of the defendant, in some cases the claimant is free to choose the jurisdiction:
1. Where the parties agree on a place, other than the domicile, to perform the contractual obligations: the court of the agreed place has exclusive jurisdiction.
2. Where the claim has various defendants with different places of domicile: the claimant is free to choose the court of one of those places (Article 16 of the Iranian Civil Procedural Act).
3. Where immovable properties locate in different places: the claimant is free to choose the court of one of those places (Article 16 of the Iranian Civil Procedural Act).
4. Where commercial claims or claims regarding movable properties arising from contracts: the claimant is free to refer to the court of the place of conclusion of the contract or the place at which the contract must be performed.

misinterpretation, the general rule and exclusions must be construed narrowly. As a result such permission is not prescribed.

b) Permission to sue a businessman in the place of location of the consumer: although it is true that Iranian law does not expressly allow for the possibility of suing a businessman at the place of domicile of a consumer, Article 23 of the Iranian Civil Procedural Act 2000 implicitly permits it:

> Claims arising from obligations of a company against persons out of the company must be submitted at the place at which the obligation has been made or at the place at which the goods must be delivered or at the place at which the money must be paid.

In B2C contracts, as the place of delivery of physical goods sold online is often the place of domicile or habitual residence of the consumer, the possibility of suing a businessman at the place of domicile of the consumer already exists. However, the key question of this chapter must not be ignored, whether it is possible to sue a business party at the place of domicile of the consumer on the ground that their website is available there, if they are not located at the same jurisdiction and none of the connecting factors of Article 23 link them to the place of domicile of the consumer.

Taking into account Iranian law's implied permission, the need to develop electronic commerce protection for consumers and enhance their trust in e-commerce, it appears that the second approach is the strongest. The other legal systems in question have also adopted the second approach and permit the consumer party to sue a business party at his own place of domicile, subject to some conditions. This approach seems logical and rational, and Iranian law can be developed and modernized by learning from the achievements of these legal systems and thus fulfil one of the mandates of this chapter. The following sections consider the conditions that are proposed to Iranian law to adopt and, by meeting them, permit consumer to sue businessman at his own place of domicile in disputes arising from electronic contracts formed over websites.

5.3.3.1 Golden Test

Studying the legal systems in question shows that it may be suggested to Iranian law that consumers can sue businessmen in their place of domicile in contracting through a website if the following conditions are met: a) the website must be interactive, b) businesses must be pursuing or directing commercial activities through the website in

the place of domicile of the consumer 'intentionally and purposefully'; c) their activities must be 'continuous'. It is necessary to consider each of these conditions in greater detail.

5.3.3.2 Website must be Interactive

The Internet jurisdiction issue arises when the website is of an interactive nature and the conclusion of electronic contracts is feasible. It is evident that in non-interactive websites, such as those established for advertising purposes, it is impossible to contract electronically. These types of websites are in fact the electronic version of paper advertisements. Learning from the legal systems in question to develop Iranian law this condition has been considered in both EU and American laws. In a case heard by the European Court of Justice it was stated that:

> Within the meaning of Article 13 of the Brussels Convention [now replaced by Brussels I Regulation][52] cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.[53]

Similarly, in websites with low levels of interactivity such as those that only allow consumers to add their names to a mailing list or leave messages, it is simply not possible to conclude electronic contracts. Therefore, the jurisdiction issue will not arise at all. In this regard, the European Commission has also given a positive response, provided that the website is an interactive one.[54] Similarly, in American law in 1997, the court in the case of *Bensusan Restaurant Corp. v. King*,[55]took into account the nature of the website and held that, because the website was used for displaying personal information and was not interactive, there is no ground for applying personal jurisdiction over the owner of the website that was located in another jurisdiction. Later, this view was also adopted in a number of cases including the landmark case of *Zippo Manufacturing Co v. Zippo Dot Com, Inc*.[56]The basis for the decision of the court in this

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[52] The author added.
[53] C-. 585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*, 2010, P. 44.
[54] Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Jurisdiction in Civil and Commercial Matters (Com 1999/348, 99/0154), 14 July 1999, available at www.europa.eu.
[55] 126 F.3d 25, 44 U.S.P.Q.2d (BNA) 1051 (2nd Cir. 1997).
[56] 952 F. Supp. 1119 (W.D. Pa. 1997). It is necessary to note that before this case the court in the case of *Inset Systems, Inc. v. Instruction Set* in 1996 in which a company was benefiting from a website

case[57]was the level and the nature of interactivity of the website. In determining this issue, the court classified websites into three categories of interactivity.

a) Interactive: personal jurisdiction is applicable if the aim of the owner of the website is to do business through it[58] and the users are able to interact with the website and conclude electronic contracts.

b) Non-interactive: personal jurisdiction is not applicable if the owner merely uploads information which is accessible by residents of other states, as there is no interaction between the users and the website.

c) Semi-interactive: if the level of interactivity is very high and is close to being fully interactive, personal jurisdiction is applicable; however, if it is closer to being non-interactive, personal jurisdiction is not applicable.

Having taken into account the above considerations, the court held that the defendant, which had 3000 subscribers, 7 contracts with the ISPs in Pennsylvania, and a high volume of communications to provide services to the residents there, could not argue the non-competence of the Pennsylvanian court.[59] The website was interactive with a commercial nature and so a personal jurisdiction was applicable over its owner.[60]

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continuously to advertise electronically to its customers in all states, regarded this level of using the Internet sufficient to apply personal jurisdiction. Some cases later followed this case (*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 - 1996.).

[57] This case is mostly referred to apply personal jurisdiction over a defendant in the Internet Activities. As it is seen in the name of both parties the word *Zippo* is seen, which was the base of the dispute. The claimant is a company which manufactures lighters in Pennsylvania. The defendant a Californian company established a website and registered the domain names of *zippo.com*, *zippo.net* and *zipponews.com*. Its contacts with the Pennsylvania were through the website, but the office, staff and servers of the website all were located in California. Around 3000 out of 140000 subscribers of the company were Pennsylvanian which have been receiving the service of the company by the Internet. The company also contracted with seven Internet Service Providers based in Pennsylvania to provide access to the data base of the website for the subscribers located there. The claimant claimed that its trade name has been infringed, and *Zippo* has been used in the domain name of the defendant's website, letterheads of the news and the Internet advertisements sent to the subscribers by the defendant, who, in turn, claimed that the Pennsylvanian court is lack of jurisdiction over it.

[58] *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996).

[59] This analyse has been employed in a number of cases, such as: *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3rd Cir. 2003); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc*., 293 F.3d 707 (4th Cir. 2002); *Mink v. AAAA Dev. LLC,* 190 F.3d 333 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.,* 130 F.3d 414 (9th Cir. 1997); *Soma Med. Int'l v. Std. Chtd. Bank,* 196 F.3d 1292 (10th Cir. 1999).

[60] Harvard Law Review Association, *No Bad Puns: A different Approach to the Problem of Personal Jurisdiction and the Internet*, Harv. L. Rev., 116(6), 2003.

5.3.3.3 Intentionally and Purposefully Directing or Pursuing Commercial Activities in the Place of Domicile of the Consumer

The second condition and the most important one is that, from its establishment, the purpose of the owner of the website should be to sell goods or provide services at the place of domicile of the consumer. The proposed elements of this condition to Iranian law are composed of the approaches found in English and American laws.

In some cases, it is possible for consumers to access the website of a foreign business that does not sell or provide goods to their place of location. Therefore, mere access to a website is not sufficient, although it has been deemed that, where a customer can access a website, the owner of the website has directed his activities towards the country of the consumer's domicile, regardless of whether it was his intention to do so.[61] To avoid any future disputes, it is recommended that the owner of the website should clarify this issue in the terms and conditions section of the website. This is referred to as 'directing or pursuing commercial activities' in the place of domicile of the consumer and is expressly addressed under the Brussels I Regulation.

It has been said that 'pursuing' commercial activities requires the physical presence of the pursuer at the place, but that this is not necessary for 'directing' activities.[62] It seems that, although such a distinction based on a physical presence is rational in traditional commerce, it is not required in electronic commerce. The reason for this is that, in electronic commerce, the aim is to take advantage of the benefits of cyberspace and eliminate intermediaries and other traditional requirements, including a physical presence in person or through agents.

There are also two important EU cases that deal with these issues. In *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*63, MrPammer was domiciled in Austria and intended to travel from Trieste in Italy to the Far East. He registered for a sea voyage with a German company, Reederei Karl Schlüter. At the time of boarding, Mr Pammer refused to board and claimed that the characteristics of the ship were dissimilar to the

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[61] King, G., *Electronic Commerce Disputes*, Communications Law 5(1): 14, 2000, P. 15.

[62] Cashia, P., *Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations*, European Law Review, 34(3), 2009, P. 483.

[63] C-585/08, Court of Justice of the European Union , PRESS RELEASE No 118/10, Luxembourg, 7 December 2010, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-12/cp100118en.pdf> and <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:055:0004:0005:EN:PDF> (last visited: August 2011)

information he had received at the time of registration. He requested his money back. The company issued a partial refund and so Mr Pammer brought an action in an Austrian court. The company claimed that the Austrian court had no competence over the German company because it did not pursue any commercial activities in Austria, given that it had no physical presence in Austria and only traded through a website.

In *Hotel Alpenhof GesmbH v. Oliver Heller*, the defendant, Mr Heller, was domiciled in Germany and reserved a number of rooms in Hotel Alpenh of in Austria, through the e-mail address mentioned on the hotel's website. Mr Heller was displeased with the hotel services and left the hotel without making payment. The manager of the hotel brought an action against him in an Austrian court. Mr Heller claimed that as he was a consumer domiciled in Germany and the hotel had directed its trade at Germany through a website, then he must be sued there under the Brussels I Regulation.

In these cases, the Oberster Gerichtshof (the Austrian Supreme Court) requested clarification from the European Court of Justice over whether a company, located in a member state, which provides its services through the Internet to other member states, is actually directing activities at member states under Article 15(1)(3) of the Brussels I Regulation. If this were the case, Mr Heller should be sued in Germany, and Reederei Karl Schlüter should be sued in Austria. In December 2012, the European Court of Justice stated that:

> The mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.[64]

However, it accepted that, in principle, it was possible to direct activities through websites to the place of domicile of the consumer:

> In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be "directing" its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract

[64] For more details refer to: Joined Cases C-585/08 and C-144/09: Judgment of the Court (Grand Chamber) of 7 December 2010 (references for a preliminary ruling from the Oberster Gerichtshof (Austria)) — *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09) (Jurisdiction in civil and commercial matters — Regulation (EC) No 44/2001 — Article 15(1)(c) and (3), available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:055:0004:01:EN:HTML>.

> with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.[65]

In deciding whether the trader's activity was directed at a member state where the consumer was domiciled, the following non-exhaustive list should be considered by the national courts:

> 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.[66]

American cases have also considered this requirement. In the case of *Calder v. Jones*[67] the 'effect test' was introduced to meet the minimum contact test set out in *International Shoe*. In *Calder*, in contrast to *Zippo* which examined the nature of the website and its level of interactivity, attention was focused on the real effect of the website in the state in question,[68] to decide whether the Internet activities of the owner directly and purposefully had an effect on individuals and entities located in that state. In 2008, this same issue was considered in the case of *Dudnikov v. Chalk & Vermilion.*[69] In this case, three conditions were set out that were considered necessary to meet the criterion of

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[65] Ibid.
[66] Ibid.
[67] 465 U.S. 783 (1984). In this case, Jones, an actress domiciled in California, brought an action against Calder, the editor of the National Enquirer, domiciled in Florida and accused him of defamation calling her an alcoholic person in the magazine. She based her claim on the distribution of 600000 out of total number of 5 million versions of the magazine weekly in Californian which is sufficient to meet the *minimum contact test*. The Californian court dismissed the case on the ground that the application of jurisdiction is against the freedom of speech! (The base of the court's decision was the First Amendment (Amendment I) to the United States Constitution which prevents any limitations to the freedom of speech.) Jones appealed and the Court of Appeal granted personal jurisdiction which later confirmed by the Supreme Court on the ground that firstly, the editor was aware that the magazine has considerable distribution in California; secondly, the claimant is domiciled there and thirdly, by the publication of such a defamation her professional status has been affected negatively (Regarding the decision of the initial court, the supreme court stated that the First Amendment (Amendment I) to the United States Constitution is applicable only in respect of the claim itself not the jurisdiction matter).
[68] Boone, B. D., Bullseye, *Why a Targeting Approach to Personal Jurisdiction in the E-commerce Context Makes Sense Internationally*, PP. 260-261.
[69] 514 F.3d 1063 (10th Cir. 2008).

'direct purposefulness': a) the acts of the defendants must be intentional; b) they must expressly attack the forum state; and c) they must be done in the knowledge that their activities would have an effect there. If these three conditions are met, there is no need for the fairness and minimum contact test[70] introduced by the case of *International Shoe*[71] in 1945, and the owner of the website with no traditional contact with the given state can be sued there.

Finally, the act of the owner of the website in displaying goods or services at the place of domicile of the consumer must be intentional and purposeful. The 'targeting approach' in American law introduced by *Bancroft & Maters, Inc v. Augusta Nat'l Inc*,[72] as well as the test over the level of interactivity of the website in *Zippo* and the effect test in *Calder*, illustrates this condition well. Under this case, the court must ensure that the defendant intentionally, knowingly and purposefully targeted the claimant domiciled in another state through its Internet activities. Such an intention can be derived from the terms of the website or the history of its previous commercial activities. This requirement was developed further in the case of *Cybersell, Inc v. Cybersell, Inc*[73] where the court concluded that the business party must have the 'purposeful availment' and do 'intentional acts' within the territory of the forum state.[74]

5.3.3.4 Directing or Pursuing Commercial Activities in a Continuous Manner

The last condition of the proposal suggested to Iranian law is that the intention of the owner of the website in directing or pursuing commercial activities at the place of domicile of the consumer must be continuous. As such, a temporary offer of goods or services to be delivered or provided at the place of domicile of the consumer cannot be

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[70] Under the idea of minimum contact and the fairness theory[70]introduced by the case of *International Shoe Co. v. Washington*[70] in 1945, personal jurisdiction (contrary to *in rem* jurisdiction) is applicable if the defendant is not domiciled in the forum state and has minimum contact with that state, as long as bringing an action in it does not prejudice the notion of fairness and substantive justice.[70] Almost all cases on jurisdiction after *International Shoe* have mainly focused on meeting the minimum contact and fairness factors of this case.

[71] 326 U.S. 310 (1945)

[72] 45 F.Supp.2d 777 (1998).

[73] 130 F. 3d 414, 419-20 (9th Circuit 1997). The claimant, a company located in Arizona, registered the trade name of cybersell and got a licence for using the trade name of *cybersell.com* in 1995. Later, it brought an action against the defendant for breaching his trade name over the Internet. The defendant established a website with a domain name of *cybersell.com* in Florida to offer consultancy in management and business. The defendant accepted the request and changed its trade name to *WebSolvers*. However, on the home page of the website the sentence of '*Welcome to Cybersell*' displayed. The claimant brought an action to sue the defendant in Arizona. The court also added that the Floridian company has merely used the name of Cybersell to display advertisements on a non-interactive website without targeting the residents of Arizona with its commercial activities to benefit from.

[74] Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).

regarded as continuous and, thus, it cannot be considered a firm basis to claim jurisdiction.

At the end of this discussion it is necessary to note that justice dictates that protecting consumers must not lead to unfairness towards business parties; a fair and reasonable balance between the parties should be struck. In order to achieve this, the business party has three choices. He may prevent consumers of a jurisdiction from accessing the website. This seems technically too difficult. He may try to meet the consumer protection rules of all legal systems. For example, if the legal system of A provides a grace of 7 days for withdrawing the order by the consumer, the legal system of B provides 15 days, and the legal system of C provides 30 days, the business party must provide the maximum protection grace which is 30 days. However, gathering consumer protection rules from all the legal systems of the world and displaying these in the terms and conditions section is a monumental task and is, therefore, an undesirable one for the business party. The logical suggestion seems to be that the business party can mention on the website the countries he intends to direct his commercial activities towards. However, if a business party intends to deal with consumers across the world or a large part of it, such as Amazon, again the problem of consumer protection rules arises. The best option would be for the business party to mention the intended countries for e-marketing on the website, and provide a standard form contract tailored to the consumer protection rules of each country.

5.4 Conclusion

Determining jurisdiction as one of the main issues of private international law is a main task in solving disputes of a foreign element. As in cross-border electronic transactions, such as dealing with a foreign website, the existence of a foreign element is evident, hence, this chapter tried to consider the determination of jurisdiction in disputes arising from electronic contracts. Similar to the previous chapters, the aim of this chapter was to examine the extent that Iranian law is able to respond the legal questions of electronic contracts, this time, in the context of the Internet jurisdiction; and if any development is required, its extent and way of making should be considered. For this aim, it was extracted that the key research questions tested the guiding principles, mainly addressed the connecting factors of the place of e-delivery of digital goods, the place of provision of electronic services, the place of making an e-payment, and consumer protection in B2C contracts in the context of an Internet jurisdiction.

As a starting point it concluded that although the legal systems in question generally permit the parties to agree on a jurisdiction clause and, in this way, avoid any future difficulties if a dispute arises, Iranian law does not allow for such a possibility. Therefore, the first step in developing and modernizing Iranian law should be to recognise such a possibility under the last stage of the guiding principles and thus remove obstacles in developing e-commerce, in particular cross-border e-commerce. In the absence of any agreement on jurisdiction, the Iranian traditional rules of jurisdiction are applicable regarding online sales of immovable property, physical goods and digital goods delivered 'physically'. Regarding e-delivery of digital goods, it is suggested that under the second stage of the guiding principles it is necessary to decide on a place as the place of delivery of digital goods. Taking into account the meaning of 'delivery' under Article 375 of the Iranian Civil Code, it is suggested that, in B2C contracts, the place of domicile or habitual residence of the consumer and, in B2B contracts, the place of business of the buyer, should be presumed to be the place of performance, unless otherwise agreed between the parties.

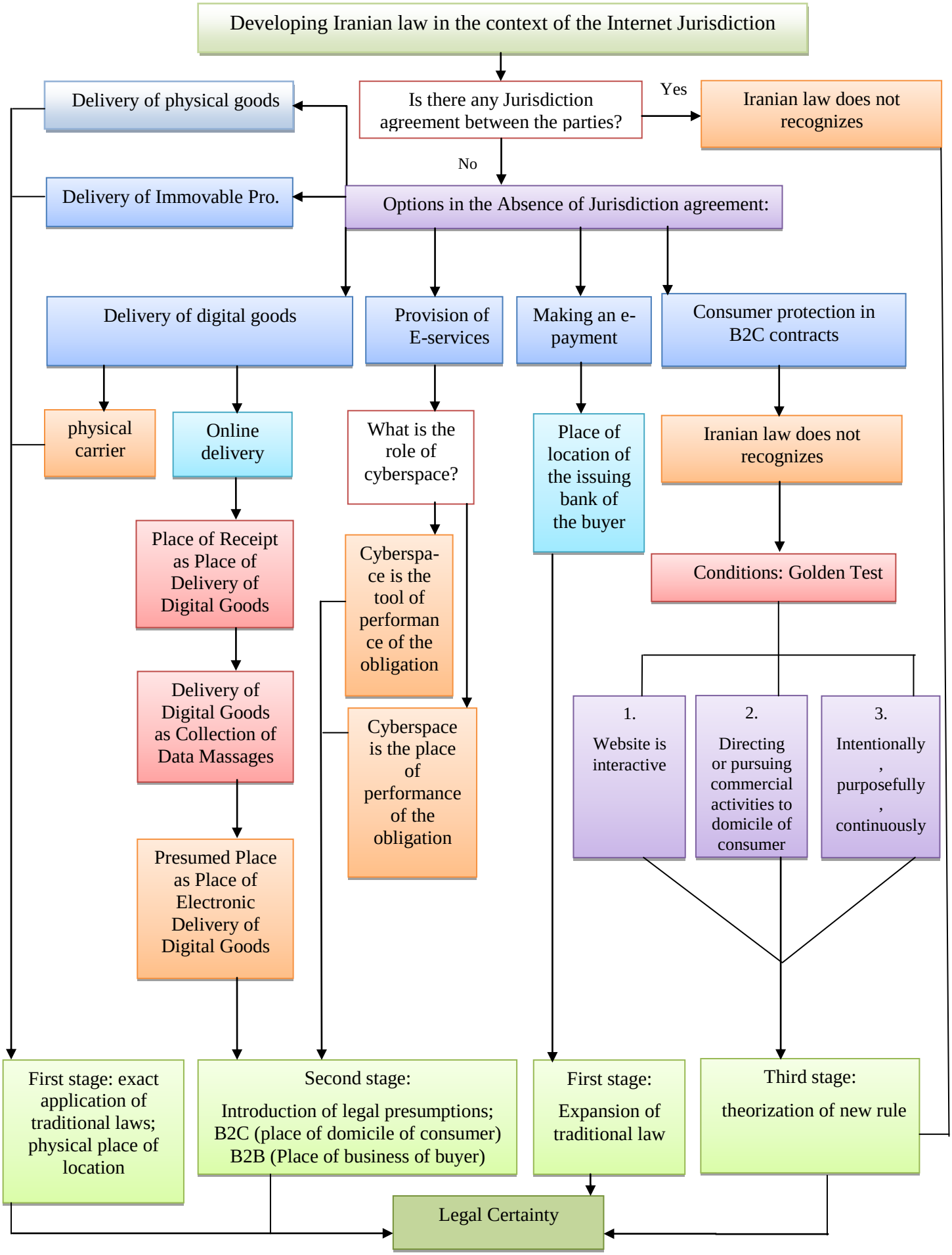
The chapter also considered the provision of electronic services and whether cyberspace was a mere tool of e-performance of the obligation or the tool as well as the place of e-performance of the obligation. The theory of presumptive place provides certain solutions. It was concluded that it is appropriate to set the place of domicile or habitual place of residence of the consumer as the presumptive place of performance in B2C

contracts, and to provide the place of business of the service receiver as the presumptive place of performance in B2B contracts, unless otherwise agreed between the parties. As regards the place of making an e-payment, having taken into account the technical process behind making an e-payment and the similarity of the process with the issuance of a bill of exchange, under the first stage of the guiding principle, the place of location of the issuing bank should be regarded as the place of making an e-payment.

Regarding consumer protection in B2C contracts, by learning from decided cases such as *Zippo*, *Calder* and *Bancroft* in American law, and the two recent leading cases of *Pammer* and *Hotel Alpenhof* in the EU, a comprehensive set of criteria for the Iranian legal system was put forward, termed the 'golden test'. Under this test, the consumer can sue the business party at his own place of domicile if the website is interactive enough for the consumer to be able to contract electronically by interacting with the e-agent of the website, if the business party directs his commercial activities to the place of domicile or habitual residence of the consumer which can be proved by taking into account the e-trade usage of the business party and the content of the terms and conditions section of the website, and, finally, if this business arrangement is permanent and not just an ad hoc offer. As a result, it is suggested that Iranian law should derogate from the general principle of the court of the place of domicile of the defendant provided in Article 11 of the Iranian Civil Procedural Act 2000 and permit the consumer to sue the business at his own place of domicile or habitual residence under the third stage of the guiding principles.

Finally, in terms of reflecting the outcome of this chapter within Iranian law, it can be said that in this area of law it is clear that Iranian law needs developments as discussed through the chapter; having taken into account the structure of the legal system of Iran that is a civil legal system in which the Parliament is the most important body of making law, the best way of making these developments is revising and reforming the IECA under the auspicious of the findings proposed through the chapter and inserting the suggestions into the Act.

Figure 5.2


Developing Iranian law in the context of the Internet Jurisdiction
Is there any Jurisdiction agreement between the parties?
Yes
Iranian law does not recognizes
No
Delivery of physical goods
Delivery of Immovable Pro.
Options in the Absence of Jurisdiction agreement:
Delivery of digital goods
Provision of E-services
Making an e-payment
Consumer protection in B2C contracts
physical carrier
Online delivery
What is the role of cyberspace?
Place of location of the issuing bank of the buyer
Iranian law does not recognizes
Place of Receipt as Place of Delivery of Digital Goods
Cyberspa-ce is the tool of performan ce of the obligation
Conditions: Golden Test
Delivery of Digital Goods as Collection of Data Massages
Cyberspace is the place of performance of the obligation
1. Website is interactive
2. Directing or pursuing commercial activities to domicile of consumer
3. Intentionally , purposefully , continuously
Presumed Place as Place of Electronic Delivery of Digital Goods
First stage: exact application of traditional laws; physical place of location
Second stage:
Introduction of legal presumptions;
B2C (place of domicile of consumer)
B2B (Place of business of buyer)
First stage:
Expansion of traditional law
Third stage:
theorization of new rule
Legal Certainty

Chapter 6: Applicable Law in Disputes arising from Electronic Contractual Obligations

6.1 Introduction

Once the Internet jurisdiction issue is determined, as discussed in the previous chapter, a court moves on to determine the applicable law. In the context of e-commerce, where parties from different jurisdictions contract electronically, they need to know which law would determine any future disputes related to their e-contract. Due to legal uncertainties in this area under Iranian law, which will be shown later, this chapter tries to examine the issue of deciding applicable law in e-contracts, as the final piece of the puzzle of the extent that Iranian law is able to respond the legal questions of contracts in cyberspace. To make clear the path of discussion, the applicable law can be discussed under two categories: a) applicable law to the formation of the e-contract; and b) applicable law to determine the rights and obligations of the parties arising from the e-contract. Regarding the first category, in general, the Iranian legal system provides that in terms of the law applicable to the formation of the contract, Iranian law is applicable if the contract is formed in Iran.[1] This is also true regarding e-contracts. Therefore, under the first stage of the guiding principles for the development of Iranian law in the context of e-commerce, the required legal certainty is reached. However, the place of formation of electronic contracts must also be considered which discussed in the second chapter.

Regarding the second category, in general, if the contracting parties agree on a choice of law clause incorporated into the contact, which is technically possible in contracting over the Internet, there would be no concerns. Here, the important challenge regarding Iranian law is that the Iranian Civil Code does not validate any agreement on the applicable law, unless both contracting parties are non-Iranians.[2] This clearly hinders the development of cross-border e-commerce between Iranians and foreigners.[3] For

[1] Article 5, Iranian Code of Civil.
[2] Articles 968, 969.
[3] In some rare cases it is really difficult or even impossible to set the proper law by the traditional rules of conflict. For example, if the person A located in the country of A and the person B located in the country of B enter into a contract with the person of C located in the country of C, to design jointly and online a web ordered by the person of C and the work of the two completes the order, deciding the place of performance of the contract is challenging. As the work is done in both countries of A and B, two governing law seems to be applicable, which is an impossible result! Here, the author suggests either measuring the amount of work done by each party and apply the law of the country of the person who effects much amount of the order, or considering the core part of the work and the person who does it. Determining the amount of work of each party or the core part of the obligation must be left to the relevant experts. However, as these types of cases are rare, in the next part on electronic discussions this issue will not be considered.

example, as it is common, in contracting through websites between an Iranian customer and a foreign website, the applicable law is agreed by inserting a clause into the terms and conditions section to which the buyer shows his consent by ticking a box before making the contract final. However, under the current Iranian law the agreed proper law is not valid. Therefore, it is necessary to suggest solutions to remove this obstacle in Iranian law. It seems that the last stage of the guiding principle should be resorted to in order to theorize a new rule for this purpose.

Where there is no agreement on the proper law in an electronic contract, it must be seen how the Iranian traditional rules of deciding governing law are applied to e-transactions in order to solve disputes arising from electronic contracts. Similar to the issue of the Internet jurisdiction discussed in the previous chapter, some uncertainties exist. For example, the Iranian traditional rule for determining the applicable law provides that the governing law for the obligations arising from the contract is the law of the place of formation of the contract; as such, in contracting electronically the place of formation of the electronic contract must be analysed as the notion of 'place' is not perceivable within the Internet. However, in some cases the application of place of formation of the contract is decolourized, such as in cases where the parties accidentally contract whilst on an airplane in mid-air. In this case, the court must take into account other relevant factors such as the place of performance of the contract.[4] Applying this factor to e-transactions has its difficulties which needs careful considerations and appropriate solutions in Iranian law; for example: in the e-delivery of digital goods such as software; in the e-provision of electronic services such as e-advertising or e-teaching, and if the place of performance of the contract is uncertain.

Another uncertainty in Iranian law relates to the place of location of digital goods. Under Article 966 of the Iranian Civil Code, movable and immovable properties come under the law of the country in which they are located. In enforcing this rule, the place of location of immovable properties is clear. This is true regarding tangible movable properties as well. However, the place where intangible goods, such as an e-book or computer software, are located need to be analysed for the purpose of determining the applicable law. Since digital goods have no physical nature, any perceivable solution

[4] Almasi, N., *Private International Law*, 3rd ed., Mizan Publication, 1384 (SC).

should be put forward and analysed in terms of each of the stages of the guiding principles and how the required legal certainty is reached.

Similar to the issue of Internet jurisdiction, another significant question relates to the protection of Iranian consumers in B2C contracts in the context of the applicable law for the Internet. In a cross-border electronic transaction, the key question to consider is whether or not, in principle, they benefit from the consumer law of their own place of domicile, i.e. Iran. Also, where there is an agreed applicable law between the consumer and the business party, it is necessary to examine whether or not they still benefit from consumer laws of their own country. In contrast to other legal systems in question which give a clear positive answer, Iranian law takes a confusing position. Responding to the first question, the IECA provides that if any other law, including the governing law, provides less protection for consumers than this Act, the application of the latter must not be stopped.[5] Responding to the second question, as stated above, the Iranian Civil Code does not allow any agreement on the proper law, either traditional or electronic, unless both parties are non-Iranians. This means that the agreed applicable law between the Iranian consumers and foreign websites is invalid and, as a result, reference must be made to the determining factors of the place of formation of the e-contract, the place of performance of the e-contract, the place of provision on e-services and the location of the digital goods, depending on the case. If they are located abroad, it must be considered whether Iranian law provides more protection than the foreign law. If they are located in Iran, the consumer protection law of Iran will be applicable; and, if the foreign law provides more protection, the Iranian consumer will be deprived of it. The ideal solution would be to provide the maximum protection possible for Iranian consumers in all situations.

Having taken into account the above considerations, the main issues that need to be addressed with the aim of developing and modernizing Iranian law in the context of the applicable law for the Internet are: a) to recognize the legality of agreements on the applicable law, either traditional or electronic, entered into by Iranians or Iranians and foreigners; b) to determine the place of formation of electronic contracts; c) the place of e-delivery of digital goods through the Internet; d) the place of e-provision of electronic services over the Internet; e) the place of location of digital goods; and finally, f) to

[5] Article 45 of the IECA.

ensure the maximum protection of consumers in electronic B2C contracts. Among the above issues, b, c and d have been addressed in previous chapters. Then, the focus of this chapter will be on a, e and f.

This chapter will test the Iranian traditional rules of conflicts in electronic transactions to see to what extent they address the said emerging legal issues.[6] Since the IECA does not involve in the conflict of laws issues as considered in the previous chapter,[7] the main focus, then, will be on the application of the relevant traditional rules for solving conflicts in the electronic environment. In order to reach legal certainty in each research question, the guiding principles for the development of e-commerce law introduced in the introduction will be followed stage by stage, following a comparative study of the legal systems in question where and to the extent that it is required.

6.2 Applicable Law to the Obligations arising from Electronic Contracts

6.2.1 Overview

In Iranian law, the rules for determining applicable law have only been provided in the Iranian Civil Code and these have remained unchanged since its enactment. As there are no provisions in the IECA regarding applicable law in electronic contracts, the traditional law will be applied to see to what extent it addresses the problem. However, in other legal systems a number of legal developments have taken place in this area. In 1980, the Member States of the European Community enacted the Convention on the Law Applicable to Contractual Obligations in order to harmonize the rules of conflict of laws in Europe. This Convention was incorporated into UK law through the Contracts (Applicable Law) Act 1990 and came into force on 1 April 1991. This was later replaced by the Rome I Regulation[8] in 2008, and this is the main basis of the discussion when referring to English and EU laws. The applicable law in the US is the Second Restatement and the American Uniform Commercial Code. Historically, the First Restatement was applied to determine the applicable law. However, this Restatement

[6] Avoiding any repetition, see the Introduction of the fifth chapter on the Internet Jurisdiction.
[7] This is true regarding other statutes on electronic commerce such as the European Electronic Commerce Directive and the Model Laws.
[8] The full title is: The Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations

had inflexible rules[9] and weaknesses[10]. Therefore, drafting of the Second Restatement commenced in 1953 and was completed in 1981.[11] Before considering the applicable law for the Internet, it is necessary to have a look to it in paper-based contracts deriving the rules to see how they are applicable in electronic contractual obligations.

The principle of party autonomy is recognised in all the legal systems in question and provides that the parties are able to agree on the applicable law for the contract, expressly or impliedly.[12] For example, Article 3(1) of the Rome I Regulation 2008 provides that: 'A contract shall be governed by the law chosen by the parties...' Similarly, Article 968 Iranian Civil Code recognizes the legality of any agreement on the applicable law, but only by foreign parties, an approach that is the basis of the challenge in contracting electronically. However, this approach operates under some limitations, such as mandatory laws[13] and public policy[14].[15] Likewise, American law

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[9] For example, the First Restatement rules that any dispute arising from a contract is settled by the law of the place of formation of the contract. This is a rigid rule which in some cases seems non-useful. For example, two traders with a place of business in New York, meet each other in Florida on a holiday travel and conclude a contract there. Any future dispute must be under the law of Florida!

[10] Such as non-recognition of renvoi in the cases of contracts and torts

[11] The theory of *centre of gravity* in 1954 had much influence on the Second Restatement in particular in adopting the test of the most significant relationship. The *most significant relationship* test has been affected by *the centre of gravity* test introduce in the case of *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). In this case an English couple got married in England and settled there. The husband left his wife to New York and provided a separation agreement there. After 14 years, wife went to New York and sued her husband for the non-payment of monetary rights. The court at first applied the general rule of conflict of laws which puts the dispute arising from the contract under the law of the place of performance of the contract, and then took into account the recent cases which pay attention to the law of the place which has the most important relation with the dispute (*Rubin v. Irving Trust Co.*, 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953). The court found that England has the most important relation with the case. The contract of marriage has concluded in England, the parties domiciled there, their children and themselves still domicile in England; the only relation of New York with the case is that husband after leaving his wife has adopted New York as his place of residents. The court concluded that *the centre of gravity* of the dispute is England and then applied English law. This theory has affected the Second Restatement largely, in which *the most significant relationship* test has been adopted. However, some states still apply *the centre of gravity* test. In the text the discussion is continued under the Second Restatement.

[12] For instance, the article 3(1) of the Contracts (Applicable Law) Act 1990 of the UK has clear reference to this issue: *'... the choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case...'*

[13] For example, Iranian law puts the legal capacity of foreigners under their own national law. Hence, they cannot put it under Iranian law by a mutual agreement.

[14] For example, under Iranian law if the foreign law is against the public order of the forum in Iran, the court is able to deny its enforcement. Article 975 of the Iranian Code of Civil provides: '*Court cannot enforce foreign laws or private contracts which are against good ethic or, because of harming the public emotions or any other reason are against the public order, although the enforcement of the laws mentioned are principally allowed.*'

[15] It is necessary to note that other limitations also apply. For example, when a person tries to escape from the enforcement of its own national law to create a new legal status, circumvention of law is posed. For instance, where he changes his place of domicile from Iran to another country to be under a foreign law where the law of domicile is applicable, Iranian law will not enforce the foreign law preventing any circumvention towards it. See more: Almasi, N., *Private International Law*, 3rd ed., Mizan Publication, 1384 (SC), P. 194; Nasiri, M., *Private International Law*, 15th ed., NashrAghah Institution, 1385 (SC), P.

recognises such an agreement in both the UCC and the Second Restatement. Section 1-301 of the UCC provides that:

> (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.[16]

Section 187 of the Second Restatement relates to the conflict of laws and has a similar statement.[17] However, there are limitations. The law chosen should not be contrary to the public policy of the chosen state,[18] and also one of the parties should have some connections to the chosen state if he wants to choose the law of that state.[19]

In the Iranian context, in the absence of any agreed applicable law, reference must be made to the rules for determining the applicable law. Non-determination of the applicable law by the parties means that they do not use the power that the principle of party autonomy confers on them. As a result, to determine the rights and obligations of the parties, the legislator imposes a law on the contract. In this regard, Article 968 of the Iranian Code of Civil expressly puts the contractual obligations of the parties under 'the law of the place of the conclusion of the contract'.[20]Apart from the place of conclusion

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193; Shahidi, M., *Iranian Rules Determining Applicable Law to Private International Contracts*, 2nd ed., Hoghoghdan Publication, 1378 (SC), P. 240.

[16] UCC, section 1-301 (as amended March 8, 2008); before amendment it stated: *'(c) Except as otherwise provided in this section: (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.*

[17] Section 187:*'(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by the parties…'* It seems that the drafters of the Second Restatement have paid the most attention to the principle of party autonomy. As the details of this section are out of the scope of this chapter, then it has not been analysed. For more explanation of this Section refer to: <http://webcache.googleusercontent.com/search?q=cache:http://www.kentlaw.edu/perritt/conflicts/rest187.htm>

[18] *DeSantis v. Wackenhut Corp* 793 SW. 2d 670 (Tex. 1990).

[19] *General Electric Co. v. Keyser* 275 S.E.2d 289 (W. Va. 1981)

[20] In international regulations there is also a law imposed to the contract if there is no agreements on by the parties. For instance, the Convention on the Law Applicable to Contracts for the International Sale of Goods 1986 in article 8(1) provides: '*To the extent that the law applicable to a contract of sale has not*

of the contract, the place of performance of the contract may be determining. For instance, if the parties make a contract on an aeroplane in mid-air, logically, the place of performance is preferred by the court over the place of conclusion of the contract due to the difficulty in determining the place of formation of the contract, although the latter is given greater emphasis in the legal texts. Furthermore, the performance of the contract is always important in the minds of the parties rather than its place of conclusion. However, in applying either of factors the court will take into account all surrounding circumstances and the intention of the parties.

Iranian law has different criteria to EU and UK law in determining the applicable law in the absence of any agreement to that effect. As the focus of the research is on the development of Iranian law in the context of e-commerce, there is no need to consider those laws each with different factors; instead, attention must be paid to the satisfaction of Iranian traditional law in contracting electronically. However, a brief reference might be useful to show the said difference. In the absence of an explicit choice of law, Article 4(1) of the Rome I Regulation provides that if the contract is for the sale of goods, then it is governed by 'the law of the country where the seller has his habitual residence'. If the contract is for the provision of services, it will be governed by 'the law of the country where the service provider has his habitual residence'. It continues by stating that: 'Where the contract is not covered by paragraph 1 … the 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'.[21]However, if the law cannot be determined on either of these factors then 'the contract shall be governed by the law of the country with which it is most closely connected'.[22] Finally, American law (Section

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been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.' As it is clear, under this Convention the law of the place of business of the seller at the time of conclusion of the contract governs the contract where the applicable law has not been chosen by the parties.

[21] Regarding the way of determination of the phrase of the '*characteristic performance of the contract*' there is no indication in the Regulation. To this aim, the nationality of the parties and the place of formation of the contract are immaterial, and instead the place of habitual residence (for consumers) and principle place of administration or business (for traders) are taken into account. In a usual contract of sale, the characteristic performance of the contract is the provision of the goods, not the payment of the price (Giuliano, M., and Legarde, P.,*Report on the Convention on the Law Applicable to Contractual Obligations*.). Therefore, in the sale of goods, the law of the country of the seller will be applicable (*William Grant & Sons International Ltd v. Marie BrizardEspana SA* 1998 SC 536).

[22] Regarding the way of determination of the phrase of '*most closely connected*', there is no indication in the Regulation. However, in this regard, the court must take into account *the centre of gravity* of the Contract. For this aim, the court gathers all factors and ultimately chooses the law of the country which is

1-103(d) UCC) provides that where the parties have not determined the applicable law, the court decides which state's law is applicable.

In this discussion on the traditional rules, a reference must be made to the exclusions. Similar to the issue of jurisdiction, in some cases in order to determine the applicable law, the principle of party autonomy is limited by the mandatory rules. The law applicable to properties is one of those that cannot be determined by mutual agreement. As immovable properties are connected with the internal sovereignty of countries and national sovereignty matters, their registration, conveyance and any related transactions are dealt with by the law of the country in which they are located. Movable properties also come under the law of their location. Article 966 of the Iranian Civil Code states that: 'Possession and ownership and other rights over movable and immovable properties are under the law of the country in which the property is located'. In this regard, English law provides that the law of the country where the property is located is applicable to the contract regarding a right *in rem* in immovable property or a tenancy of immovable property.[23] The rule of conveyance of movable properties is also subject to the law of the place where it is located at the time of conveyance.[24] Similarly, in American law, the immovable properties are subject to the law of their place of location. Regarding movable properties, the UCC provides rules that have been adopted in most states and these will be considered in the next part.[25]

To sum up, this part has shown that in Iranian law a number of traditional factors determine the applicable law in the offline environment. In the context of electronic commerce law literature they may be categorized into two groups: agreement on the

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of more connections with the contract. Sometimes it is not an easy task. Here the attention must be paid to the individual value of each factor and given much value to the factor of the place of formation of the contract. However, in English law there is no clear practice in this regard and the parties are hardly able to predict the applicable law before the announcement of the court (Clarkson, C.M.V., and Hill, J., *Jaffey on the Conflict of Laws*, PP. 219-220). However, the Contracts (Applicable Law) 1990 in article 4(2), has also similar provisions to the Rome I Regulations but with clear position in this regard: *'it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.'*

[23] RIR, article 4(1)(c); adding that whether an immovable property is conveyed following to a traditional contract or an electronic contract the same rule is applicable. However, e-contracting of immovable properties are out of the scope of this research. Determining whether a property is movable or immovable, English case law applies the law of the place at which it is situated (*Re Berchtold* [1923] 1 Ch 192 at 199; *Re Cutliff's Will Trusts* [1940] Ch 565 at 571.).

[24] *Cammell v. Sewell* (1860) 5 H & N 728; *Glencore International AG v. Metro Trading International Inc.* [2001] 1 Lloyd's Rep 284.

[25] In some cases such as the applicable law to movable properties the UCC has been adopted by most states and in some other the Second Restatement has been adopted.

applicable law, expressly or impliedly; and absence of any agreement on the applicable law. In the latter category, the following connecting factors are employed:

a) place of conclusion of the electronic contract;
b) place of performance of the electronic contract;
c) place of provision of electronic services;
d) place of location of physical goods (movable or immovable) conveyed electronically; and
e) place of location of digital goods.

The next parts consider how the above factors are met in determining applicable law when solving disputes arising from electronic contracts under Iranian law, and how and to what extent Iranian can develop. Before continuing the discussions in the electronic environment, two points need to be emphasised. First, option a, b and c have been addressed in the previous chapters. Therefore, they will not be repeated here. Regarding option d - the place of location of physical goods (movable or immovable) conveyed electronically, if an immovable or a tangible movable property is conveyed under an electronic contract, as its place of location is certain, there is no difficulty in determining the applicable law. Therefore, the first stage of the guiding principles provides certainty. As such, the focus will be on determining the place of location of a movable property of an intangible nature. Finally, the consumer protection issue will be considered separately at the end.

6.2.2Agreement on the Applicable Law in Contracting Electronically: Reference to the General Limitations

When the law provides that the parties to a contract can agree on the applicable law by virtue of the principle of party autonomy, it does not matter whether the contract is concluded electronically or traditionally. This agreement can be reached by incorporating a term in the electronic contract; in contracting through websites this is usually done by inserting a term in the terms and conditions section and the buyer can then signal his consent by putting a tick in the box provided. However, sometimes the contracting parties either do not agree on the applicable law between themselves or the law does not permit them to enter into an agreement on the applicable law. The restriction in this regard in Iranian law means that it does not answer the needs of modern commerce. In the context of an electronic contract, if an Iranian person and a foreigner intend to agree on the applicable law, the restriction does not allow such an

agreement to be enforceable. A clear example is when an Iranian resident buys goods from amazon.co.uk. Similarly, where an Iranian person establishes a website to sell goods or provide services worldwide and the parties (when the other party is a foreigner) are not allowed to agree on the applicable law, provided that Iran is the place of conclusion of the e-contract, Iranian law will be applicable. It is high likely that foreigners would be reluctant to get involved in electronic transactions with Iranian domiciled persons. Even where the contracting parties are Iranians and have their place of business or domicile in a foreign country, they are not able to agree on Iranian law as the applicable law. The only possibility to do so is the case where both contracting parties are non-Iranians, and it may not be realistic to suggest that they would put aside their own country's law and agree on Iranian law as the applicable law. In fact, if it is said that Iranian law does not, in practice, recognize the validity of any agreements on the applicable law, similar to the issue of jurisdiction, no exaggeration is made. It is obvious that this provision negatively affects the promotion of e-commerce in Iran and at an international level if one party is Iranian and they want to place the rights and obligations arising from the e-contract under Iranian law. Thus, a new provision is required and such an action falls under the theorization of a new rule under the third stage of the guiding principles. The new rule can be incorporated in either the ICC where it can be employed in e-transactions as well as under Article 4 of the IECA which refers any issues of silence to the general principles and rules, or the IECA. American law has adopted the second policy since, in the traditional laws, an absolute permission has been granted to the contracting parties to agree on the applicable law.

Section 109(a) of UCITA expressly speaks about determining the applicable law in electronic contracts by virtue of the principle of party autonomy and empowers the parties to conclude the contract based on their agreed terms.[26]However, in Iranian law as in the traditional laws the problem has not been solved yet. It seems preferable to adopt

[26] The main aim of this Act is to regulate the transactions related to the computer information products such as computer software and e-books: *'"Computer information transaction" means an agreement or the performance of it to create, modify, transfer, or license computer information or informational rights in computer information.' (*UCITA, Section 102(11)*).* It tries to grant the same level of certainty and uniformity to the rules of information technology transactions that the Uniform Commercial Code (UCC) grants to the transactions of physical goods. The difference between the UCITA and the UCC is that the former is the backbone of the transactions in the age of communications and sale of computer information and the latter is the backbone of trade in the age of industry and sale of physical goods. A dark point in the history of the UCITA is that most states have not welcomed it and it has faced severe opposition from various groups (See for example: *why we must fight UCITA?* Available at: <http://www.gnu.org/philosophy/ucita.html>).

the first policy, in order to avoid any conflict between the new law of the IECA and the old law in the ICC which is the backbone of commerce in Iranian law.

One further concern relates to the limitations to agreeing on the applicable law electronically. The limitations are the same as those that exist in the paper-based transactions and the electronic format of the contract is immaterial. In this regard, Article 975 of the Iranian Civil Code expressly provides that the Iranian courts are not permitted to enforce those electronic contracts that are contrary to public order, morality or good ethics, even if the governing law of the contract has no restriction in this regard. Again, the electronic nature of the contract does change the nature of instances related to the public order, morality and good ethics. For example, that which is against morality in the physical world is also against morality in cyberspace because internet users also live in the physical world and any interactions in cyberspace affect actual society. It is only the method of expression that differs.

Having taken into account these considerations, it seems clear that Article 58 of the IECA must be amended. It states that: ‘Storing, processing or distributing private "data messages" which may reveal tribal or ethnic origins, moral and religious beliefs, ethical characteristics, and “data messages” regarding the physical, psychological, or sexual condition of people, without their explicit consent is illegal’. Some of the instances mentioned in this Article relate to public order and good ethics in cyberspace. The basic point is that the distribution of the mentioned instances in the physical world with or without people’s consent is illegal. Any mutual agreement between the distributor and the owner is invalid, as Article 975 of the ICC indicates. The question that can be asked is how it can be said that the physical, psychological or sexual characteristics of people are permitted to be published by their prior consent in cyberspace. This deduction is undoubtedly wrong. As stated before, the Internet provides a forum and any activities in it have a significant impact in the real world; any legal recognition of these types of agreements will disturb the public order, morality and good ethics in the real world, partly or totally, which is prohibited by Article 975 of the Iranian Civil Code. Therefore, a clear conflict exists between the ICC and the IECA. Iranian legislators should remove this conflict by reforming the above Article 58.

6.2.3 Absence of any Agreement on the Applicable Law in Contracting Electronically: Reference to Copyright

In the absence of any agreement on the applicable law, it has been observed that under Iranian law the place of conclusion of the e-contract and the place of performance of the contract are determining factors. However, one point again needs to be analysed. In the case where the subject of the e-contract aims to provide access to an e-source, such as a journal database or the delivery of an electronic copy of the goods, such as computer software, the application of the connecting factors of the place of conclusion of the e-contract or delivery of the digital goods may lead to an insufficient or a complete lack of protection for the license holder of the acquired rights under the place of location of the licensor or registration of the goods. In other words, if the connecting factors are in Iran, Iranian law will be applicable and this may not protect the copyright of the holder. In addition, at the time of drafting the ICC, the legislators could not have imagined the existence of such goods and the copyright issues were not as complicated as they are today. Moreover, Iran is not a contracting state to some of the main international regulations, such as the Berne Convention and the TRIPS Agreement. Therefore, it is necessary to resort to the last stage of the guiding principles and suggest a change to Iranian law, namely, that the law of the place of location of the licensor (the place of business if he is a trader, or the place of domicile if he is a consumer) or the place at which the digital goods have been registered to be applied can provide the established protections of the copyright. This is true regarding the provision of e-services as well. This approach has been adopted in the developed American legal system, where Section 105(b) of the UCITA provides that:

> In the absence of an enforceable agreement on choice of law … An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into.

By using this suggestion, determining the jurisdiction differs from the applicable law when the digital goods are the subject matter of the contract. The reason why this approach should not be adopted for the jurisdiction matter is clear. What determines the rights and obligations of the parties is the applicable law. The jurisdiction only acts as a tool to apply the applicable law to determine the substantive legal issues which are the core and the most important part of legal disputes.

6.2.4 Place of Location of Digital Goods

In terms of the applicable law regarding immovable properties and any rights therein, due to their physical nature there is no difference whether they are transacted on paper or electronic contracts. In both ways, the law of the place where the property is located is applicable.

As stated earlier, Article 6 of the IECA has excluded three types of contracts from being made electronically, including ones for immovable properties.[27] However, it seems that in line with the development of e-commerce there is no reason to preclude the e-transactions of immovable properties, particularly where the security of communications can be guaranteed. This may be an area where Iranian law can be developed.

As far as movable properties are concerned, the type of property is a determining factor. If it is a tangible property, its place of location and the applicable law are easy to determine. However, this is not clear for intangible properties, such as computer software and games in a digital format which are delivered by downloading onto the computer system of the buyer. It is clear that digital goods have no physical nature and, thus, a physical place of location is not perceivable. One analysis is that the place of location of the server of the website is the place of location of digital goods. Every website has two important elements, a domain name such as www.manchester.ac.uk, and a host or server which provides an amount of 'space' in cyberspace. The information on the website is saved in this space and displayed from it. In some cases,

[27] It is necessary to note that EU Directive on E-commerce also excludes some e-transactions from its scope: '(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded from the scope of this Directive… (16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.' In English law the Electronic Commerce (EC Directive) Regulations 2002 also provides some exclusions: '3. (1) Nothing in these Regulations shall apply in respect of (a) the field of taxation; (b) questions relating to information society services covered by the Data Protection Directive (1) and the Telecommunications Data Protection Directive (2) and Directive 2002/58/EC of the European Parliament and of the Council of 12th July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (3); (c) questions relating to agreements or practices governed by cartel law; and (d) the following activities of information society services (i) the activities of a public notary or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority, (ii) the representation of a client and defence of his interests before the courts, and (iii) betting, gaming or lotteries which involve wagering a stake with monetary value.'

the owners of websites buy space from a foreign company. For example, an Iranian seller may establish a website with a host in Germany. The digital goods will be uploaded into it and downloaded from it and, as a result, the place of location of the digital goods will be Germany. By changing the location of the host from Germany to China, for instance, the place of location of the digital goods will also change. Obviously this criterion is less certain and also has little to do with the contract and the contracting parties.

Another theory that can be put forward is based on the nature of digital goods. Traditionally, an intangible property is situated in a place where it is only enforceable or fully recoverable there. For instance, if the intangible movable property is a debt, the general rule is that the place of location of the debt is the place of residence of the debtor, as the debt is recoverable fully at that place.[28] By transferring this, the place of location of the digital goods should be the place of location of its owner, i.e., the license holder. However, as they are often registered after they are produced, then, if the place of location of the license holder differs from the place of registration of the digital goods, in order to protect the intellectual rights of the owner he must not be deprived of the law of the place of registration of the digital goods if the law of the place of location of the holder grants less protection. Therefore, the applicable law in this case is the law of the place of registration.[29]

Sometimes, intangible property is delivered by transferring the data onto physical carriers such as CDs, and not by downloading it electronically. In this case, it can be said that the place of location of a CD could be regarded as the place of location of the intangible property and the law of that place should be the applicable law. Two points can be raised on this issue. If the CD itself, which is a physical thing, is questioned, naturally the law of its place of location is applicable. If the content of the CD, which is a collection of data messages, is questioned, the previous discussion would apply, i.e., the law of the place of its registration would be appropriate.[30]

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[28] Almasi, N., *Private International Law*, P352; *New York Life Insurance Co v. Public Trustee* [1924] 2 Ch 101.

[29] If they have not been registered, then the logical criterion is the law of the place at which the producer has his domicile or, if he is businessman, his place of business; Habibzadeh, T., *Information Technology Law: Internet Jurisdiction and Applicable Law*, Vol. 3, 2012, Majlis Publication, PP. 384-385.

[30] *Ibid*, P. 386.

6.3 Consumer Protection in B2C Contracts in the Context of the Applicable Law

6.3.1 Standard Form Contracts

In B2C contracts, almost all contracts concluded between sellers and consumers, such as those concluded on websites, are standard form contracts. In these types of contracts, there are no negotiations between the parties. In general, the content of the contract is provided by the seller, and the buyer must either accept all the conditions or reject the contract. As the bargaining power of the parties is not equal, the seller, which is often a company, is in the better position and may impose its terms on the weaker party - the consumer. In these types of contracts, a term normally refers to the applicable law. For example, among its conditions of sale, amazon.co.uk provides that: 'These conditions are governed by and construed in accordance with the laws of the Grand Duchy of Luxembourg, and the application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded.'[31] The incorporated applicable law may grant less protection than the law of domicile or residence of the consumer. This conflict must be solved in favour of the consumer to provide him with the maximum amount of protection.

6.3.2 Developing Iranian Law by Granting the Absolute Maximum Protection

The Rome I Regulation states that consumer contracts: 'shall be governed by the law of the country where the consumer has his habitual residence'.[32]The Regulation provides two conditions in this regard. The professional trader:

> a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities...[33]

This provision repeats Article 15(1) of the Brussels I Regulation regarding jurisdiction and shows that there is a strong correlation between the two. However, the parties are able to determine the applicable law under Article 3, and the applicable law must not deprive the consumer of the protections of the law which would be applicable in the

[31] If there is no express indication, factors such as the previous course of dealings, dispute resolution, and jurisdiction clause must be taken into account to determine the implied choice of law.
[32] RIR, Article 6(1).
[33] RIR, Article 6(1)(a)-(b).

absence of the parties' agreement.[34] For example, if the parties choose the law of country A as the applicable law and in the absence of the agreed law the law of country B would be applied, then the consumer protection law of country B is still applicable. It is necessary to consider how these conditions can be met in performing electronic commerce through websites. As discussed in the jurisdiction chapter, in cyberspace, directing commercial activities can be done by the establishment of interactive websites which are accessible in the habitual place of residence of the consumer. The Recital 24 of Rome I, by a reference to the declaration that accompanied the Brussels I Regulation, provides that: 'the mere fact that an internet site is accessible is not sufficient … although a fact will be that this internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means'.

In American law, there is no specific provision regarding consumer contracts in the Second Restatement. However, the UCC in Section 1-301 provides that the applicable law in the B2C contracts is either the law of the place of the habitual residence of the consumer or the place at which the contract has been concluded and will be delivered. Section 109(a) of the UCITA provides that:

> The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.

It continues by stating that:

> In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law: (1) … (2)A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.

It is clear that the UCITA, similar to the UCC where there is an absence of an agreed applicable law, sets the law of the place of delivery of the goods as the applicable law. Furthermore, regarding consumer protection it has provided some mandatory rules: 'if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer protection statute [or rule] governs'.[35]

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[34] RIR, Article 6(2)

[35] UCITA, Section 105(c); It is useful to note that in the United States there is an attempt by the Inter-American Specialized Conference on Private International Law (CIDIP) to harmonize the rules of private international law in consumer contracts. The seventh conference worked on the Draft Model Law of

As stated before, in Iranian law there is no provision regarding consumer protection in B2C electronic contracts in the context of private international law. However, some consumer protection rules have been provided in the IECA related to the provision of goods and services in Articles 33 to 49, such as the right of withdrawal within seven days from the time of delivery of goods. In the conflict of laws context, Article 45 provides that: 'The execution of consumer's rights under this Act shall not be limited by other Laws that provide less protection of the consumer.' This provision implies that, if in a B2C contract the protection of the applicable law agreed by the parties[36] or applicable following the application of the rules of conflict, in the absence of any agreement from the consumer party is less than those granted by this Act, the protections of this Act will also be applied. This provision apparently grants the maximum protection for the consumer against the businessman and this stringency in the Act in protecting the consumer in modern trade, in particular, in cross-border contracts, is defensible. However, the negative aspect of this Article is that, where the applicable law to the contract grants more protection compared to this Act, the enforcement of the provisions of this Act will be stopped; there is no express indication over whether the foreign law will be applicable or not. It is suggested to the Iranian

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Jurisdiction and Applicable Law for Consumer Contracts, May 2008 (Available at www.oas.org), to provide an effective, fair and predictable legal framework to solve the disputes arising from cross-border consumer contracts; however, there is not also in this draft an express provision regarding electronic contracts and it is required to revise the draft to respond to the needs of current modern commercial community. Article 7 of the Draft Model Law addresses the applicable law in consumer contracts. It permits, by virtue of the principle of party autonomy, providing a writing agreement, such as standard form contracts, on the law of one of the states as the applicable law to the contract (UCITA with Prefatory Note and Comments, available at www.law.upenn.edu). The agreement on the applicable law may be made at the time of conclusion of the contract or onwards. However, regarding whether the writing agreement can be made by electronic means or not, there is no indication in the Draft. This is one of the important weaknesses in the Draft. The Draft in order to protect consumer party provides that if the agreed applicable law deprives the consumer from the legal protections of the state in which he habitually resides, it will be invalid, provided that one of the following three conditions exists: *'(a) the consumer contract resulted from a solicitation of business in [name of State] by the vendor and the consumer and the vendor were not in the presence of one another in the vendor's State when the consumer contract was concluded; (b) the vendor received the consumer's order in [name of State]; or (c) the vendor induced the consumer to travel to a State other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.'* This provision is applicable where the mandatory rules of the law of the habitual place of residence of the consumer, compared to the agreed applicable law, have much protection in favour of the consumer. Article 7(3)(a) of the draft presumes that the consumer contracts have been arisen from the request of the seller to do business there, unless the seller proves that he has taken reasonable steps to avoid contracting with the consumer. Finally band 4 of article 7 states: *'4. In the absence of a valid agreement pursuant to paragraph 1, if one of the circumstances described in subparagraphs 2(a) to (c) exists, the laws of [name of State] apply to a consumer contract between a consumer who is habitually resident in [name of State] and a vendor who is habitually resident in a State other than [name of State].'*

[36] As stated before, Iranian law does not recognize absolutely the agreements on the applicable law.

legislation to provide an express provision which ensures the maximum protection of consumers. For example, if the applicable law to the contract is the law of country A which allows consumers to cancel the contract within 5 working days from the time of delivery of goods, and given that the IECA provides 7 working days in its Article 37, the latter will be applicable. In contrast, if the law of country A provides 30 days for cancellation, there is no express statement as to whether the law of country A will be applicable or not.

One important issue regarding the unfair contractual terms normally incorporated in the standard form contracts by the businesses must not be ignored; whether the contract is electronic or traditional. Such terms are not enforceable against consumers. Article 46 of the IECA makes a reference to this issue: 'The use of contractual conditions that are in contradiction with the regulations of this section and also the application of unfair conditions that disadvantages consumer shall not be effective'.[37]

[37] In this regard, in English law section 9 of the Unfair Terms in Consumer Contracts Regulations 1999 provides that: '*These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States.'* The main aim of this section is to protect consumers from the Member States by the Regulations against the laws of other jurisdictions and also any the unfair terms, which in section 8(1) provides: *'An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.'* Although the Regulation has not tailored to be applied specifically in e-commerce, however, like many others traditional rules it can well be applied in contracting electronically. It is clear that the legal system try to protect their own consumers against foreign laws if there is any less protection, and unfair terms.

6.4 Conclusion

Due to the legal uncertainties in the area of determining applicable law in disputes arising from electronic contracts in Iranian legal system and the non-consideration of this issue within the Iranian Electronic Commerce Act 2004, this chapter focused on this issue to consider the extent of response of Iranian law to the related questions and the way of its development. Having extracted the legal questions of the chapter in the introduction, first it was concluded that in developing and modernizing Iranian law in the area of the applicable law in electronic contracts by studying the approach of other legal systems, it is possible to come to the conclusion that the contracting parties, in both B2B and B2C contracts, should be able to agree on the governing law for the electronic contract by resorting to the principle of party autonomy, provided that it is made in a durable medium and is available for future reference. This is usually made by the incorporation of a term in the terms and conditions section while contracting electronically. However, contrary to English and American laws, currently Iranian law, in only one exclusive case (where both parties are foreigners), prescribes such a possibility, and this hinders the development of cross-border e-commerce. For this reason, it is a necessity for the Iranian legal system to make it legally possible to agree on the applicable law in all cases, regardless of the contracting parties, whether they are foreigners or Iranians.

It was followed and illustrated that in the absence of any agreed governing law, in some cases there are difficulties in applying the Iranian traditional rules of conflict. Starting with the place of location of digital goods, as a main challenge in applying the factor of the place of location of property in determining the applicable law on disputes arising from it, after considering a number of theories, it concluded that the place of registration of the digital goods should be regarded as the place of their location. In adopting this theory, the copyright issue has also been taken into account.

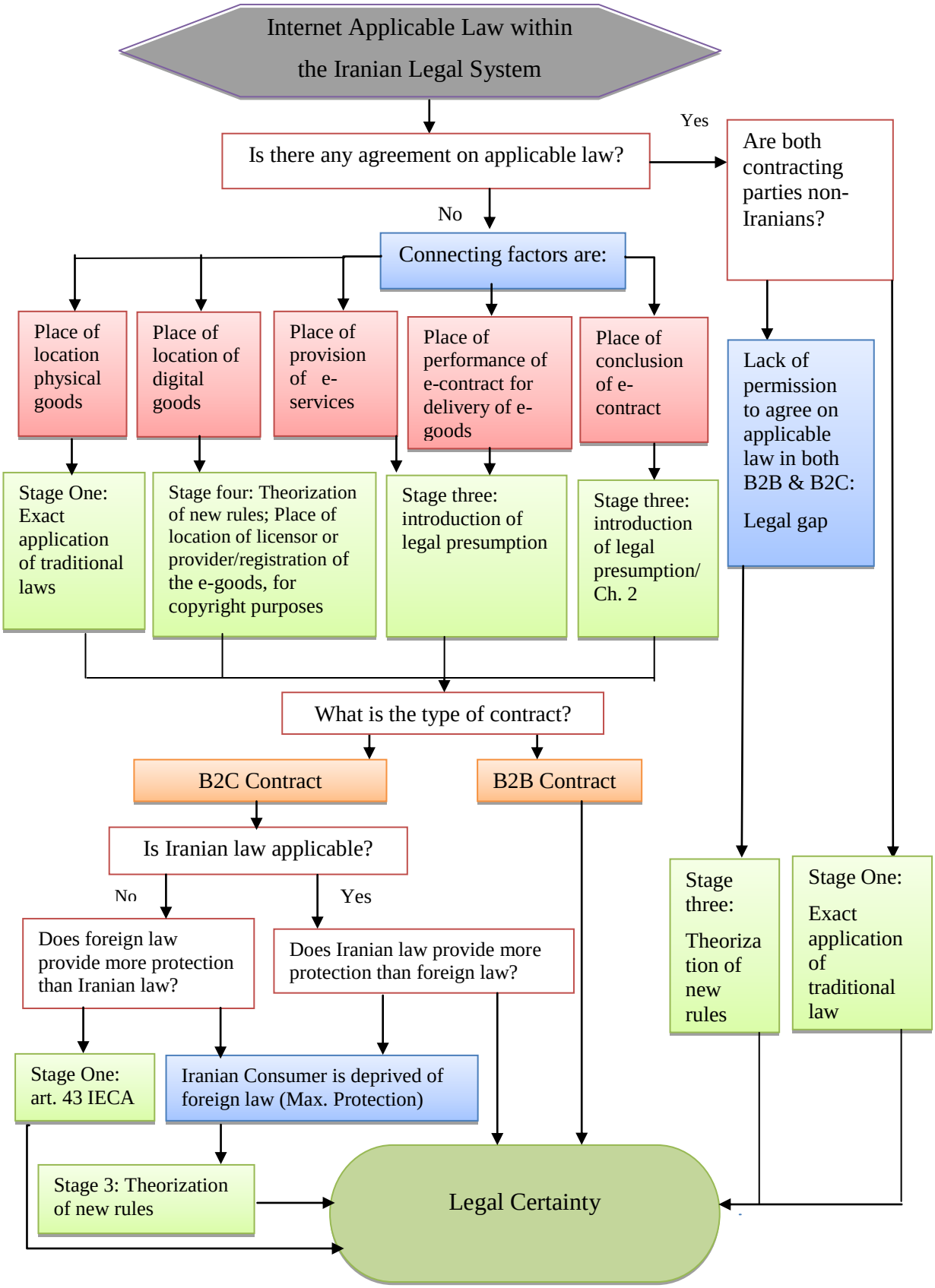
Another key question of the chapter revolved around the consumer protection issue with the purpose of maximum protection of the Iranian consumer party in cross-border B2C contracts by allowing him to benefit from the protection of his own national laws. It has been concluded that in B2C contracts the mandatory rules of the place of domicile of the consumer would still apply, i.e. Iran, even if the agreed governing law is a law other than Iran, which in force at the place of domicile of the consumer. However, there is still a case in which maximum protection of consumer is perceivable. Where Iranian

consumer deals electronically with foreign trader, Iranian law is set as the applicable law to the transaction, but the foreign law provides the maximum protection, the consumer would be deprived of the protection of foreign law. Having shown that Iranian law has no clear provision regarding consumer protection in B2C electronic contracts in the context of private international law, which is despite the fact that some consumer protection rules have been provided in the IECA related to the provision of goods, such as the right of withdrawal of the order within seven days from the time of delivery of goods, to offer the maximum protection to consumers in cross-border e-transactions under Iranian law, the protection can be done by expressly recognising this in Article 45 of the IECA, so that maximum protection can be given to consumers, whether through Iranian consumer law or its foreign counterparts.

As the final words, in terms of the way of reflecting the outcome of this chapter within Iranian law, the best way of making these developments is revising and reforming the IECA under the auspicious of the findings proposed through the chapter and inserting the suggestions into the Act.[38]

[38] The suggestion has been provided in the chapter of conclusion in a 12-article legal draft addressed to the Iranian legislation.

Figure 6.1


Internet Applicable Law within the Iranian Legal System
Is there any agreement on applicable law?
Yes
Are both contracting parties non-Iranians?
No
Connecting factors are:
Place of location physical goods
Place of location of digital goods
Place of provision of e-services
Place of performance of e-contract for delivery of e-goods
Place of conclusion of e-contract
Lack of permission to agree on applicable law in both B2B & B2C:
Legal gap
Stage One: Exact application of traditional laws
Stage four: Theorization of new rules; Place of location of licensor or provider/registration of the e-goods, for copyright purposes
Stage three: introduction of legal presumption
Stage three: introduction of legal presumption/ Ch. 2
What is the type of contract?
B2C Contract
B2B Contract
Is Iranian law applicable?
No
Yes
Does foreign law provide more protection than Iranian law?
Does Iranian law provide more protection than foreign law?
Stage three: Theorization of new rules
Stage One: Exact application of traditional law
Stage One: art. 43 IECA
Iranian Consumer is deprived of foreign law (Max. Protection)
Stage 3: Theorization of new rules
Legal Certainty

Chapter 7: Conclusion

7.1 Structural Route of Developing and Modernizing Iranian Law

Speaking about Iranian legal system, the first characteristic of it which comes to the mind is that it is categorized as a civil legal system, in which the Acts of Parliament mainly and primarily creates the legal rules. This has an obvious indication; any legal developments must be sought through the Parliament; and where there is no direct and straightforward provision, reference must be made to the general principles of law and the interpretation of the existence legal rules. Therefore, in any area of law that the current Iranian law is unable to provide legal certainty to the emerging legal questions, any developments adopted from other legal systems and suggested in the form of 'legal doctrines' as the secondary sources of law in Iran, must pass one further step of legislation to become legally enforceable and show their real impact on the Iranian legal system. This is true regarding the current research, which done to consider the extent that Iranian law is able to respond the emerging legal questions of electronic contracts by analysing four contentious areas of legal doubts concerning contracts. The outcomes summarized in the following lines must pass the same path to show well its achievements within Iranian legal system, although without taking such a step they are still invaluable for the Iranian legal system as legal doctrines.

7.2 Substantive Route of Developing and Modernizing Iranian Law: Legal Achievements of the Research

Having considered the role of information technology in modern commerce which allows and encourages the running of many aspects of commercial activity by electronic means and also the main legal questions arising from electronic transactions and contracts, it was aimed to examine the extent that Iranian law is able to respond the legal questions of electronic contracts and the way that it can be developed and modernized in the context of electronic contracts. To address this main research question of the thesis, the author has focused on four important areas relating to electronic contracts in Iranian law: a) the time and place of conclusion of electronic contracts; b) the legal status of electronic agents in contracting electronically; c) formalities (e-documents and e-signatures); and d) Internet jurisdiction and choice of law in electronic contractual obligations. This research has benefited from a comparative study of the legal initiatives and solutions in the UNCITRAL Regulations, and EU, English and American laws to

the extent that they contribute to removing the legal uncertainties in Iranian law. The research has employed a three stage roadmap, termed 'the guiding principles for the development of electronic commerce law in the Iranian context'. The three stages are: either exact application of traditional rules or their expansion or development; introduction of legal presumptions or rules in the IECA; and theorization of new rules.

7.2.1 Time and the Place of Formation of Electronic Contracts

In determining the time and place issues in contracting electronically, the discussion began by considering how the traditional four theories of 'declaration', 'postal', 'receipt' and 'information' were applicable in contracting through websites, e-mails and chatrooms. It was shown that, in order to answer this question, two steps must be considered: a) the way to apply the traditional theories in each electronic method (e-mail, website, chatrooms) which is determined by the traditional law, and b) the time and the place of occurrence of the chosen theory in each case in contracting electronically which is determined by the IECA.

Regarding the first step, it can be seen that the Iranian legal approach is not clear regarding the way to apply the traditional theories in contracting through the Internet. Having taking into account the philosophy behind the traditional theories and the legal materials of other legal systems, it was concluded that as e-mail is a non-instantaneous method of communication, the postal rule should be applicable. In contracts, chatrooms as an instantaneous method can be placed under the receipt rule. As for websites, the nature of the display of goods and services determines its categorisation. If it is regarded as an invitation to treat, the postal rule applies, and if it is regarded as an offer, the receipt rule applies. This is the first step in developing Iranian law in the context of the formation of electronic contracts under the first stage of the guiding principle.

As for the second step, the policy to reach a definitive answer was based on two main points: a) a direct reference to the time and the place of formation of electronic contracts must be made since an indirect reference may cause conflicts and again make it difficult to determine the effectiveness of the time and place of an electronic acceptance; and b) an attempt must be made to try to simulate the time and place of the chosen traditional theory in each case in cyberspace. This showed that the IECA under the second stage of the guiding principles had an indirect provision in this regard without taking into account the second point. Moreover, when examining other statutes on electronic

commerce it was seen that although some of them have addressed the time of effectiveness of an electronic acceptance directly, there seems to be no correlation between what happens in the physical world and the approach of these statutes, i.e., the use of the physical theory in cyberspace has not been done in a satisfactory way. In order to develop Iranian law, it is suggested that Articles 26 to 28 of the IECA need to be reformed to meet the above observations. Regarding the time of dispatch of an electronic acceptance in order to determine the time of occurrence of acceptance in contracting through e-mail and websites (i.e., an invitation to treat) the following provision should be inserted into the IECA:

> a) In contracting through e-mail or any similar methods of communications, if the contracting parties use the same information system under both their control an electronic acceptance takes place at the time it leaves the control of the sender, whether it reaches the addressee or not; and b) if the contracting parties use separate information systems, the electronic acceptance takes place once it leaves the information system under the control of the sender, whether it reaches the addressee or not.

Similarly, in order to provide an express, direct and comprehensive provision regarding the time at which the traditional receipt rule takes place in contracting electronically through a website (i.e. an offer), it is recommended that Iranian law should provide provisions that mirror the traditional receipt rule in the physical world, as follows:

> Unless otherwise agreed between the originator and the addressee, for the purpose of determining the time of occurrence of an electronic acceptance in contracting through a website, chatroom or any other similar method of communications, the acceptance happens as follows:
>
> (a) if the addressee has designated an information system for the purpose of receiving the acceptance, it occurs at the time when the data message enters the designated information system of the addressee and he becomes aware of it by processing and retrieving it from the receiving information system; the entrance of the acceptance into a non-designated information system is not a valid acceptance.
>
> (b) if the addressee has not designated an information systemfor the purpose of receiving the acceptance, it occurs when the electronic acceptance enters any information system of the addressee, and he becomes aware of it by processing and retrieving it from the receiving information system.

In terms of the issue of place, it was shown that the IECA's approach in Article 29 was inadequate and significant changes should be made. In order to create a comprehensive and straightforward provision, it is recommended that the IECA provisions on the issue of the place of dispatch of an electronic acceptance be rewritten in the following way:

a) Unless otherwise agreed between the originator and the addressee, an e-acceptance is deemed to be dispatched at the place where the originator has its place of business.

b) If the originator has more than one place of business, the closest one to the principle transaction is considered as his place of business;

c) If the originator has no place of business, his legal domicile is applied as criteria.

d) In determining the place of business in electronic transactions the place at which the equipment and technology supporting an information system used by a party in connection with the formation of a contract is immaterial and the sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

Similarly, as for the place of receipt of an electronic acceptance, the IECA could be changed with the following:

a) Unless otherwise agreed between the originator and the addressee, an e-acceptance is deemed to be received at the place where the addressee has his place of business.

b) If the addressee has more than one place of business, the closest one to the principle transaction is considered as his place of business.

c) If the addressee has no place of business, his legal domicile is applied as criteria.

d) In determining the place of business in electronic transactions the place at which the equipment and technology supporting an information system used by a party in connection with the formation of a contract is immaterial and the sole fact that a party makes use of a domain name or e-mail address connected to a specific country does not create a presumption that its place of business is located in that country.

7.2.2Legal Status of Electronic Agents in Formation of Electronic Contracts

The third chapter considered the role of electronic agents in contracting through websites. It was demonstrated that under Iranian traditional contract law and through the first stage of the guiding principles, an electronic agent is a mere tool of communication not the e-version of the real agent in the physical world on the ground that only a human with a will and full capacity can act as an agent. The electronic agent, as a computer program, lacks these characteristics. This was called the ‘tool theory’. Other theories were also analysed to show the correctness and strength of the theory under Iranian traditional law. In terms of the other statutes on electronic commerce, it was demonstrated that the IECA had addressed the issues of electronic agents in an indirect and strongly criticisable way. On the one hand, it believes in the personality of electronic agents which is against the traditional legal bases, and on the other hand, it attributes the acts of the electronic agent to its owner which contradicts its

legal personality and what has been provided by the law. In selecting the best approach to develop the IECA, which has a clear conflict with the outcome of Iranian traditional law, it was concluded that the IECA must first omit the term 'computer systems' from its definition of 'person' in Article 2 (under the first stage of the guiding principles); and secondly, the following comprehensive provision should be inserted into the IECA to explicitly regulate the role of the electronic agent:

> Offer and acceptance can be expressed by data messages produced by an automated data message system, such as an electronic agent, as a tool of communication between the parties, and they are attributed to the person who employs it for the purpose of making an electronic contract for himself.

The issue of liability and the person liable for 'mistakes' made by the human party in contracting with an electronic agent, and 'errors' made by the electronic agent in contracting with a human party or another electronic agent through websites were also considered. It was concluded that, generally, a 'mistake' falls under the recognised traditional rules of mistakes within the law of contracts under the first stage of the guiding principles. Only the place and the way they occur are different, not the underlying legal rules. However, one suggestion was put forward for the IECA - to allow the mistaken party to derogate from the mistaken part of his electronic communications and provide the technical infrastructure for this purpose. This option has mainly been addressed in the CUECIC by developing the concept of 'withdrawal of input errors'. The IECA should adopt a policy similar to that provided by the Convention where mistaken orders cannot be withdrawn completely as if there was no order at all, but only partially.

As for the issue of 'errors', under the tool theory resulting from the traditional law of contract under the first stage of the guiding principles, in principle, the person who directly benefits from the electronic agent when doing e-business is liable for any erroneous activities of the electronic agent, unless it is provided to the contrary. However, if this beneficiary can detect the source of errors, such as the non-professional act of the programmer of the e-agent or the hacker of the e-agent, he can, in turn, sue the person who caused the erroneous activities of the electronic agent.

7.2.3 Formalities of the Formation of Electronic Contracts: Legal Validity of Electronic Signatures and Electronic Documents

Since Iranian law provides that some contracts must be drawn up in writing and signed, chapter four discussed whether the electronic documents and electronic signatures found in contracting electronically which were unfamiliar in the literature of traditional law were legally valid or not. It was concluded that, in principle, Iranian law in the IECA by virtue of the principles of functional equivalence and technology neutrality, under the second stage of the guiding principles, recognizes the legal validity of electronic documents and signatures. However, the important question addressed was the two-tier approach of the IECA that was adopted from the Directive on Electronic Signatures regarding the legal value of electronic documents and signatures. On the one hand, it recognizes the legal value of documents and signatures in the form of data messages, and on the other hand, grants a high level of legal value to secure electronic signatures and documents in the form of secure electronic data messages, compared to simple electronic documents and signatures. This approach in the IECA apparently seems to go against the principle of technology neutrality under which there is no difference between different types of signatures solely on the ground that they have been created by different electronic methods. Removing this legal doubt in a way that is in compliance with the Iranian traditional law of evidence, it was concluded that the IECA approach should be interpreted as its intention to classify electronic signatures and documents, such as the 'usual' and 'official' documents classified under the Iranian traditional law of evidence, but with different terms, 'simple' instead of 'usual' and 'secure' instead of 'official'. As a result, the suggestion is that the legislation should be changed to adopt the same legal terms of the traditional law, thus harmonizing the traditional law and the IECA in both terminology and legal consequences.

Another important legal uncertainty concerned the legal validity and recognition of foreign certificates. It was shown that Iranian law does not recognize foreign certificates unless there is a prior agreement between the country and the relevant foreign authority, neither does it provide standards by which a foreign certificate is admissible legally in Iran. Under the third stage of the guiding principles, it is suggested that the Iranian legislation should be changed to recognise the legality and admissibility of all those certificates issued by foreign CAs and also provide general conditions upon which they are admissible. A further solution would be to remove uncertainty concerning the international recognition of foreign certificates by establishing an international certificate provider under authority of an international recognized body, such as the

International Chamber of Commerce (ICC) and recognising certificates issued by it internationally by all states worldwide.

7.2.4 Internet Jurisdiction and Choice of Law in Obligations arising from Electronic Contracts

A number of issues regarding Internet jurisdiction were discussed in chapter five. The main ones were: the legal validity of jurisdiction agreements; the place of electronic delivery of digital goods; the place of electronic provision of electronic services, making an e-payment; and protecting consumers in B2C contracts. Since Iranian law does not permit parties to agree on a jurisdiction, having analysed the negative consequences of the current situation, it was suggested that under the third stage of the guiding principles a new rule should be theorized to recognize the legal validity of jurisdiction agreements allowing the contracting parties to agree on the jurisdiction, thus avoiding any future disputes in this regard. In the absence of any jurisdiction agreement, some suggestions were analysed and finally it was concluded that, under the first stage of the guiding principles with the expansion of the traditional meaning of 'delivery' in the Iranian Civil Code to include cyberspace, the place of electronic delivery of digital goods is the place of domicile or habitual residence of the consumer in B2C contracts; and in B2B contracts, the place of business of the buyer, unless otherwise agreed between the parties. Similarly, regarding the place of provision of e-services it was concluded that it is appropriate to set the place of domicile or habitual place of residence of the consumer as the place of performance in B2C contracts; and the place of business of the service receiver as the place of performance in B2B contracts, unless otherwise agreed between the parties. As regards the place of making an e-payment, having taken into account the technical process behind this and the similarity of the process with the issuance of a bill of exchange, the place of location of the issuing bank should be regarded as the place of making an e-payment.

Finally, in the context of jurisdiction and of protecting the consumer party in B2C contracts, a comprehensive approach was recommended to be adopted in order to develop e-commerce law in general and Iranian law in particular based on meeting some conditions: a) the website must be interactive; b) pursuing or directing commercial activities through a website to the place of domicile of the consumer should be done intentionally and purposefully; c) the activities should be continuous. All these

requirements can be presented in one ‘golden test’ provided in the proposed Draft to the Iranian legislation.

Chapter six dealt with the applicable law and the discussions came to the conclusion that, under the third stage of the guiding principles, the contracting parties in both B2B and B2C contracts should be able to agree on the governing law for the electronic contract by resorting to the principle of party autonomy in all cases, not only in one exclusive case (where both parties are foreigners) as is the current position of Iranian law which is a hindrance to the development of cross-border e-commerce. In the absence of any agreed governing law, it was shown that in some cases there are difficulties in applying the traditional rules of conflict. The place of location of digital goods was the main challenge. After considering some theories, it was concluded that the place of registration of the digital goods should be regarded as the place of their location as this would provide better protection for the owner of the digital goods and his intellectual rights in the goods. Moreover, in order to solve the contradiction between Article 59 of the IECA and Article 978 of the ICC it was suggested that the IECA must be reformed and the distribution of data messages in cyberspace which are not ethical must be prohibited in law.

In order to protect consumers in the context of the applicable law, specifically, in cross-border e-transactions under Iranian law, it was suggested that Article 45 of the IECA should expressly recognise the application of the consumer protection law which grants the maximum protection to the consumer, whether it is the Iranian consumer law or a foreign one.

The outcome of chapters five and six is a draft proposal for Iranian legislation under the title: ‘The Draft Proposal for Determining Internet Jurisdiction and Applicable Law in Obligations arising from B2B and B2C Contracts 2013’. This is given in full below.This proposal may be incorporated into Iranian law in one of three ways:

a) as a separate legal instrument;
b) by incorporating it into the Iranian Civil Code; or
c) by incorporating it into the IECA.

The first solution is not recommended as it would lead to a dispersal of the legal instruments in the area of information technology. The second way should also be put aside to avoid damaging the integrity of the Iranian Civil Code, although some

countries such as France and Japan have adopted the second policy. The third solution is the most appropriate as there is a close link between the contents of the Act and the Proposal.

The Draft Proposal for Determining the Internet Jurisdiction and Applicable Law in Obligations arising from B2B and B2C Contracts 2013

Preamble

Due to the increasing use of the Internet in national and international commerce and the necessity for determining jurisdiction and applicable law to settle disputes arising from electronic contracts, provide certainty and also due to the relative inability of the traditional rules and principles for these purposes, the following provisions are proposed.

Chapter I: General Provisions

Article 1: The Scope of the Proposal

1. This law has been provided to determine jurisdiction and applicable law in contractual obligations arising from electronic B2B and B2C contracts at the national and international level.

2. Whether the contract is of a national or international nature, in each case it is determined by the national law.

3. In this proposal the meanings of the place of business, domicile and habitual residence are the same as in traditional law.

Article 2: Definitions

In this proposal:

1. 'Consumer' is a person who acts for his personal or family purposes.

2. 'Businessman' is a person who ordinarily deals with commercial transactions. Commercial transactions are determined by Articles 2 to 5 of the Iranian Code of Commerce.

3. 'Electronic contract' means a contract which is concluded by the use of modern methods of communications, such as electronic exchange of data, e-mail, website and chatroom and any other Internet communications.

4. 'B2C contract' is an electronic contract which is concluded between a consumer and a businessman.

5. 'B2B contract' is an electronic contract in which both parties are businessmen.

Chapter 2: Jurisdiction

Article 3: In disputes arising from B2B electronic contracts, the court of the place of business of the defendant is competent. In the case of different places of business, the court of the principal place of business has competence. In the absence of any place of business, the court of the habitual place of residence has competence.

Article 4: In disputes arising from B2C electronic contracts concluded through a website:

1. The consumer party is able to sue the businessman in his own place of domicile, provided that the website is interactive, the business party directs or pursues commercial activities in the place of domicile of the consumer intentionally, purposefully and in a continuous manner. This issue can be determined by reference to the content of the website and also by the previous commercial practices of the owner of the website with the residents in the place of domicile of the consumer.

2. In order to protect the consumer, the businessman is only able to sue the consumer party in the place of domicile of the consumer.

3. In the absence of a place of domicile, the habitual place of residence of the consumer is applied.

3. In meeting the conditions of clause 1, language, currency, e-mail, domain name and the location of information systems of the website shall not be taken into account.

4. In order to apply clause 2, it will be deemed that the businessman has done business at the place of domicile of the consumer unless the businessman proves to the contrary. To ascertain this, the court takes into account the following issues:

a. Whether the businessman has provided any provision on his website stating that he does not enter into contracts with consumers from specific countries.
b. Whether in the process of making the contract the businessman has asked the consumer party to provide details of his full identity and place of location.
c. Whether the businessman has employed up to date technical methods to restrict consumers from specific countries from using the website.
d. Whether the businessman has taken the necessary steps to avoid receiving orders from the residents of countries whom he does not intend to enter into a contract with.

Article 5: In B2B contracts, for the purpose of delivery of digital goods electronically by the seller, the delivery is made at the place of business of the buyer. In B2C contracts, this is the place of domicile of the consumer. In the absence of place of domicile the place of habitual residence of the consumer is deemed as the place of delivery.

Article 6: For the purpose of determining the place of provision of electronic services, they are provided at the place of business of the receiver of the services.

Article 7: For the purpose of determining the place of making an electronic payment by the buyer, the payment is made at the place of location of the issuing bank of the buyer.

Chapter 3: Applicable Law

Article 8:

1. The parties to an electronic contract are able to agree on the law applicable to the electronic contract in writing. This agreement may be done by use of either traditional or electronic means, provided that it is in a durable medium and is accessible and usable for future reference.

2. In order to provide maximum protection to consumers, the law that provides the maximum protection to the consumer party is applicable, whether it is the national law of the consumer or the foreign law.

Article 9: In the absence of any agreement on the applicable law:

1. in B2B contracts, obligations of the parties are under the law of the place of conclusion of the electronic contract;

2. in B2C contracts, obligations of the parties are under the law of the place of conclusion of the electronic contract; however, the consumer party benefits from the legal protection of his own place of domicile or habitual residence if the foreign law grants less protection.

Article 10: The place of location of the digital goods is their place of registration.

7.3 Final Words: Making Recommended Changes to Iranian Law is a 'Must'

This thesis has shown evidently that Iranian law needs to be developed in the area of e-contracts to meet the legal needs of electronic commerce and help it to flourish at both a national and a cross-border level, unless the development of electronic commerce in Iran should be regarded as a dream, the legal requests of Iranian plans on e-commerce, as mentioned in the chapter of introductions, would not be responded, and also the current e-commerce would not be able to gain trust of people in all classes and improve the business. In order to achieve this, in terms of methodology, the Iranian legal system needs to respond to the legal doubts found within traditional law, as far as possible, either by exact application of the traditional law or by its expansion to accommodate cyberspace. If it is not able to respond, the IECA should be tested. If they both (i.e. the traditional law and the IECA) are not able to respond as the current legal assets in Iranian legal system in the area in question, and then new provisions are required, it is strongly recommended that these should benefit from the legal initiatives of developed legal systems, such as English, EU and American laws, in order to provide the most direct, straightforward and comprehensive provisions possible. Furthermore, the need to understand the technical processes of the Internet must not be ignored whilst drafting new laws in this area.

However, it should be borne in mind that any legal reforms in any legal system may take a period of time to implement. Then, being realistic in achieving any legal aim is an important principle. The Iranian legal system is also not excluded from this fact. By

making the suggested changes within the Iranian legal system which will remove the emerging legal obstacles, e-commerce will be able to proceed and flourish at both national and cross-border levels and the rights of all actors will be protected in a fair manner. In contracts, clearly, if the changes are not made, Iran cannot contribute to the development of e-commerce and benefit from the advantages of doing business electronically due to the smaller amount of confidence in it. In particular, Iranian consumers will not be protected fully in national and cross-border e-commerce. This means that making the recommended changes to Iranian law is a ‘must’.

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