



**The Importance of Consumer Protection for the  
Development of Electronic Commerce: The Need for  
Reform in Jordan**

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## **Abstract**

The present thesis argues that the current Jordanian legal frameworks are insufficiently developed to provide an adequate level of consumer protection to redress the imbalance of power between parties in electronic commerce consumer contracts. This argument is triggered due to the Jordanian legislation placing great emphasis on the freedom of contract principle to govern all types of contracts, regardless of whether one of the contracting parties suffers from an inequality of bargaining power. This principle does not serve consumer protection as consumer contracts are usually presented on a take-it-or-leave-it basis where a consumer has no realistic bargaining opportunity. On the other hand, such a principle does not allow the legislature to intervene in the contract in order to redress that imbalance. By depending on the freedom of contract principle, Jordanian legislation has, to a large extent, failed to provide consumers with an acceptable level of protection.

This subject will be analysed and discussed alongside European Union legislation in order to illustrate the existing weaknesses in the legal frameworks in Jordan in relation to consumer contracts.

After concluding the legal analysis and determining the weaknesses in Jordanian law, the thesis will provide an empirical study to measure the impact of the lack of consumer protection law on the growth of electronic commerce in Jordan. This empirical study, which has been conducted by way of a questionnaire survey, has revealed that one of the factors that prevents consumers engaging in e-commerce activities, and which undermines their confidence, is their perception of the protection provided by the law.

This thesis concludes that basic consumer protection, which aims to rebalance the power in Business-to-Consumer contracts, is essential for consumer confidence and the development of e-commerce in Jordan. There is a positive correlation between purchasing online and the protective measures selected in this thesis (i.e. information requirements, protection from unfair contract terms and consumer rights). Therefore, a comprehensive model has been suggested in order to fill the gap in the Jordanian legislation.

## **Declaration**

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

Ahmad Alhusban

# *Dedication*

*To my beloved parents*

*Abdullah & Hind*

*My adored wife*

*Rania*

*&*

*My son*

*Abood*

*I also dedicate this work to the soul of my grandfather*

*Mohammad Salamah Alhusban*

*(Abu Farhan)*

*(1911-1993)*

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### Table of Abbreviations

AALR	Anglo-American Law Review
ACIT	Arab Conference Information Technology
AJCL	The American Journal of Comparative Law
ALQ	Arab Law Quarterly
ASHS	Academia for Social and Humanity Studies
B2B	Business-to-Business
B2C	Business-to-Consumer
B2G	Business-to-Government
BJHSS	British Journal of Humanities and Social Sciences
C2C	Consumer-to-Consumer
CAB	Citizen Advice Bureau
Cal WL Rev	California Western Law Review
CIL	Contemporary Issue Law
CJQ	Civil Justice Quarterly
CML.Rev.	Common Market Law Review
Colum. L. Rev	Columbia Law Review
CPUTRs	Consumer Protection from Unfair Commercial Practices Regulations 2008
CRD	Consumer Rights Directive 2011/83/EU
CTLR	Computer and Telecommunications Law Review
DSD	Distance Selling Directive 97/7/EC of 20 May 1997
DTI	Department of Trade and Industry
DUJ	Damascus University Journal
EBOC	European Business Organization Law Review
ECCC	Electronic Commerce Consumer Contract
ECD	Electronic Commerce Directive 2000/31/EC
ECJ	European Court of Justice
ECLG	European Consumer Law Group
ECLR	European Competition Law Review
e-commerce	Electronic commerce
e-environment	Electronic Environment
EJISDC	The Electronic Journal on Information Systems in Developing Countries
EJSS	European Journal of Social Sciences
ELJ	European Law Journal
ELR	European Law Review
ERCL	European Review of Contract Law
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EU	European Union
EUI-WP	European University Institute
FCC	French Consumer Code
FCL	French Civil Law
Geo Mason L Rev	George Mason Law Review
Harv. L. Rev	Harvard Law Review

IALS	International Association of Law School
IBLJ	International Business Law Journal
ICCLR	International Company and Commercial Law Review
ICT	Information Communication Technology
IJGJ	Islamic Jurisprudence Group Journal
IJIDS	International Journal of Internet and Distributed Systems
IJLIT	International Journal of Law and Information Technology
ILR	International Review of Law
Int. JBSR	International Journal Business and Systems Research
Int. JLM	International Journal of Law and Management
Int. TLR	International Trade Law & Regulation
ITM	Information Technology and Management
JAAB	The Journal of American Academy of Business
JBL	Journal of Business Law
JCL	Jordanian Civil Law
JCP	Journal of Consumer Policy
JELS	Journal of Economic and Legal Science
JETL	Jordanian Electronic Transaction Law
JFR & C	Journal of Financial Regulation and Compliance
JIBLR	Journal of International Banking Law and Regulation
JICLT	Journal of International Commercial Law and Technology
JILT	Journal of Information, Law and Technology
JITLP	Journal of International Trade Law & Policy
JLS	Journal of Law & Society
JNSCP	Jordanian National Society for Consumer Protection
L.Q.Rev	Law Quarterly Review
L.Q.Rev.	Law Quarterly Review
LE	Lex Electronica
LSL	Law and Shari' a Journal
Model Law	UNCITRAL Model Law on Electronic Commerce 1996
MR	Marketing Review
MUJLT	Masaryk University Journal of Law and Technology
MULR	Melbourne University Law Review
NJL & Bus	Northwestern Journal of International Law & Business
OECD	Organisation for Economic Co-operation and Development
OFT	The Office of Fair Trading
OJLS	Oxford Journal of Legal Studies
PCPL	Project for Consumer Protection Law
PJIR	Pakistan Journal of Islamic Research
PR	The Psychological Review
RCCAS	Robert Schuman Centre for Advanced Studies Mediterranean Programme Series
SISJ	Shari'a and Islamic Studies Journal
SJ	The Solicitors' Journal
SLJ	Shari'a and Law Journal

## **CHAPTER ONE**

### ***INTRODUCTION***

#### **1.1 Background and Gap in the Research Area**

Generally speaking, electronic commerce (e-commerce) is one of the results of outstanding progress being made in Information Communication Technology (ICT)<sup>1</sup>. However, despite the rapid developments in ICT, the success of e-commerce development depends upon several factors<sup>2</sup>. One of these factors is legal infrastructure<sup>3</sup> which can be described as the legal framework pertaining to e-commerce that consists of different branches of law dealing with different legalities of e-commerce. The role of the legal infrastructure<sup>4</sup> is not only to allow parties to conclude transactions over the internet, by acknowledging the validity of contracts that are concluded by electronic means, but also to cover all

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<sup>1</sup> See Maher Aljaber, 'The Impact of Privacy Regulations on the Development of Electronic Commerce: Jordan and the UK Comparative Study' (Phd Thesis, De Montfort University, 2012) I.

<sup>2</sup> These factors are common in both developing and developed countries as argued by several studies and reports. They generally include physical, human and legal infrastructures. Generally see United Nations, *United Nations Conference on Trade and Development: E-commerce and Development Report* (United Nations Publication, New York and Geneva, UNCTAD/SDTE/ECB/2003/1) available on <[http://unctad.org/en/docs/ecdr2003\\_en.pdf](http://unctad.org/en/docs/ecdr2003_en.pdf)> accessed March 2012. Sacha Wunsch-Vincent and Joanna McIntosh, *WTO, E-commerce, and Information Technologies, From the Uruguay Round through the Doha Development Agenda: A Report for the UNICT Task Force* (Markle Foundation, New York, 2005) available on <http://www.iie.com/publications/papers/wunsch1104.pdf> accessed December 2011. Jennifer Gibbs, Kenneth L. Kraemer and Jason Dedrick, 'Environment and Policy Factors Shaping Global E-Commerce Diffusion: A Cross-Country Comparison' [2003], *The Information Society: An International Journal* 5, 18. Particularly in the Arab world and Jordan see Sherif Kamel and Maha Hussein, 'The Development of e-commerce: The Emerging Virtual Context within Egypt' [2001] *Logistics Information Management*, University Press 119, 126. Maha Al-Khaffaf, 'Factors Effecting E-Commerce Prevalence in Jordan' [2013] *The Macrotheme Review* 66, 70. Zeinab Shalhoub, Sheikha Al Qasim, *The Diffusion of E-commerce in Developing Economies, A Resource-based Approach* (1st, Edward Elgar Publishing, Cheltenham 2006).

<sup>3</sup> *Ibid.*

<sup>4</sup> See section 2.2 for more discussion on legal infrastructure.

other issues that may arise in the electronic environment (e-environment) for the benefit of the development of e-commerce. One of these issues is consumer protection which can be considered to be an important element for the legal infrastructure of e-commerce that seeks to empower consumers and redress the imbalance between contracting parties. Accordingly, the main research question in this thesis is to what extent can Jordanian legislation provide effective protection to consumers in electronic commerce consumer contracts (ECCC)<sup>5</sup>.

In Jordan, there is a notable development in ICT. Despite statistics on internet penetration in Jordan varying<sup>6</sup>, according to the Jordanian Department of Statistics the penetration rate was 34.9% in 2011<sup>7</sup> (about 1.800.000 users out of 6.113.000 people). There has been a positive growth of 257% in Jordanian internet users in the last 5 years, i.e. between 2007 and 2012. Undoubtedly, the increased number of Jordanian internet users and the continuous penetration of the internet give an indication that ICT is reasonably developed in Jordan. Further, Jordanian governments have made efforts to increase the awareness of

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<sup>5</sup> It is worth mentioning here that this Thesis does not deal with advanced consumer protection, such as payment protection, signature protection or even personal data protection, but, instead, deals with basic consumer protection that aims to rebalance the contractual relationship between parties in B2C transactions and which must be available before awarding consumers advanced protection. This would otherwise result in a huge gap in the legislation in relation to consumer protection as will be clarified within this thesis.

<sup>6</sup> The Telecommunications Regulatory Commission reported that the penetration rate was 50.5% of internet users in Jordan in 2011.

<sup>7</sup> Jordanian Department of Statistics, census on using communication and information technology, 2011, available on <<http://www.dos.gov.jo>> accessed April 2012. However, Jordanian internet users are 40.1% in 2012 according to the same department.

ICT by different means<sup>8</sup>. However, with regard to legal infrastructure, there is still a lack of rules which undermines consumer confidence, particularly the absence of a consumer protection legal framework which is considered as one of the main constraints of e-commerce in Jordan<sup>9</sup>.

Several studies have argued about the main potential factors that might impede the development of e-commerce in Jordan<sup>10</sup>; however, the majority of those studies affirmed that the legal infrastructure is considered as a barrier for e-commerce development. The studies have looked at the topic of e-commerce from different perspectives (e.g. cultural, economic, and technical). Some of them have argued that the slow development of ICT is the reason for the slow growth of e-commerce in Jordan. However, other studies have argued that awareness, education and behaviour could be barriers for e-commerce development.

With regard to the issue of legal infrastructure, the majority of the studies focused on intellectual property rights, jurisdiction, personal data protection, contract formation, alternative dispute resolution and cross-border

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<sup>8</sup> E.g. wiring all Jordanian schools with broadband internet and making the study of English and computer science compulsory; according to the Ministry of Education, 97% of Jordanian schools have computers and 86% have Internet in February 2012.

<sup>9</sup> Valentina Donini, 'Bridging the Gap: Privatization Policy, Internet and E-commerce in Jordan' [2006] EUI-WP RCCAS 13.

<sup>10</sup> Anas Al Bakri, 'An Overview of Information and Communication Technology (ICT) in Jordan: Review the Literature of Usage Benefits and Barriers' [2013] IJIDS 9-15. Mohanad Halaweh, 'Adoption of E-commerce in Jordan: Understanding the Security Challenge' [2011] EJISDC 1, 13. Wasfi Al Rawabdeh, 'Key Internet Characteristics and E-commerce Factors in Jordan' (ACIT, Oman 2013) 8-9. Rifat O. Shannak and Mu'taz M. Al-Debei, 'The Current State of E-commerce in Jordan: Applicability and Future Prospects 'An Empirical Study' [2011] Internet and Information Technology in Modern Organizations: Challenges & Answers 457, 489. Al-Khaffaf, (n 2) 66, 70. Mohammad Al-Husban, 'The Internet Shopping Sites, Implementation and Applicability in Jordan's Market: The Propensity to Buy Online, Master Dissertation' (Master Dissertation, University of Huddersfield 2004).

transactions. None of the studies addressed the impact of consumer protection as a serious barrier for the development of e-commerce. This is considered as a gap in this research area. Nevertheless, due to the detailed and wide ranging subject of consumer protection, this thesis is unable to address every aspect; however, it does address the Jordanian legislative approach in governing ECCC and in terms of redressing the imbalance between contracting parties.

This thesis argues that Jordanian legislation does not provide sufficient protection for consumers and, thus, this may hinder the development of e-commerce. Several studies have indicated that, generally, the lack of consumer legislation may be hampering the growth of e-commerce<sup>11</sup>. This is due to the lack of trust and confidence which, in turn, is due to the lack of consumer protection in e-commerce<sup>12</sup>. According to the Organisation for Economic Co-operation and Development (OECD):

*“Consumer laws, policies and practices limit fraudulent, misleading and unfair commercial conduct. Such protections are indispensable in building consumer confidence and establishing a more balanced relationship between businesses and consumers in commercial transactions.”<sup>13</sup>*

In order to protect consumers when engaging under ECCC, due to them being considered to be the weaker party to a contract, legislation should provide

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<sup>11</sup> Gibbs, L. Kraemer and Dedrick, (n 2) 5, 18.

<sup>12</sup> See Donini (n 9) 13. See also A European Initiative in Electronic Commerce: Communication of 15 April 1997 to the European Parliament, the Council, the Economic and Social Committee of the Regions COM(1997) 157 Final, para, 35. Cited in Mutasim Alqudah, ‘Consumer Confidence in Online Cross-Border Business-to-Consumer Arbitration’ (PhD Thesis, University of Leicester 2008) 1

<sup>13</sup> The Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999, Available on <<http://www.oecd.org/internet/consumer/34023235.pdf>> Accessed April 2011.

adequate rules to rebalance the contractual relationship in Business-to-Consumer transactions (B2C). In Jordan this rebalance cannot be achieved with the absence of consumer protection laws. As will be discussed in this thesis, the current laws that govern ECCC are those contained in the Jordanian Civil Law (JCL)<sup>14</sup>. This thesis asserts that the general principles of the JCL, which are based upon the classical law of contract<sup>15</sup> and the freedom of contract principle, are not sufficiently developed to allow legislature intervention<sup>16</sup> in order to redress the imbalance in B2C contractual transactions conducted over the internet. As will be discussed in Chapter 2, such intervention is necessary in order to allow the legislature to impose restrictions and limitations on the freedom of contract principle in favour of the weaker party to the contract.

These limitations and restrictions are significantly important due to ECCC usually being presented on a *take-it-or-leave-it* basis, thereby preventing consumers from negotiating the terms of the contract. Further, e-commerce increases the rationale for such intervention due to the parties not being in physical proximity when the contract is negotiated and determined. A consumer needs all relevant information in order to make an informed transactional decision and, therefore, this lack of protection in ECCC, until resolved, is likely to be an impediment to the development of e-commerce in Jordan.

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<sup>14</sup> The Jordanian Civil Law 45/1967 published in the official gazette on page 2, issue no 2645 dated 1/8/1976

<sup>15</sup> See *infra* 2.3.2.2.

<sup>16</sup> See *infra* 2.2.4.

Further, this thesis asserts that one of the reasons behind the lack of consumer protection in ECCC is due to the lack of any consumer protection in Jordan, including in the off-line environment. Consumers were supposed to have been adequately protected before the digital revolution. Therefore, Jordan should have regulated basic consumer protection laws before introducing the JETL in order to create an environment that is strong and promising. This would have assisted in the development of e-commerce and re-assured consumers that ECCC is safe and trustworthy.

On the other hand, with regard to developing countries in general, there has always been a gap between law and technology; this is due to the rapidity of technological evolution in comparison with the slowness of the legislative process<sup>17</sup>. For example, as consumer protection law is essential for ECCC, a Project regarding Consumer Protection Law (PCPL) was suggested in 2006. The PCPL was amended on two occasions and rejected by the Jordanian Parliament on the third occasion in December 2013<sup>18</sup>. However, despite this protracted delay, Jordan must introduce this consumer protection law as soon as possible in order to provide appropriate consumer protection and replace the need to rely on the general rules of the JCL which are inadequate for this purpose.

The main shortcomings of the general principles of the JCL are that they apply to all types of contracts without making any distinction between Business-to-Business transactions (B2B) and B2C transactions in terms of protection. Consumer protection, which aims at redressing the imbalance between

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<sup>17</sup> Donini (n 9) 5.

<sup>18</sup> See *infra* section 3.8.

contracting parties, is no less important than the advanced regulations of ECCC with regard to e-commerce development (i.e. personal data protection and e-signatures) which are in the process of being discussed in the Jordanian parliament. Therefore, this thesis argues that, for the sake of protecting consumers in B2C transactions and in order to continue the development and success of e-commerce, the Jordanian legislature should introduce consumer protection law, as soon as practicable.

## **1.2 Scope, Aims and Objective**

Although Jordan has introduced JETL in order to facilitate transactions that are concluded over the Internet, regulations that govern ECCC are still far from being considered by the Jordanian legislature. The absence of such regulations are likely to lead to a reduced willingness on the part of Jordanian consumers, to be engaged in e-commerce activities due to the absence of a comprehensive legal framework that improves consumer protection and choice.

This thesis will embrace the protective measures that lead to the rebalance of power between contracting parties in ECCC, and thus increased consumer confidence in the e-environment. Therefore, for the purpose of this thesis, the focus will only be in the context of transactions that are established between businesses and consumers. Nevertheless, there will be some references to B2B transactions in order to assist in developing particular ideas.

Initially, the objective of this thesis is to analyse the necessity for consumer protection in e-commerce, taking into consideration that a consumer is the

weaker party to a contract. It will also consider the reason behind that necessity and pay particular attention to the legislative approach to governing contracts and whether Jordanian legislation addresses different contractual relationships (i.e. B2C and B2B) in the same manner or imposes compulsory terms on certain types of contractual relationships (e.g. B2C).

Secondly, this thesis will review both Jordanian and EU legislation, making particular reference to the UK and France throughout the thesis, where necessary, with regard to organising and controlling the ECCC by discussing and analysing the existing legal instruments.

Thirdly, it will evaluate the main protective measures for ECCC that attempt to rebalance the contractual relationship in B2C transactions and empower consumers in order that they are able to make informed decisions and better choices; this will be done by examining whether Jordanian legislation has implemented specific rules to ensure sufficient protection in consumer contracts in general, and ECCC in particular; and whether the general rules of the JCL are able to cover such areas.

Fourthly, as the Jordanian legal system relies on *Shari'a* in the event of an absence of rules, and in terms of interpreting the law in case of ambiguities, electronic contract (e-contract) and consumer protection will be discussed within the context of *Shari'a* in order to investigate whether *Shari'a* can be an alternative legislative solution in terms of protecting consumers in the e-environment.

Fifthly, in order to provide a high level of consumer protection in the e-environment when engaging in ECCC, all relevant information regarding goods and services must be provided. Further, information about the seller and the transaction itself are no less important in such a contract. Therefore, the "information requirements duty" will be discussed in relation to ECCC in order to examine whether the information disclosure regime under the Jordanian legal system is efficient in terms of ensuring informative consumer decision making. In this regard, as there is no pre-contractual information duty under the Jordanian legal system, it is necessary to look at the information disclosure regime from the perspective of the "theory of defects of consent".

Lastly, as the ECCC is presented on a *take-it-or-leave-it* basis, meaning that terms and conditions (T&Cs) are pre-formulated and non-negotiated, this thesis will evaluate whether the general rules of the JCL are able to ensure sufficient protection against unfair T&Cs in ECCC. This will be investigated by studying the legal nature of ECCC under the Jordanian legal system in order to determine the type of protection that must be available for consumers in relation to unfair contract terms.

Based on the above objectives, the main aim of this thesis is to examine to what extent Jordanian legislation protects consumers in ECCC. The argument put forward by this thesis is that Jordanian legislation does not provide an appropriate level of consumer protection in ECCC as there is no comprehensive legal framework that addresses consumer issues.

After conducting the legal analysis, which forms the core of this thesis in order to achieve its main objective, an empirical study will be conducted in order to examine whether the determined shortcomings of the Jordanian legislation in relation to consumer protection affects the growth of B2C e-commerce in Jordan. In order to empirically answer this question, a hypothesis has been formed, as follows; “there is a positive correlation between protective measures on behalf of consumers and the growth of B2C e-commerce in Jordan”. The empirical study has used the main, studied issues of consumer protection in this thesis in order to develop a model to measure the relationship between the main method of consumer protection and empowerment, and buying on-line.

### **1.3 Importance and Methodology**

The importance of this thesis can be represented on two levels, namely e-commerce and consumer protection. Firstly, it has been argued that the growth of e-commerce and its development depends on several factors<sup>19</sup>. Consumer protection, which falls under the legal factor, is considered to be one of the most important elements that facilitate that development, particularly in developing countries. The problem with Jordanian legislation is that it does not distinguish between consumer contracts and other commercial contracts<sup>20</sup>; this is due to

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<sup>19</sup> See Zeinab El Gawady, 'The Impact of E-commerce on Developed and Developing Countries Case Study: Egypt and United States' (international conference of Globalization , Technology and Sustainable Development, Al Ain - United Arab Emirates, 2005) 21, 32.

<sup>20</sup> See *infra* section 2.2.1 in relation of using the term 'commercial contract in this thesis.

the fact that the Jordanian legal system does not recognise the modern classification of commercial contracts and consumer contracts<sup>21</sup>.

Secondly, the particularity of ECCC, which falls under the notion of a consumer contract, and the difference in terms of contractual strength between the contracting parties, has encouraged scholars to consider consumer protection<sup>22</sup>. Thus, consumer protection, which aims at empowering consumers and redressing the imbalance between the parties, is no longer a matter of accessory. In fact, it concerns every person in society and is significantly important in order to make transactions safer, fairer and more trustworthy by providing truthful information in the marketplace and introducing contracts with fair terms and consumer rights in order to prevent fraudulent and unfair commercial practices. Further, this study is significant by reason of the fact that it is the first study ever conducted which considers, in depth, the issue of consumer protection and aims to rebalance the contractual relationship in ECCC under Jordanian legislation.

The adopted methodology in this thesis may also enhance its significance. The research can be described as a critical analytical study. The targeted issues in this thesis will be studied along with a discussion on the missing provisions in

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<sup>21</sup> Firas Kasassbeh, 'Consumer Contract against Unfair Contract Terms: In the Light of the Jordanian Civil Code and the English Regulations on Unfair Terms in Consumer Contracts 1999' (PhD Thesis, University of Newcastle Upon Tyne 2006) 3.

<sup>22</sup> See generally Iain Ramsay, *Consumer Protection and Policy: Text and Material on Regulating Consumer Markets* (2nd, Hart Publishing, Oxford 2007) 53-71. See also Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2nd, Aldershot: Ashgate 2005) 1-51. Also generally Geraint Howells and Reiner Schulze, *Modernising and Harmonising Consumer Contract Law* (1st, Sellier, Munich 2009). Also Hans-W Micklitz, Jules Stuyck and Evelyne Terryn, *Cases, Materials and Text on Consumer Law* (1st, Hart Publishing, Oxford and Portland 2010) 1-2.

the current Jordanian legal framework compared to that which is available in the EU, specifically the UK and France. Nevertheless, it is worth mentioning here that this thesis is not considered to be a pure comparative study between Jordanian legislation and other jurisdictions. This is due to the fact that until now there has been no special law or rules in Jordan that address consumer protection either in the off-line or on-line environments. It would therefore be unfair to compare a developing country such as Jordan with an advanced region such as the EU, and particularly, developed countries such as the UK and France, in this area. Nevertheless, there will be some comparison where there are comparable rules in the three selected jurisdictions.

The advantage of reviewing advanced jurisdictions is to learn from them with regard to filling the existing gap in the Jordanian legislation. Consequently, this thesis aims to convey the experience of the EU in the area of consumer protection law that could thereafter be adopted by the Jordanian government due to the current absence of specialised consumer protection laws that enable consumers to make informed decisions and promote their confidence in e-commerce.

The choice of EU legislation is based upon the wide scope of consumer protection in both on-line and off-line environments provided for by several Directives<sup>23</sup>. In addition, the choice of the UK and French legal systems is based on five reasons. Firstly, these developed countries have very developed legal frameworks in relation to the modern law that therefore provides a high level of

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<sup>23</sup> Among other: Directive 2011/83/EU on Consumer Rights, Directive 2000/31/EC on electronic commerce, Distance Selling Directive 97/7/EC, Directive 2005/29/EC on Unfair Commercial Practices, Directive 93/13/EEC on Unfair Contract Terms.

consumer protection. Secondly, although England and France share similar rules derived from the European Directives, they have very different legal systems (the English legal system is based on the common law whereas the French legal system is based on civil law). Thirdly, in comparison to other countries e-commerce is relatively developed in both the UK and France. Fourthly, Jordanian legislation was influenced by both countries' legal systems; a part of the JCL is derived from the Napoleonic Code and Jordan was influenced by the British mandate before 1946. Lastly, the researcher speaks both languages (English and French) which help him to understand the legal text<sup>24</sup>.

This thesis adopts "reform oriented research"<sup>25</sup> in order to evaluate the adequacy of the existing general rules in Jordanian legislation regarding consumer protection in ECCCs, and will recommend changes to any rules found wanting. It can also be described as a doctrinal approach which attempts to explore the weaknesses and shortcomings in relation to the governance rules of ECCC and thereafter, once determined, suggest solutions<sup>26</sup>. According to Hutchinson doctrinal research is defined as

*"Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future development"*<sup>27</sup>

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<sup>24</sup> Lisa Webley, Workshop about How to get a PhD in Law: What Legal Research Skills Will I Need? Literature reviews, qualitative and quantitative research and comparative legal research, Institute of Advanced Legal Studies, 17 March 2012.

<sup>25</sup> See Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' [2008] MULR 1065, 1095.

<sup>26</sup> For more discussion on doctrinal research see Mike McConville and Wing Hong Chui, *Research Methods for Law* (1st, Edinburgh University Press, Edinburgh 2007) 64

<sup>27</sup> Terry Hutchinson, *Researching and Writing in Law* (2nd, Thomson Lawbook Co, Pymont, N.S.W. 2006) 7.

As described above, Chapters 2, 3, 4 and 5 provide a legal analysis in order to answer the research question, namely, to what extent can Jordanian legislation provide effective protection to consumers in ECCC? Chapter 6 provides empirical evidence on the impact of the lack of a legal framework addressing consumer protection, on the growth and development of e-commerce in Jordan. Chapter 6, therefore, falls under the concept of a socio-legal study (also known as 'law in society')<sup>28</sup>.

This thesis adopts both legal and other social science methodologies. The adopted methodology in Chapter 6 is quantitative and conducted by way of a questionnaire survey. The quantitative approach has been used to identify the impact of the absence of consumer regulations on Jordanian consumers' engagement in e-commerce and its relationship with the success of e-commerce. According to Partington "*Understanding the impact of law and legal phenomena in the modern world derives from scientific empirical research about how law works*"<sup>29</sup>.

A major hypothesis has been formulated for this study; this is as follows: "*there is a positive correlation between protective measures on behalf of a consumer and the growth of B2C e-commerce in Jordan*". The protective measures in the survey focus on three main issues, namely; information obligations; protection from unfair T&Cs and consumer rights (i.e. the right of cancellation and the right of redress). All other information related to the empirical study (e.g. research

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<sup>28</sup> See Peter Cane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, forthcoming 2010) 1018.

<sup>29</sup> Martin Partington, 'Law's Reality: Case Studies in Empirical Research on Law: Introduction' [2008] JLS 1, 7.

design, philosophy, sample population, response rate, the questionnaire's description, data analysis technique and discussion) are discussed in details in Chapter 6. The main objective of conducting such an empirical study is to lead the research methodology outside the subjective border of the knowledge of the researcher, into a wide objective knowledge represented by the Jordanian consumers in order to validate the outcomes of the legal analysis. In other words, the outcome of the legal analysis undertaken will thereafter be supported by the empirical evidence. Further, as a matter of fact, the majority of legal researches are only normative or theoretical, but in order to shore up a normative point, many legal researches whose main purpose is normative, often conduct empirical research in order to support their ideas, arguments and to predict future developments. Therefore, the purpose of conducting an empirical study is to verify the validity of the findings of the legal analysis<sup>30</sup>.

Notwithstanding that the empirical study is the last chapter and was conducted after the legal analysis, cross-analyses throughout the thesis have been added in order to demonstrate the importance of certain issues and to emphasis the impact of the lack of regulations on consumer protection in Jordan.

#### **1.4 Outline of the Thesis**

The structure of the thesis will include an analysis of the ECCC, and the existing legal protection provided by the Jordanian legislation and the PCPL. This thesis seeks to determine the shortcomings of the Jordanian legislation and attempt to

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<sup>30</sup> Lee Epstein and Gary King, 'Exchange: Empirical Research and the Goals of Legal Scholarship' [2002] U. Chi. L. Rev. 2.

find solutions; this will be done by looking at other jurisdictions and assessing whether their methods could stimulate Jordanian consumer confidence to benefit fully from e-commerce.

Accordingly, this thesis is divided into seven chapters. Chapter Two '*Consumer Protection*' seeks to establish a background analysis of whether the current Jordanian legislation is sufficiently able to cope with the development of modern contract in order to protect consumers. The answer to this question will help to assess the legal problems that arise in ECCC with regard to consumer protection. The Chapter begins with an introduction to e-commerce, its relationship with the legislation generally, and thereafter consumer protection legislation in particular. Moreover, the first section will look at the necessity for consumer protection in e-commerce by exploring the definition of 'consumer' in the Jordanian legislation and looking at how other jurisdictions define 'consumer'. It will also discuss the rationales for legislature intervention in order to redress imbalances of power between contracting parties. The second section will look at the reason behind the necessity for consumer protection in Jordanian legislation by examining the Jordanian legislative approach in relation to the freedom of contract principle.

Chapter Three '*Jordanian Legislation and Consumer Protection in ECCC*' will review the available legal frameworks that govern the issues that arise in ECCC under the Jordanian legal system and evaluate whether the protective measures are sufficiently developed in order to provide an appropriate level of consumer protection. It will also include a discussion of the related legislation in Europe. However, prior to this it will briefly look at the Jordanian legal system in order

to clarify the alternative governance rules in cases where there is an absence of special laws. Moreover, this Chapter will examine the *Shari'a* in order to explore whether it could be an appropriate alternative solution to fill the gap in Jordanian legislation with regard to consumer protection.

Chapter Four '*Information Obligations*' will review the rationale and importance of the "information requirements duty" and examine the effectiveness of the information disclosure regime under the Jordanian legal system. This Chapter seeks to provide a clear argument regarding the shortcomings of the general principles of the JCL in relation to consumer protection and the information disclosure regime. It will discuss information obligations within EU legislation from the perspective of them being used as a method of consumer protection in order to redress the imbalance of knowledge in ECCC. This Chapter is important for two reasons. Firstly, information obligations are considered to be one of the main methods of consumer protection, particularly in e-commerce, as a consumer relies on the information provided in order to make his/her transactional decision. Secondly, it is important to examine whether the information disclosure regime in Jordan seeks to ensure that consumers are able to make informed decisions and redress the imbalance of knowledge between the parties, or whether it merely seeks to investigate if there are any of the defects of consent (e.g. mistake or deception) and, if not, enforcing the contract even if a consumer's decision was not informed.

Chapter Five '*Consumer Protection from Unfair Terms*' will first discuss the classification of the ECCC under the Jordanian legislation. For this purpose, the notion of the adhesion contract will be analysed under the Jordanian legal

system. Accordingly, it will discuss the type of protection provided in relation to unfair T&Cs. Moreover, as there is no comprehensive legal framework in Jordan that addresses this issue, this Chapter will also analyse the situation under *Shari'a* in relation to unfair T&Cs. Further, the improvement of the PCPL in relation to protection from unfair T&Cs will also be discussed. Finally, the above issues will be analysed alongside the situations in both the UK and France.

Chapter Six '*The Impact of Inadequate Consumer Protection on the Development of E-commerce in Jordan: An Empirical Study*' will empirically examine the relationship between the lack of consumer protection (within the targeted issues in this thesis) and the growth of e-commerce, represented by consumer participation in e-commerce activities (i.e. buying online). In addition, this Chapter provides clarification of the processes and methods used in conducting the questionnaire survey and collecting the data. Moreover, it explains the developed model in order to test the suggested hypothesis. Finally, analysis of the data and the subsequent discussion will summarise the findings of the empirical study.

Chapter Seven, 'Conclusion' will summarise the thesis including the findings and recommendations for Jordan and reflecting on the need for law reform in the area of consumer protection. This Chapter illustrates whether or not Jordanian legislation has, indeed, failed to provide the appropriate level of consumer protection in order to redress the imbalance of power in B2C transactions and empower consumers by providing them with such rights as a quick redress in the event of a dispute or the right of withdrawal. The conclusion will be divided into three main sections. The first section will discuss the results achieved by

the extensive discussion carried out in this thesis in order to create a full insight and to assist in constructing the final section. The second section will propose a suitable legislative model for Jordan which would cover critical consumer issues that are not adequately addressed by the current legal framework and which would benefit from following the example shown in some EU legal frameworks. The last section will cover further recommendations and closing comments.

It should be noted that, at various stages in the writing of this thesis, it was difficult to obtain materials written by scholars in Arabic; nevertheless, other Arabic journals have been used. Further, the reader of this thesis will notice that there is a lack of court decisions in Jordan regarding the key issues addressed in the thesis. Such decisions are important as they are able to clarify several rules and, given the nature of the JCL as a piece of non-detailed legislation, this is especially so with regard to consumer issues that are treated in a similar way to business issues regardless of the fact that consumers are in a weaker position in the contract. The lack of such decisions is a problem for the study.

This undesirable situation could be attributed to two reasons. Firstly, with regard to the Jordanian judicial system, it should be borne in mind that judicial precedents have no binding legal authority when deciding subsequent cases involving a similar set of facts. This means that the Jordanian courts are not obliged to follow previous rulings of a superior court or other courts of the same level<sup>31</sup>. In addition, the Jordanian courts do not seek to establish rules in

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<sup>31</sup> Abdelnaser Hayajneh, 'The Awarding of Punitive Damages under the Jordanian Civil Law: Is it Possible?' [2010] EJS 606, 612.

relation to uncertain issues or unclear areas of law<sup>32</sup>. This is because judges are not bound by previous decisions made and need only refer to them as an ancillary source of information<sup>33</sup>. In other words, Jordan does not apply the precedent system<sup>34</sup> and the role of the Jordanian courts is merely to apply the written laws. Secondly, the decisions of Jordanian courts are not published, with the exception of those made by the Court of Cassation that are reported in the monthly report issued by the Jordanian Bar Association and only accessible by lawyers and the judiciary.

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<sup>32</sup> Kasassbeh (n 21) 5.

<sup>33</sup> See Jordanian Civil Law 1976, s 2 (4) *"In all the above, guidance shall be drawn from judicial decisions and jurisprudence provided that they are not repugnant thereto"*.

<sup>34</sup> See Mohamed Olwan, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World 2007) 135, 138.

## **CHAPTER TWO**

### ***CONSUMER PROTECTION***

#### **2.1 Introduction**

This chapter focuses on certain preliminary issues that will help in understanding the environment in which consumer protection is a necessary and inevitable factor to enable the development of e-commerce. It is worth mentioning that this chapter is a precursor to those that follow and will therefore be summary in nature. The issues discussed in the first section of this chapter are set out in brief; this is because, albeit important, they are not the core subject of this thesis. Rather, they are intended to act as an introduction to the subsequent chapters by providing a general understanding of the problems that can be caused by the lack of legislature intervention that exists in consumer contracts in order to rebalance the contractual relationship in B2C transactions. In addition, this section looks at the importance of such consumer protection, particularly with regard to the Internet.

The second section provides a general discussion regarding the necessity for consumer protection from the perspective of the traditional theory of contract that is represented by the freedom of contract principle.

Before discussing the relationship the importance of consumer protection, it is necessary to look at the nature of the Internet<sup>35</sup>. This step is useful in order to investigate whether the Internet exposes consumers to more potential risk which may lead to a reduction in their willingness to engage under ECCCs. It has been argued that the Internet is nothing more than a communication infrastructure<sup>36</sup>.

However, with regard to e-commerce, the lack of physical interaction between contractual parties results in the transaction being uncertain for consumers unless they ensure that they are adequately protected. This uncertainty is directly related to consumer confidence<sup>37</sup>, which is considered to be a crucial issue for e-commerce and its development. This is because consumers usually appreciate off-line shopping by touching, trying and possibly discussing the product with the seller who may, in turn, increase the consumer's confidence in their prospective purchases. With regard to e-commerce, consumer confidence can be increased by website design, businesses reputation, the type of service or product being provided and other methods. However, it must be built by legislation by determining the legal framework that businesses must comply with when dealing with consumers. This is because legislation is a crucial tool in creating clarity and consistency in on-line marketing issues and provides an

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<sup>35</sup> Historically, the Internet began in the 1960s in a U.S. Defence Department network called ARPANET. In the 1980s, universities began to use the Internet for communicating among themselves. At the end of the 1980s, the Internet expanded to be used by commercial organisations. See Craig Standing, *Internet Commerce Development* (1st, Artech House, Boston & London 2000) 2.

<sup>36</sup> Peter Carey, 'The Internet and E-commerce, A Specially Commissioned Report' (Thorogood, London 2001) 4.

<sup>37</sup> See *infra* section 2.2.5.

adequate level of protection for the weaker party (consumer)<sup>38</sup>. This thesis does not deal with technology or marketing, but rather the way in which Jordanian law applies to transactions that are undertaken using the Internet within the context of a B2C relationship.

To a great extent, the legal rules which apply to off-line transactions do not necessarily differ to those which apply to a transaction that takes place on-line. This means that the legal system that governs consumers' aspects (e.g. disclosure obligation, protection from unfair T&Cs and consumer rights) on the Internet must not deviate dramatically from the traditional rules, but be sufficiently developed to accommodate new challenges arising from the Internet (e.g. additional information requirements). This is what is termed the principle of '*medium neutrality*'<sup>39</sup>, meaning that the rules are nonspecific texts which must also apply to electronic activities<sup>40</sup> and which apply the same governance system to both off-line and on-line transactions. A similar argument has been made by Quirk and Rothchild:

*"In principle, consumer protection in connection with online transactions is no different from consumer protection in connection with transactions accomplished through the older methods of communication – face-to-face, or*

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<sup>38</sup> Simone Van Esch, Arnold Roosendaal, 'Commercial websites: consumer protection and power shifts' [2007] JITLP 13, 20.

<sup>39</sup> The earliest discoverable use of the term describes the aims of the US Electronic Communications Privacy Act 1986 – see John R Kresse, 'Privacy of Conversations over Cordless and Cellular Telephones: Federal protection under the Electronic Communications Privacy Act of 1986' [1987] Geo Mason WL Rev 335. See also Nicholas W Allard & Theresa Lauerhass, 'Debalkanize the Telecommunications Marketplace' [1991-2] Cal WL Rev 231 for an early use of the term. Cited in Chris Reed, 'Taking Sides on Technology Neutrality' [2007] Script-ed 263, 264. See also Rajab Ali, 'Technological Neutrality' [2009] LE 1, 14.

<sup>40</sup> Olivier Cachard, 'Electronic Commerce Law: Legislative Comment' [2004] IBLJ 678, 682.

*using catalogues, direct mail, or telephone. After all, if a seller engages in false advertising, it is a violation of consumer protection laws regardless of whether he communicates to the consumer in person, via broadcast media, by mail or telephone, or on a website, in an e-mail, or in an online auction posting”<sup>41</sup>*

Nevertheless, in any event, in order to remove any uncertainty, legislation must be able to cover consumer aspects (e.g. disclosure obligation, protection from unfair T&Cs and consumer rights) by comprehensive regulations to provide an appropriate level of protection.

The important thing to consider is that moving from an off-line environment to an electronic one makes the transaction uncertain for consumers, unless the latter feels that the transaction is safe, fair and trustworthy. This uncertainty could seriously restrict the growth of B2C e-commerce as it may deter potential e-commerce participants. The legal uncertainty is represented by areas of major importance, and concern, for consumers and includes several aspects (i.e. contract conclusion, payment, privacy and jurisdiction)<sup>42</sup>. Without an appropriate level of consumer protection in each of these areas consumers will not be able to use the Internet as a shopping channel and the Internet will not develop to its full potential<sup>43</sup>.

Legislation plays a crucial role in removing such uncertainty and enabling the development of e-commerce. This thesis discusses the legislation that rebalances the contractual relationship in ECCCs and that provides protective

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<sup>41</sup> Patrick Quirk and John A. Rothchild, 'Consumer Protection and the Internet' in Geraint Howells, Iain Ramsay, Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (1st, Edward Elgar Publishing, Cheltenham 2010) 333.

<sup>42</sup> Report of the European Consumer Law Group (ECLG) "consumer transactions on the internet" (ECLG/194/2000) P 2.

<sup>43</sup> *Ibid.*

measures for consumers in order to enhance their confidence. This subject has been chosen for two reasons; the obvious shortcomings of the Jordanian legislation and the lack of research covered in this area. In this context, the OECD confirmed that such legal frameworks are responsible for removing uncertainty, rebalancing contractual relationships and increasing consumer confidence<sup>44</sup>.

In addition, in order to build consumer confidence in the on-line environment, considerable attention must be given to the legal framework that deals with consumer protection; this includes several elements. Core elements of this framework include; pre-contractual requirements, protection for consumers who purchase on-line from fraudulent and unfair commercial practices and efficient and effective mechanisms for dispute resolution and redress, as stated by the OECD<sup>45</sup>. This is the reason why legislation and enforcement provide the backbone for consumers' confidence in the market place<sup>46</sup>.

Based on the above, it is obvious that consumer protection is considered an essential element for e-commerce development. Before discussing Jordanian legislation in relation to consumer protection on the Internet, pre-contractual protection and protection against unfair T&Cs, this chapter will discuss the

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<sup>44</sup> The Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999, Available on <<http://www.oecd.org/internet/consumer/34023235.pdf>> Accessed April 2011.

<sup>45</sup> OECD, 'Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy: Background Report' (Washington DC, DSTI/CP(2009)20/FINAL, 2009) Available on <http://www.oecd.org/ict/econsumerconference/44047583.pdf> Accessed May 2011.

<sup>46</sup> Commission of the European Communities, 'Consumer Confidence in E-Commerce: lessons learned from the e-confidence initiative: Commission Staff Working Document' Brussels, 8.11.2004 available on <[http://ec.europa.eu/consumers/cons\\_int/e-commerce/e-conf\\_working\\_doc.pdf](http://ec.europa.eu/consumers/cons_int/e-commerce/e-conf_working_doc.pdf)> Accessed may 2012.

importance of consumer protection and the legal reasons behind the necessity for introducing special rules to govern consumer issues.

As has been previously mentioned, this chapter focuses on certain preliminary issues that will help in understanding the environment in which the provisions on protective measures in Jordanian legislation operate. These issues are addressed in simple questions such as; Who is the consumer? Why and how is s/he protected? What is the particularity of a B2C transaction? and Why does the application of the traditional theory of contract reduce the level of consumer protection?

In answering these questions, this chapter discusses the rationales for protecting the consumer. In addition wherever necessary, reference will be made to legislation in other legal systems (i.e. France and England).

## **2.2 The Necessity for Consumer Protection in E-commerce**

Generally, the Internet is growing daily as a market place for consumers. It is therefore unwise to strive for the development of e-commerce without putting consumer transactions within a specific legal framework<sup>47</sup>. The reason for this is that consumers represent the weaker party in a contract and their weakness could be increased in the electronic environment due to the absence of the parties. This is why, in the last few decades, many countries (both industrial and developed) have become seriously concerned about consumer protection. For example, this can be noted at European level from the impressive number of

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<sup>47</sup> See Clive Gringas, *The Law of the Internet* (1st, Butterworths, London 1997) 55.

legal frameworks that cover consumer issues in both off-line and online environments<sup>48</sup>. On the other hand, several other countries, such as Jordan, still rely on the general legal principles of Civil Law to govern consumer issues; these are obviously, as it will be shown throughout this thesis<sup>49</sup>, not able to provide an adequate level of consumer protection.

Consumer protection can be considered as a vital element of legal infrastructure for the development of e-commerce. Legal infrastructure aims at regulating and governing the issues of e-commerce (e.g. the formation of a contract, jurisdiction, electronic payment, electronic signature, contract conclusion etc). According to Connolly *“The term ‘legal infrastructure’ is a well-recognised term in international law that refers to the combination of elements required to make laws work effectively<sup>50</sup>”*. In other words, the legal infrastructure can be described as legal frameworks pertaining to e-commerce that consist of different branches of law dealing with different legalities of e-commerce, for example, e-contract law, e-crime law, consumer protection and personal data protection.

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<sup>48</sup> See for example table 7 in relation to the Directives that are related to the information requirements.

<sup>49</sup> More specifically Chapters 4 and 5.

<sup>50</sup> The term ‘legal infrastructure’ includes laws, regulations and codes, registration, licensing and accreditation, regulatory bodies and international standards. This thesis deals with specific aspects of consumer protection law. For the definition and more detail see Chris Connolly and Peter van Dijk, ‘An Overview of E-Commerce Legal Infrastructure’ (Galaxia 2005) available at <[http://www.galexia.com/public/research/articles/research\\_articles-pa04.html](http://www.galexia.com/public/research/articles/research_articles-pa04.html)> Accessed January 2011.

### 2.2.1 Consumer Protection and Consumer Confidence

It may be useful to begin this section by distinguishing between the modern law of contract and commercial contracts in terms of consumer protection<sup>51</sup>. This will be helpful when investigating the shortcomings of the general principles that govern commercial contracts in relation to consumer protection, which does in turn, raise the necessity for modern law to increase the level of consumer protection.

However, prior to raising such a distinction, it is worth mentioning here that the term 'commercial contracts' in this study does not go beyond the scope of the historical perspective. This means that this study does not tackle the legal classifications between civil and commercial contracts and their consequences from a legal point of view. Therefore, it is important to clarify what is meant by the term 'commercial contracts' in the context of this study.

The term 'commercial contracts' represents the classical or traditional law of governing the contract, which is the opposite of the modern law of contracts. Historically, at the beginning of the 19<sup>th</sup> century and before the concept of consumer contracts had appeared, the legislative approach of governing a contract, in general, was solely based on the freedom of contract principle<sup>52</sup>. This means that the classical law of contract leaves the parties to freely agree on whatever they want unless they contradict the general principles of law. The main objectives of the general principles of contract under classical law are to

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<sup>51</sup> See *infra* section 2.3.1.

<sup>52</sup> See *Chitty on Contracts* (30th, Vol 1, Sweet and Maxwell, London 2004) para 1-028.

ensure that the contract is lawful by verifying the elements necessary to form a valid contract (e.g. offer and acceptance, consideration, intention to enter into legal relations, capacity and legality), and that there is *consensus ad idem*<sup>53</sup> while agreeing on the terms of the contract with regard to there being real consent and the contract being free from defects (i.e. fraud, mistake and duress).

In Jordan, generally speaking, it can be said that all commercial contracts fall under the notion of civil contracts, as all types of contract are subject to the general principles of the JCL. However, not all civil contracts are considered as commercial contracts (e.g. gifts<sup>54</sup>). Further, some types of contracts, such as insurance contracts, can be considered as commercial contracts from the point of view of the company but as civil contracts from the point of view of the customer<sup>55</sup>. The main distinction between commercial and civil contracts can be summarised by their legal effects and consequences<sup>56</sup>. On the other hand, the main criterion in differentiating between commercial and civil contracts is speculation or profit and professionalism. Notwithstanding this clarification of the distinction between civil and commercial contracts from a legal perspective and under the Jordanian legal system, this has no impact on the area of study as the use of the term 'commercial contracts' is only limited by the historical

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<sup>53</sup> *Consensus ad idem* means meeting of the minds or, more literally, agreement about the same (thing).

<sup>54</sup> For example, a donative promise, which is a promise to make a gift and which is regulated by articles 557-581 in the JCL, is not considered as a commercial contract from a legal point of view as the speculation and making of a profit are elements to consider regarding whether the contract is civil or commercial.

<sup>55</sup> JCL, s 920-932.

<sup>56</sup> Amongst others, an Evidentiary Requirement (whereas commercial contracts can be proven by evidentiary methods, civil contracts can only be proven by writing), salary and commission (some civil contracts are based on the notion of gift and donation which does not exist in a commercial contract where there should instead be a profit) and limitations.

perspective of identifying the contract as either classic or modern. The term 'commercial contracts', which reflects the classical law of contract from an historical point of view, has been used to indicate that there is no legislature intervention in the contract, even if one of the parties suffers from an unequal bargaining power. This is exactly the same legislative approach when governing B2B transactions.

In relation to consumer contracts, which are still subject to the general principles of contract in the JCL, it can be categorised as either a civil or commercial contract from a legal point of view and under the Jordanian legal system. However, as will be discussed *infra*<sup>57</sup>, the current legislative approach in governing consumer contracts under the Jordanian legal system is to consider them according to a 'commercial contract' approach rather than under the modern law of contract. This is because Jordanian legislation is more oriented towards freedom than fairness due to it still relying on freedom of contract principles in governing all types of transactions without considering the identity of the parties and whether they are a business or consumer.

As a matter of fact, it is true that the law of contract, in general, either modern or classic, is about the enforcement of promises or vitiating elements of contracts by making them void or voidable. However, it is significantly important to distinguish between 'classical law' and the modern law of contract, the latter relating to fairness rather than merely lawfulness. According to Collins:

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<sup>57</sup> See section 2.3.2.2.

*“[T]he modern law of contract goes much further than simply distinguishing between voluntary and involuntary choices. It imposes compulsory terms on certain kinds of relations, such as ... consumer purchasers”<sup>58</sup>*

In fact, the modern law acknowledges consumer contract<sup>59</sup> by attempting to rectify the inequality of bargaining power that exists between consumers and the more powerful businesses, whereas commercial contracts do not differentiate between the contractual parties even if one of them suffers from an inequality of bargaining power. This is because commercial contracts are premised upon the freedom for individuals to make whatever contract they choose<sup>60</sup>. On the other hand, the modern law allows legislature to intervene in favour of the consumer in order to make the transaction more balanced. With regard to consumer contracts, the intervention of legislation is necessary due to consumers being deemed to be economically weaker and the legally less experienced party to the contract. Furthermore, in relation to ECCC, one of the reasons for intervention in favour of the consumer is the lack of information that enables the consumer to make an informed transactional decision<sup>61</sup>.

### **2.2.2 Consumer**

At the outset of this chapter it is appropriate to consider who it is that the law purports to protect. The term ‘consumer’ can mean various things in different

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<sup>58</sup> Hugh Collins, *The Law of Contracts* (4th, Lexis Nexis Butterworths, London 2003) 13.

<sup>59</sup> Roger Brownsword, ‘The two laws of contract’, (1981) 125 SJ 279, reiterated in Roger Brownsword, ‘the Philosophy of Welfarism and its Emergence in the Modern English Law of Contract’ in Brownsword R, Geraint Howells and Thomas Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994) 44. Cited in Kasassbeh (n 21) 15.

<sup>60</sup> David Oughton and John Lowry, *Textbook on Consumer Law* (2nd, Blackstone, London 2000) 13.

<sup>61</sup> See infra section 4.2 for more discussion on the asymmetry of knowledge in B2C transactions.

contexts<sup>62</sup>. Generally, *consumers, by definition, include us all*<sup>63</sup>, because human beings are consumers by default and consumption is an essential requirement to human survival and endurance<sup>64</sup>. There is no standard definition of a consumer<sup>65</sup>. Therefore, legally, many regulations define 'consumer' in a particular manner that may be similar from country to country<sup>66</sup> despite the notion of consumer being very different. In a literal sense, consumer is "*a private individual acting otherwise than in a course of a business*"<sup>67</sup>. Apparently, this definition is based on the narrow concept that includes only a natural person or 'real' consumer in the sense of private individuals<sup>68</sup>, as termed by the European Court of Justice. This is contrary to the wide definition that includes both legal and natural persons. Generally speaking, almost all jurisdictions agree that consumers are those who act outside their profession, trade and business for private purposes. However, the difference arises regarding whether legal persons fall under the notion of a consumer.

### **2.2.2.1 Jordan**

Unfortunately, until recently, the term '*consumer*' has not been defined by current Jordanian legislation due to the absence of rules that govern consumer

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<sup>62</sup> Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law* (1st, Ashgate, Dartmouth 1997) 2.

<sup>63</sup> President John F. Kennedy 'Consumer Rights' (the Global Voice for Consumer, 1962) Available on <<http://www.consumersinternational.org/who-we-are/consumer-rights>>. Accessed on June 2011.

<sup>64</sup> Muhammad Akbar Khan, 'The Role of the Islamic State in Consumer Protection' [2011] PJJIR 31, 44.

<sup>65</sup> See Christine Riefa and Julia Hornle, 'The Changing Face of Electronic Consumer Contracts' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd, Hart Publishing, Oxford 2009) 94.

<sup>66</sup> Howells and Wilhelmsson *EC Consumer Law* (n 62) 2.

<sup>67</sup> Martin Elizabeth, *A Dictionary of Law* (5th, Oxford, Oxford 2003) 110.

<sup>68</sup> Howells and Wilhelmsson, *EC Consumer Law* (n 62) 4.

contracts. One of the likely reasons is the non-acknowledgement of modern contracts and the reliance on the rules of commercial contracts, based upon the freedom of contract principle, to govern all types of relationships<sup>69</sup>. As a result there is no clear and specific meaning of what a consumer is, notwithstanding the fact that the term '*consumer*' is mentioned in different pieces of legislation<sup>70</sup>. Furthermore, as the role of the Jordanian courts is only to apply and interpret the law, and due to judicial decisions and jurisprudence only being an ancillary source of law<sup>71</sup>, they are not able to develop a definition for consumer.

In addition, the Islamic Law '*Shari'a*' has not introduced a definition for the term '*consumer*', '*consumer protection*' or '*consumer contract*'. This is due to the fact that these terms are considered to be very modern in comparison to *Shari'a* which was introduced more than one thousand years ago<sup>72</sup>. However, the *Shari'a* contains general principles that aim to protect both contracting parties (e.g. prohibition of deception or making false representations in a contract of sale).

It is worth mentioning that, in 2006, a Project for Consumer Protection Law (PCPL) was commissioned, in collaboration with the Jordanian National Society for Consumer Protection (JNSCP). The PCPL provided a definition for consumer

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<sup>69</sup> For example: the JCL and Competition Law of 2004.

<sup>70</sup> See, for example, Competition law of 2004 and Standards and Metrology Law for the Year 2000.

<sup>71</sup> See S 2 of the JCL which provides that "'2- If the court finds no provision in this Code [this applies to all other enactments] applicable to the issue in question it shall resort to the rules of Moslem *Fiqh* (Jurisprudence) which are more adaptable to the provisions of this Code, and in case there is none it shall resort to the principles of the *Shari 'a*. 3- And, if there is none, resort shall be made to custom, and if there is none then to the rules of equity... 4- In all the above, guidance shall be drawn from judicial decisions and jurisprudence provided that they are not repugnant thereto".

<sup>72</sup> Mohammad Ahmad, *Consumer Protection in Islamic Jurisdictions* (1st, Dar Al-Kotob Al-ilmiyah, Beirut 2004) 11 (in Arabic).

that has been modified on two occasions and the PCPL was subsequently rejected once submitted to the Jordanian Parliament in 2013.

The second draft of the PCPL of 2007 suggested a definition for consumer as '*a buyer of goods or services for benefits purposes, and every beneficiary of the goods or services is deemed consumer*'<sup>73</sup>. This definition is considered wide from three perspectives. Firstly, it is obvious that the PCPL adopts the wide definition for consumer by including every buyer of goods or services regardless of his/her nature (natural or legal). In other words, even if the buyer was a businessman/woman, professional or a company, s/he will still be subject to the protection provided by the PCPL. Secondly, a factor that makes this definition favourable is that it includes services within the consumption concept; this is contrary to other Jordanian legislation where only tangible goods were acknowledged<sup>74</sup>. Thirdly, the definition also includes every beneficiary of the goods or services to be deemed a consumer.

Two issues that arise regarding the definition are: the limitation of consumer under the concept of 'buyer'<sup>75</sup> and the uncertain meaning of '*benefit purposes*'. With regard to the first issue, it is true that the majority of consumer activities fall under a contract of sale. However, consumers' activities may also fall under other types of contracts (e.g. rentals and licences where consumers enjoy a limited use of goods without owning them outright i.e. the rental of a DVD, and contracts for outcomes where consumers receive a package that may involve

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<sup>73</sup> Project of Consumer Protection Law 2007 s 2.

<sup>74</sup> Jordanian Penal Code No. 16 of 1960, s 433.

<sup>75</sup> Firas Kassarbeh and Moyad Qudah, 'The Efficiency of the Project of Consumer Protection Law: Analytical Critical Study for the Scope of the Project and its Enforcement' [2009] LSL 141, 193 (in Arabic).

various goods or services such as cleaning or electrical repairs). As a result, the best practice that many developed countries have adopted is the use of terminologies such as 'person who acts' or 'person who contracts' to include all a consumer's activities within the scope of the definition.

With regard to the second issue, the PCPL leaves the door wide open in terms of the purpose for buying the product. In other words, the PCPL does not differentiate between private and business purposes. This can be regarded as an advantage for small businesses when dealing with manufacturers or large suppliers as they are also deemed to be weaker parties to the contract.

The third draft of the PCPL in 2013 introduced a very detailed definition for consumer as 'any natural or legal person who obtains a product or service for satisfying personal or others needs with or without remuneration, and it does not include those who buy goods or services for resale or rent'. It can be noted from this definition that the legislature attempted to clarify several issues that were ambiguous in the previous definition. Firstly, it introduced a clear indication of including both natural and legal persons within the definition of consumer instead of using the term 'buyer'; this helped to avoid any narrow interpretation. Secondly, both natural and legal persons are deemed consumers unless they intend to resale or rent the goods or services; this excludes small businesses from the scope of the definition even if they suffer from unequal bargaining power as the aim of obtaining the product is only to satisfy a personal need or the needs of others. Thirdly, using the word 'obtain' instead of 'buyer' results in the inclusion of both purchases and rentals. The previous use of the word 'buyer', a derivative of the word 'buy', linguistically excluded other

commercial activities. Fourthly, the definition clearly indicates that the obtaining of goods or services can be done with or without remuneration so as to include gifts as well as purchases. This definition could be criticised in a similar way to the previous draft where the use of the word 'obtain' could be replaced by the legal terminology 'contract' or 'act' to include all activities within its scope rather than clarifying that the goods or services can be possessed with or without remuneration. Finally, including the phrase 'personal needs' within the definition excludes all activities that fall under the scope of any type of business. For example, a businessman who buys a computer for his office will not be treated as a consumer. Accordingly, legal persons do not benefit from the protection provided by the PCPL as long as they deal within the scope of their business. Consequently, the reality of the definition is narrow as all the activities of legal persons fall within the scope of their business even if they do not intend to resale the purchased goods.

It is worth mentioning that the lack of definition has led to a lack of rules governing consumer issues in Jordan. This situation has a negative impact on the feelings and perception of consumers toward the protection provided by law. According to the results of the empirical study, more than 75% of respondents disagree that they feel that they are adequately protected by law as a consumer, as shown in Table (1).

**Table 1: I feel that I am adequately protected by law as a consumer**

	<b>Frequency</b>	<b>Per cent</b>	<b>Valid Per cent</b>	<b>Cumulative Per cent</b>
<b>Strongly Disagree</b>	119	31.0	31.0	31.0
<b>Disagree</b>	171	44.5	44.5	75.5
<b>Neutral</b>	75	19.5	19.5	95.1
<b>Agree</b>	16	4.2	4.2	99.2
<b>Strongly Agree</b>	3	.8	.8	100.0
<b>Total</b>	384	100.0	100.0	

### 2.2.2.2 England and France

Firstly it is worth mentioning that all EU Directives<sup>76</sup> share a common core for the notion of consumer, as they all acknowledge natural person as a consumer and who is acting for purposes which are outside some kind of business, commercial or trade activity<sup>77</sup>. Some European countries have adopted the notion of consumer from the EU directives literally (e.g. Belgium and Portugal). However, other Member states, such as France, have not adopted the same definition of the EU Directives, but adopted a wider definition by including not only natural persons, but also extending the protection to other groups of persons in specific cases (i.e. legal persons). The general European view regarding the definition of consumer complies with the definition put forward by the European Court of Justice (ECJ). The ECJ has consistently held that the definition of consumer must not be given a wider interpretation as it has been

<sup>76</sup> Directive 85/577, Directive 90/314, Directive 93/13, Directive 94/47, Directive 97/7, Directive 98/6, Directive 99/44, Directive 87/102, Directive 2000/31, Directive 2002/65 and Directive 2005/29.

<sup>77</sup> Martin Ebers, 'The Notion of "Consumer" ' in Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers (eds), *EC Consumer Law Compendium: Comparative Analysis* (1st, Sellier European Law Publishers, Munich 2008).

keen to limit protection to consumers according to the traditional definition of private individuals<sup>78</sup>.

French legislation does not define 'consumer' but its notion has been developed by case law as, in this way, different situations can be better taken into account<sup>79</sup>. Therefore, a businessman/woman can be treated as a consumer under French legislation if they are considered as a weaker party to the contract<sup>80</sup>. The *Cour de Cassation* mentioned that; although the ECJ considers that the contracts concluded with consumers apply only to natural persons within the meaning of Community law, the notion of non-professional used by French legislation does not exclude the legal person<sup>81</sup>. In other words, even the professional or the businessman/woman can be found in the same weak position as a real consumer (natural person) and thus s/he should benefit from the protection provided by the French Consumer Code (FCC)<sup>82</sup>. On the other hand, it is worth mentioning that several articles of the FCC determine the notion of consumer in different ways (e.g. L.132-1 for unfair T&Cs and article L.211-3 for the warranty against hidden defects). Accordingly, the FCC uses a variety of terms to govern each case. This means that, further to the term 'consumer', other terms are used to define the scope of each article (e.g. purchaser and contractor). As a result, the French legislature adopts the wide definition of consumer by including both natural and legal persons. To this end,

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<sup>78</sup> Howells and Weatherill (n 22) 365.

<sup>79</sup> *Ibid.*

<sup>80</sup> E.g. *Cour de Cassation*, N° 93-10514, 1<sup>ère</sup> civile du 24 Janvier 1995.

<sup>81</sup> *Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 Juris-classeur periodique)*. See also Rapports législatifs en Projet de loi relatif à la consommation, available on <<http://www.senat.fr>>.

<sup>82</sup> *Cass. 1ère civ. 25 mai 1992.*

the *Cour de Cassation* accepts two criteria for determining who can be subject to the protection provided by the FCC; namely the degree of legal or technical competence '*compétence*' and whether the contract is directly related to business, trade or profession '*le rapport direct entre l'activité professionnelle et le contrat*'<sup>83</sup>.

With regard to UK legislation, the definition of consumer differs depending on the legislation in question. For example, the definition under the Unfair Contract Terms Act 1977 (UCTA) is different from the definition given by the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs) and other consumer protection legal frameworks (e.g. The Consumer Protection (Distance Selling) Regulations 2005). The definition of consumer under UCTA is wider as businesses can claim to be dealing as a consumer as long as they engage in contracts that are outside their business or trade purposes<sup>84</sup>. However, according to Ebers, the wide notion cannot be applied beyond the context of UCTA for other consumer protection legal frameworks for the following reasons:

*"Firstly it must be noted that UCTA only partly serves the implementation of directive law (namely in relation to the Consumer Sales Directive) and the UK otherwise uses a notion of consumer which is closely orientated towards Community law. Secondly, the cited decision has in the meantime been placed in doubt, as in Stevenson v Rogers the CA held that for the purposes of the Sale of Goods Act 1979 sec. 14 any sale by a business is "in the course of a business".*

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<sup>83</sup> Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 Juris-classeur périodique).

<sup>84</sup> *R & B Customs Brokers Ltd v United Dominions Trust Ltd*. [1988] 1 WLR 321. For more discussion see M Ebers, "The Notion of "Consumer" (n 77) 723.

*Thus a solicitor selling off a computer no longer needed in his office would, for this purpose, be selling the computer in the course of business”<sup>85</sup>*

It is worth mentioning that the draft of Consumer Protection from Unfair Trading (Amendment) Regulations 2013 has adopted the narrow definition of consumer as it is stated in Article 2 that “‘consumer’ means an individual acting for purposes that are wholly or mainly outside that individual’s business”. Notwithstanding the new definition of consumer, the notion under English law still reflects the view of the ECJ. Finally, the Consumer Rights Directive 2011/83/EU (CRD) confirm this approach of defining consumer by asserting on the notion that consumer must be only the natural person and who act out side trade, business or profession.

### **2.2.3 E-commerce**

There is no international standard definition of what e-commerce is. According to Reed it is very hard to determine a definition for e-commerce because “the technology is so flexible that a wide variety of commercial activities are possible”<sup>86</sup>. However, as many scholars agree, e-commerce is “about business activities electronically conducted”<sup>87</sup>. In any event, the concept of e-commerce basically deals with transactions, the main component of e-commerce, which can be conducted in different forms, such as B2B or B2C. This thesis deals with B2C relationships which are, logically, attached to the concept of consumer protection. As mentioned above, consumer protection provided in the off-line

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<sup>85</sup> *Ibid* 724.

<sup>86</sup> Chris Reed and John Angel, *Computer Law: the Law of Regulation of Information Technology* (6th, Oxford University Press, Oxford 2007) 198.

<sup>87</sup> Jae Shim and Joel Siegel et al, *The International Handbook of Electronic Commerce* (1st, Routledge, USA 2000) 1. Cited in Aljaber (n 1) 10.

environment can be extended to the on-line environment by taking into consideration the specific characteristics of the Internet (e.g. the lack of physical presence between the parties which requires a more consistent information disclosure regime). However, the legal framework that governs consumer issues must be sufficiently developed in order to rebalance the contractual relationship.

#### 2.2.4 Consumer Protection

Generally speaking, historically, the notion of consumer protection entered the legal lexicon from the 1970s<sup>88</sup> in an era of interventionism when consumer laws and policies were produced<sup>89</sup> and it became a community objective<sup>90</sup>. The peculiarity of the B2C transaction, which is represented by the inequality of bargaining power, has encouraged legal scholars to consider consumer protection issues<sup>91</sup>. As a result, many attempts have been made to strengthen a consumer's position by introducing specific and practical regulations in the field of European consumer law. Conversely, many developing countries, such as Jordan, do not pay attention to this important area and this produces a negative effect on consumer confidence in both the off-line and on-line environments.

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<sup>88</sup> See Ian Lloyd, *Legal Aspect of the Information Society* (1st, Butterworths, London 2000) 268.

<sup>89</sup> Geraint Howells and Thomas Wilhelmsson, 'EC Consumer Law: has it come of age?' [2003] ELR 370, 386.

<sup>90</sup> Paul Klinger and Rachel Burnett, *Drafting and Negotiating Computer Contracts* (1st, Butterworths, London, Edinburgh, Dublin 2005) 50.

<sup>91</sup> See Salvatore Mancuso, 'Consumer Protection in E-Commerce Transactions: A First Comparison between EU Law and Islamic Law' in L Padmavathi (eds), *E-Commerce Consumer Protection* (1st, The Icfai University Press, Hyderabad 2009) 1.

The interventionist approach by governments to protect consumers, which permits legislation to impose guidelines on businesses when dealing with consumers, makes the relationship in B2C transactions more balanced<sup>92</sup>. It has been argued that the fact that one contracting party is a consumer is a sufficient reason to intervene in favour of him<sup>93</sup>. In fact, several justifications fall under economic and non-economic grounds to support the interventionist approach in favour of consumers<sup>94</sup>.

The economic ground for supporting that approach is related to market failure. It has been argued that "*the state, through the law, should play only a restricted role in protecting consumers, because consumer protection is most effectively achieved by the operation of free and open markets*<sup>95</sup>". However, the market can never be perfect regarding marketing and competition<sup>96</sup>. Thus, the law should intervene to address any failures when they occur<sup>97</sup>.

The non-economic ground is related to the inequality of bargaining power, standard form contracts and paternalism. This ground provides more rationale to support intervention. With regard to the principle of the inequality of bargaining power, Ramsay has stated that "*it has long been recognised that*

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<sup>92</sup> Micklitz, Stuyck and Terryn (n 22) 2.

<sup>93</sup> Roger Brownsword, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract', in Roger Brownsword, Geraint Howells and Thomas Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994) 44. Cited in Kasassbeh (n 21) 15.

<sup>94</sup> Ramsay (n 22) 53-71.

<sup>95</sup> Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (1st, Cambridge University Press, Cambridge 2001) 1.

<sup>96</sup> See Richard Craswell, 'Freedom of Contract' in Eric A. Posner (eds), *Chicago Lectures in Law and Economics* (1st, Foundation Press, New York 2000) 5.

<sup>97</sup> *Ibid.*

*freedom of contract has little meaning in consumer transaction*"<sup>98</sup>. This is because consumer contract is basically presented on a *take-it-or-leave-it* basis. This means that a consumer is not able to negotiate the terms of the contract and, further, in ECCC s/he is limited by the information provided onscreen in terms of making a transactional decision. As a result, the relationship in these contracts is imbalanced in three ways; knowledge, contract organisation and rights.

With regard to ECCC, businesses have the knowledge about the product and the transaction, they impose their T&Cs and they introduce the rights and obligations in a way that benefit their interests. With regard to the information rationale, which is itself related to the knowledge element, a consumer is unable to make efficient choices in the marketplace unless all relevant information is provided in a clear and comprehensive manner (e.g. information on price, quality and T&Cs)<sup>99</sup>. In fact, information failure leads to the misallocation of consumer resources as stated by Ramsay. He added that "*if a market is riddled with false claims, then consumers may lose confidence in the truth of all seller claims*"<sup>100</sup>. In relation to ECCC, a consumer is particularly vulnerable as, in many instances; the only information available to him/her is the business' home page address (URL)<sup>101</sup>. In this case the objective of legislature intervention is to

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<sup>98</sup> Ramsay (n 22) 159.

<sup>99</sup> *Ibid* 65.

<sup>100</sup> *Ibid*.

<sup>101</sup> See Sarabdeen Jawahitha, 'Consumer Protection in e-commerce: Analysing the Statutes in Malaysia' [2004] JAAB 55, 63.

improve transparency in order to better inform the consumer<sup>102</sup>. This, in turn, leads to a more balanced transaction.

The second justification, which overlaps with the principle of unequal bargaining power, is the standard form contract. As the ECCC falls under the standard form contract or adhesion contract, (as will be mentioned *infra* in Chapter 5), T&Cs are pre-formulated by the party in the stronger position and thereafter accepted by the weaker party who has no option but to either reject the contract or comply with its terms. This type of contract is usually used by businesses when dealing with a large number of consumers who often lack the bargaining power and the economic incentives to enforce their own terms<sup>103</sup>. In order to ensure that contract terms are fair, and for the sake of encouraging consumers to engage under contract with confidence, there is a necessity for legislature intervention. This issue will be further discussed *infra*<sup>104</sup>.

With regard to the paternalism approach, which is considered to be an extreme approach by Micklitz *et al*, a consumer should be protected, because s/he is the weaker party to the contract. This is not only with regard to 'rough traders' but also against businesses in general. This is due to the fact that businesses will only look at their own interests which will not ordinarily coincide with those of the consumer interest<sup>105</sup>. The partisans of this approach believe that consumers are not able to evaluate information, even when provided with accurate

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<sup>102</sup> Howells and Weatherill (n 22) 25.

<sup>103</sup> Micklitz, Stuyck and Terry (n 22) 279.

<sup>104</sup> See *infra* chapter 5.

<sup>105</sup> *Ibid*.

information, because they act irrationally and misestimate the risk of the product<sup>106</sup>.

More specifically, with regard to consumer protection within the context of e-commerce, it could be argued that, given the range of resources that consumers may access to protect themselves when engaging in ECCC (e.g. the rating of businesses and a businesses' history)<sup>107</sup> there is less need for legislature intervention. Nevertheless, three issues must be considered when arguing the consumers' 'self-defence' approach and consideration should be given to what degree of information accuracy should be required for a consumer? This brings us back to the following questions that the legislature needs to determine: firstly, what is the required information that a consumer needs to protect his/herself?; secondly, it must be noted that the information available on the on-line environment could also be available off-line in traditional shopping, and its availability does not serve to differentiate between ECCC and traditional consumer contract; thirdly, it has been argued that e-commerce does present some novel issues relating to consumer protection due to the low cost of on-line communication (e.g. new forms of fraud or deception by using unsolicited e-mail messages)<sup>108</sup>.

Based on the above discussion, legislature intervention is necessary in order to provide a suitable level of consumer protection. This is necessary due to consumers being deemed to be the weaker party from an economical point of

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<sup>106</sup> Ramsay (n 22) 100.

<sup>107</sup> Quirk and Rothchild (n 41) 335.

<sup>108</sup> *Ibid.*

view, less experienced and less legally educated<sup>109</sup>. Furthermore, the consumer is also vulnerable because s/he relies on the information provided by a business in order to make a transactional decision.

### 2.2.5 Consumer Confidence

Consumer confidence in e-commerce is vital for its continuous growth<sup>110</sup>. Therefore, creating trust and building confidence in e-commerce is of great importance for its development<sup>111</sup>. Several elements play a crucial role in relation to the concept of consumer confidence in the B2C relationship on the Internet<sup>112</sup>. Amongst these elements is the legislation<sup>113</sup>. The Commission of the European Communities stated that; *“Legislation and enforcement provide the backbone for consumers’ confidence in the marketplace”*<sup>114</sup>.

The majority of studies argued the confidence from security perspective by focusing on personal data protection or on-line dispute resolution in relation to cross-border transactions. However, this thesis does not tackle these aspects; it will instead cover the main methods of consumer protection that helps to provide more balanced transactions in ECCC. The information provisions of

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<sup>109</sup> Mohiuddin Ahmed, Ramlah Hussein, Rashidah Minakhatun and Rafikul Islam, 'Building Consumers confidence in adopting e-commerce: A Malaysian case' [2007] Int. JBSR 236, 255.

<sup>110</sup> See, among others, Gibbs, Kraemer, Dedrick, (n 2) 5, 18. Wunsch-Vincent, and McIntosh (n 2) 61 - 65.

<sup>111</sup> Faye Wang, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China* (1st, Routledge, Abingdon 2010) 102.

<sup>112</sup> Sirkka L Jarvenpaa, Noam Tractinsky and Michael Vitale, 'Consumer trust in an Internet store' [2000] ITM – Special Issue on Electronic Commerce 45, 72.

<sup>113</sup> In relation to Jordan, see Al-Khaffaf (n 2) 66, 70. Al rawabdeh (n 10) 1, 11. Shannak and Al-Debei (n 10) 457,489.

<sup>114</sup> Commission of the European Communities, 'Consumer Confidence in E-Commerce: lessons learned from the e-confidence initiative: Commission Staff Working Document' Brussels, 8.11.2004. available on <[http://ec.europa.eu/consumers/cons\\_int/e-commerce/e-conf\\_working\\_doc.pdf](http://ec.europa.eu/consumers/cons_int/e-commerce/e-conf_working_doc.pdf)> Accessed may 2012.

consumer contracts are one of the main protective measures that are derived from the interventionist approach<sup>115</sup>. The information requirements lead to increased consumer confidence on the Internet as it helps a buyer to make an informed decision<sup>116</sup>. Moreover, Howells added that “... *unbalanced contract terms, and bad marketing practices may undermine confidence in the market*”<sup>117</sup>. In other words, unfair contract terms, which are also considered to be one of the main protective measures, have an impact on consumer confidence. In this respect, the OECD has stated that:

*“In order to build consumer confidence and establish a more balanced relationship between business and consumers, it will be necessary for consumer laws, policies and practices limiting fraudulent, misleading and unfair commercial conduct”*<sup>118</sup>.

Other protective measures can also be taken into account where they help to increase consumer confidence in the e-environment, such as giving the consumer the unconditional right of cancellation and a quick right of redress.

In relation to the empirical study, it is worth mentioning that the overwhelming majority of 92% of respondents do not feel confident when buying over the internet, as shown in Table (2).

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<sup>115</sup> Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' [2005] JLS 349, 356.

<sup>116</sup> EC Commission, Healthier, safer, more confident citizens: A Health and Consumer Policy Strategy (Brussels, 6.4.2005 COM(2005) 115 final 2005) 10.

<sup>117</sup> Howells, 'The Potential and Limits of Consumer Empowerment by Information' (n 115) 366.

<sup>118</sup> James Catchpole, 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment' [2001] IJLIT 1. For more details see the Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999 at 1, Available on <<http://www.oecd.org/internet/consumer/34023235.pdf>> Accessed April 2011.

Table 2: I feel confident if I buy over the Internet

	Frequency	Per cent	Valid Per cent	Cumulative Per cent
<b>Strongly Disagree</b>	126	32.8	32.8	32.8
<b>Disagree</b>	229	59.6	59.6	92.4
<b>Neutral</b>	27	7.0	7.0	99.5
<b>Agree</b>	2	.5	.5	100.0
<b>Strongly Agree</b>	0	0	0	100.0
<b>Total</b>	384	100.0	100.0	

On the other hand, within the selected random sample, as will be discussed in Chapter 6, there is a strong, positive correlation between the feeling of protection and consumer confidence, as shown in Table (3).

Table 3: Bivariate correlation (Pearson) between consumer confidence and consumer protection

		<b>I feel that I am adequately protected by law as a consumer</b>	<b>I feel confident if I buy over the Internet</b>
<b>I feel that I am adequately protected by law as a consumer</b>	<i>Pearson Correlation</i>	1	.739**
	<i>Sig. (2-tailed)</i>		.000
	<i>N</i>	384	384
<b>I feel confident if I buy over the Internet</b>	<i>Pearson Correlation</i>	.739**	1
	<i>Sig. (2-tailed)</i>	.000	
	<i>N</i>	384	384

\*\* . Correlation is significant at the 0.01 level (2-tailed).

This gives an indication, as confirmed by other studies and reports<sup>119</sup>, that consumer protection is an essential factor for the development of e-commerce as it is directly related to consumer confidence.

### 2.2.6 E-commerce and B2C Relationship

“Business to consumer” is usually abbreviated to B2C, and it exists in both the off-line and on-line environment. However, the acronym B2C has primarily been attached to e-commerce as it is the most commonly discussed type of contractual relationship in this field. It can be described as an exchange of products (goods and services) from businesses to consumers, as opposed to between one business and another. In this context, B2C e-commerce can be described as “*Internet-based electronic market designed to allow online business-to-consumer communications and transactions*”<sup>120</sup>.

The notion of B2C relationships has become well known and can be easily distinguished from B2B transactions, but this differs from one field of science to another. For instance, from a technical perspective, B2C involves a large number of buyers making thousands of diverse transactions per hour with a relatively small number of sellers<sup>121</sup>. From a marketing perspective, B2B differs from B2C in a number of key ways, one being that it often depends on a

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<sup>119</sup> See for example, The Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999, Available on [http://www.oecd.org/internet/consumer/3402\\_3235.pdf](http://www.oecd.org/internet/consumer/3402_3235.pdf). Howells, 'The Potential and Limits of Consumer Empowerment by Information' (n 115) 366. James Catchpole, 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment' [2001] IJLIT 1.

<sup>120</sup> Cristina Catenae, *Cyber Consumer Law and Unfair Trading Practice: Markets and the Law* (1st, Ashgate, England 2004) 7.

<sup>121</sup> R. Kelly Rainer and Casey G. Cegielski, *Introduction to Information Systems: Supporting and Transforming Business* (John Wiley & Sons, 3<sup>rd</sup> Edition, USA, 2009) 206

campaigns' ability to invoke emotional responses, rather than solely demonstrating value<sup>122</sup>. From a regulatory perspective, B2C relationships seem to be more sensitive than B2B transactions because of privacy, jurisdiction and protection<sup>123</sup>. In terms of contract formation, the same elements of contract must be considered in both types of relationships (B2C and B2B). However, modern laws acknowledge the principle of unequal bargaining power where legislature must intervene and seek to empower consumers by rebalancing the power in this particular contractual relationship.

Therefore, in relation to the contract elements, there are no differences between both relationships. However, the difference arises in terms of the protection provided by law. According to Wang:

*"..., B2C contract is identical to B2B contract in terms of the determination of the validity of electronic contract, the time and place of dispatch and receipt of electronic communications and the location of the parties. However the differences arise in the two types of contracts because consumers are the weaker parties in commercial transactions and they need particularised rules to protect their rights."*<sup>124</sup>

A similar view stated by Hornle and Riefa:

*"Distinguishing between consumers and businesses is crucial because the law typically applies a far greater standard of protection to consumers than to business in transactions. Business are assumed to contract inter se 'at arm's*

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<sup>122</sup> See for example: Connie Chang, 'Reviewing and Conceptualising Customer-Perceived Value' [2012] MR 253, 274.

<sup>123</sup> *Ibid.*

<sup>124</sup> Wang (n 111) 17.

*length' – ie with equality of bargaining power – while this is not in B2C transactions*"<sup>125</sup>

Furthermore, in relation to ECCC, which represents the B2C contractual relationship within the context of e-commerce, the situation can be summarised by four main points. Firstly, the virtual presence of parties, which is contrary to off-line commerce that occurs face-to-face. The ECCC is conducted between strangers with no prior relationship. The role of the law is to remove any uncertainty by imposing obligations on businesses (e.g. disclosure obligation) and giving rights to consumers (e.g. cancellation right and quick redress). As the consumer is not able to touch or try the product before purchasing, s/he needs to ensure its fitness for purpose and quality satisfaction or at least his/her expectations. One of the issues that arise in the e-environment is whether or not the contract is definitely concluded. In fact, this issue can be simply solved by adding a third-procedural-step in relation to offer and acceptance, for example, a confirmation being sent by the seller, or, imposing an obligation on businesses to send an acknowledgement to the consumer once the contract is concluded<sup>126</sup>.

Secondly, the inability of consumers to negotiate contract terms. This issue is as a result of the nature of consumer contracts where T&Cs are prepared in advance by businesses and consumers can only reject them or comply with them. The problem here is that T&Cs may include unfair provisions that consumers normally accept without bothering to read beforehand. This is usually due to the fact that T&Cs are difficult to understand by consumers.

Another issue can be raised in relation to ECCCs, as they can be concluded by

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<sup>125</sup> Riefa and Hornle (n 65) 96.

<sup>126</sup> See *infra* section 3.6.4 for more discussion.

different methods<sup>127</sup>, where a consumer is not able to look at the T&Cs until s/he completes the transaction.

Thirdly, the information requirement which can be considered as the cornerstone for consumer transactional decision in e-commerce, as a consumer relies on the information provided on the screen to make his/her decision<sup>128</sup>.

Fourthly, the possible lack of opportunity for reflection by the consumer once payment is made. This aspect must be tackled alongside with the right to cancellation where a consumer has the opportunity to change his/her mind with or without reason. The right to cancellation is one of the methods that increase consumer confidence due to the fact that this right is considered an effective method to solve any problem or to redress any situation<sup>129</sup>.

### **2.3 The Reason behind the Necessity for Consumer Protection in ECCC**

The Internet has created new tools for searching and consumers can go on-line effortlessly to purchase an enormous variety of goods and services. This allows consumers to search, compare prices and features and choose payment methods<sup>130</sup>. Consumers can buy intangibles or downloadable products, such as software, books, music or tickets, and tangible or actual products, such as computers, mobile phones or food. In addition, they can do these activities by e-mail or by using websites over the World Wide Web (WWW). Nowadays, these

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<sup>127</sup> Such as shrink wrap, click wrap and browse wrap.

<sup>128</sup> See *infra* section 4.2 for more discussion.

<sup>129</sup> See *infra* section 3.6.5 for more discussion.

<sup>130</sup> Gary Shelly and Harry J. Rosenblatt, *System analysis and design* (Shelly Cashman Series, 8<sup>th</sup> Edition, USA 2010) 10.

new activities cannot be conducted without paying heed to the legal protection for consumers that includes the aforementioned areas (i.e. information requirement, protection against unfair T&Cs, opportunity for reflection by the consumer after the declaration of their will, and confirmation or acknowledgement to remove any legal uncertainty about the conclusion of the contract). The European Consumer Law Group (ECLG) said in their report on consumer transactions on the Internet that:

*“The development of the Internet as a shopping channel can be of great benefit to consumers. It can lead to lower prices, a more varied range of choices of delivery and more flexible payment solutions. But still there is a long way to go before consumer protection is sufficient and business attitudes serious enough to develop a thriving market. Today many consumers lack confidence in this new technology”<sup>131</sup>.*

The necessity for consumer protection in ECCC does not mean that this type of contract needs specific and new rules to govern consumers' issues within the context of e-commerce (technology specific approach). In contrast, for example in the EU, technology neutrality has been espoused extensively by national legislators and international organisations<sup>132</sup>, and this concept has become desired and part of the general wisdom<sup>133</sup>. This is because, as Reed summarised, the fundamental rules should be the same on-line as off-line and legal rules

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<sup>131</sup> Report of the ECLG “consumer transaction on the internet” (ECLG/194/2000) P 2 available on <http://docshare.beuc.org/docs/2/GAIKBJDANINELHEOMIPGCGFPDB19DBDWY9DW3571KM/BEUC/docs/DLS/2005-00011-01-E.pdf> accessed January 2012.

<sup>132</sup> Bert-Jaap Koops, “Should ICT Regulation be Technology-Neutral” in Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens, Starting Points for ICT Regulation: deconstructing prevalent policy one-liners (The Hague: TMC Asser Press 2006) 77, 77-9. Cited in Reed, ‘Taking Sides on Technology Neutrality’ (n 39) 265.

<sup>133</sup> Reed, ‘Taking Sides on Technology Neutrality’ (n 39) 265.

should not favour or discriminate against a particular technology<sup>134</sup>. However, in order to provide a high level of consumer protection when applying off-line rules on ECCCs, legislation needs to acknowledge the modern law of contract instead of relying upon the rules of commercial contracts to govern consumer issues on the Internet. This is because, as has been mentioned *supra*, the modern law of contract allows for legislature intervention in order to rebalance B2C contractual relationships. This is in contrast to the general rules of commercial contract that are based on the freedom of contract principle and do not distinguish between the different contractual relationships, even if one of the contracting parties suffers from unequal bargaining power.

A consumer who intends to engage under an ECCC might be the same consumer who is conducting a normal or traditional transaction in an off-line environment. However, in the first case, consumers face more complex transactions due to the fact that traditional consumers can easily identify businesses and their location, touch and feel the product, and deal face to face with businesses who might be a part of their quotidian experience. Therefore, the adoption of the neutral technology approach does not prevent legislatures imposing extra obligations on businesses to ensure that the transaction is safe and trustworthy for the consumer (e.g. providing extra information for consumers).

Finally, before looking at the reason behind the necessity for consumer protection in the ECCC under Jordanian legislation, it would be helpful to understand what consumer protection on the e-environment is. In general

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<sup>134</sup> *Ibid* 266.

terms, “consumer protection is generally understood as the protection of weaker market parties by means of mandatory rules in order to adjust the environment where consumers bargain and conclude transactions”<sup>135</sup>. Therefore, the concept of consumer protection is not only the traditional protection from defective goods or services, but also includes increasing consumer bargaining power by limiting the freedom of contract principle. As a result, the objective of this section is to determine whether the general principles of the JCL are able to achieve the rebalance in ECCC.

In order to answer this questions this section looks at the traditional theory of contract and the general rules of the JCL in relation to the extent of the protection provided for ECCC. Further, this section revises the shortcomings of the Jordanian legislation to provide the required level of consumer protection on the Internet.

### **2.3.1 Modern Law of Contract vs. Commercial Contract Law**

Generally speaking, commercial contract law, or the classical law of contract as it is also known, revolves around the freedom of contract principle as a reflection of the dominance in the 19<sup>th</sup> century of a *laissez-faire* attitude to the economy<sup>136</sup>. Contracting parties were governed by rational self-interest whereas the courts simply intervened in order to give effect to the parties' agreement<sup>137</sup> and settle disputes<sup>138</sup>. The classical law of contract has been

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<sup>135</sup> Marco Loos, Natali Helberger, et al, 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts' (Final Report, University of Amsterdam 2011) 245.

<sup>136</sup> Richard Stone, *The Modern Law of Contract* (9th, Routledge , Abingdon 2011) 6.

<sup>137</sup> Richard Stone, 'The Modern Law of Contract' [2009] ICCLR 23, 24.

developed to reflect a new economic model which required the intervention of the legislature in order to protect parties from unfairness and unreasonableness. Thus, this development of contract law produced the modern law of contract where fair dealing and reasonable expectation by the parties are the main standards that should be protected in order to facilitate commercial relations<sup>139</sup>. In relation to the growth of e-commerce, the modern law of contract is more proportionate as it facilitates commercial relations and provides protection for the legitimate and reasonable expectations of the parties<sup>140</sup>, particularly in ECCC where consumers suffer from an unequal bargaining power.

One of the main distinctions between the modern and classical law of contract is the level of control over the contractual regime. Beatson and Friedman stated that:

*"[While] [m]odern contract law is characterized by an increased control over the contractual regime. This control is reflected both by general supervision over the process of contract formation and by intervention in the very contents of the contract ... The freedom of contract approach [which is the basis of the classical law of contract,] was said to have led to the reduction of supervision over contractual terms to a bare minimum. A contract could not be invalidated on the ground of unreasonableness or unfairness. These matters were for the parties to decide."*<sup>141</sup>

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<sup>138</sup> Stone, *The Modern Law of Contract* (n 148) 6-7

<sup>139</sup> See Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' [1997] L.Q.Rev. 433, 438. Cited in Hisham Tahat, 'Legal Issues Related to the Formation of Electronic Contracts: A comparative Study of English and American Law' (PhD Thesis, University of Aberdeen 2006) 20.

<sup>140</sup> Tahat (n 139) 21.

<sup>141</sup> Jack E. Beatson and Daniel E Friedmann, 'Introduction: From 'Classical' to Modern Contract Law' in Jack E. Beatson and Daniel E Friedmann (eds), *In Good Faith and Fault in Contract Law* (1st, Oxford University Press, Oxford 1997) 8-12.

There are several reasons for classifying the approach of the JCL under the classical law of contract. First, Treitel has defined contract as:

*“[A]n agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties”<sup>142</sup>.*

In addition, he commented that the contract definition is still subject to a number of qualifications. Amongst others, contracting parties are normally expected to observe certain standards of behaviour which are the result of terms implied by law<sup>143</sup> (legal duties). For example, with regard to distance contracts in the UK, even if a business does not mention the right of withdrawal, a consumer was not informed or even aware of the right or the contract has been agreed contrary to that right, a consumer still has the right to cancel the contract. Consequently, the legal duties in the modern law of contract go much further than the fulfilment of good faith; they also empower weaker parties, rebalancing bargaining power and facilitating trade. The other qualification is related to the freedom of contract principle, since the classical law interfered in some specific grounds such as misrepresentation or illegality, the modern law of contract interfere because one of the parties has a stronger bargaining power<sup>144</sup>.

In comparison with the abovementioned qualifications, the outcomes under the JCL will be different. For example, the JCL provides very basic implied terms

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<sup>142</sup> G.h Treitel, *The Law of Contract* (11th, Aweet & Maxwell, London 2003) 1.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid* 2.

that are appropriate for all types of contractual relationship and which aim to protect the consent of the parties, for example, the right to terminate the contract if a product was found to be defective. However, if a product was not defective, parties have no right to cancel the contract except by mutual consent or by a legal cause. On the other hand, the JCL does not interfere merely because one of the parties has a stronger bargaining power, with the exception of adhesion contracts where the law gives permission to a judge to vary the unfair terms. However, this may give rise to a further problem which is discussed below.

Secondly, according to Friedman, the classical theory of contract was that “*two or more individual persons freely bargained with each other [so] control over terms of contract was limited to a few categories of illegality*”<sup>145</sup>. This situation is the same as that which has been introduced by the JCL where parties can include any term they wish, knowing that it will be considered valid and binding unless it contradicts the law. It may be said that the JCL provides protection for unfair terms in an adhesion contract. This is correct; however, when considering the traditional theory of the adhesive nature of a contract under Jordanian legislation, the protection will not be extended to the ECCC or even conventional consumer contracts unless there is the existence of the three traditional pillars of an adhesion contract; namely, that the contract is pre-

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<sup>145</sup> See David Campbell, 'Reflexivity and welfarism in the modern law of contract' [2000] OJLS 477, 478.

formulated and non-negotiated; that its subject matter is essential to the consumer and that the seller or supplier is a monopolistic power<sup>146</sup>.

### 2.3.2 Freedom of Contract and Consumer Protection

It is important to mention that the traditional theory of contract in Jordan, known as the general theory of contracts, has a central principle; namely, freedom of contract. Articles 87-249 of the JCL sets out the general theory of contract in a context in which the parties are deemed equals in their respective bargaining power. In Jordan, the only governance system that can be applied to cover consumer issues in both on-line and off-line environments are the general principles provided by the JCL. The JCL treats all parties as having an equality of bargaining power, whilst also taking into account the existing restrictions that derive from the JCL and other regulations. The next sub-sections attempt to investigate whether the Jordanian legislature imposes the minimum restrictions to limit the traditional theory of contract or leaves parties free to make their bargains in good faith which the law can then enforce.

The following sub-sections investigate the above title in relation to the two main issues that can cause an imbalance in the contractual relationship with an ECCC (i.e. disclosure obligation and protection from unfair T&Cs)<sup>147</sup>. However,

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<sup>146</sup> See Abd El-Razzak El Sanhuri, *The Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence* (1st, Dar Unnahdah Alarabiah, Cairo: 1967) 78 (in Arabic); Mohammed Al Badawi, *The General Theory on Obligation* (1st, the Open University Publications, Cairo 1991) 59 (in Arabic). Kasassbeh (n 21) 116. For more discussion see section 5.2.1.1 and 5.2.1.2.

<sup>147</sup> In fact, both aspects play a crucial role in terms of the rebalancing of bargaining power in consumer contract in general. See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Consumer Policy Strategy 2002–2006, COM (2002) 208.

before investigating freedom of contract in relation to consumer contracts within the context of Jordanian legislation, it will be useful to look at the freedom of contract principle and its limitation in Europe.

### **2.3.2.1 Freedom of Contract in Europe**

In the 19<sup>th</sup> century, the freedom of contract principle was considered by many philosophers, economists and judges to be the cornerstone of contract law, where it was presented by the autonomy theory in law and *laissez-fair* policy in economics<sup>148</sup>. The rationale for that adoption was justified on the grounds that parties are the best judges of their own interests in relation to deciding whether or not to enter into a contract and imposing the most appropriate T&Cs to suit their interests, whereas the only function of the law was to enforce their agreement<sup>149</sup>. However, during the 1960's the issue of the inequality of bargaining power was a recurring justification for establishing clear limitations and restrictions on the freedom of contract principle, particularly in terms of unfair T&Cs<sup>150</sup>. As a result European legislature now acknowledges the rules of the modern law of contract which is mainly designated by the definition of the freedom of contract principle and its limitations<sup>151</sup>. According to Atiyah *"[f]reedom of choice was whittled down in many directions, government regulation replaced free contract ... and paternalism once again was the order of*

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<sup>148</sup> See *Chitty on Contracts* (30th, Vol 1, Sweet and Maxwell, London 2004) para 1-028.

<sup>149</sup> *Ibid.*

<sup>150</sup> Ramsay (n 22) 157.

<sup>151</sup> Maria Marella, 'The Old and the New Limits to Freedom of Contract in Europe' [2006] ERCL 257.

*the day*<sup>152</sup>. Therefore, with regard to consumers, the law started to take measures to protect the vulnerable parties to a contract by dictating some T&Cs, prohibiting others rendering others illegal, void, voidable or unenforceable<sup>153</sup> and imposing special information requirements (e.g. technical steps to conclude an ECCC<sup>154</sup>). In addition to this form of legislature intervention, the courts still apply the classical interpretation of contract to ensure that the agreement is free from fraud, duress or unfair T&Cs.

At legislative level, which will be further discussed in Chapters 4 and 5, the intervention in consumer contract was focused on aspects that seek to avoid imbalance in the contractual relationship (i.e. information requirements<sup>155</sup> and the control of unfair T&Cs<sup>156</sup>)<sup>157</sup>.

#### 2.3.2.1.1 England

With regard to England, there had never been an overt principle of fairness and the unequal bargaining power principle was not taken into account under the common law of contract in the 17<sup>th</sup> and 18<sup>th</sup> century<sup>158</sup> as the freedom of

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<sup>152</sup> See P.S. Atiyah, *Essey on Contract* (1986), Essay 12: 'Freedom of Contract and New Right' 355 at 356. Cited in Dori Kimel, 'Neutrality Autonomy, and Freedom of Contract' [2001] OJLS 474.

<sup>153</sup> Kimel (n 152) 475.

<sup>154</sup> The Electronic Commerce (EC Directive) Regulations 2002, s 9 (1) (a).

<sup>155</sup> See *infra* chapter 4

<sup>156</sup> See *infra* chapter 5

<sup>157</sup> Immaculada Barral-Vinnals, 'Freedom of contract, unequal bargaining power and consumer law on unconscionability' in Mel Kenny, James Devenny, Lorna O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (1st, Cambridge University Press, Cambridge 2010) 54.

<sup>158</sup> Lee Boldeman, 'The Doctrine of Freedom of Contract' in Lee Boldeman (ed), *The Cult of the Market: Economic Fundamentalism and its Discontents* (1st, ANU E Press, Australia 2007) 18.

contract principle was presented as a cornerstone of wealth maximisation<sup>159</sup>. The only function of the law and the judge was to enforce the agreement as long as it represented an agreed exchange, regardless of whether or not the bargain seemed fair or unfair<sup>160</sup>. This approach was based on the ‘*will theory*’ of contract and the concept of *laissez-faire* where there was no intervention in the contract if it was free from deception<sup>161</sup>. With regard to the judicial *laissez-faire*, a famous observation of Sir George Jessel MR in 1875 stated:

“[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice”<sup>162</sup>

Nevertheless, the *laissez-faire* principle was restricted at certain levels by public policy, for example, the common law struck down contracts which were illegal or that did not comply with certain formalities<sup>163</sup>. However, this situation has changed in the course of the last century where the principle of freedom of contract has become subject to many qualifications (e.g. restricted freedom as to T&Cs by the Unfair Contract Terms Act 1977). As a result the *laissez-faire* principle has become more influenced by judges who, in the common law system, are the ones who make the law<sup>164</sup>.

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<sup>159</sup> Howells and Weatherill (n 22) 14.

<sup>160</sup> *Ibid.*

<sup>161</sup> A.V. Dicey, *Law and Opinion in England* (2<sup>nd</sup> ed. 1914). 150-158. Cited in *Chitty on Contracts* (n 148) 1-028.

<sup>162</sup> *Printing and Numerical Registering v Sampson* (1875) LR 19 Eq 462-465.

<sup>163</sup> Peter Gillies, *Concise contract law* (1st, Federation Press, Sydney e.g. 2005) 5. Also See P.S. Atiyah, *Essay on Contract* (1986), Essay 12: ‘Freedom of contract and New Right’ 323 at 361.

<sup>164</sup> Boldeman (n 158) 18.

Lately, with regard to the modern law of contract and its influence, the freedom of contract principle has been declined as a sole source of rights and obligations in the case of unequal bargaining power, particularly in consumer contracts which awards rights for the weaker parties (i.e. consumers) and imposes obligations on the stronger parties (i.e. businesses) to keep the balance in the contractual relationship<sup>165</sup>. Currently, the ECCC in the UK is considered as an example of the legislature intervening in order to keep the balance in contract for the purpose of protecting consumers. This can be noted, for example, from the pre-contractual information duty imposed on businesses that ensures that consumers are able to make an informed transactional decision<sup>166</sup> and the obvious limitations on the freedom of contract principle in relation to T&Cs<sup>167</sup>.

#### 2.3.2.1.2 France

Freedom of contract under French Civil Law is justified by the '*autonomie de la volonté*' autonomy principle derived from the French revolution<sup>168</sup>. The rationale for that principle was justified on the basis that the parties were the best judges of their interests as stated by Rousseau "*Nul n'est injuste envers lui-même*" which means that no one can be unjust towards himself<sup>169</sup>. Nevertheless, this notion has been developed to permit everything unless it is expressly prohibited by the law. The notion of the adhesion contract '*contrat*

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<sup>165</sup> See Howells and Weatherill (n 22) 18.

<sup>166</sup> The Electronic Commerce (EC Directive) Regulations 2002 s (6)-(10).

<sup>167</sup> Unfair Contract Terms Act 1977 and Consumer Protection from Unfair Commercial Practices Regulations 2008.

<sup>168</sup> Gérard Aubin et Jacques Bouveresse, *Introduction historique au droit du travail* (1st, PUF, Paris 1995) 98 (in French).

<sup>169</sup> Jean Jacques Rousseau, *Du Contrat Social ou Principe du Droit Politique* (1st, Chapitre 2.6 De la loi, France 1762) (in French).

*d'adhésion*<sup>170</sup>, which was a phenomena in the 19<sup>th</sup> century that reflected the economic necessities, has restricted the autonomy principle where the contract presented on '*à prendre ou à laisser*' basis (*take-it-or-leave-it*)<sup>171</sup>. The last stage of contract development in relation to the freedom of contract principle in France was during the implementation of the European Directive of Unfair Terms in Consumer Contracts. This has been followed by a further set of Directives to introduce a general framework for consumer contracts which include certain rights and obligations for the purpose of rebalancing the contractual relationship in B2C transactions.

Finally, the French legal system sets various limits on the power to create legally enforceable obligations by agreement<sup>172</sup>. Thus, consumer contracts are not binding if the legislative requirements have not been met.

### **2.3.2.2 Freedom of Contract under the Jordanian Civil Law**

The current JCL has been enacted in 1976 to replace the Ottoman *Majalla* of 1876 (The Ottoman Courts Manual 'Hanafi')<sup>173</sup> which was represented on the

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<sup>170</sup> See *infra* section 5.2.1.1 for more discussion on the notion of adhesion contracts.

<sup>171</sup> Brigitte Lefebvre, 'Le Contract D'Ahésion' [2003] La Revue du Notariat, Montréal 439, 451 (in French).

<sup>172</sup> Arthur Mehren, 'The French Civil Code and Contract: A Comparative Analysis of Formation and Form' [1955] 15 La. L. Rev 687, 711.

<sup>173</sup> Ottoman Journal of Legal Rules 1876 or the Civil Code of the Ottoman Empire, *Majallah al-Ahkām al-adliyyah*, Available online [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf). It is worth mentioning that JCL is influenced by "Sharia", which refers to Islamic Law represented in the main source of rules in Islam. Therefore, JCL has stipulated in article 2 that " *The provisions of this law shall apply to all matters it deals with, and if the court do not find applicable provision, then it has to apply the rule of Islamic Jurisprudence "Fiqh", which is more "appropriate" to this law, then it has to apply the general principles of Islamic Sharia', then by customary rules, then by natural law "principles of fairness"*. For more details see Hayajneh, 'The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?' (n 31) 606, 611.

basis of freedom of contract principle which is the cornerstone of contract in Islam. After the replacement of the Ottoman *Majalla*, the JCL comprised rules derived from the Egyptian Civil Code of 1948 which, in turn, was modelled on the Napoleonic code<sup>174</sup>. Despite this replacement, the JCL can still be described as an Islamic-oriented approach which is largely based on Islamic principles and the freedom of contract principle.

The JCL is considered to be one of the most important laws in Jordan as it is the origin of all branches of private law<sup>175</sup> and is the only alternative legal framework in cases of absence regulation where the parties are deemed equal in their respective bargaining power. This is with the exception of article 204 regarding the oppressive terms in an adhesion contract<sup>176</sup>. The JCL thus established the main principles of the commercial contract rules which are presented on the basis of equality between contractual parties and the free will or autonomy of the parties as being general principles of freedom of contract.

In similarity with other jurisdictions, Jordan adopts the autonomy of will principle '*principe de l'autonomie de la volonté*'<sup>177</sup>; to interpret freedom of contract as a juridical basis for contractual obligations. This can be noted from the definition of contract translated from the JCL: "*the joining of affirmation of the offer by one of the contracting parties with acceptance from the other in a manner which proves the effect thereof on the object of the contract and the*

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<sup>174</sup> Abdelnaser Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' [2012] BJHSS 45, 53.

<sup>175</sup> Abdelnaser Hayajneh, 'Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law' [2011] EJSS 277, 278.

<sup>176</sup> Contract of adhesion will be discussed *infra* in section 5.2.1.2.

<sup>177</sup> Cristina Coteanu, *Cyber consumer law and unfair trading practice, Markets and the law* (1st, Ashgate Publishing, England 2004) 4.

*obligation of each party by what he is bound with to the other*<sup>178</sup>. In addition, article 164 (2) of the JCL provides that contracting parties have the right to include any terms beneficial to one of them unless it is prohibited by law<sup>179</sup>.

The above articles represent the freedom of contracting where the essence of the contract is the agreement and the concurrence of the wills of two or more parties to undertake and to perform certain duties to each other. Therefore, it follows that a contract can be conducted by the expression of will regardless if one of the parties suffers from an inequality of bargaining power. Further, this principle is presented on the *laissez-faire* basis which means that, in contract law, contractors should be as free as possible to make their bargains which the law would then enforce<sup>180</sup>. As a result, the above definition of the principle of freedom of contract refers not only to the freedom to decide whether or not a party wishes to enter into a contract but also the free will of the parties to determine the content and T&Cs. One can argue that notwithstanding the freedom of contract approach adopted by the JCL, the principle of good faith is included as a nuance of the principle of freedom of contract. This statement will be argued in the next sub-section<sup>181</sup>.

The freedom of contract principle remains acceptable and applicable even if parties have unequal bargaining power. However, this is under the condition

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<sup>178</sup> JCL, s 87.

<sup>179</sup> JCL, s 164 (1) & (2) “*contract may be accompanied by a term which contain an advantage to one of the contracting parties or a third party provided that in the case of all of the foregoing it is not prohibited by law or contrary to public order or morals, otherwise the condition shall be void and the contract shall be valid, unless the condition is the inducement to make the contract, in which case the contract also shall be void*”

<sup>180</sup> *Chitty on Contracts* (n 148) 1-028.

<sup>181</sup> See *infra* section 2.3.2.2.3.

that the consumer is *de facto* protected by the law which provides rules to restrict that principle and make the contractual relationship more balanced. If the legislation was solely based on the freedom of contract approach, the contractual relationship would remain unbalanced.

Finally, countries that have no special regulations for consumer protection but instead rely on the general principles of Civil Laws to restrict and limit the applications of the traditional theory of contract, still have a problem regarding transactional relationships that suffer from the inequality of bargaining power<sup>182</sup>. In this regard, Whittaker stated that: "*freedom of contract has lost much of its intellectual attraction in the late twentieth century, and is subject to many exceptions in the positive law*"<sup>183</sup>.

In order to provide an acceptable level of protection to increase consumer confidence, freedom of contract shall be restricted by making ECCC the subject of considerable legislative regulations that provide that the only voluntary aspect of the freedom of contract will be whether or not to enter the contract, a decision which then triggers a set of obligations which are determined by law<sup>184</sup>.

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<sup>182</sup> Abd El-Razzak El Sanhuri, *Medium commentary on the new Civil Code: Part 1* (1<sup>st</sup>, Dar Alnashr, Cairo 1952-1970) 120-130.

<sup>183</sup> *Chitty on Contracts (29th, Vol 1, Sweet and Maxwell, London 2004)*12.

<sup>184</sup> *Ibid* 14.

### 2.3.2.2.1 ECCC and Freedom of Contract in Jordan

In relation to the electronic contract under Jordanian legislation, JETL<sup>185</sup> defined it as “*An agreement concluded in whole or in part by electronic means*”<sup>186</sup>. The only feature that can be noted from the drafting of the JETL definition of electronic contract is the acknowledgement of the electronic method to conclude contracts. Nevertheless, this was already acknowledged by the JCL which considered that the contract is valid merely by the existence of the main elements of contract, regardless of the medium, by stating that “*A contract made by telephone or by any similar means ...*”<sup>187</sup>. A contract is therefore valid whether it is concluded via telex or even Internet. Based on this doctrinal principle, the Supreme Court of Cassation in Jordan has stated that contracting by telex shall be regarded as if it had been made between the contracting parties otherwise than in a single place with them both present at the time of the contract by applying article 102 of JCL<sup>188</sup>.

Accordingly, the general definition of contract provided by article 87 of JCL is still applied in relation to the formation of contract and in terms of the other legal issues (i.e. information requirements and T&Cs) as a part of the medium neutrality approach. However, as JCL, JETL and other Jordanian legislation do not acknowledge consumer contracts, they treat consumers as having the same bargaining power as businesses. The non-acknowledgement of consumer contracts by Jordanian legislation and the reliance on the freedom of contract

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<sup>185</sup> See *infra* section 3.4 for more discussion on JETL.

<sup>186</sup> JETL, s 2.

<sup>187</sup> JCL, s 102.

<sup>188</sup> Supreme Court of Cassation (1990/1202) – Jordanian Bar Association, Vol 1 and 2, p 1713.

principle without clear and direct limitation, allows businesses to take advantage of a consumers' vulnerability in terms of information requirements and T&Cs which play important roles in avoiding an imbalance in such contracts<sup>189</sup>. Consequently, as consumer contracts are usually presented on the *take-it-or-leave-it* basis, businesses make the agreement, determine rights and obligations, and introduce their pre-formulated and non-negotiated T&Cs freely, without any legislature intervention. This is the case unless the T&Cs contradict the law which results in the contract being *de facto* unenforceable for its illegality *per se* (i.e. contradicting public policy, contracts signed with minors or persons with certified mental incapacity and the liability exemption).

In relation to Jordanian legislation and the principle of freedom of contract, the problem is not represented by whether or not parties have freely entered into an ECCC, but the influence of the parties' will to form the ECCC. This means that consumers must freely declare their wills in order to consider the validity of the contract, as there is no contract without assent. However, once consumers accept the terms of the contract, they are bound by the agreement. Everyone must have complete freedom of choice with regard to the other contractual party, but once the bargaining power is not equal, such as in ECCC, there may be a danger to the weaker party (consumer) with regard to information and T&Cs.

As long as there are pre-formulated or one-sided T&Cs and the consumer is limited by the information provided by businesses on their websites, the agreement might be unreasonably favourable to those who have stronger bargaining powers without the awareness of consumers. Therefore, this

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<sup>189</sup> Barral-Vinnals (n 157) 54.

situation *per se* affects consumers' consent unless the legislature police consumer contracts. As a result, the rationale for limiting the freedom of contract principle in ECCC is related to the legislature's intervention on the grounds that, in the case where consumers are not able to negotiate T&Cs and they are relying on the information provided, it is possible for businesses to include exploitative T&Cs in their standard form contracts<sup>190</sup>. On the other hand, if the legislature adopts a more fairness oriented approach, rather than the freedom of contract principle, the rules will interfere in the freedom of businesses to present their T&Cs and all required information in a way that meets consumers' interests more than merely inducing consumers to engage under the contract. To this end, in order to provide a high level of consumer protection, consumer contracts need to be restricted within a framework drawn up by legislation rather than leaving that framework to be drawn up by businesses who will present it on the sole basis of freedom of contract. This is necessary as freedom of contract can also be described as "*creative power of the participants in the contractual process to act as private legislators and to legislate rights and duties binding upon themselves*"<sup>191</sup>.

The general rules under the JCL can be described as more oriented toward freedom than fairness. For example, JCL does not require a high level of transparency, whereas the fairness oriented approach does<sup>192</sup>. This is to enable consumers to protect their interests during the bargaining process by

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<sup>190</sup> Scott R. Peppet, 'Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts' [2012] 59 UCLA L. Rev 676, 733.

<sup>191</sup> Beatson and Friedman (n 141) 7.

<sup>192</sup> Chris Willett, *Fairness in Consumer Contracts: The Case of Unfair Terms* (1st, Aldershot: Ashgate 2007) 23.

improving the chance that they will understand what they are agreeing to.

According to Willett:

*“A full-blooded freedom approach would certainly not adopt rules requiring high levels of transparency as such rules interfere with the freedom of the parties in the bargaining process”*<sup>193</sup>

With regard to Jordanian legislation, two issues arise in terms of the disability of limiting the freedom of businesses. Firstly, article 161 of the JCL<sup>194</sup> requires businesses to specify the subject matter of the contract in such a way as to avoid ‘*gross uncertainty*’. In order to avoid *gross uncertainty*, it will be sufficient to provide the distinguishing characteristics which are not specified or clarified by any Jordanian legislation. In fact, this leaves the door wide open for businesses to determine their own terms and provide the information that induces consumers to engage under their contracts. The Explanatory Memorandum of the JCL distinguishes between ‘*gross uncertainty*’ and ‘*slight uncertainty*’ by the level of information that must be provided. ‘*Gross uncertainty*’ can lead to the contract being declared void, whereas ‘*slight uncertainty*’ retains the validity of the contract and, in the majority of cases, the contract can be permitted. This is due to the subject matter of the contract still being able to be specified<sup>195</sup>.

Secondly, until recently, there have been no special rules that require certain

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<sup>193</sup> *Ibid* 19.

<sup>194</sup> JCL, s 161 “(1) In commutative contracts involving property the subject matter must be specified in such a way as to avoid gross uncertainty by reference to it or to the place where it is if it is in existence at the time of the contract or a statement of its distinguishing characteristics, and the amount thereof must be stated if it is measurable property or the like, so as to avoid gross uncertainty; (2) If the subject matter is known to both contracting parties there is no requirement that it should be otherwise described or defined; (3) If the subject matter is not specified as aforesaid, the contract shall be void”.

<sup>195</sup> The Explanatory Memorandum of the JCL, Part One, published by the Jordanian Bar Association, Amman, p 157 (in Arabic).

information to be provided by businesses to make the contract controlled or to restrict the freedom of contract.

#### 2.3.2.2.2 Terms and Conditions

Under Jordanian law, and as a codified system (civil law system), two essential elements must be present at all times in order for a contract to be valid; namely an agreement (i.e. offer and acceptance) and an intention to be bound (i.e. to create a legally binding contract, also known as entering legal relations). The doctrines also classify these elements as consent and capacity, the presence and the legality of subject matter of the contract and legal cause. Freedom of contract is related to the first element (consent and capacity). Consequently, a person of full legal age (the age of majority in Jordan is 18 years)<sup>196</sup> and competent understanding shall have the liberty of contracting, and his/her contract, when entered into freely and voluntarily, shall be enforced. In addition, consumers are supposed to know the contract that they are entering into as it requires them to tick the box next to the declaration that states: '*I have read and understand the Terms and Conditions*'. Since ECCC is considered as a standard form contract or adhesion contract<sup>197</sup>, the contract and its contents (i.e. T&Cs) are dictated by the stronger bargaining power.

With regard to T&Cs, the imbalance between consumers and businesses, which has been explained *supra*, is particularly relevant to the situation where T&Cs are pre-formulated by businesses, particularly it has been argued that T&Cs are

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<sup>196</sup> JCL, s 43 (2).

<sup>197</sup> See *infra* section 5.2.

often understood in a vague way<sup>198</sup>. In this case, two issues arise regarding the limitation of the freedom of contract principle, namely; whether the JCL considers the governance system of the ECCC on the same footing as contract of adhesion or whether the ECCC is still subject to the traditional commercial contract rules which are completely based on the freedom of contract principle.

With regard to the first issue, the JCL does not define the contract of adhesion but article 104 describes the form of acceptance in contracts of adhesion which is no more than a submission to the offeror's non-negotiable and pre-formulated T&Cs<sup>199</sup>. This is a similar situation to ECCC, where consumers usually have no right to negotiate any of the T&Cs but instead either comply or reject the agreement as a whole. In this case the consumer deserves the protection provided by article 204 whereby the legislature gives the judge permission to police unfair provisions. However, further to the problem of the conditions of the traditional theory of adhesion contract which cannot be met in all ECCC as it will be discussed later, a legal problem arises with the above rule in relation to the terms '*oppressive provision*' and '*test of oppression*'<sup>200</sup> (such as the fairness test under English law)<sup>201</sup>. The problem concerns the ambiguity of oppressive terms and the absence of an indicative or informative list that could assist the courts in their interpretation. This situation leaves the door wide open for businesses to include their most desirable provisions with the exception of those that contradict the general principle of law, public order and

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<sup>198</sup> Friedrich Kessler, 'Contracts of Adhesion--Some Thoughts A bout Freedom of Contract' [1943] 43 Colum. L. Rev 632

<sup>199</sup> JCL, s 104.

<sup>200</sup> See infra section 5.3.1.

<sup>201</sup> i.e. UCTA.

morals<sup>202</sup>. Furthermore, the absence of the judicial ruling under the Jordanian legal system means that these issues lead to, *inter alia*, a lack of clarity in relation to 'test of oppression'<sup>203</sup>.

A further issue arises under Jordanian legislation with the notion of the adhesion contract. As has been explained by the Explanatory Memorandum of the JCL<sup>204</sup> the traditional theory of the adhesion contract requires that three main elements be considered regarding its adhesive nature, namely; that T&Cs must be pre-formulated and non-negotiated, the subject matter must be essential and necessary to the consumer, and the business must have a monopolistic power on the subject matter of the contract. The best examples of this are agreements for gas and electricity. However, with regard to the ECCC, only the first element is available where the T&Cs are pre-formulated and non-negotiated. The subject matter of the ECCC cannot be considered as essential or necessary for the consumer's life further, it is not necessary for the product to be monopolised on the Internet as the nature of e-commerce is that it can provide a large number of suppliers or sellers which is considered as one of its advantages.

With regard to the second issue, article 164 treats all parties on the basis that they have equal bargaining power. The rule allows one of the contractors to include the term s/he wants and which contains an advantage to him/her or third parties (as stipulated by the article), insofar as that term is consistent with the law and does not contradict public morals and policy. It can be noted that

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<sup>202</sup> See *infra* section 2.3.2.2.3 for further discussion.

<sup>203</sup> Kasassbeh (n 21) 198.

<sup>204</sup> The Explanatory Memorandum of the JCL (n 195) 113 (in Arabic).

the only restriction to that freedom of contract, which can be exclusively applied on businesses in terms of dictating the contract in the case of ECCC, is public morals and policy. The term '*public morals and policy*' is constantly used by the Jordanian legislation but there is no sufficient clarity regarding what it means<sup>205</sup>. In relation to public policy, Kassasbeh has stated that "*Perhaps this has nothing to do with the sufficiency of Jordanian law, but is rather due to the idea itself which is, as is well-known, a nebulous concept, differing from time to time and from one place to another*"<sup>206</sup>. On the other hand, the JCL gives a general glimpse of what '*public morals and policy*' could include as stipulated in article 163 (3): public policy shall be deemed to include matters relating to personal status such as capacity; marriage; inheritance; the transfer of property; immovable property; the property of the State; the obligatory fixing of prices; the procedures prescribed for disposition of *Al-Waqf* (Moslem trust) and its property; and all legislation enacted to deal with consumers' needs in exceptional circumstances<sup>207</sup>. Despite this general notion of public and moral policy, it can be used for consumers' interests as public policy is defined by the Oxford dictionary of law as "*the interests of the community*"<sup>208</sup> and it has been mentioned at the beginning of this chapter that consumer protection is a community objective. Accordingly, this can be considered as a strong rationale for legislature intervention to limit the principle of freedom of contract in favour of consumers and in relation to unfair T&Cs.

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<sup>205</sup> See for example, Companies Act No 22/1997, s. 11; the Arbitration Act No 31/2001, s. 54; the Media Act No 71/2002, s. 20; Patents Act No 32/1999, s. 4; Trade Names Act No 22/2003, s. 4; Public Congregations Act No 7/2004, s. 8; Civil Procedures Act No 24/1988, ss. 25; the Magistrate Courts Act No 15/1952, s. 12.

<sup>206</sup> Kassasbeh (n 21) 28.

<sup>207</sup> JCL, s 163 (3).

<sup>208</sup> Elizabeth (n 67) 396.

### 2.3.2.2.3 Principle of Good Faith

In Jordan, as a civil law legal system, the JCL recognises and enforces the principle of good faith as a general clause as stated in article 202 (1) where a contract shall be performed according to what has been agreed on and in a manner consistent with the requirement of good faith<sup>209</sup>. Generally speaking, in contract law, the core of this principle is to avoid any significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Accordingly, in relation to ECCC, it is true that consumers must comply with the agreement which is formulated by the freedom of businesses, but that compliance is not unlimited because the principle of good faith can be counted as an indirect limit that can be used as a tool to interpret the contract. Bingham L.J. has commented on that principle within the civil law system by saying:

*"[good faith principle] does not simply mean that they [the parties] should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing"*<sup>210</sup>.

Despite the clear reference made by the JCL to the principle of good faith, there is no sufficient clarity on what it means exactly, or at least, the JCL does not clarify how to act contrary to that principle. However, an indication can be

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<sup>209</sup> JCL, s 202 (1) *"The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith"*.

<sup>210</sup> *Chitty on Contracts (n 148)* para 1-039.

derived from article 239 (2)<sup>211</sup> which determine that two elements fall under the concept of good faith, namely loyalty and confidence between contractual parties. In considering both forms of the above article, the principle of good faith is not the subjective representation of justice in the ECCC; in particular this article is only applied in the case of interpreting the contract. However, it has been expressly indicated in article 239 (1) that if the provisions of the contract are clear, the court has no right to interpret the contract to discover the legal intention of the contractors who are liable for the exact meaning of the contract. Accordingly, it is notable from the related articles regarding the principle of good faith under the JCL that this principle has no serious impact on the freedom of contract principle except if businesses contradict the law (i.e. public policy, formation in general, the liability exemption). Further, in contract law, the general meaning of good faith, at a time when there is an absence of an accepted normative grounding to clarify what is the contrary of good faith, leads to a very considerable degree of legal uncertainty<sup>212</sup>. In this case, in Jordan, it would be better for consumer not to rely on this general limitation but on the protection provided in a contract of adhesion despite the legal problems facing ECCC (i.e. the existence of the elements of traditional theory of adhesion and the absence of grey and black lists of T&Cs within the current Jordanian legal system).

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<sup>211</sup> JCL, s 239 (2) *“If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in (such) dealings”.*

<sup>212</sup> *Chitty on Contracts* (n 148) para 1-024.

## **2.4 Conclusion**

This chapter has given an account of the major rationales for consumer law and policy to rebalance the B2C contractual relationship. It is becoming increasingly difficult to ignore the consumer's position as a weaker party in terms of bargaining power within an unequal relationship. The situation in the electronic environment includes more potential risks for consumers that may result in a decrease in their confidence. Therefore, consumer contracts should be subjected to considerable legislative regulation because of the correlation between consumer protection and consumer confidence. This is to the extent that the freedom of contract principle appears only to decide whether or not to enter the contract rather than adopting a full-blooded freedom approach which allows businesses to dictate their ECCC from the outset. Thus, a set of obligations (i.e. information requirements) and certain limitations (i.e. blacklist of T&Cs) should be determined by law where legislature intervention takes place to ensure a high level of consumer protection.

Generally speaking, in the law of contract, ECCC rules cannot be separated from off-line consumer contract rules when adopting the medium neutrality approach. However, the general legislative approach must be modern rather than classic or commercial in order to accommodate with nature of B2C transaction. This is because consumer contracts in both on-line and off-line environments fall under the notion of modern law rules rather than traditional commercial contract rules where the parties are deemed equals in their respective bargaining power.

With regard to Jordan, the general rules of the JCL are applied to all types of contracts, due to the absence of a legal framework that covers consumer issues, and regardless of the fact that consumers suffer from an inequality in bargaining power. The reliance on the freedom of contract principle in its two forms (i.e. whether or not to enter into the contract, and creating the content of the contract) gives businesses an advantage in gaining more benefits at the expense of consumers due to the absence of clear limitations in terms of T&Cs and the lack of clear information requirements. This is because ECCC is always presented on a *take-it-or-leave-it* basis<sup>213</sup> where businesses do not negotiate their pre-formulated T&Cs and where consumers are not usually interested in reading them. This is considered to be the reason why it is necessary for pre-emptive intervention by the legislature to provide a blacklist of T&Cs that are deemed to be automatically void and a list of information that allows consumers to make an informed transactional decision and must be provided by businesses in a clear manner to prove their good faith. The lack of the relevant legislation, which restricts the freedom of contract principle with regard to T&Cs imposes a clear pre-contractual duty to provide information to ensure that a consumer is able to make an informed transactional decision<sup>214</sup>; and empowers consumers by providing the right to cancel, can be considered, at least in this thesis, as one of the biggest hindrances to enable the development of e-commerce for consumers in Jordan.

As a result, in order to provide a high level of consumer protection on the Internet to promote B2C relationships and in the case of applying the

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<sup>213</sup> For more discussion see 5.2.

<sup>214</sup> See 4.2.1.

contractual autonomy principle as a function of freedom of choice in consumer contracts, particularly on the Internet, this principle must be restricted by other rules.

Finally, in order to cope with the modern law that offers more fairness than general commercial contract rules, freedom of contract must be interpreted according to the following pattern. Firstly, the making of the contract is to be controlled and restricted by the state as long as weak parties confront strong parties. Secondly, intervention by the legislature is required in terms of limiting freedom of contract because an unfair contract disregards consumers' fundamental rights<sup>215</sup>. Thirdly, clear and comprehensive rules that govern information requirements must be addressed by any future potential legislation that intends to protect the consumer.

The next Chapter will look at the Jordanian legislation that governs ECCC in relation to consumer protection. This analysis will evaluate its effectiveness in dealing with consumer issues for the purpose of empowering consumers and rebalancing the contractual relationship between parties to a contract.

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<sup>215</sup> M Marella, 'The Old and the New Limits to Freedom of Contract in Europe' [2006] ERCL. Vol 2, issue 2 257, 274.

## **CHAPTER THREE**

### ***JORDANIAN LEGISLATION AND CONSUMER PROTECTION IN ECCC***

#### **3.1 Introduction**

In order to provide a high level of consumer protection in ECCC, several protective measures need to be taken into consideration by the legislature. After examining Jordanian legislation, *inter alia*, six protective measures are related to the conclusion of the ECCC need to be reconsidered by the Jordanian legislature in order to enhance consumer protection in the e-environment. These are: information requirements, protection from unfair contract terms, performance period, acknowledgement, the right of unconditional cancellation and special mechanisms of redress for consumers. These protective measures will be studied within the Jordanian legislation and thereafter with brief reference to EU law. This Chapter seeks to undertake a background analysis of whether the current Jordanian legislation is sufficiently able to deal with the abovementioned protective measures and to cope with the development of other legislation in relation to ECCC.

It is worth mentioning that the issues of lack of information and protection from unfair contract terms will also be extensively discussed in subsequent chapters as these issues play a crucial role in terms of rebalancing the contractual relationship in B2C transactions. These two issues (i.e. information

requirements and protection from unfair contract terms) have been fundamentally tackled in the subsequent chapters for four reasons. Firstly, after studying the Jordanian legislation, it has been noted that there is a weakness and a great deal of uncertainty in relation to these specific issues, resulting in a situation that does not serve consumer protection in general. Secondly, notwithstanding that this thesis tackles other protective measures (i.e. performance period, acknowledgement, the right of unconditional cancellation and special mechanisms of redress for consumers), these protective measures fall under the umbrella of legislature intervention where the legislature can impose such compulsory terms in consumer contracts in order to increase the level of consumer protection. For example, in order for the legislature to increase the level of consumer protection, a fixed period of time should be determined for performing the contract instead of leaving the door wide open for businesses to determine such an issue. Consequently, as these issues can be considered as implied terms in consumer contracts and businesses cannot therefore modify or alter them, they can fall under the idea of consumer protection from unfair contract terms. Thirdly, although other protective measures are related to contract terms in general, and to those implied by the legislature in consumer contracts in particular, they can also be considered as an extension to information requirements. For example, the right of cancellation can be seen as an extension to the right of information as businesses must inform consumers about the existence of such a right. Fourthly, these two issues (i.e. information requirements and protection from unfair contract terms) are considered as cornerstones for rebalancing the contractual relationship in B2C

transactions, as other studies and reports have argued<sup>216</sup>. According to Barrel-Vinnals “consumer law tends to avoid imbalance by focusing on two principal aspects: lack of information and the control of unfair terms”<sup>217</sup>.

This Chapter discusses the scope of consumer protection that can be derived from Jordanian legislation. The legislation under consideration is the most relevant for consumer transactions (i.e. JCL, JETL and PCPL)<sup>218</sup>.

Before tackling the aforementioned issues, it will be useful to consider the Jordanian legal system in relation to the functionality of its legislation.

### 3.2 Jordanian Legal System

The Hashemite Kingdom of Jordan is a hereditary constitutional monarchy with a parliamentary system of government based on the constitution promulgated in 1952<sup>219</sup> which announced Jordan as an independent sovereign Arab state<sup>220</sup>.

The Jordanian legal system is based on a civil law jurisdiction that is similar to the French model, where legislative authority codifies rules into written statutes. Generally speaking, in a civil law system, which is contrary to a common law system, countries have comprehensive legal frameworks that

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<sup>216</sup> See for example Immaculada Barral-Vinnals, 'Freedom of contract, unequal bargaining power and consumer law on unconscionability' in Mel Kenny, James Devenny, Lorna O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (1st, Cambridge University Press, Cambridge 2010) 54. See also Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Consumer Policy Strategy 2002–2006*, COM(2002) 208.

<sup>217</sup> *Ibid*

<sup>218</sup> Reference to other laws in Jordan is made wherever necessary

<sup>219</sup> The constitution has been amended in 2011.

<sup>220</sup> Lynn Welchman, 'The Development of Islamic Family Law in the Legal System of Jordan' [1988] *International & Comparative Law Quarterly* 868, 886.

specify all matters and continuously update legislation to cope with new issues. If legislation were not updated many gaps would appear, particularly regarding modern issues such as ECCC.

Jordanian legislation is also influenced by the *Shari'a*, due to the fact that the JCL, which is the origin of all branches of private law<sup>221</sup> and the alternative applicable law in the event of the absence of rules<sup>222</sup> (e.g., in cases concerning consumer issues), must be interpreted according to '*fiqh*' Islamic jurisprudence. In addition, in the event of a lack of rules, the alternative is *Shari'a* law as stipulated in Article 2 of the JCL:

*"(2) If the court finds no applicable provision in this Code [this applies to all other enactments] to the issue in question it shall resort to the rules of Islamic Fiqh (Jurisprudence) which are more adaptable to the provisions of this Code, and in case there is none it shall resort to the principles of the Shari'a; (3) And, if there is none, resort shall be made to custom, and if there is none then to the rules of equity...; (4) In all the above, guidance shall be drawn from judicial decisions and jurisprudence provided that they are not repugnant thereto"*<sup>223</sup>

With regard to the Jordanian judicial system, it should be borne in mind that judicial precedents have no binding legal authority when deciding subsequent cases involving a similar set of facts. This means that the Jordanian courts are not obliged to follow previous rulings of a superior court or other courts of the same level<sup>224</sup>. In addition, the Jordanian courts do not seek to establish rules in

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<sup>221</sup> See Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' (n 174) 47

<sup>222</sup> See Adnan Alsarhan, *Jordan Civil Code: Sources of Obligations* (1st, DarAlthaqafah, Amman 2005) (In Arabic).

<sup>223</sup> JCL, s 2.

<sup>224</sup> Hayajneh, *The Awarding of Punitive Damages under the Jordanian Civil Law: Is it Possible?* (n 31) 607.

relation to uncertain issues or unclear areas of law<sup>225</sup>. This is because judges are not bound by previous decisions made and need only refer to them as an ancillary source of information. In other words, Jordan does not apply the precedent system<sup>226</sup> and the role of the Jordanian courts is merely to apply the written laws. As a consequence of this the author himself was only able to rely on legislative texts, literature, doctrines, explanatory notes and other materials, but not the decisions of the Jordanian courts, to address the issues in this thesis.

Furthermore, court decisions are not published and can only be found in the courts' archives, which are not digitalised, and which are only accessible to a limited number of persons, for example, lawyers and judges. The lack of court decisions can be considered problematic for the study as, if they existed and were judicially adopted when settling problematic and controversial similar cases or ambiguous legal texts; it would help to develop clear legal frameworks. Accordingly, in cases where there is an absence of rules or unclear legal text, this thesis will look at *Shari'a* law in attempting to find clarification.

The Jordanian government sought to enable the development of e-commerce by making economic and legislative reforms from 2000. This can be evidenced from several treaties and agreements that Jordan has signed at international level<sup>227</sup> in order to create an appropriate environment to enable the development of e-commerce. However, at national level, e-commerce remains

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<sup>225</sup> Kasassbeh (n 21) 5.

<sup>226</sup> See Olwan, (n 34) 137.

<sup>227</sup> Such as the World Trade Organization in April 2000. World Intellectual Property Organization joint statement on e-commerce was made by Jordan and the United States on 7th June 2000. Jordan and the European Union signed an Association Agreement on 24 November 1997.

in its infancy for consumers due to the lack of a comprehensive legal framework that addresses consumer contracts. This issue will be discussed below.

### 3.3 Jordanian Civil Law (JCL)

As previously mentioned, the JCL is the origin of all branches of private law and the alternative governance system where there is an absence of legislation. As Jordan has not yet introduced a legal framework to govern consumer contracts, either in an on-line or off-line environment, ECCCs are subject to the rules of contract provided by the JCL. The main functions of the general principles provided by the JCL are to provide a general legal framework to govern contracts, regardless of the type of transaction (i.e. B2B or B2C) and compensating damage resulting from wrongful conduct. It has been argued that *“these traditional functions are developed according to the new norms of human life; therefore, e-contracting has become a novel type of transaction that enters the orbit of the law of contract”*<sup>228</sup>. Notwithstanding this observation, the attitude of the JCL still revolves around the notion of commercial contract which makes no distinction between different types of transactions (i.e. B2B and B2C); this, consequently, does not provide adequate consumer protection in ECCCs. Furthermore, e-contracting was already acknowledged by the Jordanian legal system as the JCL does not exclude any method of expressing the wills of the parties when making an agreement<sup>229</sup>, and acknowledged the validity of

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<sup>228</sup> Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law ' (n 174) 47.

<sup>229</sup> JCL, s 93.

contracts conducted by all means and between parties who are not in the same place, such as by telex or any similar methods<sup>230</sup>.

The JCL was an attempt to codify the Islamic jurisprudence, '*fiqh*' into a modern legal framework by relying, as a first resource, on the *Majalla*. However, *Majalla* itself needs to be reviewed in order to avoid loopholes and correct any legal irregularities or paradoxes that appear through its application (e.g. the need to clarify or define terms such as 'adhesion contract', 'gross cheat' and 'gross uncertainty' where the clarification of such terms would serve the fairness of the transaction instead of relying on the courts' role of interpretation that does not set a precedent in Jordan). Furthermore, in relation to consumer contracts, three issues must be taken into consideration by the legislature regarding any potential future modifications of the JCL; namely the enactment approach, uncertainty and the principles' structure.

With regard to the first issue, in examining the JCL, it can be easily noted from the classical model of contract negotiation and formation that the legislature adopts the full-blooded freedom approach which treats all parties as having the same level of bargaining power. For example, the JCL allows parties to include contractual terms that contain advantages to one of them, or a third party, whereas in cases involving unequal bargaining power businesses determine contractual terms in their favour. Secondly, there is a significant legal uncertainty around consumer protection provided by the JCL. For example, the JCL requires the contract to be of an adhesive nature in order to provide protection to the consumer, whereas the nature of an adhesion contract lacks

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<sup>230</sup> JCL, s 102.

clarity as mentioned *supra*. Thirdly, with regard to the principles' structure, the JCL is not a detailed legal framework which may not serve to protect the consumer, particularly in e-commerce. For example, the information requirements under the JCL are very general; they require businesses to make the goods sufficiently known to the purchaser in order to avoid gross uncertainty<sup>231</sup> by mentioning the distinguishing characteristics<sup>232</sup>. According to the JCL, in order to avoid gross uncertainty it will be sufficient to show the product to the purchaser<sup>233</sup>. However, the situation would be totally different in the electronic environment where consumers need a defined set of information about the product, the business' identity and information concerning the transaction in order to make an informed decision.

### **3.4 Jordanian Electronic Transaction Law (JETL)**

Jordan introduced JETL in 2001; it is largely based on the Model Law of Electronic Commerce (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1996. The main objectives of the JETL are to acknowledge those contracts that are formed by electronic means; to make electronic records as legally effective as written records<sup>234</sup>; and to give legal recognition to data messages.

The Model Law is not considered to be a convention; instead it offered Jordanian legislators a set of internationally acceptable rules regarding how certain legal obstacles to the development of e-commerce could be removed,

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<sup>231</sup> JCL, s 466 (1).

<sup>232</sup> JCL, s 161 (1).

<sup>233</sup> JCL, s 466 (2).

<sup>234</sup> UNCITRAL Model Law on Electronic Commerce 1996, s 5.

and evaluated certain aspects that arise in the e-commerce arena based on modern communication techniques<sup>235</sup>. In addition, the Model Law sought to encourage consistency and uniformity of legislation at international level<sup>236</sup>. The Model Law is divided into two main parts; the first part sets out provisions dealing with e-commerce in general and the second deals with e-commerce in specific areas of commercial activity<sup>237</sup>.

It can be noted from the JETL that the legislature only adopted the first part which does not include any regulations regarding the carriage of goods. On the other hand, one of the significant limitations of the Model Law is the exclusion of consumer protection within its scope. This has been expressly stated in the Guide to Enactment of the Model Law as “*Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection*”<sup>238</sup>. However, it does not override any rule of law intended to protect

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<sup>235</sup> Barry Sookman, ‘Legal Framework for E-commerce Transactions’ [2001] CTLR 85, 95.

<sup>236</sup> Model Law, s 3. See also Michael Dabit, ‘The Protection of Electronic Payments Systems under Jordanian Law’ [2004] JIBLR 360.

<sup>237</sup> Part II of the present draft of the Model Law is limited to provisions regarding the carriage of goods (*i.e.* EDI as a substitute for conventional transport documents). The intention is for these provisions to become Chapter 1 of the second part, with additional chapters being added over time to address other sector-specific requirements. For more discussion, see S Rawson, ‘An Emerging Framework for Electronic Commerce: the E.U. Electronic Commerce Directive and Related Developments’ [1999] *International Company and Commercial Law Review* 171, 175. For more details see UNICITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, C. Structure. P 18 at [http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

<sup>238</sup> Notwithstanding, it is worth mentioning that the views of the Working Group of UNCITRAL on Electronic Commerce were different in relation to consumer transactions on the Internet. They can be summarised into three different views. The first view supported the necessity to introduce two separate instruments to deal separately with consumer and commercial transactions. The second view believes that the future instrument should deal with the issues of consumers in much the same way as Article 1 of the UNCITRAL Model Law on Electronic Commerce did. The third view was that further efforts should be made towards clarifying the notion of “consumer transactions” to better understand whether a distinction based on the consumer or

consumers, as mentioned in its second footnote<sup>239</sup>. This means that the assumption made by the UNCITRAL when considering the Model Law as an appropriate legal framework for consumer protection, depends entirely on there being legislation in each enacting State as the UNCITRAL supposed that those states already had national consumer protection legislation in place<sup>240</sup>. Furthermore, it supposed that some countries had special consumer protection laws that may govern certain aspects of the use of information systems. However, many developing countries that have adopted the Model Law have no consumer protection legislation, as is the case in Jordan. This position brings the consumer back to square one where s/he must find some protection in the general principles of the JCL. However, the JCL makes no distinction between parties who have unequal bargaining power<sup>241</sup> and lacks a defined set of rules regarding information obligations, as will be discussed in Chapter 4<sup>242</sup>.

It is worth mentioning that since the Model Law was developed to offer national legislators a set of internationally acceptable rules, the main objective of the UNCITRAL was related to the development of international trade. However, it is noted from its recommendations that States are expected to give favourable consideration to the Model Law when they enact or revise their own domestic

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commercial purpose of the transaction was workable in practice. This controversial issue was related to the problem presented in Article 2, subparagraph (a), the United Nations Sales Convention which did not apply to sales “*of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use*”. See UNCITRAL, 'Report of the Working Group on Electronic Commerce on its thirty-eighth session' [24 April 2001] Thirty-fourth session, A/CN.9/484

<sup>239</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, New York, 1999, available on < <http://www.uncitral.org>>.

<sup>240</sup> *Ibid.*

<sup>241</sup> See *supra* sections 2.2.4 and 2.2.6.

<sup>242</sup> See *infra* section 4.2.

laws. This means that States shall also consider their national domestic laws by including further rules (e.g. additional information requirements) to govern and control other types of contracts (i.e. B2C). For example, some countries, such as South Africa<sup>243</sup>, adopted the Model Law and additional regulations that were introduced by the government and incorporated into the same Act. Other countries, such as Canada, used a dual approach whereby both the federal and state/provincial governments played a role in introducing e-commerce law. The situation in the EU is slightly different; EU Directives are considered the main source of legal guidance, for example, the UK's implementation of the Electronic Commerce Directive on 17 January 2002.

Accordingly, the JETL aims to remove the obstacles for electronic transactions and create clarity, certainty and equality of treatment between media<sup>244</sup>. It is true that it is considered as a significant legislative step toward e-commerce development. However, this piece of legislation is not a magical instrument that turns on the button to enable e-commerce development from a legal point of view; this is because e-commerce needs a defined set of rules to cover several areas<sup>245</sup>. Jordan followed the suggestion made by the UNCITRAL to extend the

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<sup>243</sup> Electronic Communications and Transactions Act 2002 of South Africa. Chapter 3 of the Green Paper on e-commerce specifically recognised the Model Law on e-commerce as a source to be used in the development of South African law on e-commerce. Chapter 4 addresses provisions on e-government services. Chapter 5 covered copyrights ... Chapter 7 covers consumer protection... etc.

<sup>244</sup> JETL, s 3 (a) *"The aim of this Law is to facilitate the use of electronic means in transactions' procedures, with due regard to all other Laws and without amending or deleting any of these provisions"*.

<sup>245</sup> For example, Consumer protection laws including mandatory contractual disclosures, labelling requirements for contents and safety, prohibited unfair terms, rights of rescission and return, warranties, rules on limitation of liability, language of the contract, restrictions on debt collection practices, and special requirements, for example, distance sales, telemarketing, package travel, automobiles, time-share condominiums, medicinal and health products; Consumer credit reporting and credit

applicability of the Model Law to any kind of information in the form of a data message, except those mentioned in Article 6 (i.e. contracts and instruments or documents that are drafted in accordance with special legislation, in a certain format or in accordance with specific measures such as establishing and amending wills).

Several criticisms can be directed at the enactment of JETL and can be summarised as follows: Firstly, the main problem arising from JETL is that the Jordanian legislature adopted the first section of the Model Law as it was presented by UNCITRAL at both national and international level without having considered other important areas (i.e. consumer protection) or imposed any obligations or duties (e.g. Information requirements) which, consequently, make it a non-comprehensive legal framework regarding e-commerce. Further, as it has been mentioned *supra*, JETL is very much based on the Model Law, and it is not an exaggeration to say that it is merely an Arabic translation regarding some of its provisions. However, it raises a problem regarding the understanding of technical terms and phrases, and this could lead to a problem with interpretation. Secondly, with regard to the definitions provided by Article 2, the Jordanian legislature failed to establish legal certainty by stating that “[t]he following words and expressions, wherever stated in this Law, shall have the meanings assigned thereto hereunder unless the context provides otherwise”<sup>246</sup>. In

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checking regulations; advertising regulation to govern (e.g. fraudulent or deceptive advertising, disclosure requirements, comparative advertising); Privacy and data protection laws; *Contract law* including mandatory elements of contracts, writing and signature requirements, notarial and other formalities, doctrines of contract interpretation, and concepts of good faith and fair dealing; competition law and fair trade practices laws; Franchise or distributorship laws; Tax laws including transaction taxes; Securities (investment) regulation; Banking, lending and credit regulations.

<sup>246</sup> JETL, s 2 first paragraph.

other words, since the JETL does not provide fixed definitions, this could raise problems with interpretation and increase the complexity of the transaction if disagreements arise. Thirdly, the acknowledgement of receipt of an order is optional for the parties. However, in ECCC, which is usually presented on a *take-it-or-leave-it* basis and where the T&Cs are pre-formulated/non-negotiated, consumers are not able to request such an acknowledgement unless the legislature makes it mandatory, as in the case of ECCC in the UK under the Electronic Commerce (EC Directive) Regulations 2002<sup>247</sup>. Fourthly, despite the modern methods of contracting within the context of e-commerce, the Jordanian legislature still relies on the freedom of contract principle by treating all parties as having equal bargaining power. This can be noted from the generic drafting of the rules which focuses on the technical methods of dealing with data messages, giving discretion to the parties and not making a distinction between the different types of transactions (i.e. B2B and B2C). As a result of this situation the governance rules of commercial contract, which are embodied under the JCL, are still applicable to transactions carried out electronically over the Internet, and the only achievement brought by the JETL is expressly validating contract that concluded over the electronic means.

### **3.4.1 Scope of Application (JETL)**

The JETL<sup>248</sup> has a broad application with regard to transactions carried out over the Internet. It applies to all types of transactions (e.g. B2B, B2C, C2C and

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<sup>247</sup> The Electronic Commerce (EC Directive) Regulations 2002, s 11 (a).

<sup>248</sup> First of all, JETL contains seven Chapters and 41 Articles; it starts with General Provisions and includes the legislative definition of technical terms. The Chapters are in the following order; Electronic Records; Contracts; Messages and Signatures;

G2B<sup>249</sup>), whether for goods or services. It also applies to electronic records, electronic signatures and electronic contracts<sup>250</sup>. In order to achieve the goal of JETL, this wide scope must be reflected by comprehensive regulations that are able to govern each contractual relationship. The Model Law was designed for international commerce<sup>251</sup> whereas consumer protection was expressly excluded from its scope and relied upon national legislatures to provide their own domestic rules to cover consumer protection issues. However, the Jordanian legislature did not include any rules regarding consumer protection within the context of JETL. Furthermore, the examination of the JETL indicates that it does not contain any provisions that cover rights or obligations<sup>252</sup>. This omission by the Jordanian legislature implies that the JCL is still the relevant governance system for all e-contracts. In other words, it could be argued that, at least at national level, the JETL does not provide new electronic contracting rules nor exclude any traditional contracting rules of the JCL in relation to consumer contracts<sup>253</sup>.

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Transferable Electronic Documents; Authentication of the Record and Electronic Signature; Penalties; and Final Provisions. It can be easily noted that the JETL does not provide any rules concerning consumer protection, personal data protection, or even the rights and obligations of each party. In contrast, the laws in Europe impose such obligations on the seller or the Internet Service provider (ISP), such as the information that must be provided in the contract.

<sup>249</sup> *Government-to-business*.

<sup>250</sup> JETL, s 4 (a).

<sup>251</sup> According to the Model Law *"This Law applies to a data message as defined in paragraph (1) of Article 2 where the data message relates to international commerce"*. available on [www.uncitral.org](http://www.uncitral.org).

<sup>252</sup> Emad Dahiyat, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law' [2011] JCP 423, 436.

<sup>253</sup> Marwan Al-Ibraheem, Hisham Tahat, 'Regulating Electronic Contracting in Jordan' (21st BILETA Conference: Globalization and Harmonization in Technology Law 2006) 4.

Another criticism that can be made in relation to JETL is that, as the JCL implied that the application of the embodied contracting rules should be extendable to the new methods of communications, electronic contracts were already acknowledged before the enactment of the JETL. This is obvious from Article 102 of the JCL which indicates that "*Contracting by telephone or any similar method shall in respect of the place be considered as if it has been completed between two contracting parties not present when the contract was made*"<sup>254</sup>. Thus the contract is valid if it is concluded via telex or even over the Internet. Therefore, based on this doctrinal principle, the Supreme Court of Cassation in Jordan has issued that, by applying Article 102 of the JCL, contracting by telex shall be regarded as if it had been made between the contracting parties otherwise than in a single place with them both present at the time of the contract<sup>255</sup>.

On the other hand, the JETL defines e-contract as "*an agreement concluded in whole or in part by electronic means*"<sup>256</sup>. This gives a clear indication of the medium neutrality approach of putting electronic contract rules on the same footing as the commercial contract rules provided by the JCL. Furthermore, the JETL confirms this approach by merely acknowledging electronic means as a method of expressing the consent of the parties<sup>257</sup>, whereas the JCL has

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<sup>254</sup> JCL, s 102.

<sup>255</sup> *Supreme Court of Cassation (1990/1202)* – Jordanian Bar Association, Vol 1 and 2, p 1713.

<sup>256</sup> JETL, s 2.

<sup>257</sup> JETL, s 13.

previously acknowledged all means, including electronic, to show the demonstration of mutual consent of the parties<sup>258</sup>.

As a result, the JETL does not add a new concept of contracting, nor new rules to govern specific contractual relationships. Instead it clarifies certain aspects (e.g. Article 15 under JETL clarifies when and where the message is deemed to be sent or received), suggests that a new option can be included in an electronic contract (i.e. acknowledgement), and confirms the legal validity of using new communication technology for contracting and transacting purposes.

Finally, since the Model Law and JETL share the same objectives, which include enabling and facilitating the use of e-commerce and providing equal treatment to users of both paper-based documentation and computer-based information, both legal frameworks implied the medium neutrality approach. Accordingly, with regard to ECCC, the problem arises regarding whether the legislature acknowledges the modern rules of contract and that this requires intervention by the legislature in order to rebalance the contractual relationship. This intervention should take the form of pre-emptive protection aimed at empowering consumers and rebalancing the contractual relationship, i.e., providing information requirements, protection from unfair T&Cs, imposing obligations (e.g. acknowledgements) and awarding rights (e.g. the right of withdrawal). Therefore, in order to achieve a full development of the law of e-commerce for consumers, several areas need to be addressed by the legislature (e.g. consumer protection and privacy). Such a lack of rules may create legal

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<sup>258</sup> JCL, s 93.

uncertainty regarding such areas and this may not only reduce consumer confidence, but hinder the development of e-commerce.

### **3.5 Electronic Commerce Consumer Contract**

Within this sub-section, the issue concerning the protective measures in ECCC will be examined through a comparative study of Jordanian and EU laws. Generally, ECCC can be described as an agreement conducted between a consumer and another party, who is not a consumer, over the Internet. However, such transactions raise many issues regarding formalities, information, and the level of legislature intervention. The following sub-sections will look at ECCC and its protective measures in order to investigate whether Jordanian legislation is sufficiently able to provide the minimum level of protection for consumers within the context of e-commerce.

In order to create a valid contract under Jordanian law, two essential elements must be present in all circumstances, both in regard to on-line and off-line environments, for the contract to be valid; namely an agreement (i.e. offer and acceptance) and intention to create legal relations. This situation is similar to that which is found in French law as both countries follow a civil law legal system<sup>259</sup>. Unlike the civil law system, English law, which is based on a common law system, requires an additional element, namely 'consideration'. This thesis will not address these elements in detail as the subject matter specifically relates to consumer protection.

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<sup>259</sup> Mehren (n 172) 687, 711.

Needless to say, ECCCs are contracts formed through a modern means of communication (e.g. email or website). However, existing contract laws in various countries were initially designed to deal with traditional contracts, such as face-to-face or via the telephone. As a result, the phenomenon of e-commerce has brought about the uncertainty as to whether e-contracts or contracts formed electronically are valid and enforceable under existing contract laws. Generally speaking, legal frameworks governing e-commerce have been introduced in order to remove that uncertainty and give paperless messages the same legal effect and validity as paper-based methods of communication.

### **3.5.1 EU**

Generally speaking, an ECCC must be constituted according to the aforementioned contract elements of each particular legal system. However, in the meantime, ECCC is subject to additional regulations that require other contractual procedures to be followed in order to consider its validity and legal effect. For example, with regard to French and English legislation, notwithstanding the differences between both legal systems (i.e. common and civil law), with regard to the elements of contract, both countries have implemented several Directives that cannot be separated from ECCC. Further, it has been argued that in spite of the indication given by EU Directives that their implementation is 'without prejudice' to contract law, some Directives have indirect consequences for national and European contract law<sup>260</sup>. This can be justified by the rapid evolution of e-contracts where there is no, single

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<sup>260</sup> For more discussion see footnote 523.

applicable regime but, instead, a vast array of Directives and national instruments introducing the governance system of ECCC<sup>261</sup>.

The two main Directives playing a crucial role in ECCC within the European context are the Distance Selling Directive (DSD) regarding the protection of consumers entering into distance contracts<sup>262</sup> and the E-commerce Directive (ECD) regarding certain legal aspects of information society services, in particular electronic commerce<sup>263</sup>. Both Directives provide the backbone for ECCC<sup>264</sup> by introducing a defined set of rules that specifically deal with consumer protection and the interaction between consumers and businesses in the on-line environment<sup>265</sup>. Further to the precise information required by the DSD in ECCC's (e.g. the identity of the supplier and his/her address; the main characteristics of the goods or services; the price of the goods or services including all taxes etc.), it is considered a significant Directive for on-line consumers due to the required features that must be contained in the contracts (i.e. written confirmation of the contract<sup>266</sup>, the right of withdrawal or "cooling off period"<sup>267</sup>, and performance within a maximum of 30 days from the day following that on which the consumer forwarded their order unless both parties agree to extend the period<sup>268</sup>).

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<sup>261</sup> Riefa and Hornle, (n 65) 92-97.

<sup>262</sup> Directive 97/7/EC of 20 May 1997.

<sup>263</sup> Directive 2000/31/EC of the European Parliament and Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce).

<sup>264</sup> Christina Riefa, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' [2009] LE 3-6. See also Riefa and Hornle (n 65) 90.

<sup>265</sup> See Chapter 4 for more discussion on the information obligations

<sup>266</sup> DSD, art 5.

<sup>267</sup> DSD, art 6.

<sup>268</sup> DSD, art 7.

On the other hand, other Directives must be applied whether the transaction is concluded on-line or off-line, most notably The Unfair Terms in Consumer Contracts Directive (UTCCD)<sup>269</sup> and Unfair Commercial Practices Directive (UCPD)<sup>270</sup>. These two Directives will be discussed further in Chapters 4 and 5 respectively. All stipulated requirements regarding consumer contracts in both the off-line environment, and the additional ones specifically relating to the on-line environment, must be complied by businesses when intending to conclude an ECCC. For example, failure to comply with the DSD, when it is already implemented in the French and English national legislation, would be regarded as a breach of contract.

As a result the ECCC cannot be separated from the above Directives. This is because the modern law of contract in Europe goes much further than simply distinguishing between voluntary and involuntary choices<sup>271</sup>, as mentioned in Chapter 3<sup>272</sup>. It imposes compulsory and additional implied terms and further requirements to ensure that extra layers of protection exist in such contractual relationships (i.e. B2C)<sup>273</sup>.

Therefore, the ECCC in the EU has found a solid base of legal frameworks which has also been developed to meet other technological developments, as stated by Winn and Haubold:

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<sup>269</sup> Directive 93/13/EC.

<sup>270</sup> Directive 2005/29/EC.

<sup>271</sup> See Collins, *The Law of Contracts* (n 58) 13.

<sup>272</sup> See *supra* section 2.3.2.1.

<sup>273</sup> Jeremy Newton, 'System Supply Contracts' in Chris Reed, John Angel (eds), *Computer Law: The Law and Regulation of Information Technology* (6th, Oxford, Oxford 2007) 11.

*“Electronic commerce in Europe is not taking place in a lawless space or “legal vacuum” that would have to be filled by broad legislation. As a consequence, to legislate for consumer protection in electronic commerce on a European level can only mean to harmonize and eventually adapt the existing instruments and to fill remaining gaps, but not to proceed to a complete codification of electronic consumer contracts”<sup>274</sup>.*

To this end, the governance system that applies with regard to ECCC, which is basically technology neutral, was in existence but not complete before the emergence of e-commerce. Nevertheless, the EU has not stopped at this point, but has brought its legal system in line with the requirements of the technological situation. For example, the additional information requirement is only required in electronic consumer transactions.

### **3.5.2 Jordan**

As has been mentioned in the previous sub-section, e-contract is *per se* a legally valid contract under the JCL. However, the JCL was initially designed to govern off-line contracts that were concluded by traditional means (e.g. face-to-face), whereas e-contracts can be formed via instantaneous and modern communication technology (e.g. a website). This may cause legal uncertainty for parties regarding whether e-contracts formed over the Internet are valid and enforceable under the JCL. In response, JETL was introduced to remove such uncertainty by expressly acknowledging the legal validity of contracts concluded by electronic means.

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<sup>274</sup> Jane Winn and Jens Haubold, 'Electronic Promises: Contract Law Reform and E-commerce in a Comparative Perspective' [2002] ELR. 576.

Needless to say, ECCC under Jordanian legislation should consist of agreement (i.e. offer and acceptance) and legal intention. However, the governance system for such contracts goes much further than these traditional elements, whereas the general principles of the JCL are insufficient to cope with the development of modern contracts (e.g. consumer contract), particularly if they are concluded over the Internet (i.e. ECCC). This means that the application of Jordanian legislation is insufficiently able to provide adequate consumer protection in e-commerce as will be discussed below.

From the perspective of modern law and in relation to Jordanian legislation, it can be said that the ECCC is taking place in a legal vacuum. This argument is based on four justifications.

Firstly, Jordanian contract law, which is fundamentally based on the freedom of contract principle in its two forms (i.e. the voluntary choice to enter into a contract and the voluntary choice to compose the contract where parties are the best judges of their own interests) does not contain clear limitations and restrictions in favour of consumers and does not yet acknowledge the modern classification of commercial contracts and consumer contracts<sup>275</sup>. Secondly, the absence of consumer friendly regulations that manage consumer contracts and ensure a rebalance in B2C transactions by covering certain issues (e.g. transparency and protection from unfair T&Cs) for the purpose of ensuring that

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<sup>275</sup> See Kasassbeh (n 21) 3. Also, generally, one of the features of modern law is the acknowledgment of consumer contracts as against commercial contracts. For more discussion, see Roger Brownsword, 'The two laws of contract', (1981) 125 SJ 279, reiterated in Roger Brownsword, 'the Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in Brownsword R, Geraint Howells and Thomas Wilhelmsson (Editors), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994) 44.

consumers' make informed decisions, makes ECCC subject to the general principles of the JCL where the parties are deemed to be equal in their respective bargaining power. Thirdly, the absence of the consumer empowerment approach awarding the right to withdrawal and a clear right of redress is also likely to increase the problems associated with ECCC. Finally, the application of the general rules of the JCL and the absence of protective measures to govern ECCC (i.e. specific periods of performance and confirmation of orders) constitute uncertainty regarding consumer protection which therefore leaves ECCC without a distinguishable legal framework. These protective measures will be discussed in the sub-sections.

### **3.6 Important Protective Measures in ECCC**

Generally speaking, in order for the legislature to enhance the level of consumer protection and ensure a balance between contracting parties in ECCC, several effective protective measures need to be implemented. The following sub-sections address six important protective measures (i.e. information requirements, protection from unfair T&Cs, performance period, acknowledgment of receipt, the right of withdrawal and the right of redress) that the Jordanian legislature need to take into account in order to avoid ambiguity in the general principles that could result in legal uncertainty for consumers. These protective measures will be studied further below with reference to EU law.

#### **3.6.1 Information Requirements**

With regard to information requirements, (which will be further discussed in Chapter 4), it is generally considered to be a main method of consumer

protection and crucial in consumer contracts<sup>276</sup>, particularly with regard to ECCC. E-commerce gives rise to its own rationale for information provisions as consumers are dealing with remote businesses and may know very little about their identity and contact details, specific information about the product or services, and information about the transaction itself (e.g. rights, obligations, T&Cs, and technical steps to conclude the contract)<sup>277</sup>.

With regard to information requirements under Jordanian legislation, ECCC is not an exception to the general principles of the JCL<sup>278</sup>; this is due to the lack of such requirements under the JETL and the absence of an enforceable consumer protection law in Jordan. Therefore, the general rule regarding information under the JCL requires businesses to specify the subject matter of the contract in such a way as to avoid gross uncertainty<sup>279</sup>. In order to avoid gross uncertainty businesses can simply mention the distinguishing characteristics of the product<sup>280</sup>. However, this principle raises four issues.

Firstly, the principle does not require sellers to give any information about their identities, contact details or any information about the transaction; this is because the JCL focuses only on the subject matter of the contract. Secondly, the Jordanian legislature did not provide a comprehensive list of what constitutes the distinguishing characteristics of a product. This can therefore create

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<sup>276</sup> Howells and Wilhelmsson 'EC Consumer Law: Has it Come of Age?' (n 89) 370, 388.

<sup>277</sup> See Annette Scholes, 'Information Requirement' in Geraint Howells and Reiner Schulze (eds), *Modernizing and Harmonizing Consumer Contract Law* (1st, Sellier, Munich 2009) 213.

<sup>278</sup> Mansor Al Sarayra, 'The Legal Framework for Contract Concluded via Electronic Means: Study in Jordanian Legislation' [2009] JELS, Damascus University 821, 846 (in Arabic).

<sup>279</sup> JCL, s 161 (1).

<sup>280</sup> *Ibid.*

uncertainty with regard to interpreting this principle as the term '*product*' can imply both goods and services within the context of the related general principle. Thirdly, despite being the only reference to the term 'gross uncertainty' throughout the JCL, there is no sufficient clarity on what this term means, or at least how and when 'gross uncertainty' can be found. Fourthly, the Jordanian legislature makes no distinction between pre-contractual information and the contractual information obligation; these separate obligations have therefore been mixed together in the same general principle. Pre-contractual information must be provided to the consumer before the conclusion of the contract whereas contractual information must be provided to the consumer once the contract has been concluded<sup>281</sup>. As a result, the Jordanian legislature has failed to define a set of information that has to be given to the consumer in order for it to be determined that a business has succeeded in complying with this requirement. Consequently, the protection that can be derived from the information requirement is uncertain.

This uncertainty leaves the door wide open for businesses to include whatever information they desire when promoting their products and services, which, in turn, may not facilitate consumers in making informed decisions. In contrast to this situation, comprehensive information requirements restrict the freedom of businesses insofar as they are required to disclose and provide all relevant information that they may prefer not to reveal, in a prescribed format<sup>282</sup>. This

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<sup>281</sup> See Scholes, 'Information Requirement' (n 277) 213.

<sup>282</sup> Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' [2005] JLS 349, 355. Howells also commented "*This limitation on the autonomy of the trader is minimal compared to the potential growth in autonomy of the consumer who can make an informed choice of product or service*". See also Chris Willett,

can also be noted from the perception of Jordanian consumers within the selected random sample in the questionnaire survey conducted in Chapter 6. Five questions have been addressed in order to cover five different issues, namely; inaccurate or insufficient information, information about the product, information about the transaction, information about the identity of the trader and information about consumer rights<sup>283</sup>. The majority of respondents believe that they are not sufficiently protected in relation to information requirements as 60% of respondents believe that they are not adequately protected if a business has provided insufficient information about their identity or about the product<sup>284</sup>. Therefore, there is a need for legislature intervention in order to impose a duty to provide all relevant information as an information disclosure regime is considered to be one of the main methods of consumer protection<sup>285</sup>. According to Howells: *"the justifications for such state interventions derive both from the desire to protect the consumer and to prevent society suffering the external costs that arise when consumers suffer harm"*<sup>286</sup>.

On the other hand, with regard to the UK and France, the situation is totally different due to the EU's strategy towards emphasising rules on consumer information<sup>287</sup>. This legislative technique falls under the notion of legislature intervention which requires particular types of information to be made available to the consumer for the purpose of reducing the imbalance of

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'Autonomy and Fairness: The Case of Public Statements' in Howells, Janssen, and Schulze, op. cit., n. 8, 1-15.

<sup>283</sup> See questions 25-29 in the questionnaire survey in the appendix.

<sup>284</sup> Only 15% who believe that they are protected and 25% of respondents have a neutral response.

<sup>285</sup> Howells and Wilhelmsson 'EC Consumer Law: Has it Come of Age?' (n 89) 370, 388.

<sup>286</sup> Geraint Howells, 'The Potential and Limits of Consumer Empowerment by Information' [2005] JLS 349, 355.

<sup>287</sup> See Howells and Wilhelmsson, *EC Consumer Law* (n 62) 18.

knowledge between parties in the B2C contractual relationship; this then bridges the information gap and ensures that consumers have the ability to make informed transactional decisions<sup>288</sup>. Informational intervention will be extensively discussed in Chapter 5. However, suffice it to say that, in the area of e-commerce, information disclosure has played a major role in ensuring legal control of the market. This may be observed in both UK and French laws that have implemented according to EC rules.

Three main Directives constitute the backbone of the rules regarding information requirements in ECCC (i.e. DSD, ECD and UCPD). Firstly, the DSD requires that certain types of information must be provided to a would-be purchaser at the pre-contractual stage and therefore before a contract is entered into. The required information must be provided in clear language and the burden of proof concerning the provision of that information is on the business rather than the consumer. The rationale behind this requirement is that a consumer in an e-commerce transaction does not have the opportunity to assess goods or services in the same way as they would in a shop<sup>289</sup>. Secondly, the ECD contains a set of principles and provisions that aim to establish a high level of consumer protection<sup>290</sup>, and reduce the risks to consumers trading on-line by increasing the mandatory information that a business must provide regarding their identity<sup>291</sup>. In addition, the information obligation under the

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<sup>288</sup> *Ibid* 53.

<sup>289</sup> Kay Henderson, Alan Poulter, 'The Distance Selling Directive: Points for Future Revision' [2002] ILR Computers and Technology 289, 300.

<sup>290</sup> See Zabia Vernadaki, 'Consumer Protection and the Reform of the European Consumer Acquis' [2010] ICCLR 21(9) 319.

<sup>291</sup> European Commission, 'Study on The Economic Impact of the Electronic Commerce Directive' [Final Report 2007] Ramboll Management, para 2.3.

ECD plays an important role in a consumer's decision to purchase over the Internet as comprehensive information regarding the business itself, the purchase price and technical steps for the contract's conclusion are decisive for the consumer's willingness to do business<sup>292</sup>. Thirdly, the UCPD focuses on the primary aim of the EU's consumer policy, i.e., enhancing the decision-making powers of consumers by including several provisions that address the information requirement<sup>293</sup>, not only regarding the description or the representation of goods and services, but also in advertising.

The information requirements in all of these Directives aim to ensure that consumers are supplied with all the relevant information that is essential for them to make an informed decision and that would be needed in order to contact the business or make a complaint after entering into a contract<sup>294</sup>.

### **3.6.2 Protection against Unfair Contract Terms**

This subsection will briefly discuss the situation with regard to protection against unfair contract terms due to an extensive discussion being dealt with in Chapter 5. The issue of unfair contract terms, the subject matter of which is also

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<sup>292</sup> According to the European Consumer Centre in Germany: "*The consumers want to be well informed about the company they purchase from, and who stands behind the products they buy. Without having relevant basic information the consumers will increasingly avoid purchasing from the company and search for the same products in other companies which supply more information. Thus, Article 5 of the Directive has increased consumer confidence.*" See European Consumer Centre Network (2005) *The European Online Market Place: Consumer Complaints 2005*. See also Claus Kastberg Nielsen, Mr. Christian Jervelund, European Commission, DG Internal Market and Services Unit E2, *Study on the Economic Impact of the Electronic Commerce Directive: Final Report* (Ramboll Management September 2007).

<sup>293</sup> Geraint Howells, Hans-W Micklitz, Thomas Wilhelmsson, 'Towards a Better Understanding of Unfair Commercial Practices' [2009] *Int. JLM* 69, 90.

<sup>294</sup> Annete Scholes, 'Does Harmonisation Go Far Enough? The E- Commerce Directive 2000/31/EC: Implementation and Sanctions' [2007] *IJLSE* 1 (1-2) 114. Cited in Vernadaki (n 290) 319.

governed by the general principles of the JCL, give individuals the freedom to agree on contract terms and other details of their transaction in order to achieve what is in their best interests whilst conforming to its general and imperative rules<sup>295</sup>. However, this situation may provide uncertain protection for consumers for the following two reasons.

Firstly, the problem with classifying ECCC under the notion of an adhesion contract, which requires three elements, namely T&Cs must be pre-formulated and non-negotiated, the subject matter of the contract must be essential and necessary to the consumer, and the business must have a monopolistic power on the subject matter of the contract. Secondly, the uncertainty in applying the test of oppression, which is equivalent to the fairness test, due to the absence of an informative list (grey list) or blacklist of unfair T&Cs<sup>296</sup> and of a clear judicial mechanism in order to determine whether or not a term is fair. Furthermore, the role of the Jordanian courts may also exacerbate the problem due to their decisions being merely an ancillary source of law rather than creating a source of legal precedent<sup>297</sup>. This may create uncertainty in interpreting the T&Cs of the adhesion contract as this approach may lead to contradictions.

On the other hand, the situation regarding consumer protection against unfair T&Cs in the UK and France is quite different due to the specific rules that govern B2C relationships either before or after the UTCCD. For example, the UK had been very active in protecting consumers against unfair T&Cs by introducing

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<sup>295</sup> A Hayajneh, 'Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law' (n 175) 277, 287.

<sup>296</sup> See Kasassbeh (n 21) 253.

<sup>297</sup> JCL, s 2 (4). For discussion see Kasassbeh (n 21) 5.

specific and comprehensive regulations to cover consumer contracts even before the implementation of the UTCCD and before the emergence of e-commerce activities<sup>298</sup>. T&Cs were controlled by the statutory framework introduced by the Unfair Contract Terms Act 1977 (hereafter UCTA). Furthermore, there is no problem with the classification of ECCC under UK law as they are deemed to be a standard form contract that deserves legislative intervention and thus protection provided merely on the ground that consumer is the weaker party in the contract.

### **3.6.3 Performance**

With regard to the performance of the contract, the situation in ECCC requires the consumer to pay in advance; this requirement obviously increases the potential risk<sup>299</sup>. Therefore, in order to ensure that consumers feel that the transaction is safe and trustworthy, businesses must be limited by a specified period of time in order to execute the contract. If this were not the case, the legislature would be leaving the door wide open for businesses with regard to performance of the contract due to the consumer not being able to include their own terms in the ECCC.

With regard to Jordanian legislation, the JCL does not determine a specific period in which the contract must be executed. However, due to the silence of JETL and the absence of a specific consumer protection law, this matter is governed by two different general principles under the JCL. Firstly, the contract must be performed in accordance with its contents, and in a manner consistent

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<sup>298</sup> Tahat (n 139) 45.

<sup>299</sup> Henderson and Poulter (n 289) 289, 300.

with the requirement of good faith. Accordingly, in ECCC, as it has been mentioned *supra*<sup>300</sup>, the contract is presented on a *take-it-or-leave-it* basis, where consumers have no right to negotiate the T&Cs which are sometimes not even accessible to them (e.g. shrink and click wrap), and where consumers avoid reading the contract due to the difficulty in understanding the legal language. Thus in this situation, where the contract is completely formed by businesses without any consumer intervention, there is an increased importance of legislature intervention in order for it to impose a mandatory clause on sellers to execute the contract within a specific period of time. Secondly, where contracts are binding on both parties, as stipulated in the JCL<sup>301</sup>, if one of the parties does not carry out his obligations under the contract, the other party may, after giving notice, require that the contract be performed or cancelled. This principle would then bring consumers back to the first problem regarding the absence of a clear deadline within which the contract should be performed. These principles may therefore create uncertainty due to the weak position of the consumer.

On the other hand, the DSD requires a supplier to perform a contract within 30 days from the day after the consumer sent his/her order. In the event of non-performance, the consumer has two options; either to agree to extend the execution of the contract or rescind the contract. In both scenarios the consumer will still be entitled to remedies for non-performance. If a contract requires more than 30 days to be performed, the seller or supplier must state this clearly within the T&Cs in order that the consumer can be informed in

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<sup>300</sup> See *infra* section 2.3.2.2.1.

<sup>301</sup> JCL, s 246 (1).

advance. However, in the UK, with regard to a failure to deliver within a specified period, it has been argued that the rearranging of delivery may be unfair if the supplier has a wide discretion; this is because a consumer has no clear remedy for breach of delivery<sup>302</sup>. Therefore, the OFT suggested that if a supplier fails to deliver the order on time, a consumer has the right to either terminate the contract without penalty or defer payment under the contract<sup>303</sup>. It could be said that the more favourable approach to solving the problem would be for the consumer to use their right of withdrawal due to the product falling within the cancellable contracts provision provided by Regulation 10 of the Consumer Protection (Distance Selling) Regulations (CPDSRs). Even if the consumer falls under those exceptions provided by Regulation 13 where the right to cancel cannot be exercised, a consumer still has the right to terminate the contract if a supplier fails to deliver the product within the agreed period or after the 30 days stated in the CPDSRs.

#### **3.6.4 Confirmation and Acknowledgement**

The procedural steps of confirmation and acknowledgement are not recognised by Jordanian legislation as a required formality for concluding a contract. Thus, the general principles do not address such issues. With regard to e-contracts, the JETL makes confirmation and acknowledgment optional between the parties. This attitude reflects the full-blooded freedom approach where parties can either agree or disagree on such term as whether or not to request an acknowledgement of receipt. This is also another example of the adoption of the Model Law. The Model Law did not intend to impose the use of an

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<sup>302</sup> Newton (n 273) 113.

<sup>303</sup> *Ibid.*

acknowledgement procedure and instead allows one to be used at the discretion of the originator; this again shows that the Model Law does not consider any protective rules in favour of the consumer due to it not dealing with consumer protection issues.

With regard to the EU, the original draft of the ECD contained a novel method regarding the formation of contracts<sup>304</sup>, with Article 11 attempting to include a mechanism that cannot be found in any of the member states' domestic laws of contract. It required a double confirmation by both contracting parties as an extra formality in the formation of a contract after the exchange of an offer and acceptance<sup>305</sup>. The approach was that an e-contract should not merely come into existence after the agreement (i.e. offer and acceptance), had been made; another confirmation would be needed. The rationale for this extra requirement was to avoid any uncertainty as to whether or not an e-contract had been formed. However, based on the medium neutrality approach, confirmation does not exist in the law of contract as it merely repeats an already existing agreement between the parties that can only be understood from an evidentiary point of view<sup>306</sup>. However, confirmation as a three-step-formation-procedure (offer, acceptance and confirmation) was cancelled by the European Council in the final version of the ECD<sup>307</sup>. Notwithstanding the non-adoption of the confirmation process, the ECD does impose another procedural obligation upon

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<sup>304</sup> Christina Ramberg, 'The E-commerce Directive and Formation of Contract in a Comparative Perspective' [2001] E.L. Rev. 429, 450.

<sup>305</sup> Winn and Haubold (n 274) 567, 588.

<sup>306</sup> Ramberg (n 304) 429, 450.

<sup>307</sup> Common Position (E.C.) 22/2000 of 28 February 2000, [2000] O.J. C128/32-49; cf. Emmanuel Crabit, "La Directive sur le Commerce électronique. Le Projet 'Méditerranée'" (2000) *Revue du Droit de l'Union Européenne* 749, 818.

businesses when dealing with consumers; this is to provide an acknowledgement of receipt<sup>308</sup>. Article 11 of the ECD states that:

*"1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply: - the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means; - the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them."*<sup>309</sup>

It is worth mentioning that the Model Law does not address the issue of confirmation nor the mandatory acknowledgement in relation to e-contracts. This gives a clear indication of the importance of the consumer's position within EU legislation where the EU's legislature, by adding some degree of certainty to the contracting procedure<sup>310</sup>, has sought to provide all the necessary means to protect consumers when dealing with businesses in the e-environment. An acknowledgment aims to ensure that there is an actual exchange of information attesting to the parties' mutual consent and shows that electronic transmission was successful<sup>311</sup>. In fact, this special requirement for ECCC has no equivalent regarding traditional contracts that are concluded in the off-line environment; this is because the UCPD does not consider it as material information and an infringement will not automatically be regarded as unfair commercial

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<sup>308</sup> Ian Walden, 'Regulating Electronic Commerce: Europe in the Global E-conomy' [2001] E.L. Rev. 26(6) 529, 547.

<sup>309</sup> ECD, s 11.

<sup>310</sup> G Veysey, 'The Perils of On-line Contracting' [2000] CTLR. 6(5) 121, 122.

<sup>311</sup> Annette Scholes, 'Information Requirement in the E-commerce: Directive and the Proposed Directive on Unfair Commercial Practices' in Geraint Howells, Reiner Schulze et al (eds), *Information Rights and Obligations a Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate, Hants 2005).

practice<sup>312</sup>. On the other hand, the DSD requires written confirmation as part of the contractual information provided<sup>313</sup> and businesses should provide it at any time before the conclusion of the contract or, at the very latest, at the time of delivery (of the goods) or when a service is carried out<sup>314</sup>.

### 3.6.5 Right of Withdrawal

Generally speaking, the right of withdrawal is a new concept in the law of contract<sup>315</sup>. This can be understood from the increase in legislature intervention in order to enhance the level of consumer protection and rebalance the contractual relationship in B2C transactions. Thus, this right can only exist under legislation that acknowledges the modern law of contract. In relation to ECCC, it allows the consumer who is buying “in the dark”<sup>316</sup>, to assess the wisdom of his choice of product or service and the standing of the business concerned<sup>317</sup>. According to Loos:

*“The right of withdrawal is usually meant to protect consumers from making rash decisions: during a relatively short cooling-off period, the consumer may go back on his decision to conclude a contract, sometimes even if that contract has already been pre-formulated by the parties.”<sup>318</sup>*

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<sup>312</sup> See Scholes, ‘Information Requirement in the E-commerce: Directive and the Proposed Directive on Unfair Commercial Practices’ (n 311) 105.

<sup>313</sup> DSD, art 5.

<sup>314</sup> See Henderson and Poulter (n 289) 289, 300.

<sup>315</sup> Marco Loos, ‘Right of Withdrawal’ in Geraint Howells, Reiner Schulze (eds), *Modernizing and Harmonizing Consumer Contract Law* (1st, Sellier, Munich 2009).

<sup>316</sup> See J. Dickie, ‘Consumer Confidence and the EC Directive on Distance Contracts’ (1998) 21 J.C.P. 217 at p.219. Cited in E Hall, ‘Cancellation Rights in Distance-selling Contracts for Services: Exemptions and Consumer’ [2007] J.B.L. 683, 700.

<sup>317</sup> John Rothchild, ‘Making the Market Work: Enhancing Consumer Sovereignty Through the Telemarketing Sales Rule and the Distance Selling Directive’ [1998] 21 JCP 279, 295. Cited in Elizabeth Hall, ‘Cancellation rights in Distance-Selling Contracts for Services: Exemptions and Consumer’ [2007] JBL 683, 700.

<sup>318</sup> Loos, ‘Right of Withdrawal’ (n 315).

The right of cancellation, which can also be termed as the right of withdrawal or the cooling off period, but not rescission<sup>319</sup> (at least under Jordanian legislation), is simply described as the ability for a consumer to think again about the purchase, end the contract without liability and receive the return of their money without needing to take court action or even give a legal reason<sup>320</sup>. Furthermore, one of the most important features of the right of withdrawal is allowing consumers to gain redress without the need to take expensive, complex or lengthy court action. According to the European Commission:

*“Cooling-off periods are a fundamental pillar of consumer protection, providing time for consumers to re-consider online or home purchases, where they may not have fully appreciated what they were buying or felt pressured into making a purchase. They therefore provide an important opportunity for consumers to improve their decision if they change their mind or identify a better offer”*<sup>321</sup>

Jordanian legislation does not acknowledge the right of withdrawal for consumers. Once an acceptance has been given in response to an offer and a valid contract created, consumers cannot cancel the contract for goods or services in any situation. Therefore, according to the JCL; if the contract is valid and binding, it shall not be permissible for either of the contracting parties to unilaterally change their decision, nor to vary or rescind the contract, except by

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<sup>319</sup> Treitel has argued that “it is a great pity subsequent lawmakers have not taken this observation to heart... they use the expressions “rescind”, “rescinded” and “rescission” without attempting to define them. They have in the past been used in a number of senses, and it is impossible to say that one of these rather than another is the “correct” one: “there is no primary meaning”” see Treitel (n 142) 370.

<sup>320</sup> See Citizen Advice Bureau, Can You Cancel It, (CAB Evidence Briefing December 2005) available on < [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)>.

<sup>321</sup> European Commission, 'Commission Staff Working Paper: Consumer Empowerment in the EU' (Brussels 8 2011) SEC(2011) 469 final.

mutual consent, an order of the court, or under a provision of the law<sup>322</sup>. This rule gives a clear restriction on parties' rights to terminate or modify the contract except by the aforementioned routes. Accordingly, the JCL, or any other Jordanian legislation, gives no right to cancel the contract; rather, the contracting parties shall be entitled to rescind the contract in certain circumstances (i.e. misrepresentation<sup>323</sup>; deception<sup>324</sup>; mistake<sup>325</sup>; option of conditionality<sup>326</sup>; option of defects<sup>327</sup>; option of inspection<sup>328</sup> and in the case of breach of contract, particularly in the case of non-performance<sup>329</sup>). Furthermore, the above rule gives a clear indication that contracts cannot be modified except by the mutual consent (i.e. agreement) of the parties. However, this cannot be done with regard to ECCCs as they are presented on a *take-it-or-leave-it* basis.

It should be borne in mind that the main distinction between the right of cancellation and the right of rescission is the existence of a legal cause to terminate the contract. The right of cancellation is unconditional<sup>330</sup> whereas the right of rescission requires one of the abovementioned legal causes.

With regard to rescission, the JCL used the *Majalla's* term '*Fasekh*', which has been derived from the *Shari'a*, in order to regulate a rescission of a contract by one of the contracting parties. This does not automatically determine the

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<sup>322</sup> JCL, s 241.

<sup>323</sup> *Ibid*, s 154-155.

<sup>324</sup> *Ibid*, s 145.

<sup>325</sup> *Ibid*, s 151-156.

<sup>326</sup> *Ibid*, s 177-183.

<sup>327</sup> *Ibid*, s 193-198.

<sup>328</sup> *Ibid*, s 184-186.

<sup>329</sup> *Ibid* s 246 (1).

<sup>330</sup> Reed and John (n 86) 91.

contract but rather gives one of the parties the option of terminating the contract or claiming further performance. In examining the JCL, it can be noted that the term '*Fasekh*' can be applied if something has affected the consent of one of the contracting parties, such as deception or misrepresentation.

In addition, the contracting parties should be entitled to rescind the contract where certain conditions are met i.e., in the case of a product being defective. In this situation it must be a pre-existing defect, must affect the value of the subject matter of the contract, must be unknown to the purchaser and the seller must not have exempted his/herself from liability in respect of that particular defect<sup>331</sup>. On the other hand, if a seller fails in its performance, a consumer, after giving notice to the him/her, can claim for further performance or rescission<sup>332</sup>.

Under Jordanian legislation the only means whereby both contracting parties can enjoy the unconditional right to cancel the contract is by agreeing on the option of conditionality<sup>333</sup> (a term to cancel the contract). However, there is a difficulty in consumers imposing such contractual terms as the ECCC is usually a non-negotiated contract. This option highlights the main problem with the non-acknowledgment of the modern law of contract which provides a rebalance in those relationships that suffer from an inequality of bargaining power by imposing such implied terms. Consumers are not able to negotiate T&Cs with

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<sup>331</sup> JCL, s 194.

<sup>332</sup> *Ibid*, s 246 (1).

<sup>333</sup> Option of continuity is defined by JCL (Articles 177-183) "*In binding contracts which are liable to be cancelled it shall be permissible for the contracting parties or either of them to make it a condition in the contract or thereafter that he should enjoy the benefit of the option of conditionality in his own or another's favour for such period as may be agreed between the parties, and if they do not agree on a particular period, it shall be permissible for the judge to specify that period in accordance with custom*"

regard to ECCC because the majority of businesses use their standard form of contracts to conduct their transactions. This is because they deal with a large number of consumers which makes the process of negotiation impossible. Furthermore, accepting such a term in an ECCC is impractical for businesses because it is quite simply against their interests. This is further evidence to support the rationale for legislature intervention to impose such a requirement, as an implied term, in ECCC in order to enhance the level of consumer protection.

It is worth mentioning that the JCL provides the buyer with another option to terminate the contract; this is known as the 'option of inspection'<sup>334</sup>, which is related to the ability of seeing, but not examining, the product. This option could be similar to the unconditional right of cancellation within the context of e-commerce as it can be exercised if the subject matter of the contract is not presented to the parties at the time of forming the contract. In the case of distance contracts, the objective of the right of cancellation is to protect the consumer who is unable to examine the product and who may make a rash decision, whereas the 'option of inspection' aims to protect the buyer who did not see the product. This option shares two similarities with the cancellation rights; firstly, consumers must make their transactional decision within a fixed period of time; secondly, in the case of consumers not having seen the product<sup>335</sup>, it is an implied term even if it is not mentioned in the contract.

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<sup>334</sup> The precise translation is 'option of view'. However this thesis uses the usual translation in spite of its inaccuracy.

<sup>335</sup> Aymen Massadeh and Ala Khaswaneh, 'The Option of Consumer to Withdraw the Domestic Sale and Distance Sale' [2011] SLJ 157, 210 (in Arabic).

The question that arises here is whether the image of the product is sufficient for a consumer to make the correct transactional decision, and accordingly, merely seeing the image on the internet is preventing consumers being able to exercise this option. Furthermore, this option is controversial under the Islamic schools of thought due to the buyer not being able to exercise such an option if the product is found to match the description provided at the time that the contract was formed.

With regard to the first issue, a doctrinal view from *Shari'a* says that seeing the product behind the glass raises the 'option of inspection'<sup>336</sup>. In fact, there is a strong analogy between this doctrinal view and seeing the product as an image on the screen. However, despite the Islamic jurisprudence, which is considered to be a secondary source of law for the Jordanian legislature, the JCL clearly stipulates that the application of the JCL's provisions is limited to their literal meaning without any further implications as to their meaning<sup>337</sup>. This means that the 'option of inspection' does not include the examination of the product but merely seeing the product, as outlined in the Explanatory Note of the JCL<sup>338</sup>. Therefore, the accurate translation into English is not the 'option of inspection' but the option that gives the consumer the right to rescind the contract after seeing the product. With regard to the second issue, some Islamic schools of thought (such as *al-shafiyah*) do not acknowledge such options for a buyer due to it being considered that the contract *per se* is invalid if the subject matter was not presented at the time of forming the contract.

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<sup>336</sup> See Abd Alrahman Aljaza'ery, 'The Doctrine Book on the Four Schools of Thought' (2nd, Dar Al-Kotob Al-ilmyah, Beirut 2004) 479-481 (in Arabic).

<sup>337</sup> JCL, s 2 (a).

<sup>338</sup> The Explanatory Memorandum of the JCL (n 195) 208.

On the other hand, two different Islamic doctrinal views are relevant if a product matches its description. The first view says that this option should always be available regardless of whether or not the product matches the description. The second view argues that the buyer has no right to cancel the contract if the description gives accurate information<sup>339</sup>.

Such an option cannot be exercised before the buyer has seen the product. Therefore, in relation to e-commerce where an image was not provided and the description does not match the product, a consumer cannot cancel the contract until s/he receives the product. In any event, due to the ambiguity of terminology and the lack of comprehensive rules that put such rights into a clear framework, the application of the 'option of inspection' under the JCL provides uncertain right of withdrawal for consumers with regard to ECCC. The above discussion shows that Jordanian legislation does not acknowledge the unconditional right of cancellation unless businesses agree on the option of conditionality that gives them the same right of withdrawal. Consequently, this situation does not serve consumer protection.

In relation to the empirical study conducted in Chapter 6, a question has been addressed concerning the perception of consumers as to whether they can cancel a transaction and get their money back before delivery. The overwhelming majority of 90% of the participants believe that they cannot cancel the transaction whilst the other 10% have provided a neutral response. It is true that the majority of participants who answered this question had no experience of buying on-line, but their answer was instead derived from their

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<sup>339</sup> See Aljaza'ery (n 336) 148.

experience in buying off-line. The experience of Jordanian consumers is that once they buy a product or service they cannot change their mind other than if there is a legal cause (e.g. fraud). Further, the participants' perception was based on the custom and practice of the Jordanian market where it is usual for the product sold not to be returnable nor changeable<sup>340</sup>. This custom and practice is exploited by traders in Jordan due to the uncertainty and the lack of direct and clear rules that award consumers such rights. As a result, this situation does not serve consumer protection and can hinder the development of e-commerce in terms of B2C transactions.

On the other hand, in European law, the first time the right of withdrawal was introduced was in the Doorstep Selling Directive. The DSD provides two forms of consumer protection (i.e. a disclosure obligation and an unconditional right of cancellation, although certain exceptions need to be taken into account<sup>341</sup>). Within the same Directive, this right can be seen as an extension to the right of information<sup>342</sup> as businesses must inform consumers about the existence of such a right. Howells and Weatherill noted that the DSD requires that information on the right of withdrawal must be provided in writing whereas other information can be provided by another durable medium; the UK has not recognised that distinction whereas this information can be provided by e-mail<sup>343</sup>. The right of withdrawal can be exercised from the moment the contract is concluded by way of an express notice that indicates the intention of the

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<sup>340</sup> See Nazih Qusos, 'The Limitation of Liability' *Ad-Dustour Newspaper* (Amman-Jordan, 20 August 2013) available on <<http://http://www.addustour.com>>.

<sup>341</sup> DSD, art 6 (3).

<sup>342</sup> See Howells and Weatherill (n 22) 376.

<sup>343</sup> See Howells and Weatherill (n 22) 386. Also Ramsay (n 22) 142.

consumer to cancel the contract<sup>344</sup>. The cancellation period of 7 days starts on the day the ECCC was concluded and expires after 7 working days from the day on which the consumer or third party receives the goods. This situation applies where the seller complies with the regulations; otherwise the period extends to 3 months.

### **3.6.6 Right to Redress**

In order to enhance consumer confidence and encourage the growth of e-commerce an efficient mechanism of redress must be provided for consumers<sup>345</sup>. The lack of feasible redress reduces consumer confidence in e-commerce and undermines the fostering of e-commerce as a tool for further integration of the internal market<sup>346</sup>.

One of the most evident features of e-commerce is the speed with which the transaction is able to be concluded. Another important feature is the distance that often exists between the seller and consumer. Considering these two features, the settlement of a dispute through traditional mechanisms of redress in court will not always be the most suitable option, particularly for consumers<sup>347</sup>.

Consumers, in general, need quick and easy solutions to redress their disputes.

It has been argued that the right of redress lies at the heart of consumers'

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<sup>344</sup> Reed and John (n 86) 90-94.

<sup>345</sup> Chin Eang, 'Means of Redress in Business-to-Consumer E-Commerce Environment' (27th Int. Conf. Information Technology Interfaces ITI 2005, Croatia – June 20-23).

<sup>346</sup> Julia Hornle, 'The European Extra Judicial Network — Overcoming the Obstacles' [2002] Communications Law 143, 145.

<sup>347</sup> Norel Rosner, 'Features - International Jurisdiction in European Union E-Commerce Contracts' [2004] available on [http://www.llrx.com/features/eu\\_ecom.htm](http://www.llrx.com/features/eu_ecom.htm) Accessed June 2013.

concerns regarding ECCC. This is because the cost of obtaining a remedy will be greater than any amount that could be recovered by any of the current available means of redress<sup>348</sup>. In other words, owing to the low value of consumer transactions, the cost of traditional redress is greater than any positive effect of a traditional means of redress<sup>349</sup>. This right therefore embodies a very high value which, consequently, influences consumers' decision making in terms of engaging under an ECCC. This is due to e-commerce posing more potential risks than the traditional marketplace<sup>350</sup>. The main objective of redress is to initiate the balance of interest among businesses and consumers and find a way to bridge the gap of any differences<sup>351</sup>.

In Jordan, in cases where disputes arise in the electronic marketplace, the only available route for consumers to access redress is the traditional route. This is due to the lack of regulations that cover consumer issues, particularly with regard to the Internet. The traditional route is embodied in the ordinary civil litigation mechanism for compensating parties adversely affected by wrongful conduct. The traditional mechanism can be described as slow, complex and often expensive which does not therefore promote consumer protection, especially with regard to the small amount of compensation that is available to consumers. On the other hand, it is worth mentioning that the JCL adopts the

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<sup>348</sup> See Daril Gawith, 'Model Laws Relevant to Preparation for the International Regulation of International Consumer Transactions' [2010] JBL 474, 501.

<sup>349</sup> *Ibid.*

<sup>350</sup> Jennifer Hamilton and Lorna E. Gillies, 'The impact of e-commerce developments on consumer welfare - information disclosure regimes' [2003] JFR & C 329-348.

<sup>351</sup> Committee to Study Global Networks and Local Values, Computer Science and Telecommunications Board, National Research Council, 'A Comparative Look at Germany and the United States' (The National Academic Press 2001).

strict offence liability system, which does not require proof of *mens rea*<sup>352</sup>. The JCL is not concerned with the conduct or the intention of the defendant but will find the defendant liable if his/her commission or omission constitutes negligence or intentional harm<sup>353</sup>.

In any event, under the JCL consumers have the right to return an item and receive a refund if they buy faulty goods by relying on the 'option of defect'. However, this situation is getting much less clear for consumers if they have been misled or pressured into making the purchase, particularly in the e-environment where consumers are always required to provide evidence of loss. The problem with consumer disputes is that they go beyond the issue of faulty or defective goods; they extend, for example, to the lack of conformity, unclear technical information provided in the T&Cs, or even low quality tangible goods or software. Therefore, consumers need a more flexible route that offers less formality and a quick and easy process outside court. Finally, as will be seen below, the PCPL has provided a more favourable route for consumer redress albeit that it is still not applicable and subject to amendments.

In relation to the perception of the Jordanian consumers within the selected random sample, approximately 73% of consumers believe that it is not easy to resolve a dispute with traders online, as shown in Chapter 6. This obviously seems to be an international issue for all consumers regardless of the legal system that they are subject to. However, other legal systems provide other

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<sup>352</sup> Which implies a mental element in the offence, for example knowledge or recklessness.

<sup>353</sup> Abdelaziz Lasasmeh, *Civil Liability for Injurious Acts: Base and Conditions* (1st, Dar Althaqafah, Amman 2006) 57. Cited in Hayajneh, 'The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?' (n 31) 608.

alternative solutions in order to speed up the process in the courts and, in the meantime, award consumers an unconditional right of cancellation which obviously serves to resolve most consumers' disputes. Further, since the opinion of the Jordanian consumers is based upon their off-line experience, the right to redress in the e-environment seems to be more complicated for them as it is also related to other issues, such as the lack of information about the identity of a business. This is because it has been argued that the information obligation may also enhance the possibility of consumers making complaints<sup>354</sup>. According to a study on the economic impact of the ECD conducted by the European Commission:

*"In order to increase the chances of a complaint leading to a positive outcome, there is a need for effective enforcement of the information requirements. The information requirements if enforced may firstly increase complaints. In the longer run, efficient enforcement could help reduce the number of complaints relative to e-commerce sales, due to a preventive effect."*<sup>355</sup>

As it has been mentioned above, generally speaking, a consumer's right of redress seems to be a common problem even within the EU. For example, in the UK, the Citizens Advice Bureau has revealed that in 2012 *"consumer problems with goods and services are widespread, and a significant number of consumers cannot get redress even where they take action to complain"*<sup>356</sup>. Another study

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<sup>354</sup> European Commission, 'Study on The Economic Impact of the Electronic Commerce Directive' [Final Report 2007] Ramboll Management, para 2.3.

<sup>355</sup> Ibid.

<sup>356</sup> A Citizens Advice survey of people with experience of trying to resolve consumer problems was carried out in June and July 2012 which has revealed that *"Ninety four per cent of the consumers taking part in the Citizens Advice survey told us they had complained, attempted to get a refund or tried to get the problem put right. But only 10 per cent were able to say this was successful. Most had hit a brick wall. Seventy four per cent said they were not successful at all and 16 per cent said they were only partially successful"*. See CAB evidence briefing: Redressing the balance, Why consumers need

found that “consumers were put off taking court action themselves because they felt it was too complex, risky and costly”<sup>357</sup>. According to Eurostat data, in relation to e-commerce, one of the main factors inhibiting buying on-line is the problem in getting redress<sup>358</sup>. In addition, it has been argued that individual lawsuits are often not an effective way to stop unfair commercial practices or even obtain compensation for the harm caused by these practices<sup>359</sup>; consumers often decide to give up their claim due to the low amounts involved<sup>360</sup> in comparison with the cost of litigation.

It is worth mentioning that the European Communities adopted a Communication European Contract Law in 2004<sup>361</sup> to discuss the necessity of providing uniform definitions for basic consumer related legal terms, fundamental principles and coherent model rules for consumer law<sup>362</sup>. This Communication was followed by another in 2005 regarding health and consumer protection strategy for 2007-2013<sup>363</sup>. The three main fundamental

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better means of resolving problems with faulty goods and services (Citizen Advice Bureau December 2012).

<sup>357</sup> University of Lincoln, Lincoln Law School (2008): Representative Actions and Restorative Justice. Report for the Government Department for Business, Enforcement and Regulatory Reform.

<sup>358</sup> See Mystery Shopping Report ECC-Net 2011, available at <<http://ec.europa.eu>>.

<sup>359</sup> European Commission, 'Towards a Coherent European Approach to Collective Redress' (Public Consultation SEC(2011)0173 2011) Para 4.

<sup>360</sup> The European Consumer Centres' Network, 'The European Online Marketplace Consumer Complaints 2010-2011' [September 2012] available on [http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012\\_en.pdf](http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf) Accessed on January 2013.

<sup>361</sup> COM(2004) 651 final [2005] OJ C14.

<sup>362</sup> Moritz Roettinger, 'Towards a European Code Napoleon/ABGB/BGB? Recent EC Activities for a European Contract Law' [2006] ELJ 807, 827. Cited in Vernadaki (n 290) 321.

<sup>363</sup> Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, Healthier, Safer, More Confident Citizens: a Health and Consumer Protection Strategy (2005), COM(2005) 115 final; Proposal for a Decision of the European Parliament and of the Council establishing a Programme of

objectives in European consumer law are: consumer empowerment, where consumers can achieve redress through effective mechanisms that do not impose cost and delay that is disproportionate to the value at risk; consumers' welfare enhancement, where Member States seek to encourage the creation of effective out-of-court complaints and redress procedures for settling consumer disputes; and, effective consumer protection<sup>364</sup>. In order to achieve the aforementioned objectives, it was necessary to improve provisions on information requirements, protection from unfair T&Cs and provide more mechanisms for redress for consumers<sup>365</sup>.

Within the EU, the first step was taken by implementing the Directive on Injunctions for the Protection of Consumers' Interests<sup>366</sup> in order to allow consumer bodies to stop unlawful and unfair commercial practices against consumers' collective interests anywhere in the EU. In addition, the situation has become clearer with the Green Paper on Consumer Collective Redress<sup>367</sup> which aims to assess the current state of redress mechanisms; to promote consumer confidence in the market; to improve the performance of businesses; to facilitate redress in situations where large numbers of consumers have been harmed by a single trader's practice that breaches consumer law; and to ensure that consumers who are victims of illegal commercial practices can obtain compensation for their losses. The Green Paper envisages, as one option, the

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Community Action in the Field of Health and Consumer Protection 2007-2013, SEC(2005) 425.

<sup>364</sup> Vernadaki (n 290) 316, 322.

<sup>365</sup> *Ibid.*

<sup>366</sup> Directive 98/27/EC. It is worth mentioning that this Directive has been substantially modified on several occasions and codified to be launched in 2009.

<sup>367</sup> European Commission, 'Green Paper on Consumer Collective Redress' COM (2008) 794 final.

reliance on the existing national legislation to achieve adequate individual or collective redress for consumers.

Under European Law and with regard to the remedies available where goods do not conform to a contract, a consumer has the following three options; repair or replacement; price reduction; or the rescission of the contract. However, EU law has already provided the best method for redress where consumers can exercise the right of withdrawal in the event that they face any kind of problem with a product, with a transaction or even with a business itself.

At national level, for example in the UK, the court-based/judicial redress mechanism can be considered as a last resort<sup>368</sup>. The means and the process by which a consumer can seek redress from a business are numerous, for example, in-house complaints procedures or any type of alternative dispute resolution (ADR). With regard to in-house complaints procedures, in some sectors, businesses are required by regulations to operate an in-house complaints mechanism<sup>369</sup>.

### **3.7 Shari'a**

The term '*Shari'a*' is used to represent Islamic law<sup>370</sup>. However, the term 'law' within the context of Islamic Law is wider than the usual meaning in a legal context. *Shari'a* (شريعة) is an Arabic term meaning 'path' or 'guide' and refers to

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<sup>368</sup> Christopher Hodges, 'Collective Redress in Europe: The New Model' [2010] CJK 370, 395.

<sup>369</sup> OFT, 'Mapping UK Consumer Redress: A Summary Guide to Dispute Resolution Systems' (Crown 2010) Para 2.5.

<sup>370</sup> Abdulrahman Alzaagy, 'Electronic Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case' (PhD Thesis, University of Wales 2009) 21.

the all-encompassing nature of Islamic Law which has two main sources, namely the Holy Qur'an and the Glorious Prophetic *Sunnah* (Prophetic Traditions). It is worth mentioning that the *Majalla* was based on the *Hanafiyah* School of thought which is considered to be one of the four famous Islamic Schools of thought, established by *Abu Hanifah Al-Nu'man* in the eighth century AC. The next sub-sections will investigate the possibility of exploiting the *Shari'a* as an alternative in filling the gap in Jordanian legislation regarding consumer protection in ECCC.

Notwithstanding the fact that the JCL is a codified legal framework, largely based on the *Majalla* and influenced by the civil law system, it cannot be separated from the *Shari'a* as the Islamic jurisprudence '*fiqh*' is Jordan's second source of legal provision and the alternative solution if a court is unable to find a provision in the JCL. This situation is applied to all other enactments. Thus the influence of the Islamic governance system is still obvious throughout Jordanian legislation<sup>371</sup>; this can be described as an Islamic oriented approach<sup>372</sup>. Therefore, as long as the JCL is understood and interpreted on the basis of the Islamic jurisprudence, '*fiqh*'<sup>373</sup>, it is necessary to investigate the possibility of concluding e-contracts and exploring the scope of consumer protection under the *Shari'a*.

Before discussing the attitude of the *Shari'a* and the *Majalla* toward consumer protection in ECCC, it is worth mentioning that the *Shari'a* is an interpretation

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<sup>371</sup> See Hayajneh, 'Vanishing Borders: Can Human Rights be a Subject of Private Law? Exploring Human Rights under Jordanian Civil Law' (n 175) 277, 278.

<sup>372</sup> See Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' (n 174) 45, 53.

<sup>373</sup> JCL, s 3.

of the holy text of the Qur'an and the Prophetic traditions. This interpretation was made by the four main Islamic schools of thought in 699-855 AC (i.e. *Al-Hanafiyah, Al-Malikiyah, Al-Shafiyah, and Al-Hanbaliyah*), and the current Islamic jurisprudence is largely based around them. They introduced general principles according to the circumstances of their era. However these have not developed with time whereas the holy text is flexible and able to serve the modern theory of contract instead of relying on the freedom of contract principle. A similar statement has been given by Vogel and Hayes:

*"It is easy for the uninitiated to underestimate the difficulty of applying the classical Islamic law to modern commercial transactions. Some believe the law's dictates can be summed up in a set of vague and general ethical and moral precepts, which do not entail any precise system of legal rules. In contrast, others expect that the legal restrictions are few, concrete, specific and easily accommodated, leaving the rest of the field free for innovation and development."*<sup>374</sup>

Therefore, even if *Shari'a* contains very general principles and sometimes a high level of formalism and complexity, this does not mean that it is not capable of awarding consumers an appropriate level of protection in the electronic environment<sup>375</sup>. However, this area of analysis is still undergoing further research and examination<sup>376</sup>, which is beyond the scope and aims of this thesis; this thesis deals with the prevalent interpretation of the *Al-Hanafiyah* and

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<sup>374</sup> Frank Vogel and Samuel Hayes, *Islamic Law and Finance: Religion, Risk, and Return* (1st, Kluwer Law International, Hague 1998). Cited in Jane K. Winn, 'Islamic Law, Globalization and Emerging Electronic Commerce Technologies' in the International Bureau of the Permanent Court of Arbitration (eds), *Strengthening Relations with Arab and Islamic Countries through International Law: E-Commerce, the WTO Dispute Mechanism and Foreign Investment* (1st, Kluwer Law International, Hague 2002) 8.

<sup>375</sup> Mancuso (n 91) 5.

<sup>376</sup> *Ibid.*

*Hanbaliyah* Schools of thought where the latter is, in the words of the Explanatory Memorandum, “*the best School that makes it easy for the people to contract freely*”<sup>377</sup>, whereas *Al-Hanafiyah* can be described as the most flexible school of thought which the *Majalla* adopted.

### 3.7.1 E-contract under *Shari’a*

E-commerce, in principle, is a legitimate practice under *Shari’a*. The rationale of this legitimacy is based on two justifications. Firstly, the general principle in *Shari’a* is that every transaction is allowed in Islam unless it shifts the allowance to prohibition. Thus e-commerce is permitted as long as it does not break the rules of *Shari’a* (e.g. buying alcohol on-line as alcohol is prohibited under *Shari’a*). Secondly, based on one of the supplementary source of Islam, “consideration of public interest”, e-commerce can offer many advantages and benefits to society<sup>378</sup>.

Accordingly, as a preliminary outcome, nothing prevents e-commerce activities under *Shari’a* if parties do not permit the forbidden or *vice versa*. However, in relation to the e-contract, the theory of ‘meeting place’ is still controversial under *Shari’a* which may therefore restrict the conclusion of the e-contract. According to El-Sanhuri this theory is a unique Islamic notion<sup>379</sup>. The *Majalla* defined it as “*the meeting that is held for forming a contract*”<sup>380</sup> which means that the consent of the parties in the form of offer and acceptance must be

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<sup>377</sup> The Explanatory Memorandum of the JCC (n 195) 93 (in Arabic).

<sup>378</sup> See Alzaagy, ‘Electronic Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case’ (n 370) 57.

<sup>379</sup> See Abd El-Razzak El Sanhuri, *Sources of Justice in Islamic Jurisprudence* (1st, Cairo, Dar A-Hana 1960) 90 (in Arabic).

<sup>380</sup> *Majalla*, s 181.

communicated during the parties' 'meeting place' without being distracted by something not related to the contract; this would otherwise render the contract invalid in the case of face-to-face transactions. The theory of 'meeting place' has been extended to include two requirements; whilst some Islamic schools of thought considered both of them, other schools recognised only one<sup>381</sup>. Firstly, it must be the place where contractors meet together to form the contract<sup>382</sup>; if one of the parties leaves that place before completing the agreement, the contract is deemed to be invalid. This means that in order to form a valid contract in face-to-face transactions, the consent of contracting parties must be communicated in the same place. Secondly, it is the time during which the contracting parties engage to form a deal<sup>383</sup>. This means that even if contractors make an offer and acceptance at the same place, the agreement should be done without any distractions unrelated to the deal<sup>384</sup>.

On the other hand, the opposite situation to the face-to-face transaction is the 'contracting inter absentees' as termed by the *Shari'a*. This type of transaction is formed between two or more contracting parties who are not in the same 'meeting place' and which is deemed valid under *Shari'a*<sup>385</sup>. The only requirement for such a contract is an intermediary who is employed to exchange the offer and the acceptance on behalf of the original contracting

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<sup>381</sup> Osama Al-Shekh, *The Meeting Place of the Contract and its Impacts on Electronic Contracts: a Comparative Study between Islamic Jurisprudence and Man-made Law* (1st, Umm Al-Qura University, Mecca 2007) 19-28 (in Arabic).

<sup>382</sup> see Abdulrahman Alzaagy, 'The Islamic Concept of Meeting Place and its Application in Electronic Commerce' [2007] MJLT 27, 42.

<sup>383</sup> Mohamed Al-Zarqa, *The General Introduction of Jurisprudence* (1st, Dar al-Qalem, Damascus 2004) 432 (in Arabic).

<sup>384</sup> Al-Shekh (n 381) 19-28.

<sup>385</sup> See A Alzaagy, 'Electronic Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case' (n 370) 166.

parties (e.g. a written letter or email). Therefore, instead of the 'meeting place', which is impossible to be determined in the case of 'contracting inter absentees', the *Shari'a* requires a 'constructive meeting place' which can be determined in the moment when and where an offer comes to the knowledge of the offeree<sup>386</sup>. However, the concept of 'constructive meeting place' is a controversial issue for the majority of Islamic schools of thought, as the recent Islamic jurisprudence validates the distance contract made by 'contracting inter absentees' as long as the offeree physically remains in the same place as where the offer came to his knowledge. This doctrinal view is impractical for e-commerce and its application is uncertain because of the difficulty of determining the 'constructive meeting place'. This is due to the fact that an offer in e-commerce can be received on a device and the acceptance of that offer can be made from a different device at a different time and location.

With regard to the statutory situation before the enactment of the JCL, the *Majalla*<sup>387</sup> adopted the *Al-Hanafiyah* school of thought that shared the aforementioned view with regard to contracts made at a distance or by 'contracting inter absentees'. According to the *Majalla*, in order to make a valid contract the parties must meet together at the same time and place<sup>388</sup>. Fortunately, this article has been modified by the JCL to consider those contracts that are made at a distance, in different places and at different times to be valid and binding<sup>389</sup>.

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<sup>386</sup> *Ibid.*

<sup>387</sup> According to the JCL, the applications of the *Majalla* of 1876 are still applied as long as its rules do not contradict with the JCL. See JCL. Art 1448 (1).

<sup>388</sup> *Majalla*, s 445.

<sup>389</sup> JCL, s 101 and 102.

### 3.7.2 Consumer Protection in *Shari'a*

The issue of consumer protection was not directly addressed by the *Majalla*. Rather, it provided general principles to give a general notion for contractors regarding how a valid contract must be concluded. For example, the *Majalla* did not issue specific rules regarding the issue of information requirements; instead it contained a very general rule that states “[t]he thing sold must be known to the purchaser”<sup>390</sup>. There are two methods available in order to make an item known to a potential purchaser. Firstly, if the thing being sold is tangible, it is sufficient to show it to the purchaser. This means that a seller does not need to provide any description (e.g. as regards measurement, weight, quantity, quality and colour) if the product is able to be shown to the purchaser when the parties to the sale meet<sup>391</sup>. This has been justified on the grounds that once a purchaser sees the product; s/he does not need to be provided with any further details in order to make a transactional decision<sup>392</sup>. In fact, in this regard, the applications of *Majalla* in the e-commerce arena leave uncertainty for consumers where, by analogy, it requires only that a picture of the product, rather than a description, be provided to the consumer. Secondly, the product can be known by mentioning the distinguishing characteristics if the subject matter of the contract was not presented at the time of the sale. It has been argued that in order to mention the distinguishing characteristics of the product, it is sufficient for the seller to inform the purchaser about its quantity, measurements and

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<sup>390</sup> *Majalla*, s 200.

<sup>391</sup> *Majalla*, s 202.

<sup>392</sup> Ali Haider, *The Explanation Ottoman Courts Manual* (1st, Dar Ala'am Alkotb , Beirut 2003) 178 (in Arabic).

species<sup>393</sup>. It is worth mentioning that this approach of informing the consumer about the product has been adopted in the JCL as will be discussed in Chapter 4.

Protection from unfair T&Cs in consumer contracts was not addressed by the *Majalla*, it instead provided a general notion whereby T&Cs must be observed in all types of contracts to ensure that they do not contradict the *Shari'a*. The benchmark against which judges can decide whether or not the term contradicts *Shari'a* is the principles of the Holy Qur'an and the prophetic tradition '*Sunna*'. This has been expressly stated by the Prophet (PBUH)'s narration that:

*"Muslims are to abide to their [T&Cs] except for those that forbid a permissible matter or permit a forbidden matter"*<sup>394</sup>.

In other words, every agreement is lawful under the *Shari'a*, except if a term declares as forbidden that which is allowed in Islam, or declares allowed that which is forbidden in Islam. Accordingly, the above narration implies that contracting parties are endorsed to set out whatever terms they choose in their agreement, without limitation, as long as it does not contradict Islam<sup>395</sup>. In other words, the recent Islamic jurisprudence controls only the unlawful contractual terms but not unfair terms, where the same situation has been extended to the application of the JCL.

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<sup>393</sup> *Ibid.*

<sup>394</sup> Reported by Al-Tirmizi and Al-Albani said Authentic by the virtues of another hadith.

<sup>395</sup> See Alzaagy, 'Electronic Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case' (n 370) 51.

It is worth mentioning that, under *Shari'a*, contract terms are divided into void terms, '*batil*' and voidable terms, '*fasid*'. In turn this results in two forms of contract namely void contracts, '*batil*' and voidable contracts, '*fasid*'. For example, if the contract contains a term that permits a forbidden matter but which is not directly related to the main subject matter of the contract, the contract is still valid but the term deemed to be void. On the other hand, if the term is related to the subject matter of the contract or the price, it renders the contract void *ab initio*<sup>396</sup>. If the term leads to a possible dispute between the contracting parties it may render the contract voidable, '*fasid*'. The voidable term '*fasid*' is always connected to an obligation that is outside the contract, such as requiring a buyer to undertake a certain performance that is not related to the contract<sup>397</sup> (e.g. if you buy this car you have to serve the former owner for a month). As a result, the general rules that consider the validity of a contractual term are that; firstly, it should not be prohibited by *Shari'a*, and secondly, it should be directly related to the nature of the contract (such as the term giving the seller the right to withdraw<sup>398</sup> after payment has been made<sup>399</sup>). Overall, the major Islamic rule that "*the norm in regard to things is that of permissibility*" means that everything is permitted except those things that are expressly forbidden<sup>400</sup>. This emphasises the freedom of contract principle<sup>401</sup> and can

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<sup>396</sup> From the beginning.

<sup>397</sup> See Aljaza'ery (n 336) 484.

<sup>398</sup> Option of conditionality under Majalla, s 301 "*The person in the enjoyment of an option conferred by the contract is empowered either to cancel or to ratify the contract within the period of the validity of the option*".

<sup>399</sup> See *Majalla*, s 186.

<sup>400</sup> Mancuso (n 91) 7.

<sup>401</sup> See Abd El-Wahab El-Hassan, 'Freedom of Contract, the Doctrine of Frustration, and the Sanctity of Contracts in Sudan Law and Islamic Law' [1985] *Arab Law Quarterly* 51, 59.

leave the door wide open for businesses to include whichever T&Cs they wish, within the limit indicated above, when contracting with consumers.

The *Shari'a* distinguishes between freedom of contract and freedom of trade. Freedom of contract is governed by the aforementioned governance system, whereas *Shari'a* provides very clear restrictions and limitations in relation to the freedom of trade. This means that trade practice is expressly divided into permissible and forbidden practices (e.g. it is forbidden to sell alcohol).

It can be noted that the approach of the JCL in dealing with T&Cs is very similar to that under *Shari'a*, which means that the situation has not changed since the enactment of the JCL. Article 164 of the JCL allows contracting parties to include any terms they wish insofar as they do not contradict the law. According to Kassasbeh, the approach of the JCL can be attributed to two reasons:

*“Firstly, ... the issue of consumer and weak party protection was not among the motives for the amended provision, and, then, such parties lost nothing, in the view of the legislator, as a consequence of amending that provision; Secondly and more significantly, one can venture to say that the legislator was not aware, when enacting the JC[L], of the importance of the amended provision in tackling imbalanced terms. Or, on the assumption that he was aware of this fact, the triggering of the notion of the contract of adhesion in the JC[L] for the first time in Jordan might have been seen by the legislator at that time as an outstanding innovation that would demolish the element of unfairness in contracts, and therefore that there was no need for the amended provision which is of limited impact and would put at risk, at the same time, the parties' right to contract freely.”<sup>402</sup>.*

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<sup>402</sup> Kassasbeh (n 21) 35.

Finally, with regard to the right of withdrawal, the *Shari'a* did not award such a right for buyers unless the contracting parties mutually agree to cancel the contract within a fixed time. An identical attitude has been adopted by the JCL, as mentioned above<sup>403</sup>.

### **3.8 Project of Consumer Protection Law (PCPL)**

Unfortunately, Jordan delayed in introducing a law governing consumer protection, which could otherwise have been considered as the first step to recognising the modern law of contract that requires legislature intervention to provide a rebalance between contracting parties and to govern B2C contractual relationships instead of relying on the general principles provided in the JCL. This is important as such special regulations impose certain clear limitations on the freedom of contract principle in order to achieve the rebalance. In response to numerous requests from civil and non-governmental organisations, the Jordanian Government prepared the first draft of a Project for Consumer Protection Law in cooperation with the JNSCP in 2006. The JNSCP also contributed to the preparation of the second draft of the PCPL that was submitted to the Ministry of Industry and Trade in 2007 but which has never been presented to Parliament for adoption<sup>404</sup>. In 2013, with a direct request from King Abdullah to process the PCPL in his speech from thorn in the opening

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<sup>403</sup> See *supra* section 3.6.5.

<sup>404</sup> OECD, 'Jordan Adherence to the OECD Guideline for Multinational Enterprise' in *OECD Investment Policy Reviews: Jordan 2013* (OECD Publishing, 2013) 191. It is worth mentioning that the report claims that the PCPL has never been presented to Parliament for adoption until the date of publishing (6<sup>th</sup> December 2013), whereas, contrary to that claim, the report has been discussed and rejected in the Jordanian Parliament on 17<sup>th</sup> March 2013. See Ad-Dustour Newspaper, PMs transfer 'consumer protection' to the legal committee after a widespread controversy (Amman 18 March 2013) available on < <http://www.addustour.com/>>.

of the non-ordinary session of the 17th Jordanian Parliament<sup>405</sup>, the PCPL has been modified by the government to meet the United Nation's principles for consumer protection<sup>406</sup>. However, the Jordanian Parliament rejected the PCPL at its first reading; it was criticised for not meeting the ambitious expectations of the Jordanians and sanctions not being tight enough to provide a high level of protection for consumers.

Beyond the issue regarding sanctions, after the examination of the PCPL, this Thesis observed several weaknesses that may cause legal uncertainty regarding consumer protection, particularly with regard to the Internet. However, this Thesis does not intend to cover the PCPL in all its detail, for example its scope and limitations; it instead addresses other selected issues (i.e. information disclosure regime, protection from unfair T&Cs and the right of withdrawal) that have a serious impact on consumer protection in ECCC. Furthermore, the next sub-section will only highlight the lack and weaknesses of the PCPL as there will be further discussion in the proceeding chapters.

### **3.8.1 Information Obligation**

Despite the slow progress in terms of introducing a consumer protection law since 2006, information requirements still need to be redrafted due to the

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<sup>405</sup> King Abdullah II, Speech from the Throne, Opening the Non-Ordinary Session of the 17th Parliament, Amman, Jordan, 10 February 2013 *"I also underline here a set of laws that require your cooperation to be completed in a manner that responds to citizens' aspirations. Most important among these are the draft laws on illicit gains, civil service retirement and income tax, along with the landlords and tenants law, which should ensure justice for all parties. There are also the consumer protection, investment and public-private sector partnership, labour and social security laws"*. Available on <<http://www.kingabdullah.jo/>> Accessed May 2013.

<sup>406</sup> See the preamble of the PCPL para 4.

ambiguity and uncertainty of the final draft of the PCPL. The information requirements in a consumer contract have required in the first and second drafts of the PCPL only information about the risk of the product. This was categorised under the section of consumer rights as an implied term that businesses must comply with. Accordingly, a supplier must furnish adequate warnings and directions for use with any product<sup>407</sup>. In relation to information requirements, the approach of protecting consumers was only focused on their health and safety which is not the subject matter of this Thesis. No rules have been addressed to ensure the ability of a consumer to make informed transactional decisions.

This approach changed in the third draft of the PCPL where a consumer has the right to obtain; complete and correct information, provided in a clear manner, about the purchased goods or services and the terms of sale; complete information regarding the supplier's rights and consumer's commitments before the conclusion of the purchase; and complete and correct information about the identity of the supplier and his/her address<sup>408</sup>. The main question that arises regarding the information requirements under the final version of the PCPL is whether providing the aforementioned information is a mandatory requirement on the part of the supplier or whether such information is subject to the consumer's request. The same project provides a helpful answer to this question as SS 8 from the same Article prohibits a supplier from performing an act or refraining from doing an act that leads to a disruption of any of a consumer's rights, including those mentioned in the project. Notwithstanding

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<sup>407</sup> PCPL, s 6 in both 1<sup>st</sup> and 2<sup>nd</sup> drafts.

<sup>408</sup> PCPL 3<sup>rd</sup> draft s 3 (2), (3) and (5).

this, the terminology used by the legislature '*the consumer has the right to obtain information*' gives an uncertain meaning. Therefore, in order to remove any uncertainty regarding a seller's disclosure obligations, which is considered to be one of the main methods of consumer protection<sup>409</sup>, clear and direct terminology must be introduced by the legislature in order to make the obligation a mandatory requirement in consumer contracts; this, in turn, will help consumers make informed decisions. Such terminology must illustrate the mandatory nature of the requirement, for example, '*the following information must be provided*' rather than '*the consumer has the right to obtain information*'.

With regard to e-commerce, the assumption that the information requirement is subject to a consumer's request seems to be impractical as their decision-making is based on the information provided. On the other hand, with the assumption that the PCPL imposes a mandatory requirement on businesses, the ambiguity in disclosure regime itself may lead to uncertainty in relation to the required information; this will be discussed in Chapter 4.

### **3.8.2 Protection from Unfair Contract Terms**

Undoubtedly, the PCPL made impressive progress regarding consumer protection against unfair contract terms, particularly in the third draft. According to Article 204 of the JCL, the first and second draft of the PCPL only acknowledged the standard form contract when making it subject to the protection provided in adhesion contracts. This means that the three elements that needed to be present for there to be an adhesive contract are no longer

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<sup>409</sup> Howells and Wilhelmsson, 'EC Consumer Law: has it come of age?' (n 89) 370, 388.

required (i.e. the contract is pre-formulated and non-negotiated; the subject matter is essential to the consumer; and the business has a monopolistic power); only one element is now required, i.e., T&Cs are pre-formulated and non-negotiated. These drafts have not provided any grey or blacklist of T&Cs<sup>410</sup> but they give the Highest Committee of Consumer Protection the right to study standard form contracts and make recommendations if it finds any unfair provisions. These recommendations must be sent to the Minister of the Industry and Trade Ministry who will inform businesses what they should consider when making standard form contracts. However, there is no mechanism clarified in either draft regarding the process of how to prohibit such unfair contract terms and what the consequences are in such unfair commercial practices. In addition, this approach to fighting against unfair T&Cs is impractical due to the impossibility of investigating the large number of standard form contracts.

The third draft of the PCPL made significant progress in protecting against unfair T&Cs. It not only included standard form contracts within the protection provided but also all consumer contracts whether or not they are negotiated. In addition, the final draft finally provides a blacklist of certain unfair contract terms that must be automatically ineffective. This topic will be extensively addressed in Chapter 5.

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<sup>410</sup> Except two terms (i.e. liability exemption and warranty exemption).

### **3.8.3 Performance, Acknowledgement and the Right of Withdrawal**

The PCPL, in all its drafts, does not determine a fixed time for a supplier to execute a contract. However, the contract must be executed within the fixed period agreed by the parties or within the time that is customarily used in certain contracts, whether for goods or services. Otherwise, in the case of delay, the contract is deemed defective under the PCPL which thereafter raises the right of the consumer to cancel. In any event, if the cancellation of the contract becomes impossible, the seller must pay an amount equal to the harm which can be estimated to have been caused to the buyer, such an amount to be determined by the Court or by the mutual agreement of the parties.

With regard to the acknowledgement, this is important as consumers need to be certain about the conclusion of the ECCC. The first and second drafts of the PCPL gave the consumer the right to request an acknowledgement or receipt showing the type of purchase, the purchase price, the date of the transaction, the essential characteristics and the quantity, quality and identity of the business. This Article was deleted in the last draft of the PCPL which means that a consumer does not have the right to request such an acknowledgement. This action may raise another issue as the second draft stipulated that the application of the PCPL's provisions were on all goods and services, in both the traditional and electronic environment, including e-commerce or any other means. This Article, which gave clear scope for the application of the PCPL, is not adopted in the third draft. The question therefore arises as to whether the legislature implied that provision within the scope of the third draft or whether special rules for consumer protection, such as those governing

acknowledgements and confirmations, will be added to the JETL which, as announced by the government in December 2013, is the subject of modification.

Finally, with regard to the right of withdrawal, the PCPL, in all its drafts, has not acknowledged the unconditional right of cancellation but has stated that a consumer can rescind a contract in certain circumstances (i.e. in the case of a defective product and therefore a defective contract<sup>411</sup>).

### **3.8.4 Right to Redress**

The PCPL mentioned in its preamble that it adopted the general principle of the last version of the UN Guidelines for Consumer Protection that were released in July 1999 and adopted by the General Assembly in the latter part of 1999. The Guideline has been criticised by commentators for being too vague<sup>412</sup>. However, in response to the UN Guidelines' recommendations on redress, many countries have established various mechanisms to deal with redress in their national consumer protection laws; for example, Canada, the United States, Hong Kong and New Zealand. In addition, Jordan, despite the non-adoption of special procedures for consumer disputes or the establishment of a small claims court, has, for the first time, adopted a hierarchy system of remedies in the last draft of the PCPL. Article 6 provides, as a first step, that the consumer has the right to return a product if it was defective or the transaction was concluded by way of a defective contract, and be reimbursed for the price paid at his or another's

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<sup>411</sup> The defective contract releases when a seller doesn't comply with the PCPL. For example the delay of performance or the incorrect information renders the contract defective.

<sup>412</sup> Murray Weidenbaum, 'The Case Against the UN Guidelines for Consumer Protection' [1987] JCP 425, 425. Cited in Gawith (n 348) 474.

request. If it is not possible to return the product, for example, due to only discovering a defect after the consumption of it, a consumer is still able to seek compensation for damages and any losses s/he suffers due to the defective product<sup>413</sup>. Finally, despite the aforementioned, a supplier or seller can acquire the opportunity, upon the agreement of the consumer, to remedy the defective product by way of repair or maintenance. However, in relation to e-commerce where there are more potential risks, additional options need to be provided to a consumer in order for the consumer to feel that their position is protected. For example, a price reduction could be offered in order to remedy a lack of conformity.

The mechanism of redress under the PCPL does not suggest ADR, but only refers the dispute to the relevant court for litigation by way of fast track procedures. In addition the claim can be individual or collective and can be introduced by the Consumer Protection Organisation on behalf of consumers.

### **3.9 Conclusion**

Putting the PCPL aside, due to it still being the subject of amendments and not having been adopted by Parliament, Jordanian legislation is insufficiently able to provide adequate consumer protection in the electronic environment. This means that the application of the general principles of the JCL's provisions do not provide the basic protective measures in ECCC due to its lack of clarity and its scope in relation to the commercial transaction that makes no distinction in cases where there is an inequality of bargaining power.

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<sup>413</sup> PCPL, s 6 (a) and (b).

From a modern law perspective, which allows for the intervention of the legislature in order to rebalance the contractual relationship in B2C transactions, ECCC was taking place in a lawless space or legal vacuum that has been filled by broad legislation and general principles. The enactment of the JETL has acknowledged that the Jordanian legal system allows contracts to be concluded by electronic means in order to ensure that it does not deprive contracts of validity just because they are electronic (with some exceptions such as property sales<sup>414</sup>); but in the meantime it has left a legislative gaps in relation to consumer transactions by not implementing rules to cover any consumer concerns regarding their weak position in the contract. This gives an indication that despite the rise in modern e-contracts in an era where technology has fundamentally changed the character of many commercial and other relationships<sup>415</sup>, the Jordanian legislature is still relying on the rules of commercial contract to govern all relationships regardless of the bargaining power of the parties.

On the contrary, further to the specific additional protection that has been introduced with regard to ECCC<sup>416</sup> (e.g. Article 10 of ECD regarding the additional information that must be provided in ECCC and the other protective measures of the DSD, such as acknowledgement and the right of withdrawal), the EU and its Member states, such as the UK and France, are using the approach of harmonising and adopting existing instruments regarding

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<sup>414</sup> JETL, s 6.

<sup>415</sup> See Raymond Nimmar, 'The Legal Landscape of Electronic Commerce: Redefining Contract Law in an Information Era' [2007] *Journal of Contract Law* 3.

<sup>416</sup> Winn and Haubold, (n 274) 567, 588.

consumer law in order to legislate in the area of e-commerce and fill in any remaining gaps.

One could conclude that the Jordanian legislature did not include a specific chapter regarding consumer protection in JETL because of the absence of consumer protection law in the off-line environment. However, this justification does not prevent the legislature including, at the very least, the information requirements and the obligation to acknowledge receipt of the order in consumer contracts as both issues may escalate problems within the context of electronic transactions. This gives two indications; firstly, that the Jordanian legislature has literally adopted the Model Law which does not cover any consumer issues; and, secondly, that the Jordanian legislature intended to rely on the general principles of the JCL to cover consumer issues regarding ECCC.

In Jordan, as long as the alternative legal framework for governing ECCCs is the JCL, it is difficult to say that consumer protection is sufficient in the electronic environment. The JCL does not provide clear and comprehensive rules regarding the protective measures (i.e. information requirements, protection from unfair contract terms, performance period, acknowledgement, unconditional right of withdrawal and special mechanisms of redress for consumers). This does not mean that the JCL does not cover the aforementioned areas, but more that its provision is very general and is suitable to govern commercial contracts between businesses where they can agree, for example on the right of withdrawal under the 'option of conditionality'; negotiate the contract terms; determine a fixed period for the execution of the contract;

request an acknowledgement; and add a special term for ADR. However, this cannot happen in ECCC as the contract is presented on a *take-it-or-leave-it* basis.

In relation to *Shari'a* as an alternative legislative solution, it is clear from the above discussion that the general Islamic approach has no problem with e-commerce in general unless it prohibits the allowance or allows the prohibition. The main problem that could arise is regarding the conclusion of e-contracts due to the fact that some Islamic schools of thought impose certain formalities and complexities when forming contracts between absentees in different places and at different times. This, in fact, does not raise any problems as the JCL and the JETL both acknowledge the validity of contracts that are concluded by electronic means. On the other hand, in relation to consumer protection under *Shari'a*, the general approach of regulating commercial transactions was based on the freedom of contract principle that reflected a particular economical need at that time. The general principles of *Shari'a* could be able to serve consumer protection but, in the writer's view, the legal principles of *Shari'a* need to be either codified or unified and thereafter reinterpreted in order to reflect contemporary needs.

Finally, with regard to the protective measures, a consumer's position will be strengthened after the adoption of the PCPL. Notwithstanding the lack of clarity in relation to several areas concerning consumer protection, such as the information requirements, the PCPL is considered a progressive step towards the acknowledgement of the modern law of contract where the interventionism approach is obviously taken seriously.

The following Chapters discuss the main methods of consumer protection that are indispensable for rebalancing the contractual relationship between parties involved in ECCC (i.e. information obligations and protection against unfair contract terms)<sup>417</sup>. The information disclosure regime will be analysed by focusing on the rationale and importance of the information disclosure regime under the Jordanian legal system, and by thereafter analysing the European information disclosure regime in order to illustrate its experience, as an advanced region, in introducing legal frameworks to ensure that consumers are fully informed when concluding contracts. Chapter 5 will thereafter investigate the classification of ECCC under Jordanian legislation in order to determine the type of protection that must be available regarding unfair contract terms.

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<sup>417</sup> See section 3.1 for the reasons behind focusing on information obligations and protection against unfair contract terms.

## **CHAPTER FOUR**

### ***INFORMATION OBLIGATIONS***

#### **4.1 Introduction**

It has been mentioned *supra* that information obligations are considered to be one of the main methods of ensuring consumer protection, and aim to rebalance the contractual relationship in terms of knowledge. A consumer has, *de facto* less knowledge than a seller in terms of the description of the goods or services and the legal and technical background concerning the conclusion of the contract, particularly in ECCC where the transaction is conducted at a distance and the consumer is unable to examine the product before making a transactional decision. Therefore, as will be discussed in the next section, the legal systems that acknowledge the modern law of contract, such as the EU, have evolved as a result of the legislature intervening and imposing a duty on businesses to provide specific information in order to enable consumers to make more informed transactional decisions.

This Chapter will investigate the importance and rationale of information obligations in general and within the context of ECCC in particular. The purpose of this Chapter is to discuss firstly, the extent to which the current and future Jordanian legislation is sufficiently able to deal with information requirements in order to provide adequate consumer protection and; secondly, whether the current Jordanian disclosure regime is able to redress the informational imbalance in ECCC or whether it merely redresses the consent of the consumer after the conclusion of the contract if it was concluded by reason

of mistake, fraud or latent defect. In addition, this Chapter will look at the European approach in terms of information obligations in order to appreciate the importance of such a duty.

## 4.2 Obligation to Provide Information

Firstly, generally speaking, information requirements (information obligations or information disclosure duty) are a relatively common feature of consumer protection regimes<sup>418</sup>. Stuyck stated that “*a better level of consumer protection can be achieved by information duties*”<sup>419</sup>. It has been argued that market failure can result where the consumer is not equipped with sufficient information to participate effectively in the market<sup>420</sup>. Thus the rationale for information requirements is a response to the asymmetries of information between parties in B2C transactions<sup>421</sup> that can be illustrated by the unequal bargaining power from a knowledge perspective. Howells stated that:

*“[C]onsumers have less information than traders and so have difficulty in making decisions that reflect their true preferences. There are not sufficient incentives for traders to volunteer information, so the law needs to require that the information be provided. Once this information is provided, consumers can protect their own interests by selecting the goods or services closest to their preferences. Harm will be reduced by ensuring goods and services are more likely to be in line with realistic consumer expectations based on reliable information.”*<sup>422</sup>

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<sup>418</sup> Hamilton and Gillies (n 350) 329.

<sup>419</sup> See Jules Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' [2000] CML.Rev 270.

<sup>420</sup> See Ramsay (n 22) 55-69. Howells, 'The Potential and Limit of Consumer Empowerment by Information' (n 115) 352.

<sup>421</sup> *Ibid* 245.

<sup>422</sup> Howells, 'The Potential and Limit of Consumer Empowerment by Information' (n 115) 455.

In addition, Howells and Weatherill stated that:

*“For all systems, a powerful rationale for intervention lies in the perception that consumer information reduces the imbalance of knowledge between consumer and trader which is the hallmark of modern economy”*<sup>423</sup>

Therefore, based on the fact that the trader is better informed than the consumer, this informational imbalance should be redressed to ensure that the consumer is contracting with real consent; thus an obligation must be imposed on the trader to make available all relevant information for the consumer to redress that imbalance<sup>424</sup>. The uninformed consumer therefore justifies the intervention by the legislature<sup>425</sup>. Further, as mentioned in Chapter 2, in order to rebalance the contractual relationship in B2C transactions, the freedom of contract principle must be restricted by clear limitations. Information obligations restrict the freedom of businesses, for example, where they are required to provide certain information in a clear and comprehensive manner and they may prefer not to disclose it in the prescribed format<sup>426</sup>.

E-commerce gives rise to its own rationale for information requirements on the basis that a consumer is dealing with a remote trader about whom s/he knows little<sup>427</sup>; one of the main rationales behind imposing such obligations is the potential additional risks for consumers when entering ECCCs. Consumers buy

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<sup>423</sup> Howells and Weatherill (n 22) 64.

<sup>424</sup> See Thomas Wilhelmsson and Christian Twigg-Flesner, 'Pre-contractual Information Duties in the Acquis Communautaire' [2006] ERCL 453.

<sup>425</sup> See Ramsay (n 22) 64.

<sup>426</sup> Chris Willett, 'Autonomy and Fairness: The Case of Public Statements' in Geraint Howells, Andre Janssen, Rriner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate, Hant 2005). Cited in Geraint Howells, 'The Potential and Limit of Consumer Empowerment by Information' (n 115) 455.

<sup>427</sup> See Scholes, 'Information Requirements' (n 277) 213.

goods or services over the Internet and are operating in the context of 'an information deficit' which can be illustrated by comparing a purchase on-line, with ECCC, to that of a purchase in the off-line environment. In an off-line purchase, the consumer, through his physical presence alone, has certain knowledge of the supplier which allows him/her to physically examine the product<sup>428</sup>. Conversely, in e-commerce, that knowledge is likely to be unclear unless sufficient information is provided to the consumer. In order to conclude an ECCC with informed consent, legislation must ensure that consumers are supplied with all relevant information that is essential for them to make an informed transactional decision, as well as additional information that may be needed to facilitate contact with the seller/supplier for the purpose of making enquiries or complaints<sup>429</sup>. Therefore, by having complete and adequate information, it can be ensured that a consumer's choice is fully informed and therefore likely to give effect to their true wishes<sup>430</sup>.

This risk may not be accommodated by traditional contract rules or general provisions<sup>431</sup>. Therefore, the purpose of the information disclosure requirements regime is to enable consumers to make more informed decisions and to ensure that contracts do indeed have the full consent and understanding of the consumer. It has also been argued that one of the purposes of such requirements is to increase and encourage consumer confidence, thus

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<sup>428</sup> Mary Donnelly and Fidelma White, 'Regulation and Consumer Protection: A Study of the Online Market' [2006] DULJ 27, 40.

<sup>429</sup> Vernadaki (n 290) 321.

<sup>430</sup> See Peter Cartwright, 'Consumer Protection Rationales' in Peter Cartwright (eds), *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (1st, Cambridge University Press, Cambridge 2004) 6.

<sup>431</sup> Hamilton and Gillies (n 350) 331.

strengthening the marketplace<sup>432</sup>. As a result, legislature intervention in ECCC is most easily justified in order to ensure that consumers are able to make informed transactional decisions. It is also justified for the purpose of organising the market to allow the development of e-commerce. According to Henry:

*“Consumers increasingly use the Internet to search for information and evaluate product alternatives before purchasing. Many commentators claim that information access will empower consumers with enhanced decision-making capabilities. This has been stimulated by the belief that if a more complete range of information is made available to consumers they will take the time to sift through the material to arrive at a more thought-through, considered decision”*.<sup>433</sup>

Therefore, governments usually play an important role in shaping, controlling, monitoring and correcting deficiencies in the market place. This can be achieved by using different tools, one of which is the use of Regulations. From a legal point of view, legislation, when used to impose information obligations as a tool for organising the market and protecting weaker parties, can ensure that a consumer's consent is free of defects and determine easily whether or not businesses deal in good faith. In consumer law and policy, consumer information rules are widely acknowledged as one of the single most important tools to realise consumer policy objectives<sup>434</sup>.

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<sup>432</sup> *Ibid.*

<sup>433</sup> Paul Henry, 'Is the Internet Empowering Consumers to Make Better Decisions or Strengthening Marketers' Potential to Persuade?' in Curtis Haugtvedt, Karen Machleit and Richard Yalch (eds), *Online Consumer Psychology: Understanding and Influencing Consumer Behaviour in the Virtual World* (1st, Lawrence Erlbaum Associates, New Jersey 2005) 345.

<sup>434</sup> Loos and Helberger (n 135) 45.

Information requirements are not only of concern with regard to the rationality of consumer decision making and ensuring that a consumer's consent is protected and free from defects. Such requirements also enhance honesty and good morals in society and the market place<sup>435</sup>.

#### 4.2.1 Consumer Decision making

There is no standard legal definition for consumer decision making. However, the consumer decision making process can generally be defined as a “[p]rocess by which consumers identify their needs, collect information, evaluate alternatives, and make the purchase decision”<sup>436</sup>. On the other hand, transactional decision is defined by the UCPD as:

*“transactional decision’ means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting”<sup>437</sup>*

As mentioned *supra*, adequate information must be provided for the consumer to ensure that s/he is able to make an informed transactional decision. The primary objective of information obligations is to improve consumer autonomy and freedom of choice<sup>438</sup>. This means that sufficient information promotes consumer autonomy to help the consumer to determine whether they are certain that they wish to enter into a contract, whilst not unduly interfering

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<sup>435</sup> See Howells, Wilhelmsson and Micklitz (n 293) 45.

<sup>436</sup> <http://www.businessdictionary.com/> accessed July 2013.

<sup>437</sup> UCPD, art 2 (k).

<sup>438</sup> Loos and Helberger (n 135) 45.

with the autonomy of the trader<sup>439</sup>. Therefore, once a consumer is provided with all the relevant information that they need, they will be able to make their desired decision. It is worth mentioning that the secondary objective of the information rules is to assist in resolving disputes; this functionality can be described as a 'contract synopsis'<sup>440</sup>. In other words, once the seller has provided all relevant information to the consumer, determining any subsequent breach of the contract would be more straightforward as this would merely involve a comparison of whether the product or performance matched the information provided.

It is important to ensure that the information mandated for disclosure in ECCC is adequate to protect a consumer's consent. It is therefore necessary to determine what type of information consumers need in order to make an informed decision. The following sections discuss the type of information requirements.

#### **4.2.2 Type of Information Requirements**

In order to achieve a high level of consumer protection and enable a consumer to make a better and more informed decision, legislation should consider both positive and negative information obligations<sup>441</sup>. The positive information obligation can be achieved by requiring a business to provide a list of information that must be in a clear and comprehensive form (e.g. the

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<sup>439</sup> See Geraint Howells, 'Information and Product Liability - A Game of Russian Roulette' in Geraint Howells, Andre Janssen, Rainer Schulze (eds), , *Information Rights and Obligations a Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate, Hants 2005) 154.

<sup>440</sup> Geraint Howells, 'The Potential and Limit of Consumer Empowerment by Information ' (n 115) 355.

<sup>441</sup> Stuyck (n 419) 373.

availability, benefit and delivery of the product), whereas the negative information obligation is represented by any information that is absent or information being provided that is, in fact, misleading.

As a general principle of information requirements, when considering the basic and necessary information that a consumer should know, legislation focuses primarily on price, quality and convenience. The modern law of contract does recognise other information that must be provided at particular point in particular relationships, such as pre-contractual information in ECCC<sup>442</sup>. Generally, the information requirements in ECCC can be divided into pre-contractual and contractual information<sup>443</sup>. The next sub-sections discuss these types of information requirements further and examine the disclosure information regimes under Jordanian and EU legislation.

#### **4.2.2.1 Contractual Information**

##### **4.2.2.1.1 EU**

Information obligations have become an ever more important issue within EU consumer policies<sup>444</sup> and are considered to be an important factor in ensuring consumer protection<sup>445</sup>. They play a crucial and expanding role as a regulatory tool and enjoy considerable popularity in the development of EC measures

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<sup>442</sup> See *infra* section 4.2.2.2.

<sup>443</sup> See Scholes, 'Information Requirements in the E-commerce Directive and the Proposed Directive on Unfair Commercial Practices' (n 311) 93-114.

<sup>444</sup> Scholes, 'Information Requirements' (n 277) 213.

<sup>445</sup> Howells and Wilhelmsson, 'EC Consumer Law: has it come of age?' (n 89) 370, 388. See also Wilhelmsson and Twigg-Flesner (n 424) 441, 470.

affecting the protection of consumers' economic interests<sup>446</sup> due to EU legislators recognising the advantages of such regulatory methods<sup>447</sup>. According to Stuyck; “[t]he right to information is undoubtedly the most fundamental specific consumer right”<sup>448</sup>. Therefore, it can be said that information obligations are dominating the consumer law and policy agenda in the EU and its member states such as UK and France<sup>449</sup>. This approach has been supported by the view of the ECJ which stated that:

*“[U]nder Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements.”*<sup>450</sup>

Due to the importance of the provisions regarding information obligations and the need to protect consumers it can be easily noted that there is an overlap between the various EU Directives (e.g. DSD, ECD and CPUCP)<sup>451</sup>, particularly with regard to ECCC. In addition, from a chronological point of view, it can also be noted how the information requirements have become increasingly detailed<sup>452</sup>. The aim of focusing on information obligations and considering them as an important element of the contract is in order to give consumers the opportunity to reach a reasonable decision regarding the conclusion of the

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<sup>446</sup> See Stephan Weatherill, 'Market Transparency and Consumer Protection' in Stephan Weatherill (eds), *EU Consumer Law and Policy* (1st, Edward Elgar Publishing, Cheltenham 2005) 84.

<sup>447</sup> Karsten Sorensen, 'Disclosure in EU Corporate Governance - A Remedy in Need of Adjustment?' [2009] EBOR 255, 256.

<sup>448</sup> Stuyck (n 419) 370.

<sup>449</sup> Howells, 'The Potential and Limit of Consumer Empowerment by Information ' (n 115) 349, 351.

<sup>450</sup> Case C-362/88, *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] E.C.R. 667 at 689; [1991] 2 C.M.L.R. 801. Cited in Howells and Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (n 89) 370, 380.

<sup>451</sup> Vernadaki (n 290) 316, 319.

<sup>452</sup> Scholes, 'Information Requirements' (n 277) 213.

contract<sup>453</sup>. Consumers are then in a position to decide whether or not to enter into the contract.

The developments in ICT have created new challenges and requirements regarding consumer protection policy<sup>454</sup>. Therefore, the EU Consumer Policy Strategy 2007-2013<sup>455</sup> focused on consumer empowerment which had been planned to be achieved by providing consumers with, *inter alia*, real choice, correct and sufficient information and market transparency<sup>456</sup>. Further, according to Scholes, the reasons behind the development of information obligations are various, such as the development and integration of consumer protection in the EC Treaty<sup>457</sup> and reasons resulting from technical developments that make it more difficult for consumers to examine goods or understand services and their possible impact, for example, e-commerce, which has its own rationale for information requirements<sup>458</sup>. As a result, it can be said that information obligations have primarily been developed in the context of

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<sup>453</sup> Vernadaki (n 290) 319.

<sup>454</sup> Donnelly and White (n 428) 27, 52.

<sup>455</sup> The Consumer Policy Strategy (2007-2013) seeks to establish equal levels of security and protection throughout the EU, as well as a more integrated internal market, through the following objectives; (1) empowering consumers by creating a more transparent market; (2) enhancing consumers' welfare; and (3) protecting consumers from serious risks and threats. See EU Consumer Policy Strategy 2007-2013 COM(2007) 99 final available on <http://ec.europa.eu/>.

<sup>456</sup> Vernadaki, (n 290) 316, 321.

<sup>457</sup> The consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, Article 153 "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests*"

<sup>458</sup> Scholes, 'Information Requirements' (n 277) 213.

consumer contracting,<sup>459</sup> as an aspect of consumer rights and a method of consumer protection.

On the other hand, the European approach to information requirements has been criticised on two grounds. Firstly, even confident and well educated consumers may interpret the provided information in ways that suit their prejudices, as suggested by Howells and Wilhelmsson<sup>460</sup>, or not rationally respond to information provided by businesses<sup>461</sup>. This means that consumers may only consider the information that meets with their approval, benefits or supports their desired decision. Consequently, businesses know how to exploit this weakness and may induce consumers into buying their products by being keen to comply with particular information obligations.

Secondly, as suggested by Howells<sup>462</sup>, the EU legislature, via Directives, has imposed extensive information requirements with little regard for their impact. For example, the DSD requires a long list of information that must be provided by businesses; as member states have the right to add any extra information requirements to suit their particular market situation much of this information may be irrelevant to many consumer transactions. Therefore, the appropriate

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<sup>459</sup> See Howells, 'Information and Product Liability - A Game of Russian Roulette' (n 416) 155, 170. See also Wilhelmsson and Twigg-Flesner (n 439) 441, 470.

<sup>460</sup> Howells and Wilhelmsson, 'EC Consumer Law: Has it Come of Age?' (n 89) 370, 382.

<sup>461</sup> Howells, 'The Potential and Limit of Consumer Empowerment by Information' (n 115) 349, 358. See also Weatherill S, 'Market Transparency and Consumer Protection' (n 446) 85.

<sup>462</sup> Howells, 'The Potential and Limit of Consumer Empowerment by Information' (n 115) 363.

approach, according to Ramsay, is to provide consumers with adequate rather than perfect information<sup>463</sup>.

#### **4.2.2.1.2 Jordan**

This section will discuss the information disclosure regime and the inadequate information requirements under the Jordanian legal system; these inadequacies are likely to lead to undesirable decision making in ECCC which, consequently, does not provide consumer protection in the e-environment. In Jordan, the contractual information requirements are very limited, as shown by table (5) below.

According to the results of the empirical study conducted in Chapter 6, where five questions covered five different areas related to information requirements (i.e. insufficient information, information about consumer rights, and information related to product, trader identity and the technical steps to conclude the transaction), the majority of respondents selected from the random sample that represents Jordanian consumers, reflected the lack of comprehensive regulations that cover the duty of information requirements. The uncertainty of information obligations under the Jordanian legislation resulted in 60% of respondents believing that they are not adequately protected if a business has provided insufficient information about their identity, or about the product, as shown in table (4). On the other hand only 15% believe that they are protected, whereas 24% of participants in the questionnaire survey provided a neutral answer.

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<sup>463</sup> Ramsay (n 22) 65.

**Table 4: I am adequately protected if a business has provided me with insufficient information about their identity or about the product**

	<b>Frequency</b>	<b>Per cent</b>	<b>Valid Per cent</b>	<b>Cumulative Per cent</b>
<b>Strongly Disagree</b>	44	11.5	11.5	11.5
<b>Disagree</b>	186	48.4	48.4	59.9
<b>Neutral</b>	95	24.7	24.7	84.6
<b>Agree</b>	47	12.2	12.2	96.9
<b>Strongly Agree</b>	12	3.1	3.1	100.0
<b>Total</b>	384	100.0	100.0	

As has been mentioned *supra*<sup>464</sup>, notwithstanding the importance of the JETL as a step forward in terms of removing uncertainty in transactions that are concluded over the Internet, it does not provide comprehensive regulations dealing with, for example, information requirements; it can really only be considered as a procedural law that facilitates electronic transactions<sup>465</sup>. The facilitation offered by the JETL is represented by acknowledging the validity of a contract that is concluded by electronic means and treating data messages according to the same rules as paper documents. However, it does not facilitate the contractual relationship between parties by intervening with the substantive distribution of rights and obligations that arise at particular points in certain types of relationships (e.g. pre-contractual information in the context of ECCC).

In addition, the absence of consumer protection law renders the JCL as the main source of legislation that covers information requirements on the Internet.

<sup>464</sup> See *supra* section 3.4.

<sup>465</sup> See Donini (n 9) 23.

However, the reliance on the general principles of the JCL regarding disclosure, as the primary consumer protection measure, raises particular concern because of its ineffectiveness; this will be discussed further in relation to the Jordanian disclosure regime<sup>466</sup>.

Nevertheless, it is worth mentioning that some information requirements can be taken from other regulations, such as the Geographical Indication Law regarding the geographic origin of a product and the Jordanian Industry and Trade Law regarding the requirement that the provision of a price for a product be in a clear manner.

On the other hand, notwithstanding the general objective of the final draft of the PCPL, which was to create a consumer protection system containing legal certainty and information transparency<sup>467</sup>, a lack of requirements and a lack of clarity arise in relation to the information provisions. The JCL also shares these shortcomings as will be illustrated in the next sub-sections. However, before discussing these issues, it is necessary to look at the existing information disclosure regime under the Jordanian legislation.

As the Jordanian legal system does not distinguish between contractual and pre-contractual information duties, except via the reference made in the PCPL that lacks clarity, the Jordanian legislature does not impose an obligation on a seller to give a consumer specific information prior to the conclusion of a contract. However, the JCL stipulates that the subject matter of the contract

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<sup>466</sup> See *infer* section 4.2.2.1.3.

<sup>467</sup> Hetham Abu Karky, 'Consumer Protection in Jordan: What Do We Have and What Do We Need?' [1992] ECLR 489, 491.

must be known by the consumer and this section will therefore discuss both duties as they both deal with contractual information under the Jordanian legal system.

**Table 5 Information Requirements under the Jordanian Legal System**

<b>Law</b>	<b>Contractual information</b>
<b>Jordanian Civil Law Article 644</b>	<ol style="list-style-type: none"> <li>1. The property sold must be known to the purchaser sufficiently to avoid gross uncertainty;</li> <li>2. The property sold must be known to the purchaser by its distinguishing characteristics and descriptions, and if the property is in his presence, an indication of it shall be sufficient.</li> </ol>
<b>Jordanian Industry and Trade Law No. 18 1998 Article 11</b>	A. Every trader must provide the price of every product in a clear manner.
<b>Jordanian Electronic Transaction Law No. 85 2001</b>	None
<b>Project of Consumer Protection Law 2013 Article 3 (A)</b>	<p>A consumer has the right to:</p> <ol style="list-style-type: none"> <li>2. obtain in a clear manner complete and correct information about the goods or services that s/he bought</li> <li>3. obtain complete and correct information prior to the conclusion of the contract about his/her obligation and the seller's rights</li> <li>8. obtain complete and correct information about the identity and the address of the seller/supplier</li> </ol>
<b>Geographical Indication Law No. 8 2000 Article 3</b>	1.1. This law prohibits anyone to use any method that misleads the public about the geographical origin of the product.

#### 4.2.2.1.3 Information Disclosure Regime in Jordan

The Jordanian legal system, as mentioned *supra*, relies on the will theory which emphasises the freedom of contract principle. However, this reliance does not necessarily provide consumer protection. On the other hand, the modern law of contract allows for legislature intervention in order to distinguish B2C contractual relationships from other types of transactions; this intervention results in the provision of specific forms of protection for the benefit of the consumer. One of these forms is ensuring that consumers have the freedom of choice and, in order to achieve this, the legislature should impose a list of information that must be provided to a consumer by a seller or supplier.

In Jordan, given the absence of a direct duty to provide particular information, it can be said that the information disclosure regime is an extension to the theory of "defects of consent", which is represented by mistake, deception and coercion. The problem with the application of this theory is its limitation in redressing those situations where there is an obvious breach of the law resulting in a weaker party (the consumer) being unable to make informed decisions. On the other hand, this could be extended to the general theory of contract which is represented by the liabilities rules (e.g. tort and liability for latent defect). In other words, under the Jordanian legal system, the consequences of providing false information or a lack of information are dealt with by the laws governing defects of consent, tortious liability or latent defects. The next sub-sections look at whether the abovementioned regimes provide

sufficient protection for consumers in order to ensure that they are able to make better and more informed decisions in the internet marketplace.

#### 4.2.2.1.3.1 Defect of Consent

The consent of the consumer may be affected by one of the defects of consent provided by the JCL (i.e. coercion<sup>468</sup>, deception<sup>469</sup> or mistake<sup>470</sup>). The defect of consent does not mean that the consent does not exist<sup>471</sup>, just that it cannot be regarded as having been freely given<sup>472</sup>. The consequence of such a situation is that the contract is rendered suspended<sup>473</sup>, voidable<sup>474</sup> or even void,<sup>475</sup> as stipulated by the JCL<sup>476</sup>. For the purpose of this Chapter, only mistake and deception are related to the issue of information requirements as coercion could still occur even if the consumer is well informed. In relation to unfair commercial practices, which have a direct impact on consumer protection in both the off-line and on-line environments, it is worth mentioning that the JCL does not recognise undue influence<sup>477</sup> as a defect of consent and does not therefore provide rules to address it.

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<sup>468</sup> JCL, s 135-142.

<sup>469</sup> JCL, s 143-150.

<sup>470</sup> JCL, s 151-156.

<sup>471</sup> The consent is considered to not exist in the case of a minor who is not of the age of discretion, insane persons and imbeciles. See JCL, s 117 and 127 (1).

<sup>472</sup> El Sanhuri, *Medium commentary on the new Civil Code: Part 1* (n 182) 237 (in Arabic)

<sup>473</sup> JCL, s 141 “A person who exercises either kind of duress to conclude a contract may not enforce his contract, but the contract will be valid if the victim or his heirs so permit after the threat has ceased, either expressly or by their acts”.

<sup>474</sup> JCL, s 145 “If one of the contracting parties makes a misrepresentation to the other and it transpires that the contract was concluded by a gross cheat, the other contractor has the right to rescind the contract”.

<sup>475</sup> JCL, s 152 “If a mistake occurs in the substance of the contract, in one of the terms of creating the contract or in the subject matter of the contract, then the contract shall be void”.

<sup>476</sup> See Ahmad Owaidi and Qais Mahafza, 'Different Legal Implications of Consent Defects under Jordanian Civil Law: An Attempt to Unification' [2011] EJSS 218, 226.

<sup>477</sup> Undue influence can occur in a case if there is sufficient trust and confidence between parties and the transaction that has taken place between them must not be

The next sub-sections discuss the related defects of consent (i.e. mistake and deception) and the information disclosure regime in Jordan as well as their ability to enable consumers to make informed decisions.

#### 4.2.2.1.3.1.1 Mistake

The JCL does not provide a definition for 'mistake'. However, commentators describe it as an erroneous belief or false assessment of reality<sup>478</sup>. There are three types of mistake under the JCL. The first type is the error-obstacle which is related to the formation or nature of the contract (e.g. someone intends to rent a DVD; the other person intends to sell it). The consequence of such a mistake renders the contract void *ab initio* and nullifies any consent given<sup>479</sup>.

The second type of mistake is fundamental as it relates to the substance or subject matter of the contract, such as an essential characteristic of a product (e.g. someone thinks they are buying a diesel car, but discover that it is, in fact, petrol). This type of mistake renders the contract voidable<sup>480</sup>. It is worth mentioning here that the JCL does not distinguish between fundamental mistakes made in relation to essential characteristics and fundamental mistakes made regarding desired characteristics. The Explanatory Memorandum of the JCL states that all desired characteristics might be considered as essential

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explicable in terms of the ordinary motives on which ordinary people act, but one of the parties has exploited his bargaining power to gain unfair advantage in relation to a consumer so as to apply pressure without using threatening or physical force.

<sup>478</sup> See for example El Sanhuri A, *Medium commentary on the new Civil Code: Part 1* (n 182) 237 (in Arabic). Also Owaidi and Mahafza (n 476) 224. See also I Abdulawy, *The General Theory of Obligations: The Theory of Contract* (1st, Dar Alma'aref Aljame'yah, Casablanca 1996) 329 (in Arabic).

<sup>479</sup> JCL, s 152.

<sup>480</sup> JCL, s 153.

characteristics of the subject matter of the contract<sup>481</sup>. However, with regard to both desired and essential characteristics, in order to have the right to rescind the contract, the mistake must either relate to the motive of the contract or affect the value of the subject matter of the contract.

The third type of mistake is a non-fundamental mistake that is related to non-essential characteristics, either regarding the terms of the contract or regarding the identity of the other party to the contract. This type of mistake is not considered to be a defect of consent and does not affect the validity of the contract unless the identity of the other party was of crucial importance<sup>482</sup>.

Undoubtedly, there is a relationship between the mistake regime and the information requirements regime in terms of protecting the consent of consumers. However, in relation to ECCC, where contracts are presented on a *take-it-or-leave-it* basis and information is the cornerstone of the consumer decision making process, the mistake regime renders it difficult for consumers to claim that certain desired features or characteristics were the motive behind the contract. In particular, the reliance on the defects of consent regime in terms of information disclosure is not relevant to ensuring that consumers are able to make fully informed decisions or even to provide pre-emptive protection. In other words, it does not seek to redress the imbalance of knowledge between the parties; rather, it seeks to redress the issue of consumer consent in case of a breach of contract or the law after the conclusion of the contract. Therefore, the

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<sup>481</sup> Explanatory Memorandum of the JCL (n 195) 147.

<sup>482</sup> Ali Al Obidi, *The Explanation of Sales and Lease Contracts* (1st, Almarkez Alqawmy Lelnasher, Irbid 2000) 153 (in Arabic).

modern disclosure regime is more consistent in terms of protecting the consent of consumers where the mistake is concerned with the seller/trader/supplier not providing the information required by law. In addition, consumers in the latter case do not need to prove whether the mistake that occurred in an essential characteristic.

#### 4.2.2.1.3.1.2 Deception

Firstly, the JCL describes 'deception' as having occurred where one of the contracting parties tricks the other by verbal or actual fraudulent conduct, thereby causing him to take a transactional decision that he would not have otherwise taken<sup>483</sup>. In addition, the JCL considers the intentional silence concerning a fact or set of circumstances to be regarded as deception if it can be proved that the misled person would not have otherwise concluded the contract<sup>484</sup>. In other words, deception can be a positive act (e.g. by adding false information to induce a consumer to buy a product); or negative behaviour (e.g. by intentionally omitting information that may affect a consumer's consent). Deception is therefore also considered to be a defect of consent<sup>485</sup>. It has been argued that the rules governing mistake could substitute the rules regarding deception; this is because deception leads to mistaken consent<sup>486</sup>. It would seem that the difference between mistake and deception is whether or not the act is intentionally committed<sup>487</sup>.

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<sup>483</sup> JCL, s 143.

<sup>484</sup> JCL, s 144. See also Owaidi and Mahafza (n 476) 222.

<sup>485</sup> For more discussion see El Sanhuri, *Medium commentary on the new Civil Code: Part 1* (n 182) 261-272 (in Arabic).

<sup>486</sup> *Ibid.*

<sup>487</sup> *Ibid.*

It can be noted from the recognition of negative deception that the legislature has acknowledged the importance of disclosing all relevant and essential information related to the contract. This is closer to the modern disclosure regime that requires a seller to reveal all information. However it shares the same shortcomings as the provisions regarding 'mistake' by not providing pre-emptive protection to redress the imbalance in ECCC; rather, it seeks to redress the contractual relationship after the fraud has occurred, and imposes the burden of proof of proving fraud and loss on the consumer.

#### 4.2.2.1.3.1.3 *Liability for Latent Defects*

The main objective of a buyer when purchasing a product is to acquire an intended benefit. In order to achieve this goal, a seller must provide a suitable product that is free from any defects<sup>488</sup>. As a general rule, a sale shall be deemed to have been concluded on the basis that the item being sold is free from any defects, except latent defects, within the customary tolerance<sup>489</sup>. The seller is otherwise required, by way of an implied duty, to disclose any latent defects that exist in the item being sold, except if the buyer was aware of those defects<sup>490</sup>. Latent defects render the contract voidable under the JCL, if the buyer is faced by a latent defect, s/he has a choice to elect to treat the contract as continuing 'affirmation' or to bring the contract to an end<sup>491</sup>. It is worth mentioning that if a buyer discovers the defect after having used a product<sup>492</sup>, they have no right to rescind the contract. However, if this were to happen, the

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<sup>488</sup> See Al Obidi (n 482) 149.

<sup>489</sup> JCL, s 512 (1).

<sup>490</sup> JCL, s 514 (2).

<sup>491</sup> JCL, s 513 (1).

<sup>492</sup> JCL, s 515.

PCPL has provided that a consumer has the right to claim compensation for any damage<sup>493</sup>.

Under the JCL, in order for a seller to be liable for latent defects, five main conditions must be met: 1) the latent defect must exist prior to the conclusion of the contract, or, if it arises thereafter, whilst the goods are still in the possession of the seller and prior to delivery; the PCPL does not require that such a condition be satisfied; 2) the defect must be hidden and not visible, i.e. it is something that cannot be seen or noted by a non-professional person; 3) the defect must result in the product being less valuable than it was supposed to be; 4) the defect must be unknown by the buyer; and 5) the seller must not have exempted himself from liability; the JCL gives the seller the right to exempt himself from liability from latent defects if s/he wishes to<sup>494</sup>.

It can be noted from the abovementioned conditions that the scope of protection regarding latent defects is narrower than the scope of the information requirement duty. This is because the application of the latent defects provision under the JCL is limited to a pre-existing defect that affects the value of the subject matter of the contract and renders the item sold unsuitable for the use for which it was intended. The information requirement duty goes beyond these applications by covering several other issues such as the risks of using the product because of its nature or the instructions for use due to, for example, their complexity.

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<sup>493</sup> PCPL, s (6) a 2.

<sup>494</sup> JCL, s 514 (4).

4.2.2.1.3.2 *Lack of Requirements*

Firstly, a lack of information or inadequate information may render consumer decision making erroneous. The PCPL is considered to be an advanced step in terms of providing protection for consumers under the Jordanian legal system. However, the provisions governing information requirements, in both the first and second drafts, focused on the risks and safety of the product or the manner in which the product should be used. This can be justified on the grounds that one of the major expectations for consumers is to be protected from an unsafe product. The rationale for this intervention is to avoid any cost that arises when a consumer suffers harm. However, it is obvious from the above discussion that the information obligations go much further than the issues of risk and safety, and such information is important for consumer decision making. Thus, the legislature failed when excluding such information from the final draft of the PCPL. It can be argued, however, that the legislature has substituted this particular information (i.e. risk and safety) by requiring businesses to provide all relevant information regarding goods and services.

Secondly, in e-commerce, the consumer is particularly concerned about the price of the product which can be considered a focal point in consumer thinking when deciding on a particular transaction<sup>495</sup>. Generally speaking, from the point of view of the information disclosure regime and for transparency in consumer protection, price is considered to be the most important information regarding a product<sup>496</sup>. As it is detrimental to consumer decision making for such

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<sup>495</sup> See Willem Boom, 'Price Transparency in Consumer Decision Making and European Consumer Law' [2011] JCP 359, 376.

<sup>496</sup> Howells and Thomas, *EC Consumer Law* (n 62) 146.

information not to be provided, legislature intervention is required to ensure that such information is clearly and unambiguously given. In order to ensure that consumers are not misled, the information must state whether the price is inclusive of tax and delivery costs, whether there are any other charges and the period for which any offer is valid. The Jordanian Industry and Trade Law requires businesses to provide clear information regarding price which can then provide consumer protection from the point of view of disclosure. However, in order to provide better protection for consumers, all relevant information regarding price must be directly required from businesses.

Thirdly, as the parties are not physically present in ECCC this gives rise to its own rationale for information regarding the trader<sup>497</sup> (i.e. identity, address, contact details and qualifications). This can be helpful in terms of making informed decisions, enquiries, complaints and resolving problems. In Jordan, there is no direct requirement to disclose such information to conclude a valid contract. However, according to Jordanian Commercial Law<sup>498</sup>, businesses should conduct their transactions and sign their documents by a specific name, known as a 'merchant address' that contains both their name and surname. The question that arises here is whether or not businesses in Jordan should disclose their identity to consumers in the same way. The Jordanian Commercial Law tackles the 'merchant address' in the section of the store but not in merchant section as an information duty. The main purpose of the 'merchant address' is to prove that the seller is registered with the Chamber of Commerce and that a record exists that permits the seller to practice their trade officially and legally.

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<sup>497</sup> See Scholes, 'Information Requirements' (n 277) 213.

<sup>498</sup> Jordanian Commercial Law 12/1966, s 40 and 41 (1).

The purpose is not to build awareness for consumers with regard to the seller's identity. In addition, individuals who run small businesses are not obliged to register themselves with the Chamber of Commerce and do not therefore need to disclose their identity to the public<sup>499</sup>. Consumers involved in off-line commerce are not looking for a business' identity or contact details as they are able to determine that easily in the event of a dispute occurring. However, such information is important in ECCC in order to ensure that a consumer feels that the transaction is safe and trustworthy. Further, the Jordanian legislature does not introduce any provisions in the JETL, or any other laws, to prescribe general information requirements on information society provider. This lack and uncertainty of rules reflects the actual practice in the Jordanian market place where there is a lack of information regarding the identity of businesses. The overwhelming majority of 90% of the participants in the questionnaire survey believe that it is not easy to obtain the contact details, including the name and address of the trader, in order to make enquiries and solve problems. This may obviously hinder the development of e-commerce, as has been discussed *supra*<sup>500</sup>, whereas providing such information facilitates consumers in being able to make complaints, which in turn, increases their confidence.

Fourthly, there is no general rule under Jordanian legislation that requires businesses to disclose consumer rights. This can be justified on the basis that the traditional theory of contract, based on the freedom of contract principle, gives the right for both contractors to impose obligations on each other and thus they are, *de facto*, aware of their rights. However, the situation in ECCC is

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<sup>499</sup> Jordanian Commercial Law, s 10.

<sup>500</sup> See *supra* section 3.6.6.

quite different as such contracts are non-negotiable. For example, in relation to the 'option of conditionality',<sup>501</sup> which allows contracting parties to cancel the contract within a specified period of time by mutual consent, consumers are not able to impose such terms due to ECCC being presented on a *take-it-or-leave-it* basis. However, on the assumption that a consumer succeeds in imposing such a right, s/he will be already aware of it. Interestingly, no one of the participant in the questionnaire survey believe that traders provide sufficient information about consumer rights and sellers obligations, and only 11% of the participants have a neutral responds. This problem may increase once the PCPL comes into force in its recent draft, because of the uncertainty and lack of clarity in relation to article 3 (a) which requires sellers to provide information about their rights and consumers obligation, but not the opposite.

Fifthly, e-transactions are more often subject to error and mistake than transactions in an off-line environment. Therefore, modern legislation, such as in the EU, requires information regarding the technical means for identifying and correcting input errors prior to the placing of an order. The purpose of such information is not to redress the situation after the conclusion of the contract, but to avoid any disputes arising in the first place. Therefore, the rules of mistake cannot be substituted regarding such information requirements as these rules seek to redress the defect in the consent after the conclusion of the contract. In this regard, as such concept of providing consumer with information about the technical step to conclude the contract has been never existed or even known under the Jordanian legal system, no one of the

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<sup>501</sup> See *supra* section 3.6.5.

participants has agreed that sellers provide clear information about the technical steps to conclude the contract and the correction of any errors as shown in Table (6).

**Table 6: Sellers provide clear information about the technical steps to conclude the contract and the correction of any errors**

	<b>Frequency</b>	<b>Per cent</b>	<b>Valid Per cent</b>	<b>Cumulative Per cent</b>
<b>Strongly Disagree</b>	<i>151</i>	<i>39.3</i>	<i>39.3</i>	<i>39.3</i>
<b>Disagree</b>	<i>184</i>	<i>47.9</i>	<i>47.9</i>	<i>87.2</i>
<b>Neutral</b>	<i>49</i>	<i>12.8</i>	<i>12.8</i>	<i>100.0</i>
<b>Agree</b>	<i>0</i>	<i>0</i>	<i>0</i>	<i>100.0</i>
<b>Strongly Agree</b>	<i>0</i>	<i>0</i>	<i>0</i>	<i>100.0</i>
<b>Total</b>	<i>384</i>	<i>100.0</i>	<i>100.0</i>	

Lastly, in ECCC, delivery and payment are essential to the transaction. Therefore, businesses must be clear about the estimated time for delivering the product or service, via which carrier and other information related to delivery restrictions if businesses do not deliver their product to certain locations. Further, businesses need to mention the timescale that they need in order to dispatch the item. Moreover, the consumer must be given information about the acceptable methods of payment (e.g. PayPal, Credit card, Debit card), and those that are not permitted (e.g. sending cash or cheques through the post).

It has been argued that such information must be provided at the beginning of the ordering process as it is regarded as pre-contractual information; this is not only to ensure that consumers have made informed decisions, but also to

protect consumers from wasting time and money in selecting goods to purchase and then discovering that the transaction cannot be completed<sup>502</sup>.

#### 4.2.2.1.3.3 *Lack of Clarity*

As a starting point, the main piece of legislation that governs consumer issues in ECCC is the JCL. This requires that a seller, as a general rule, has to make a product being sold sufficiently known to a consumer to avoid gross uncertainty. A seller can comply with this requirement either by providing the distinguishing characteristics of the product being sold or by showing it to the consumer<sup>503</sup>. This means that if the subject matter of the contract is not presented at the time of the conclusion of the contract, the seller is either required to provide information about the distinguishing characteristics of the product being sold or show it to the consumer. In relation to this general rule, several questions have arisen as to: whether an image of the product is sufficient to adequately inform a consumer; whether the seller is required to provide the distinguishing characteristics of a product in ECCC when the item being sold is not actually presented at the time of the conclusion of the contract; what information falls under the definition of distinguishing characteristics; and finally, whether the required distinguishing characteristics are sufficient to ensure that the consumer has the ability to make an informed decision.

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<sup>502</sup> Elizabeth Hall, Geraint Howells and Jonathon Watson, 'The Consumer Rights Directive — An Assessment of its Contribution to the Development of European Consumer Contract Law' [2012] ERCL 139, 166.

<sup>503</sup> JCL, s 466 (1) and (2). This Article has been derived from the *Majalla* (Article 200, 201 and 202). It is worth mentioning that Al Obidi noted that including such an Article from the *Majalla* created legal uncertainty and contradiction in relation to Article 247 of the JCL which does not require a seller to provide any information if the subject matter of the contract was known to the buyer.

With regard to showing the image of the product to the consumer, and as the JCL can be interpreted according to the *Shari'a*, it has been argued in the *Al Hanafyah* School of thought that viewing a product through glass is insufficient to adequately inform a buyer as it could still lead to a mistaken decision being made<sup>504</sup>.

Therefore, if the subject matter of the contract is not presented at the time of the conclusion of the contract, the first rule must be applied, i.e. informing the buyer about the distinguishing characteristics of the product or service in question. The JCL does not introduce rules to clarify what those distinguishing characteristics are. The Explanatory Memorandum of the JCL explains that the item being sold must be known to the buyer in a way that does not lead to disputes<sup>505</sup>. However, there is still uncertainty in relation to the information that can be considered to constitute distinguishing characteristics that must be provided to a consumer; this is especially so as the legislature requires that "distinguishing" rather than "essential" characteristics be provided which means the characteristics that distinguish an item from another<sup>506</sup>. This uncertainty and lack of clarity, in fact, reflects the practice in the Jordanian marketplace. This can be noted from the perception of the selected random sample in the empirical study conducted in chapter 6 where the majority of 89% of the participant believe that sellers do not provide sufficient information

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<sup>504</sup> See Aljaza'ery (n 336) 482. It is worth mentioning that the *Al Shafiyah* school of thought invalidates the contract if the thing sold was not presented at the time of the conclusion of the contract.

<sup>505</sup> The Explanatory Memorandum of the JCL (n 195) 156.

<sup>506</sup> See Al Obidi (n 482) 51.

about the products over the Internet. This situation, as discussed *supra*<sup>507</sup>, reduces consumer confidence on the Internet and has a negative impact on the growth and the development of e-commerce.

On the other hand, the PCPL, as mentioned *supra*, has made a significant step toward information obligations. This can be noted from Article 3 (a) 2-3 and 8<sup>508</sup> which gives the right to a consumer to obtain complete information about purchased goods or services; the right to obtain complete information regarding a seller's rights and consumer's duties prior to the conclusion of the contract; and the right to obtain full information regarding the identity of the seller. Notwithstanding these rules, there are legal uncertainties in relation to three issues. Firstly, the provisions of information under the PCPL do not seem to impose a burden on the trader to provide the abovementioned information; rather, it gives the right for a consumer to 'obtain' information which therefore puts the onus on the consumer to make a request. This means that the contractual and pre-contractual information requirements under the PCPL seem to be merely an 'incentive' to provide information rather than being drafted in a way that conveys them to be of a mandatory nature. Secondly, as the main objective of the PCPL is to create a consumer protection system that contains legal certainty and information transparency<sup>509</sup> in order to provide a high level of consumer protection, including information obligations, the legislature should impose an information duty to disclose consumer's rights and seller's duties instead of the other way around, or at the very least, disclose

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<sup>507</sup> See section 4.2. and 4.2.2.2.

<sup>508</sup> See table (5).

<sup>509</sup> Abu Karky (n 467) 489, 491.

information about the rights and duties of both contracting parties. Thirdly, a similar problem to the JCL, regarding a lack of clarity, also arises in relation to the PCPL due to it not defining or clarifying the definition of complete information and what requirements fall within it.

#### **4.2.2.2 Pre-contractual Information**

Firstly, as a general principle in contract law, the transaction itself does not impose a pre-contractual information duty<sup>510</sup>. However, in the EU, contract law has been developed to consider the imposition of such a duty in certain circumstances i.e. in ECCC.

Generally speaking, in relation to the nature of the pre-contractual information duty, which can also be referred to as an obligation to disclose information or an encouragement to provide information<sup>511</sup>, it requires a business to make specified information available to its consumers. The term 'duty,' as stated by Wilhelmsson and Twigg-Flesner "*suggests that there is a positive obligation to act by providing information*"<sup>512</sup>. Sefton-Green noted that there was a distinction between this type of duty and a duty to disclose information; the pre-contractual information duty focuses on transparency by making all relevant information available to a consumer to enable them to make an informed decision, whereas a duty of disclosure requires businesses to inform consumers

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<sup>510</sup> See Wilhelmsson and Twigg-Flesner (n 424) 448.

<sup>511</sup> See Christian Twigg-Flesner, 'Information Disclosure about the Quality of Goods -- Duty or Encouragement?' in Geraint Howells, Andre Janssen and Reiner Schulze (eds), *Information Rights and Obligations* (1st, Aldershot: Ashgate, 2005).

<sup>512</sup> Wilhelmsson and Twigg-Flesner (n 424) 441, 470.

about something they intend to hide<sup>513</sup>. In other words, a duty of disclosure forces businesses to reveal any information they intend to hide. In any event, both the pre-contractual duty and the disclosure information obligations are two sides of the same coin as they focus on transparency and the revealing of information; they therefore share the same objective. This thesis uses both terms for the same purpose.

Moreover, according to Wilhelmsson and Twigg-Flesner it is significantly important to distinguish between a pre-contractual information duty and the notions of fraud and mistake, the latter relating to false knowledge rather than lack of knowledge<sup>514</sup>. Generally speaking, a pre-contractual information duty is not based on the assumption that the consumer would regard this information as material in deciding whether or not to conclude the contract, although it will often assist the consumer in making up his mind<sup>515</sup>. In the event of fraud or mistake the consumer can obtain a remedy if the information was wrong; however, with regard to the pre-contractual information duty a consumer would not have entered into the contract and therefore the consequences of non-compliance are the same. Further, fraud and mistake can be related to a similar set of rules as the pre-contractual information duty. However, the main distinction is that the pre-contractual information duty encompasses a broad obligation to provide information.

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<sup>513</sup> Ruth Sefton-Green, 'General Introduction' in Ruth Sefton-Green (eds), *Mistake, Fraud and Duties to Inform* (1st, Cambridge University Press, Cambridge 2004) 2-3. Cited in Wilhelmsson and Twigg-Flesner (n 424) 448.

<sup>514</sup> *Ibid* 449.

<sup>515</sup> *Ibid*.

Commentators have argued that, generally, the pre-contractual information duty has five main purposes in all types of relationships<sup>516</sup>. Within the context of ECCC these purposes can be summarised as follows:

1. It protects the real consent of a consumer where contract law should attempt to equip the consumer with sufficient information in order that the ECCC is based on real consent.
2. It assists consumers to make choices between various options.
3. It upholds the clarity of information as it requires that the information concerning the ECCC is preserved for consumers in an adequate manner.
4. It is not actually a duty to avoid or prevent harms or losses. However, it attempts to ensure that the content of the ECCC can be achieved, particularly in relation to the disclosure of negative information, where one of its main functions can be considered as an incentive for businesses to improve their standards.
5. It supports the moral duty of honesty for stabilising B2C contractual relationships which might lead to increased consumer confidence in the Internet marketplace.

Moreover, it has been argued that one of the main advantages that can be gained from implementing pre-contractual information obligations is obtaining better remedies for breach of contract<sup>517</sup>.

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<sup>516</sup> *Ibid.*

<sup>517</sup> Hans Schulte-Nölke, 'EC Law on the Formation of Contract — from the Common Frame of Reference to the Blue Button' [2007] ERCL 332, 349.

4.2.2.2.1 EU

At European level, several Directives<sup>518</sup> play important roles in relation to contractual and pre-contractual information duties in consumer contracts conducted in both the off-line and on-line environments. In relation to ECCC, it is not only subject to the specific Directives that apply to the on-line environment (i.e. DSD and ECD), but also those Directives that deal with consumer contracts (e.g. UCPD<sup>519</sup>). In relation to the latter Directive, even if there are overlaps with the information required in other Directives (e.g. DSD and ECD), the requirements under the UCPD are still applied and cannot be excluded. This is because the UCPD complements any information requirements and fills any remaining gaps in the protection of consumers against unfair commercial practices<sup>520</sup>.

As information requirements are the central focus of consumer protection within EU legislation, it is worth mentioning that the related Directives regarding consumer protection are not Directives on contract law. Nevertheless, they may establish underlying principles in national or European contract law within the consumer arena<sup>521</sup>. For example, the UCPD stipulated in its scope that “[t]his Directive is without prejudice to contract law”<sup>522</sup>. However,

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<sup>518</sup> E.g. UCPD, DSD, ECD, Door-Step Selling Directive and Package Travel Directive.

<sup>519</sup> The Unfair Commercial Practice Directive, which was adopted on 11 May 2005, has a very broad scope of applications; it applies to all B2C transactions in all sectors, whether in on-line or off-line environments, and involves both goods and services.

<sup>520</sup> COM(2013) 139 final.

<sup>521</sup> See Wilhelmsson and Twigg-Flesner (n 424) 457.

<sup>522</sup> UCPD, art 3(2).

according to Collins, the UCPD has indirect consequences for national and European contract law<sup>523</sup>.

The UCPD constitutes the main body of EU legislation regulating unfair commercial practices and misleading advertising in relation to B2C transactions. It is worth mentioning that the technical choice to implement the UCPD was different from one Member State to another<sup>524</sup>. For example, whilst France incorporated it into existing French Consumer Code (FCC), the UK adopted a new *ad hoc* law transposing the UCPD almost verbatim (Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs)).

In relation to information requirements, the UCPD introduced lists of information that must be respected and complied with by a trader in order to enable consumers to make informed and meaningful choices<sup>525</sup>. Otherwise, any incorrect information or lack of information in any act, course of conduct, representation, or commercial communication (including advertising and marketing) renders the action as unfair commercial practice<sup>526</sup>.

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<sup>523</sup> These consequences, according to Collins, can be summarised in three issues. First, it has an impact on the development of private law where it includes a wider range of misleading statements. This is because businesses may commit unfair commercial practice that results in invalidating the contract due to the non-compliance with the rules implementing the legislation. Second, it provides strong impetus for the development of a general principle of good faith in the context of pre-contractual negotiations. Third, it endorses other concepts that have other implications on European contract law such as undue influence. Briefly, "*it complements the specific contract law directives by prohibiting 'misleading commercial practices'*" as stated by Wilhelmsson and Twigg-Flesner. For more discussion see Hugh Collins, 'The Unfair Commercial Practices Directive' [2005] E.R.C.L. 417, 441.

<sup>524</sup> COM(2013) 139 final.

<sup>525</sup> DSD, art 4.

<sup>526</sup> UCPD, art 2 (d).

A specific pre-contractual information duty for ECCC is addressed by two main Directives, namely the DSD and ECD; these Directives basically provide the backbone of the information disclosure regime in ECCC<sup>527</sup>. The DSD is one of the most significant sources of information requirements that divided disclosure into two specific categories, namely pre-contractual disclosure and written disclosure at or soon after the conclusion of the contract. Pre-contractual information must be provided to a would-be consumer before a contract is entered into. The EU legislation facilitates this duty by requiring a seller to provide such information in any manner appropriate to the means of distance communication. However, it has been argued that the list of information requirements specified under the DSD with regard to ECCC highlights the problem of information overload<sup>528</sup>. This argument has been justified on the basis that a consumer can only process seven 'chunks' of information<sup>529</sup>. On the other hand, EU legislation gives certain flexibility within the second set of information requirements under the DSD, which can be complied with by businesses prior to the conclusion of the ECCC or thereafter; this is due to the fact that this information has less influence on consumer decisions and only provides a record of what has been achieved. The main information that must be included here are the rights of cancellation (including all instructions for returning the product and at whose expense).

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<sup>527</sup> See also Hornle and Riefa (n 65) 90.

<sup>528</sup> See Howells and Weatherill (n 22) 374.

<sup>529</sup> George Miller, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information' [1956] PR 81, 97. Cited in Howells and Weatherill (n 22) 374.

In addition, as there is another distinction under the EU Directives in relation to general and specific information, the ECD requires certain specific information that must be provided to a consumer in the ECCC. The information requirements under the ECD must be provided in connection with the formation of contracts<sup>530</sup>. The specific information required, as shown in Table (7) not only provides protection for consumers, but also facilitates the transaction in ECCC. This is because consumers must be informed about the technical steps of concluding the contract and the methods of correcting input errors. Thus, such types of information can be considered as pre-emptive protection where the ECCC can be redressed before any dispute occurs.

With respect to Consumer Right Directive (CRD)<sup>531</sup>, which is based on an information approach<sup>532</sup>, provides 20 different pre-contractual information obligations relating to distance contracts; these must be provided in a clear and comprehensible manner before the consumer is bound by ECCC, and are shown in Table (7). If the information provided by the trader is incorrect, therefore, the consumer may have a claim for breach of contract. The burden of proof in respect of compliance with the information requirements of Chapter III of the

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<sup>530</sup> See Ramberg (n 304) 429, 450.

<sup>531</sup> Consumer Right Directive 2011/83/EU. It is worth mentioning that despite the numerous directives that have addressed issues in the field of consumer protection, only four principle directives have played an important role in this field; namely Sale of Consumer Goods and Guarantees; Unfair Contract Terms Directive, which aims to harmonise the laws in the EU in order to protect consumers from unfair terms in standard form contracts ; Distance Selling Directive, which aims to put consumers who purchase goods or services through distance communication in a similar position to consumers who buy goods or services in shops; and, Doorstep Selling Directive, which aims to protect consumers in respect of contracts with traders for goods and services. These four directives were replaced by a proposal for a Directive on Consumer Rights in 2008 that was subsequently adopted in 2011.

<sup>532</sup> See Scholes, 'Information Requirements' (n 277) 216.

Directive rests with the trader<sup>533</sup>. The CRD is considered to be an extremely detailed piece of legislation due to the long list of sub-paragraphs that contain a variety of rules relating, *inter alia*, to the scope of its application, the content of the information, the point at which the information is to be given, the burden of proof and formal requirements<sup>534</sup>. The approach of the CRD is based on the premise that once a consumer has various information, s/he will be able to make an informed decision that s/he will be confident about<sup>535</sup>. The main advantage regarding the information obligations under the CRD is that it does not increase the information requirements, which could otherwise cause the consumer to become overloaded with information<sup>536</sup>; rather, it consolidates and harmonises the existing information requirements under other Directives.

Consequently, the CRD resolved the issue of overlapping information requirements that were imposed by several Directives. Further, in relation to the existing information overload, the European Commission argued that “*there is no such thing as an over-informed consumer*” and it believes that consumers must have as much information as possible in order to make an informed decision<sup>537</sup>. In addition, the Member States consider that the information provisions in the ECD are a welcome development, even if consumers do not

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<sup>533</sup> CRD, s 6 (9).

<sup>534</sup> See Hall E, Howells and Watson (n 502) 139, 166.

<sup>535</sup> See Scholes, Information Requirements (n 277) 216.

<sup>536</sup> See Franziska Rischkowsky and Thomas Döring, 'Consumer Policy in Market Economy: Consideration from the Perspective of the Economics of Information as well as Behavioural Economics' [2008] JCP 285, 313. Cited in Scholes, 'Information Requirements' (n 277) 217.

<sup>537</sup> European Union Committee, EU Consumer Rights Directive: Getting it Right (Session 2008-09, Eighteenth Report) para 125 Available on <<http://www.publications.parliament.uk/>>.

read that information at the time of entering the contract and only need it in the future if something goes wrong<sup>538</sup>.

**Table 7 Information Requirements under the EU legislation**

<b>Directive</b>	<b>Pre-contractual information</b>
<b>Distance Selling Directive Article 4</b>	<p>(a) the identity of the supplier (and his address where pre-payment is required);</p> <p>(b) main characteristics of the goods/services;</p> <p>(c) price of the goods including taxes;</p> <p>(d) delivery costs;</p> <p>(e) arrangements for payment, delivery or performance;</p> <p>(f) where available, the existence of a right of withdrawal;</p> <p>(g) cost of using the means of distance communication;</p> <p>(h) period of validity of the particular offer; and</p> <p>(i) Minimum term of a contract of indefinite duration.</p>
<b>Electronic Commerce Directive 2000/31/EC Article 10</b>	<p>(a) the different technical steps to follow to conclude the Contract;</p> <p>(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;</p> <p>(c) the technical means for identifying and correcting input errors prior to the placing of the order;</p> <p>(d) The languages offered for the conclusion of the contract.</p>
<b>Consumer Rights Directive 2011/7/EC Article 6</b>	<p>(a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;</p> <p>(b) the identity of the trader, such as his trading name;</p> <p>(c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;</p> <p>(d) if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader,</p>

<sup>538</sup> *Ibid.*

	<p>and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;</p> <p>(e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided;</p> <p>(f) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;</p> <p>(g) the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;</p> <p>(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);</p> <p>(i) where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;</p> <p>(j) that, if the consumer exercises the right of withdrawal after having made a request in accordance with Article 7(3) or Article 8(8), the consumer shall be liable to pay the trader reasonable costs in accordance with Article 14(3);</p> <p>(k) where a right of withdrawal is not provided for in accordance</p>
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	<p><i>with Article 16, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal;</i></p> <p><i>(l) a reminder of the existence of a legal guarantee of conformity for goods;</i></p> <p><i>(m) where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;</i></p> <p><i>(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;</i></p> <p><i>(n) the existence of relevant codes of conduct, as defined in point (f) of Article 2 of Directive 2005/29/EC, and how copies of them can be obtained, where applicable;</i></p> <p><i>(o) the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;</i></p> <p><i>(p) where applicable, the minimum duration of the consumer's obligations under the contract;</i></p> <p><i>(q) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;</i></p> <p><i>(r) where applicable, the functionality, including applicable technical protection measures, of digital content;</i></p> <p><i>(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;</i></p> <p><i>(t) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.</i></p>
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### **4.3 Conclusion**

This Chapter has provided an account of and the rationale for information obligations as a main method of consumer protection that aims to ensure that consumers are able to make informed decisions. This Chapter argues that the current Jordanian legal system does not provide an effective information disclosure regime. The existing information disclosure regime under Jordanian legislation relies on the general principles that are derived from the rules of defects of consent. As discussed in this Chapter, these rules do not seek to ensure the ability of the consumer to make informed decisions but do provide a redress for any contracting party if his/her decision making was based on mistaken or deceptive information.

Further, in reliance on the defects of consent theory, and where a consumer is not satisfied with a product, there may be difficulties for consumers to claim that certain information must be considered as a distinguishing characteristic in order to then have the right to rescind the contract. Furthermore, the general principles of the JCL do not seek to redress the imbalance in terms of knowledge in ECCC; rather, they seek to redress consumer consent if it falls within one of the "defects of consent", whilst taking into account the conditions to consider such defects. Therefore, the JCL does not offer pre-emptive intervention in ECCC in terms of imposing specific contractual and pre-contractual information duties.

Moreover, in relation to ECCC, which raises its own rationale for a pre-contractual information duty due to the contract being concluded between two

or more absent parties where a consumer only relies on the information being provided onscreen when making their decision, the legislature has not taken into account the different ways in which an on-line consumer interacts with the Internet in order to develop an appropriate response. In other words, the legislature did not consider the particularity of the Internet in order to provide an effective disclosure regime that would enable consumers to make better and more informed transactional decisions. Particularly, other information considered important for consumers in ECCC is not offered by the general principles of the JCL (e.g. contact details for enquiries, the seller's address and technical steps to conclude the contract and correct errors).

On the other hand, the information disclosure regime under the Jordanian legal system will be improved by the PCPL, despite the lack of clarity and the absence of some information requirements in relation to ECCC. The lack of clarity in relation to the information disclosure regime under the PCPL can be summarised as follows. Firstly, the way the information requirements are drafted regarding consumer rights, i.e. by expressly using the phrase '*a consumer has the right to obtain information*' does not give the impression that it is a mandatory requirement; rather, it gives the impression that the provision is voluntary in nature unless a consumer specifically requests the information. Secondly, assuming that the information requirements are mandatory in nature, the PCPL gives no clarification or detail regarding the phrase '*complete information*'. Thirdly, as the main purpose of the PCPL is to create a consumer protection system containing legal certainty and information transparency, Article 3 (A) 3 would make more sense if the legislature required businesses to

provide information to the consumer about their rights and business obligations instead of businesses' rights and consumer obligations. Despite ECCC not being exempt from the scope of the PCPL, the information disclosure regime under the PCPL seems to be designed for off-line transactions more than ECCC; this is due to the absence of important information requirements that increase the level of consumer protection in the e-environment (e.g. the different technical steps to follow to conclude the contract, the technical means for identifying and correcting input errors prior to the placing of the order, delivery etc).

The above uncertainty and the lack of rules in relation to information requirements do not help to restrict the freedom of traders insofar as they are not required to disclose all relevant information under Jordanian legislation. This situation has left consumers in a very weak position as they are always under the remit of businesses who do not reveal or disclose all information in a prescribed format. Further, this situation does not only promote the principle of freedom of contract, which does not best serve consumer protection, but also fails to improve consumer autonomy and freedom of choice. The overall mean of all questions relating to information requirements was 1.8526 which means that the majority of Jordanian consumers within the selected random sample do not feel that they are adequately protected in relation to the provision of information. This dissatisfaction among Jordanian consumers has a negative impact, not only with regard to their ability to make informed and better transactional decisions, but also with regard to making complaints and resolving disputes. Consequently, these issues reduce consumer confidence in

the Jordanian marketplace and hinder the development of e-commerce in terms of B2C transactions.

At European level, it can be easily noted that the focus on information obligations is the main method of consumer protection. Several Directives have addressed the required information requirements; some of them are general requirements for all consumer contracts (e.g. UCPD) and others require specific information in specific consumer contracts (e.g. ECD and DSD). It is true that the European information disclosure regime has been criticised on two grounds. Firstly, there can be an overlap of information requirements and Directives where more than one Directive may apply to particular types of contracts; thus businesses then become subject to more than one set of information rules. However, this matter has been resolved by consolidating and harmonising the existing information requirements in the CRD. Secondly, the overload of information may result in confusion for a consumer. The reason behind the long list of information requirements in European consumer policy is to redress the balance in B2C transactions where businesses have knowledge regarding the goods and services and the legal and technical steps regarding the contract that are not available to the consumer. Thus, consumers can then protect themselves and make better and more informed transactional decisions.

Finally, it can be concluded that the information disclosure regime under the Jordanian legal system is not sufficiently developed to ensure that consumers have the ability to make informed decisions, and not effective in terms of rebalancing the contractual relationship between a seller and a consumer from a knowledge perspective.

As this Chapter has focused on examining the effectiveness of the information disclosure regime under the Jordanian legal system in relation to rebalancing the contractual relationship in ECCC, the next Chapter will examine the other forms of legislature intervention that aims to protect consumers from unfair contract terms under the Jordanian legal system.

## **CHAPTER FIVE**

### ***CONSUMER PROTECTION FROM UNFAIR TERMS***

#### **5.1 Introduction**

The purpose of this Chapter is to examine whether Jordanian legislation provides effective protection for consumers against unfair contract terms. In order to achieve that purpose, the Chapter will discuss the type of protection that consumers currently enjoy under the Jordanian legal system. In order to do this it is necessary to investigate the legal nature of ECCC in Jordan. This analysis will primarily focus on the current Jordanian legislation that deals with consumer protection and unfair terms and conditions. This Chapter will also provide analysis in relation to the PCPL of 2013 as this legislation introduces, for the first time in the Jordanian legal system's history, a blacklist of unfair contract terms to protect consumers.

Accordingly, the question that arises in this Chapter is whether the current Jordanian legislation provides effective protection against unfair terms and conditions or whether the general principles are sufficient to accomplish such a task. In order to answer this question, we begin by investigating the legal nature of ECCC in general and under the Jordanian legal system in particular. Once the legal nature is determined, the type of protection will then be discussed accordingly. Finally, the Chapter will look at the legal frameworks

that deal with the issue of unfair terms in consumer contracts in both the UK and France.

Before discussing the legal nature of ECCC, it is worth highlighting the rationale for consumer protection. Howells and Weatherill argued that there is no need to control unfair terms in a perfect market as there can be no contract term that is unfair; this can be achieved if both parties have freely negotiated the contractual terms that represent their wishes<sup>539</sup>. However, the rationale for intervention is related to the imperfection of the market which can occur because of several factors, among them the inequality of bargaining power in consumer contracts. This inequality is due to the form of consumer contracts that are presented on a *take-it-or-leave-it* basis; as a result consumers may not have realistic bargaining opportunities. In addition, even if the will of a consumer is limited to either accepting or rejecting the contract, s/he may not be aware of some of the T&Cs or, as commentators have argued<sup>540</sup>, s/he may not read them due to them being comprehensive and difficult to understand<sup>541</sup>.

Furthermore, according to the empirical study results, approximately 55% of respondents disagree that it was easy to find and access terms and conditions on a shopping website, as shown in table (8). On the other hand, only 17% of respondents agree that T&Cs are easy to access. This gives an indication that there is a necessity to impose an obligation upon businesses to ensure that T&Cs are easy to access.

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<sup>539</sup> See Howells and Weatherill (n 22) 261.

<sup>540</sup> Among others: Kessler and Rakoff.

<sup>541</sup> See Kasassbeh (n 21) 38.

**Table 8: It is easy to find and access terms and conditions on a shopping website**

	<b>Frequency</b>	<b>Per cent</b>	<b>Valid Per cent</b>	<b>Cumulative Per cent</b>
<b>Strongly Disagree</b>	47	12.2	12.2	12.2
<b>Disagree</b>	165	43.0	43.0	55.2
<b>Neutral</b>	105	27.3	27.3	82.6
<b>Agree</b>	55	14.3	14.3	96.9
<b>Strongly Agree</b>	12	3.1	3.1	100.0
<b>Total</b>	384	100.0	100.0	

On the other hand, the overwhelming majority of respondents, 88%, disagree that T&Cs are generally easy to understand, as shown in Table (9).

**Table 9: Terms and conditions are generally easy to understand**

	<b>Frequency</b>	<b>Per cent</b>	<b>Valid Per cent</b>	<b>Cumulative Per cent</b>
<b>Strongly Disagree</b>	196	51.0	51.0	51.0
<b>Disagree</b>	142	37.0	37.0	88.0
<b>Neutral</b>	34	8.9	8.9	96.9
<b>Agree</b>	9	2.3	2.3	99.2
<b>Strongly Agree</b>	3	.8	.8	100.0
<b>Total</b>	384	100.0	100.0	

Further, in addition to the above issues, the inability for consumers to negotiate T&Cs raises the necessity for legislature intervention in order to consider the weak position of consumers in their contracts. It is therefore important to firstly look at the nature of ECCC which falls under the umbrella of consumer contracts in general.

## 5.2 The Legal Nature of E-commerce Consumer Contracts

Firstly, as there is no comprehensive legal framework in Jordan to protect consumers from unfair T&Cs in either the off-line or on-line environments, it is necessary to specify the legal nature of ECCC in order to determine the type of protection that must be provided for the consumer. However, before discussing the classification of ECCC under the Jordanian legal system, it is important to analyse and discuss the common features of ECCC in contract law in general.

Generally speaking, e-commerce offers two ways of concluding contracts over the Internet, namely; by exchange of e-mail or by what is known as web-click (or interactive application) whereby a consumer visits a website and selects an item or orders a service that he wishes to have<sup>542</sup>. The vast majority of ECCCs, particularly web-click agreements, are presented on a *take-it-or-leave-it* basis<sup>543</sup> which means that a consumer has no opportunity to bargain but only has the choice of either accepting the contract and complying with its terms or rejecting the entire contract. In other words, contract terms relating to such issues as exemption, limitation of liability, quality, payment methods, price and rights and obligations are not negotiable. As a result, ECCC can be described as a

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<sup>542</sup> See Aymen Masadeh and Mohammad Bashayreh, 'Contemporary Legal Issues of Contract Formation by Online Order' [2006] *Journal of Sharia and Law* 19, 21. For more details see also Gbenga Bamodu, 'Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary' [2004] *JILT* section 5. Available on <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004\\_2/bamodu/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_2/bamodu/)> Accessed on Jun 2012.

<sup>543</sup> As Slawson noted, contracts that are presented on a take-it-or-leave-it-basis account for more than 99% of all contracts now made. David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' [1971] *Harv. L. Rev* 529, 566. See also Batya Goodman, 'Shrink Wrapped the Consumer: the Shrink Wrap Agreement as an Adhesion Contract' [1999] *Cardozo L. Rev.* 319, 360.

standardised form of contract offering consumers goods or services without affording them a realistic opportunity to bargain.

The general classification of such an agreement is similar in most jurisdictions as it is a consumer contract that falls under the notion of an adhesion contract<sup>544</sup> or, what is sometimes referred to as a standard form contract. The name of such agreements varies from one legal system to another. For example, whilst Jordanian<sup>545</sup> and French<sup>546</sup> legal systems recognise it as an adhesion contract, English law recognises it as a standard form contract<sup>547</sup>. In any event, both an adhesion contract in its modern form<sup>548</sup>, which is pre-formulated and non-negotiated, and a standard form contract, are two sides of the same coin<sup>549</sup>. This is because they have arisen as a result of the same factors and in response to an economic situation at the beginning of the nineteenth century<sup>550</sup> which raised the techniques of production and providing services to large segments of the population<sup>551</sup>.

According to the French jurist Saleilles<sup>552</sup>, adhesion contracts are pre-formulated stipulations in which the will of one party is predominant and the terms and conditions of the contract are dictated to an undetermined number of

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<sup>544</sup> See Kessler (n 198) 629, 642.

<sup>545</sup> JCL, s 104.

<sup>546</sup> The founder of adhesion contract.

<sup>547</sup> See for example UCTA 1977 s 17 (2).

<sup>548</sup> See *infra* section 5.2.1.1 for discussion about the development of adhesion contracts.

<sup>549</sup> See Hugh Collins, *The Law Of Contract* (n 58) 119. See also Kessler (n 198) 623.

<sup>550</sup> See Goodman (n 543) 321-322. Also Kasassbeh (n 21) 39.

<sup>551</sup> Vera Bolgar, 'The Contract of Adhesion: A Comparison of Theory and Practice' [1972] AJCL 53, 78.

<sup>552</sup> Raymond Saleilles a French jurist who identified *Contrat d'adhésion* in 1901. See Andrew Burgess, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' [1986] AALR 255, 280.

acceptants rather than one individual party<sup>553</sup>. Adhesion contracts have several advantages as they can serve both contracting parties' interests. This type of contract is practical for businesses as it best serves their methods of mass production and mass marketing by avoiding the negotiating of contractual terms with every consumer that would otherwise be costly and require time and skill<sup>554</sup>. On the other hand, adhesion contracts can benefit the whole of society by offering consumers lower prices as a result of the reduction of administrative time and costs<sup>555</sup>. Furthermore, it is practical for the courts, as the interpretation of one adhesion contract assists the court in interpreting other, similar forms, which will result in an accumulation of judicial experience<sup>556</sup>.

Adhesion or standard form contracts do, however, have disadvantages as there is great potential for abuse due to the absence of the freedom to negotiate. For example, one of the significant drawbacks of such a contract is that the strongest bargaining power may draft the terms of the contract with the intention of having the utmost protection; this may subsequently result in an unfair transaction.

Generally speaking, an adhesion or standard form contract has three distinct features, namely; T&Cs are pre-drafted by the party who has the stronger bargaining position in the contract; T&Cs cannot be altered or re-negotiated as

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<sup>553</sup> Raymond Saleilles, *De La Déclaration De Volonté; Contribution A L'Etude De L'Acte Juridique Dans Le Code Civil Allemand* (1st, Librarian Cotillon, Paris 1901) Art. 133 at 229 (in French). See also Andrew Burgess (n 552) 256 and Bolgar (n 551) 54.

<sup>554</sup> See Goodman (n 543) 325.

<sup>555</sup> See Slawson (n 543) 52.

<sup>556</sup> See also Goodman (n 543) 325.

a consumer has no opportunity to bargain, and; they are executed with weaker parties who have unequal bargaining power. It should be noted that ECCC shares the same distinct features as an adhesion or standard form contract as they too are pre-formulated/non-negotiated contracts that are concluded between consumers, who represent the weaker parties to the contract, and sellers who have the stronger bargaining power.

Because of the dominance of the freedom of contract principle at the beginning of the nineteenth century, which allowed contractors to arrange their obligations without legislature or judicial intervention, except in the event that they contradicted the law, Saleilles has suggested that 'the sovereignty of the will', which means that the contract is the law of the contracting parties, should not be applied to adhesion contracts<sup>557</sup>. This is because the will of the weaker party is not absolutely free and they are only able to decide whether or not to enter into a contract, rather than being able to negotiate any of the terms that are, instead, dictated by businesses.

To this end, the notion of adhesion contracts and the judicial and legislative treatment of such contracts have been developed in order to meet certain criterion that considers specific protection for the weaker parties to the contract. The next sub-sections deal with these developments and the trend of classifying consumer contracts in general, and ECCCs in particular, under the Jordanian legal system.

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<sup>557</sup> See Georges Berlioz, *Le Contrat D'Adhésion* (2nd, L.G.D.J., Paris 1973) 5 (in French).

### 5.2.1 ECCC and the Concept of Adhesion Contracts

As mentioned above, the vast majority of ECCCs take place between parties with a disparity of bargaining power and are presented on a *take-it-or-leave-it* basis without affording the consumer a realistic opportunity to bargain; this therefore shares similar characteristics with an adhesion contract. As a result of this similarity it is necessary to investigate whether adhesion contracts require other conditions that may not be available in ECCCs. The next sub-section will discuss the traditional elements of adhesion contracts generally and under the Jordanian legal system in particular. Moreover, it will review the different approach to classifying ECCC which will help to determine the type of protection that consumers must be provided with in relation to unfair T&Cs.

#### 5.2.1.1 *The Concept of an Adhesion Contract*

In addition to the general conditions of adhesion contracts whereby the terms of the contract are pre-formulated by the stronger bargaining power and there is an absence of negotiations, adhesion contracts were connected to the idea of monopolising the goods and services that form the subject matter of the contract. Kessler stated that;

*“Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus,*

*standardized contracts are frequently contracts of adhesion; they are a prendre ou a laisser [take-it-or-leave-it]"*<sup>558</sup>

Accordingly, Rakoff commented that the legal response to a contract of an adhesive nature is not only dependent upon its social importance, but also upon the degree of monopoly enjoyed by the party who has the stronger bargaining power<sup>559</sup>. However, Rakoff's model of an adhesion contract, which requires that seven characteristics be present before protection becomes available to the weaker party, did not include the monopolistic character as a condition to be considered regarding the adhesive nature of a contract. Nevertheless, he did suggest that the two conditions (standardisation and the take-it-or-leave-it basis) were insufficient to determine whether or not a contract is adhesive. The seven characteristics to define adhesion contracts are as follows:

- "(1) The document whose legal validity is at issue is a printed form that contains many terms and clearly purports to be a contract;*
- (2) The form has been drafted by, or on behalf of, one party to the transaction;*
- (3) The drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine;*
- (4) The form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price terms), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent;*
- (5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent;*
- (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party;*

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<sup>558</sup> See Kessler (n 198) 632.

<sup>559</sup> See Todd D. Rakoff, 'Contract of Adhesion: an Essay in Reconstruction' [1983] Harv. L. Rev 1173, 1218.

*(7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.”<sup>560</sup>*

However, within the context of the common law system, Rakoff admitted that “*the most famous academic and judicial treatments of the subject assumed a close connection between the use of contracts of adhesion and the exercise of monopoly power*”<sup>561</sup>. On the other hand, within the civil law system, commentators have also argued about the importance of the monopolistic character regarding essential goods or services provided to consumers when considering the adhesive nature of a contract<sup>562</sup>. However, other commentators have argued that contracts of adhesion should not be connected to the concept of monopolisation; rather, it is connected to the existence of large organisations that are a central element of social and economic life and which represent the stronger bargaining power<sup>563</sup>.

In any event, the notion of an adhesion contract has been developed by acknowledging that the contract is adhesive merely because of the condition of standardisation whilst declining other conditions, such as monopolisation and the essential nature of the subject matter on a consumer’s life<sup>564</sup>. This approach has been adopted in France, which is where the adhesion theory originated, by providing consumer protection based on the distinction between negotiable

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<sup>560</sup> *Ibid* 1177.

<sup>561</sup> *Ibid* 1178.

<sup>562</sup> Among them: Georges Berlioz; Victor Pichon; Georges Fortier. For more details see Mohammed Imran, *Consumer Protection During the Conclusion of the Contract* (1st, Monsha'at Al-Ma'arif, Alexandria 1986) 28 (in Arabic).

<sup>563</sup> Mathew O. Tobriner and Joseph R. Grodin, 'Individuals and the Public Service Enterprise in the New Industrial State' [1967] Cal. L. Rev. 1247, 1251. See also Rakoff (n 559) 1173, 1220.

<sup>564</sup> Rabahi Ahmad , 'The Legal Nature of Electronic Contract' [2013] ASHS 96, 105 (in Arabic).

and non-negotiable contracts '*contrats négociés et contrats non-négociés*'<sup>565</sup>. Therefore, with the development of consumer contracts the modern theory of adhesion contract asserts that the key to preventing a particular contract from being adhesive is the absence of a disparity in bargaining power<sup>566</sup>. Consequently, adhesion contracts can be summarised as agreements that must be standardised and pre-formulated by a party who enjoys a superior bargaining power and where consumers do not have the opportunity to bargain<sup>567</sup>.

As adhesion contracts is simply offered on a *take-it or leave-it* basis, Saleilles suggested that such contracts necessitated a different interpretive technique compared to that used to interpret ordinary contracts<sup>568</sup>. The system of contracting has therefore been changed, as a result of the extensive use of adhesion contracts, by making the contractual relationship subject to a test of oppression or test of fairness<sup>569</sup>. These types of judicial tests aim at ensuring that the economic power has not been exploited by businesses who may impose undesirable or unexpected contractual terms upon the weaker contracting party. With the development of contract law, Kessler also suggested that such contracts need more than a different mode of interpretation; they also need a new set of legal principles<sup>570</sup>. This situation has been developed with the recognition of the modern law of contract where certain terms are always

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<sup>565</sup> See Kasassbeh (n 21) 104.

<sup>566</sup> See Goodman (n 543) 319, 324.

<sup>567</sup> *Ibid.*

<sup>568</sup> See Burgess (n 552) 256.

<sup>569</sup> See *infra* section 5.3.2.1.

<sup>570</sup> Kessler (n 198) 529, 642

deemed unfair and prohibited by law so as to redress the imbalance between contracting parties in terms of bargaining power.

On the other hand, despite the similarity of the characteristics of ECCC with adhesion contracts, a few commentators have argued that ECCC might be classified as an ordinary contract from a bargaining point of view. This trend of classifying ECCC as an ordinary contract is based on the following grounds. Firstly, the monopolistic character is not present in the majority of ECCC as consumers have the choice between many sellers and the competition on the Internet is not limited or restricted<sup>571</sup>. Accordingly, if a consumer was not satisfied with the terms of a particular seller, s/he can easily find an alternative choice with another seller. This view can be applied to contracts where contracting parties have equal bargaining power and are able to negotiate every term within the contract. However, as ECCC is usually presented on a take-it-or-leave-it basis, consumers may conclude contracts that include unfair terms which are often not fully understood or even read<sup>572</sup>. Further, the development of consumer protection within the context of the modern law of contract has excluded the monopolistic character as a condition in relation to which the law will intervene in favour of the consumer with regard to unfair T&Cs.

Although a consumer can voluntarily decide whether or not to enter into an ECCC, the non-negotiable way in which the T&Cs are dictated, restricts the will of consumers. Therefore, in general, ECCC can be classified under the notion of

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<sup>571</sup> Mansour Al Sarayrah, 'The Legal Framework of Contract Concluded Over the Electronic Means' [2009] DUJ 821, 845 (in Arabic).

<sup>572</sup> Kasassbeh (n 21) 72.

an adhesion contract because, as mentioned *supra*<sup>573</sup>, it shares many features with adhesion contracts which can be summarised as follows: (i) it is standardised and offered to the public, (ii) it is pre-formulated, (iii) non-negotiated, and (iv) concluded within a relationship of unequal bargaining power.

Further, as the reason for legislature intervention in consumer contract is to redress the imbalance between contracting parties, the connection between the notion of adhesion contracts and monopolising goods or services represents the traditional theory of adhesion contract at the beginning of the nineteenth century. However, the French doctrine, where adhesion contracts have appeared, has widened the scope of protection to include all non-negotiated consumer contracts, whether the goods or services are monopolised or not<sup>574</sup>. Nevertheless, it has been argued that even if there was no realistic monopolisation of goods or services on the Internet, it does not mean that consumers can find better terms as, generally, businesses dictate similar T&Cs<sup>575</sup>.

### **5.2.1.2 Adhesion Contracts under the JCL**

Firstly, the JCL was designed to deal with a paradigmatic agreement, arrived at through a process of free negotiation, as it makes no distinction between consumers and businesses in terms of their respective bargaining powers, except in the case of adhesion contracts which have their own particular

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<sup>573</sup> See *supra* 5.2.1.

<sup>574</sup> Mustafa Jamal, *Toward Contracting in Comparative Law* (1st, Manshurat Alhalani Alhoqoqyah, Beirut 2002) 101-102 (in Arabic). Cited in Ahmad (n 564) 96, 103.

<sup>575</sup> See Ahmad (n 564) 96, 101.

situation. However, nowadays the prevalent type of consumer contract in both off-line and on-line environments takes place between parties with a disparity of bargaining power<sup>576</sup>. It is therefore necessary, in order to protect consumers, to examine whether ECCC is considered as an adhesion contract under the Jordanian legal system; this is because, in Jordan, there is no comprehensive legal framework that deals with unfair T&Cs in consumer contracts.

The notion of an adhesion contract is dealt with under Article 204 of the JCL; this is the only general principle that deals with unfair T&Cs. The JCL does not provide a definition of an adhesion contract; however, Article 104 describes the form of acceptance of such a contract as being no more than a submission to a pre-formulated and non-negotiated offer<sup>577</sup>. It is clear from the description of the acceptance regarding adhesion contracts that the Jordanian legislature considers that there are two elements to recognise before acknowledging the adhesive nature of a contract, namely; that the terms of the contract are pre-formulated and that they are non-negotiated. However, at the practical and juristic levels, commentators<sup>578</sup> consider other elements before the relevant protection is made available to the weaker party to such a contract<sup>579</sup>. These are that the subject matter of the contract, whether for goods or services, should be under a monopolistic power, whether legally or in practice, by single or multiple businesses who have a stronger bargaining power, and that the role of

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<sup>576</sup> See Goodman (n 543) 323.

<sup>577</sup> JCL, s 104.

<sup>578</sup> Among them: Abd El-Razzak El Sanhuri, *The Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence* (1st, Dar Unnahdah Alarabiah, Cairo: 1967) 78 (in Arabic); Mohammed Al Badawi, *The General Theory on Obligation* (1st, the Open University Publications, Cairo 1991) 59 (in Arabic).

<sup>579</sup> See Adnan Al Sarhan and Noory Khatir, *The Sources of Obligations in the Jordanian Civil Code* (1st, Daruth Thaqafah, Amman: 2000) 71.

the consumer is represented by the choice of a better and different set of terms in the case of multiple businesses. Further, the subject matter of the contract, whether for goods or services must be essential to the consumer<sup>580</sup>. This approach obviously narrows the scope of the protection provided in an adhesion contract as the above conditions are not necessarily present in all consumer contracts.

Although Article 104 stated only one condition in order to consider the adhesive nature of a contract, i.e. a pre-formulated and non-negotiated contract, and notwithstanding the fact that the JCL is the main source of law and that the views of commentators and jurists are considered an ancillary source of law in Jordan, the Explanatory Memorandum of the JCL confirmed the approach of considering the exercise of monopoly power and the necessity of the subject matter of the contract as relevant conditions that are central to considering the adhesive nature of a contract<sup>581</sup>. Furthermore, in the absence of previous judicial decisions (due to Jordan not having a judicial system based on precedent), it may be useful to look at similar jurisdictions such as Egypt due to several sections of the JCL being comprised of rules derived from the Egyptian Civil Code of 1948 which, in turn, was modelled on the Napoleonic Code<sup>582</sup>.

The Egyptian Court of Cassation has confirmed the conditions relating to monopolistic power and the necessity of the subject matter of the contract to a

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<sup>580</sup> Nazih Hadad, 'Adhesion Contracts in the Islamic Jurisprudence' [2004] *Al'adl* 52, 78 (in Arabic).

<sup>581</sup> The Explanatory Memorandum of the JCL (n 195) 113 (in Arabic).

<sup>582</sup> See Hayajneh, 'Legal Surgery: the Need to Review Jordanian Civil Law' (n 174) 46.

consumer's life, when considering the adhesive nature of a contract<sup>583</sup>. The best example of adhesion contracts exhibiting these conditions are gas and electricity contracts. Nevertheless, the whole issue of adhesion contracts remains uncertain due to the contradiction between theory and practice when classifying consumer contracts; this is as a result of the absence of a specific legal framework in Jordan that deals with consumer issues.

The enactment of consumer protection law in Jordan is able to solve the problem of the classification of ECCC, as will be discussed *infra*. Otherwise, ECCC could be classified either as an adhesion contract, if the conditions of the traditional theory of adhesion are met, or as an ordinary contract. Neither of these classifications serve consumer protection due to consumers, who represent the weaker party, dealing with a party who enjoys a superior bargaining position. In other words, as the JCL is based on the freedom of contract principle but the freedom of consumers is restricted in ECCC, there will be an obvious imbalance in the transaction which may undermine consumer confidence.

It is worth mentioning that the PCPL provides a very practical solution to solving the problem of classifying ECCC in order to determine the type of protection that consumers deserve. With regard to the scope of protection in relation to unfair T&Cs, which will be discussed *infra*<sup>584</sup>, the PCPL does not require the aforementioned conditions of the traditional theory of adhesion contracts in order to protect a consumer; rather, it provides consumers with

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<sup>583</sup> Egyptian Civil Cassation 208/1954. Cited in Kasassbeh (n 21) 105.

<sup>584</sup> See *infra* section 5.3.1.2.

specific protection in relation to unfair T&Cs merely because the contract is concluded between a seller/supplier and consumer. It further protects consumers even if the contract is individually negotiated as it does not limit protection to non-negotiated contracts<sup>585</sup>. However, as the PCPL was rejected by the Jordanian parliament, the only current available protection for consumers is derived from the JCL and this is the reason why it is necessary to examine whether ECCC can be classified as an adhesion contract.

The attitude of the Jordanian legal system in classifying ECCC in order to determine the type of applicable protection in the case of unfair T&Cs is uncertain. This is due to the absence of a clear concept regarding adhesion contracts under the JCL; the JCL merely requires that an adhesion contract be pre-formulated and non-negotiated, whereas commentators and jurists require the extra conditions regarding monopolisation and the essential nature of goods and services for a consumer's life. This situation renders ECCC an ordinary contract regardless of the inequality of the bargaining power between the contracting parties. Therefore, the latter part of this Chapter will examine the available protection under each potential classification of contract (adhesion and ordinary) and the attitude of the PCPL in relation to unfair T&Cs.

In summary, after discussing the required characteristics of the adhesion contract under the JCL and ascertaining the uncertainty that exists in relation to whether ECCC should be treated on the same footing as an adhesion contract according to Article 104, it would be useful to look at whether *Shari'a* is more

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<sup>585</sup> See PCPL, s 21-22.

fixable in relation to the requirements of an adhesion contract with a view to providing specific protection for consumers against unfair T&Cs in ECCCs.

### **5.2.1.3 Adhesion Contracts under Shari'a**

Firstly, according to El-Sanhuri, adhesion contracts cannot be found in Islamic jurisprudence, as they are in occidental jurisdictions<sup>586</sup>. Further, the contemporary Islamic schools of thought have not organised and regulated such modern contracts<sup>587</sup>. However, the general principles of Islamic jurisprudence remain the main applicable source to govern contract law.

Adhesion contracts are not recognised by *Shari'a* for two reasons. Firstly, the notion of an adhesion contract is relatively new and, as mentioned above, arose as a result of the particular economic situation at the beginning of the nineteenth century; this is in contrast to the main scholars of *Shari'a* who provided the main jurisprudential rules between the sixth and eighth centuries. In other words, the notion of an adhesion contract appeared in modern legal systems in the occidental world and was adopted by other countries, such as Jordan. Secondly, and most importantly, *Shari'a* holds the principle of freedom of contract in high regard in order to ensure the crucial role of free trade and commerce in society<sup>588</sup>; in contrast, the notion of an adhesion contract restricts the autonomy of the weaker party and contradicts the main Islamic rule of contract that 'the contract is the law of the contractors'<sup>589</sup>.

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<sup>586</sup> El Sanhuri, *Medium commentary on the new Civil Code: Part 1* (n 182) 191. (in Arabic).

<sup>587</sup> Hadad (n 580) 52, 57 (in Arabic).

<sup>588</sup> *Ibid* 55.

<sup>589</sup> *Ibid*.

It is worth mentioning that this rule is also emphasised by Article 1134 of the French Civil Code which stipulates that “*agreements lawfully entered into take the place of the law for those who have made them*”<sup>590</sup>. This principle has been adopted by modern Arab legislation<sup>591</sup> with two exceptions<sup>592</sup>; adhesion contracts being one of them. However, the problem, as mentioned above, relates to the requirements that need to be considered to determine whether or not the ECCC is adhesive.

Returning to the *Shari'a* and adhesion contracts, the contemporary Islamic doctrines differ and fall into three trends. The first trend argued that adhesion contracts were allowed,<sup>593</sup> ‘*mubah*’, and such a contract was valid under *Shari'a*, the justification coming from a version of the holy Quran, where God said “*O you who have believed, fulfil [all] contracts*”<sup>594</sup>. This version of the Quran does not exclude any specific type of contract as long as it does not contradict the core of Islam. This argument has been supported by the prophetic narration that “*Muslims are to abide to their [T&Cs] except for those that forbid a permissible matter or permit a forbidden matter*”<sup>595</sup>. In other words, every agreement is accepted in Islam unless a term declares as forbidden that which is allowed, or declares allowed that which is forbidden. Accordingly, the above narration implies that contracting parties are permitted to set out whatever terms they choose in their agreement, without limitation, as long as it does not contradict

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<sup>590</sup> French Civil Code, s 1134.

<sup>591</sup> See Egyptian Civil Code, S147.

<sup>592</sup> The other exception is the case of force majeure supervenes.

<sup>593</sup> Among others: Hassan Al Jawaheri, 'Adhesion Contracts' [2000] IJGJ 37, 73 (in Arabic), Mohemmed Al Farfour, 'Adhesion Contract in the Islamic Jurisprudence' IJGJ 214/3. Cited in Manal Khalah, 'The Rules of Adhesion Contract in Islamic Jurisprudence' (Master Dissertation, Islamic University, Gaza 2008) 59 (in Arabic).

<sup>594</sup> The Holy Qura'n, Chapter 5, Surat Al-Ma'idah, Verse 1.

<sup>595</sup> Reported by Al-Tirmizi and Al-Albani.

the general principles of Islam<sup>596</sup>. The rationale for this argument is that the vast majority of contracts are presented on a *take-it-or-leave-it* basis.

The second trend neither permits nor prohibits adhesion contracts under *Shari'a*, rather it considers it as an action detested (discouraged or abominable)<sup>597</sup> that renders the contract '*fasid*' (voidable) due to its monopolistic character<sup>598</sup>. The justification for this trend is that monopolisation is prohibited in Islam.

Finally, the third trend believes in the prohibition of adhesion contracts under *Shari'a* and its characteristics render the contract '*batil*' (void). The justification for this last trend, in addition to the monopolisation objection, is based upon the idea that adhesion contracts contradict the autonomy theory which is considered to be the cornerstone of the contracting model under *Shari'a*. Some commentators argue that there is a connection between duress and adhesion contracts<sup>599</sup> as the weaker party cannot intervene to impose his/her own T&Cs or even modify the existing ones. However, Haddad argues that duress in adhesion contracts is not related to psychological pressure; rather it is connected to a particular economic situation<sup>600</sup>.

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<sup>596</sup> Alzaagy 'Electronic, 'Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case' (n 370) 51.

<sup>597</sup> An act that to avoid doing is preferable to doing it.

<sup>598</sup> Mahmoud Saleh, 'Adhesion Contract and Defective Practices' [2004] SISJ 272, 363.

<sup>599</sup> Among others, Qadri Basha Almasri and Abu Zahra. Cited in Khalah (n 593) 34 (in Arabic). Also see Wahba Al Zuhaili, *The Doctrine of Legitimate Necessity: Comparative Study with the Positive Law* (1st, Dar Alfikr, Damascus 1997) 117-118. Cited in Saleh (n 598) 272, 363.

<sup>600</sup> Hadad (n 580) 52, 78 (in Arabic).

Despite the disagreements concerning the attitude of *Shari'a* and the legality of entering into adhesion contracts, the abovementioned Islamic scholars have, almost consensually, agreed that adhesion contracts cannot exist without its traditional conditions (that the contract is pre-formulated and non-negotiated; that its subject matter is essential to the consumer and that the seller or supplier is a monopolistic power)<sup>601</sup>. Therefore, based on the above analysis it can be said that the contradiction and legal uncertainty of adhesion contracts does not serve consumer protection. Consequently, in relation to protection from unfair T&Cs in ECCCs *Shari'a* is not considered to be a more favourable, alternative solution for Jordanian consumers.

### **5.3 Consumer Protection against Unfair Contract Terms**

Generally speaking, the fairness of terms in consumer contracts is a central issue in consumer law<sup>602</sup>. The rationale for protection from unfair T&Cs is related to the inequality of bargaining power where the stronger party dictates the terms of the contract and the other party (the consumer) only has the right to either accept and comply or reject the entire contract. Therefore, the first technique used to protect consumers from unfair T&Cs was giving the courts the right to intervene for the purpose of voiding unfair terms or interpreting ambiguous terms in favour of the weaker party. The second technique was introducing terms that must always be considered unfair (the blacklist) and other indicative or informative terms which can be used as an ancillary source when interpreting contract terms that are potentially unfair (the grey list).

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<sup>601</sup> Saleh (n 598) 272, 363.

<sup>602</sup> Ramsay (n 22) 157.

In relation to the first technique, which can be termed the judicial technique, the court has the authority to protect the weaker party to a contract. In Jordan, and according to the JCL, the court is not authorised to intervene regarding contracts except within the context of Article 204; this is exclusively applied in relation to the notion of adhesion contracts in order to police and vary unfair terms in favour of the weaker contracting party. On the other hand, this technique is limited by countries that have specific laws to protect consumers in general or provide protection against unfair T&Cs in particular. The second technique, which can be termed the legislative technique, is widely used in European law and prohibits certain specific terms, nominating them as void, or, to a lesser degree, voidable.

The next sub-sections will review the situation in relation to consumer protection against unfair T&Cs in Jordan, the UK and France respectively, in order to determine whether the judicial technique is able to provide the desired protection for consumers. Further, the future legislative approaches of the PCPL in terms of unfair T&Cs will be discussed.

### **5.3.1 Jordan**

As mentioned above, the absence of a specific law in Jordan that covers T&Cs in consumer contracts renders the JCL the only legal framework that is able to provide contracting parties with protection against unfair T&Cs. The protection that can be derived from the JCL is represented in two forms, namely; general protection for all types of contracts (e.g. B2B and B2C) and specific protection for particular types of contracts (i.e. adhesion contracts). As this Chapter is

particularly concerned with the protection that is provided to the weaker party to a contract, it will not focus on the general protection which implies terms (i.e. statutory rights) such as good faith. Rather, it focuses on Article 204 of the JCL which, thus far is the only general principle that can be exploited to provide some degree of protection for consumers in ECCC. The second sub-section will look at the proposed rules in the PCPL in relation to consumer protection and unfair terms and conditions.

### **5.3.1.1 Protection Provided by the JCL**

This section deals with Article 204 of the JCL which represents the only specific protection provided to the weaker party within the context of an adhesion<sup>603</sup> contract. Article 204 provides that:

*“If the contract is made by way of adhesion and contains oppressive provisions, it shall be permissible for the judge to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void”<sup>604</sup>*

According to the above general principle, the court is authorised to intervene to protect the weaker party under two conditions, namely; the nature of the contract must be adhesive and it must contain oppressive terms<sup>605</sup>. It is worth mentioning that the Jordanian legislature has used the term ‘*oppressive*’ but not

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<sup>603</sup> The term ‘adhesion’ has been translated from French ‘adhésion’ to Arabic ‘Itha’an’(إذعان) by the Egyptian jurist El Sanhuri. The term ‘Itha’an’ in Arabic can be precisely translated into English as ‘submission’. Thus the weaker party submits to the stronger party.

<sup>604</sup> JCL, s 204.

<sup>605</sup> Linguistically, the term ‘*oppressive terms*’ is closer to the meaning of the term ‘*clauses abusive*’ used in French to refer to unfair terms.

the term '*unfair*' to describe those terms that may cause a significant imbalance with regard to the parties' rights and obligations arising under the contract<sup>606</sup>.

With regard to the first condition, as discussed *supra*<sup>607</sup>, an issue arises regarding whether ECCC should be treated as an adhesion contract. With reference to Article 104 of the JCL, which determined the form of acceptance in adhesion contracts, ECCC could be seen to fall under the notion of an adhesion contract due to the majority of ECCCs being pre-formulated and non-negotiated contracts. However, as commentators<sup>608</sup> have emphasised, in adhesion contracts the remaining two conditions must be present before protection can become available. In concluding this argument, Kasassbeh stated that:

*"In Jordan, legislative and judicial attitudes still revolve around the three pillars of the adhesion contract as imposed by the traditional theory [of adhesion contract] (that the contract is pre-formulated and non-negotiated; that its subject matter is essential to the consumer; that the seller or supplier is a monopolistic power). Therefore, it is quite hard to say that consumer protection is sufficient. The prevailing opinion ... is that the three pillars must meet in the contract to be considered a contract of adhesion ... On this ground, it is clear that the JC[L] immunizes many contracts from the test of oppression [which is equivalent to the test of fairness in other jurisdictions], the situation which seems to be against the requirements of consumer protection."*<sup>609</sup>

As a result, within the context of the Jordanian legal system, ECCC cannot fall under the notion of an adhesion contract and consumers will therefore be treated on the same footing as businesses, regardless of the inequality of

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<sup>606</sup> For example, UTCCD. In relation to the UK the term '*unfair*' is used in the Unfair Contract Terms Act 1977.

<sup>607</sup> See *supra* 5.2.1.2.

<sup>608</sup> See footnote 562.

<sup>609</sup> Kasassbeh (n 21) 116.

bargaining power or the fact that the ECCC is a pre-formulated and non-negotiated contract. Therefore, Article 162 (2) of the JCL, which provides general protection for contracting parties in all contractual relationships, will be applied in ECCCs. Article 162 (2) provides that it is permissible for the parties to include in the contract any term beneficial to one of them or to a third party, unless it is prohibited by law or contradicts public policy or morals. If this is the case the term should be rendered void but the contract still remains valid unless the unlawful term was the motive for the contract<sup>610</sup>. It can be noted that this Article is based upon the principle of freedom of contract and the protection provided does not aim at redressing the imbalance of power between contracting parties; instead it ensures that parties do not contradict the law of public policy which has been discussed *supra*<sup>611</sup>. In fact, the freedom of contract principle, as has been discussed *supra*<sup>612</sup>, does not serve the issue of consumer protection against unfair T&Cs in ECCC as it leaves the door wide open for businesses to include any terms in a contract as long as they are consistent with the law. In other words, this general principle is not related to whether or not the term is fair; it is rather related to whether or not the term is lawful.

Article 164 (2) of the JCL reflects the attitude of *Shari'a* in terms of dealing with the issues of T&Cs where contracting parties are obliged by the terms of the contract and, as mentioned *supra*<sup>613</sup>, the contract must be considered the law of the contractors. The situation in *Shari'a* also allows contracting parties to

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<sup>610</sup> JCL, s 164 (2).

<sup>611</sup> See *supra* section 2.3.2.2.2 and 3.6.2.

<sup>612</sup> See *supra* section 2.3.2.2.2.

<sup>613</sup> See *supra* section 2.3.2.

include any terms except those which purport to change the forbidden to be lawful and vice versa, as represented by the Prophetic (PBUH) narration “Muslims are to abide to their [T&Cs] except for those that forbid a permissible matter or permit a forbidden matter<sup>614</sup>”.

Article 164 (2) therefore controls two types of terms, namely; those which expressly contradict the law (unlawful terms) and terms that contradict public policy. In relation to the first, as public policy has been argued *supra*<sup>615</sup>, the JCL provides very limited terms that contracting parties cannot contradict, as shown in Table (10) below. It is true that the scope of the phrase ‘unless it is prohibited by law’ in Article 164 (2) is not limited to the terms provided in the table below; however, it extends to the contract elements in general, such as capacity and the legality of the subject matter of the contract. For example, it is prohibited to include terms that exempt a seller from liability in the event that s/he concludes a contract with a minor, an insane person or an imbecile.

**Table 10 Blacklist Terms under Jordanian Civil Law**

<b>Article Number in the Jordanian Civil Law</b>	<b>The Article</b>
270	<i>A term excluding the liability of a party arising under tort shall be void.</i>
506(1)	<i>A term absolving a vendor from liability for the price of a property he sold in case it is found to belong to a third party, shall be void and the whole contract shall be voidable.</i>
640	<i>A term in the loan contract providing for a benefit in favour of the lender in excess of securing the latter's right, shall be void</i>
790	<i>A term intended to exclude or limit the liabilities of an independent contractor or an engineer arising when a building collapses, shall be void.</i>
1343	<i>A term in a mortgage contract providing for the ownership of the mortgaged property to be shifted to the mortgagee should</i>

<sup>614</sup> Reported by Al-Tirmizi and Al-Albani.

<sup>615</sup> See *supra* section 2.3.2.2.2.

	<i>the mortgager be unable to satisfy his obligation under the contract, shall be void.</i>
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It can be noted from Table (10) that the prohibited terms that are related to consumer protection in ECCC are Articles 270 and 506 (1) which have considerable importance in the field of consumer protection. This is because Article 270 prohibits any terms that exclude liability arising under tort, regardless of the degree of damage that results from the act, and any such term is rendered as void. However, the freedom of contract approach under the JCL, which follows classical law and does not distinguish between consumer contracts and other commercial contracts, needs to be limited by other restrictions in order to provide protection, not only for physical safety but also to cover economic issues and the interests of consumers. Therefore, in consumer contract in general, and ECCC in particular, the required protection against unfair T&Cs goes beyond whether or not the term is lawful but seeks to redress the imbalance by ensuring that the stronger bargaining power does not exploit his/her position in the contract by imposing unfair terms in order to gain extra benefits.

On the other hand, the JCL does not provide a clear test to identify unfairness or, as some authors refer to it, the '*test of oppression*'<sup>616</sup>. This means that there is no way to determine what concept of unfairness constitutes '*oppression*' in Article 204. Kasassbeh argued that the term '*oppression*' has only two possible meanings<sup>617</sup>. The first meaning can be derived from French and Egyptian law as this term is directly related to adhesion contracts which have been developed in

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<sup>616</sup> See Kasassbeh (n 21) 184.

<sup>617</sup> *Ibid.*

French law. The concept of an oppressive term under French and Egyptian law is related to the excessive advantage that the stronger bargaining power has at the expense of the weaker party. The second meaning is related to the concept of the abuse of rights, which is derived from Article 93 of *Majalla*, that is enshrined in Article 66 (2) of the JCL<sup>618</sup>. This concept is based upon two elements, namely; the intention to conduct a lawful act to achieve an unlawful interest, which directly relates to the principle of good faith, and the result of that act causing harm to a consumer<sup>619</sup>. In the writer's view, the concept of oppression under the JCL is much more closed to the concept of undue influence under the CPUTRs which occurs when a trader exploits a position of power, so as to act in such a way as to significantly limit a consumer's ability to make informed choices<sup>620</sup>. In addition, in a pre-formulated contract, businesses may exploit their position with regard to the particular weaknesses of a consumer. In these circumstances equity is able to give relief against unconscionable bargains as explained by Treitel<sup>621</sup>. In any event, the absence of a specific definition for oppression, or a list of potential oppressive T&Cs to clarify the meaning, does not make the general rules of JCL comprehensive enough in terms of providing protection for consumers against unfair T&Cs when

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<sup>618</sup> JCL, s 66.2 "(1) A person shall be held liable for an unlawful exercise of his rights. (2) The exercise of a right shall be unlawful: (a) if there is an intentional infringement (of another's rights); (b) if the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari'ah, the law, public order, or morals; (c) if the interests desired are disproportionate to the harm that will be suffered by others; or (d) if it exceeds the bounds of usage and custom"

<sup>619</sup> Kasassbeh (n 21) 188.

<sup>620</sup> Undue influence has been defined as "*exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision*" Office of Fair Trading, Consumer Protection from Unfair Trading, Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive.

<sup>621</sup> Treitel (n 142) 420.

concluding an ECCC. Further, the absence of past court decisions and considering them as an ancillary source in relation to oppressive terms, leaves the whole issue deeply uncertain.

As a result, the generality and the uncertainty of the general principles of the JCL, which are applied in all types of relationship regardless of the inequality of bargaining power and the fact that the ECCC is a pre-formulated and non-negotiated contract, enhanced a necessity to proceed with the PCPL as soon as possible in order to fill the gap in consumer protection under the JCL. The next sub-section will review the position of the PCPL in relation to consumer protection against unfair T&Cs.

#### **5.3.1.2 Protection Provided by the PCPL**

Firstly, the Jordanian legislature aimed at providing solutions to fill in the gaps in relation to consumer protection due to the general principles of the JCL failing to provide sufficient protection in consumer contracts. The improvement in the PCPL in relation to the protection against unfair T&Cs is represented in three areas. These are as follows.

Firstly, the PCPL acknowledges the concept of consumer contracts that require legislature intervention in order to provide specific protection. This means that whilst the Jordanian legal system requires certain conditions to be met in order to protect the weaker party to an adhesion contract<sup>622</sup>, and these are not present in ECCCs, the law will no longer require any conditions to be met in

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<sup>622</sup> See *supra* page 196.

order to protect the weaker party to a contract. This has made the scope of protection very wide and, consequently the PCPL covers almost all types of consumer contracts. Thus, the PCPL, by taking the step of acknowledging consumer contracts, shifts Jordanian law from the notion of the classical or commercial law of contract, to the modern law of contract.

Secondly, as the Jordanian legal system relies on the judicial technique in order to protect the contracting parties against unfair T&Cs within the context of unequal bargaining power relationships, the PCPL not only uses the judicial technique, but also the legislative technique by providing a blacklist of terms that must always be considered illegal, and thus void.

Thirdly, whilst the general principles of the JCL aim to protect the contracting parties from unlawful terms, the PCPL aims to protect consumers from unfair terms. An example of the first situation is where one of the contracting parties imposes a contractual term that contradicts the law or public policy, whereas an example of the second situation is where the stronger bargaining power exploits his/her position by imposing unfair terms in order to gain extra benefits or to protect his/her interests.

The Jordanian legislature is therefore paying particular attention to consumer contracts by introducing specific rules to govern both non-negotiated contracts, that are presented on a take-it-or-leave-it basis, and negotiated contracts where there is an inequality of bargaining power between the contracting parties. The first example of interventionism is represented by the requirement of businesses to write their contracts in Arabic. Article 7-B-5 stipulates that the

contract is deemed defective under the PCPL if the contract does not include the essential characteristics in the Arabic language. The consequence of a defective contract under the PCPL renders the contract voidable.

On the other hand, the PCPL provides, for the first time, pre-emptive protection in relation to unfair T&Cs in all consumer contracts, in favour of a consumer. This can be noted in Articles 22 and 23 of the PCPL that provide a blacklist of terms, as shown in Table (11) below, that are considered unfair and, thus, void and unenforceable.

**Table 11 Blacklist Terms in Consumer Contracts under the PCPL**

<b>Article Number in the Project of Consumer Protection Law</b>	<b>Provision</b>
21 (A)	<i>Shall be void if any term or consent purports to restrict or limit consumer rights provided by this law</i>
21(B)	<i>Any term or consent purports to exclude any obligation imposed on a seller or supplier by virtue of this law, shall be void</i>
22 (B)	<p><i>Terms shall be considered unfair if:</i></p> <ol style="list-style-type: none"> <li><i>1. it leads to cause imbalance in the rights and obligations of the parties to the detriment of consumer interests</i></li> <li><i>2. it excludes any obligations or duties imposed on the seller or supplier by virtue of this law (PCPL) or other laws</i></li> <li><i>3. it implies that a disclaimer to withdraw any statutory</i></li> <li><i>4. any amendment of evidentiary of rules</i></li> <li><i>5. it allows unilateral contract termination by the seller or supplier without reasonable grounds or without a substantial breach by the other party</i></li> <li><i>6. it implies a duty on consumers to pay compensation in the case of a breach of contract, that exceeds the actual damage</i></li> <li><i>7. it implies a duty on consumers to pay compensation if s/he terminates the contract, that is not commensurate with the actual detriment</i></li> <li><i>8. it prevents consumers accessing justice or any alternative dispute resolution</i></li> <li><i>9. it excludes any after sale obligations or duties imposed on the seller or supplier</i></li> </ol>

The above list of unfair terms helps to prevent business vendors, who have a greater bargaining power, from taking advantage of their consumers who have less bargaining power. In addition, they provide protection to consumers from unfair T&Cs prior, during and after the conclusion of the contract. Further, the above list is not only applied to non-negotiated consumer contracts, but also extends to individually negotiated contracts. This, therefore, makes the scope of protection wide enough to cover all types of consumer contracts.

On the other hand, some criticisms can be directed at the provisions which govern unfair terms in the PCPL. The first criticism relates to the lack of an indicative list of terms that are potentially unfair (a grey list). This is very important in a country such as Jordan as the rulings of the courts are only an ancillary source of law. Thus, such a list would facilitate the process of reaching a judgement upon whether or not a particular term is fair. Secondly, the PCPL does not provide a mechanism for interpreting terms in the case of any ambiguity. The legislature seems to have referred this matter to Article 240 of the JCL which stipulates that a doubt shall be interpreted in favour of a debtor.

### 5.3.2 EU

The EU consumer rules are not only concerned with the protection of the physical safety of a consumer. They go much further beyond this in order to protect the economic and other interests of a consumer<sup>623</sup>. According to Howells and Wilhelmsson, the Unfair Contract Terms Directive (UCTD) is the

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<sup>623</sup> See Howells and Wilhelmsson, *EC Consumer Law* (n 62) 85.

most important legal framework within the context of consumer law<sup>624</sup>. As European countries, such as the UK and France, have, since the early 1970s, acknowledged the modern law of contract that allows for legislature intervention, it can be noted, and will be discussed below, how legislatures have sought to fight unfair contract terms.

### 5.3.2.1 UK

The UK rationale behind protecting consumers from unfair T&Cs has been briefly stated by Winn and Haubold and has been derived from EU Directives<sup>625</sup>:

*“Consumers have commonly been presumed to have weaker bargaining powers and few means to negotiate standard form contracts; the consumer is supposed not to grasp the true value of a contract and the economic impact of his commitment when he is addressed in his home by a sales representative; and the consumer cannot see or test the goods before she buys them through a distance contract”*<sup>626</sup>

With regard to classifying ECCC, the UK treats it as a standard form contract, and considers this form of contract as a mirror of adhesion contracts<sup>627</sup>, with the vast majority of contracts on the Internet being standard click-and-point

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<sup>624</sup> *Ibid* 87.

<sup>625</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] O.J. L 95/29; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, [1997] O.J. L 144/19.

<sup>626</sup> Winn and Haubold (n 274) 567, 588. For more details about the rationale behind the Unfair Contract Terms Directive see Mário Tenreiro and Jens Karsten, 'Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelty of a Directive' in Hans Schulte-Nölke and Reiner Schulze (eds), *Europäische Rechtsangleichung und Nationale Privatrechte* (1st, Baden-Baden, Nomos 1999) 223.

<sup>627</sup> See Llewellyn Gibbons, 'Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration' [2002] *NJL & Bus* 1, 7, 8. Cited in Alqudah (n 12) 26. Kasassbeh (n 21) 36.

agreements<sup>628</sup>. The issue of classifying consumer contracts as a standard form contract or adhesion contract, does not give rise to any problems with regard to protection; this is because consumer regulations provide protective rules in both cases. However, it is worth mentioning that in the UK, there is no exact English translation of '*contrat d'adhésion*' (adhesion contract)<sup>629</sup>.

The situation in the UK is quite different from Jordan with regard to consumer protection against unfair T&Cs; this is due to the specific rules that govern B2C relationships. The UK has been very active in empowering consumers and providing them with strong consumer protection in contract law; this was done by introducing specific and comprehensive regulations that cover consumer issues even before the emergence of e-commerce activities<sup>630</sup>. These are as a result of cumulative and consistent EU Directives which provide the framework for most of the national consumer protection rules<sup>631</sup>. Therefore, the UK legislature does not need to address specific rules to cover certain areas within the context of ECCC, for example, consumer protection against unfair T&Cs on the Internet, because the existing consumer protection rules that apply in the traditional context (off-line) should extend their application to protect consumers in the electronic environment (on-line)<sup>632</sup>.

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<sup>628</sup> See Mark D. Powell, *Electronic Commerce: An Overview of the Legal and Regulatory Issues*, Int. TLR 85.

<sup>629</sup> Micheal Furnston, *Law of Contract* (14th ed London: Butterworths, LexisNexis, 2001) 22. Cited in Sophie Vigneron, 'The Implementation of Standard Contract Terms Directive in France' [2006] CIL Volume 8, Issue 2/3.

<sup>630</sup> Tahat (n 139) 45.

<sup>631</sup> Winn and Haubold (n 274) 567-588.

<sup>632</sup> *Ibid*, p 40.

With regard to the common law, there was no general test of fairness due to the reliance on the freedom of contract principle, where the role of the court was merely to enforce the contract and ensure that it was free from duress, fraud and misrepresentation. Despite the special legal frameworks introduced in the area of unfair contract terms, the common law is still considered as the indirect method of controlling unfair contract terms<sup>633</sup>. The common law focuses on two major areas in relation to T&Cs. The first area relates to exemption clauses which can be incorporated in to the contract, whether by signature, by notice<sup>634</sup> or by a course of dealing<sup>635</sup>. For example, one of the contracting parties may formulate the T&Cs and the other party may sign to express their will in a written contract. In this case, all parties will be bound by the T&Cs, irrespective of whether they have actually read them. In *L'Estrange v Graucob*<sup>636</sup> the plaintiff bought an automatic cigarette machine from the defendant and signed the agreement without reading its terms which contained an exemption clause that was presented in legible, but regrettably small print. It was held that the plaintiff was bound by the clause. The same application of this case is when a contract has been signed by someone who does not speak English<sup>637</sup>.

Secondly, the common law deals with the construction of terms. This gives the party suffering detriment a second chance to void the contractual term even if it was incorporated into the contract. For example, with regard to the *contra*

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<sup>633</sup> See Howells and Weatherill (n 22) 267.

<sup>634</sup> If the contract contains unexpected terms, the one who formulated the contract must give notice to the other contractor. See *Thornton v Shoe Lane Parking* [1971] 2 QB 163.

<sup>635</sup> See Treitel (n 142) 216.

<sup>636</sup> *L'Estrange v Graucob* [1934] 2 KB 394.

<sup>637</sup> See Treitel (n 142) 217.

*proferentem* rule<sup>638</sup>, a seller or supplier who relies on a term that gives ‘no warranty’ does not protect him/her from liability for breach of condition<sup>639</sup>.

Before the Unfair Contract Terms Directive (UCTD) was implemented, T&Cs were controlled by the Unfair Contract Terms Act 1977 (UCTA), which has recently been considered one of the two sources of controlling and policing unfair contract terms in the UK, the second source being the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs). The UCTA represents another mechanism by which to control other types of T&Cs and its scope is wide enough to cover all types of contracts. It is considered the most important legislative limitation on the effectiveness of standard terms as it deals almost exclusively with exemption clauses in contracts. The adopted mechanism of controlling unfair terms under the UCTA is represented by making some clauses automatically ineffective in all circumstances and others ineffective unless they comply with the requirements of reasonableness<sup>640</sup>. With regard to consumer contracts, the UCTA deals with T&Cs that exclude or restrict liability for breach of certain obligations, rendering such terms ineffective.

In 1994<sup>641</sup>, the UTCD, which intended to ensure that consumer contracts did not include unfair terms, was implemented in the UK by the introduction of the Unfair Terms in Consumer Contract Regulations<sup>642</sup> (hereafter UTCCRs) that

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<sup>638</sup> According to Treitel “*Contra proferentem* means that such a clause is construed strictly against the party at whose instigation it was included in the contract and who now seeks to rely on it”. See Treitel (n 142) 221.

<sup>639</sup> See Wallis, Son & Wells v Prett & Haynes [1911] A.C. 394.

<sup>640</sup> See Treitel (n 142) 264.

<sup>641</sup> SI 1994/3159.

<sup>642</sup> UTCCRs implements the EU (then EEC) Unfair Consumer Contract Terms Directive 93/13/EEC.

address specific rules to protect consumers against unfair standard terms that apply only to consumer contracts<sup>643</sup>. In 1999, the UTCCRs of 1994 were replaced by the current regulations<sup>644</sup> in order to improve the provision of enforcement so as to include organisations such as The Office of Fair Trading (OFT).

Currently, both UCTA and the UTCCRs of 1999 are operating side by side. However, there is an overlap as well as different applications as these are two separate pieces of legislation that apply to the same subject matter. For example, there is a possibility to validate a contractual term under the UCTA if it is considered unfair under the UTCCRs, and vice versa. Further, contracting parties who dictate their terms must ensure that they comply with the requirements of both the UCTA and UTCCRs. However, the issue that arises here is whether such a situation offers consumers better protection. Such issues can be discussed by comparing and exploring the scope of each enactment. In comparing both enactments, it would appear that, in some respects, the UCTA is wider in scope than the UTCCRs, as shown in Table (12) below.

**Table 12 Scope of UTCCRs vs. Scope of UCTA**

<b>UTCCRs</b>	<b>UCTA</b>
<i>They apply only to contract terms</i>	<i>It applies to contract terms and notices</i>
<i>They apply to terms which have not been individually negotiated<sup>645</sup></i>	<i>It applies to both negotiated contracts and contracts that have not been individually negotiated<sup>646</sup></i>
	<i>This point gives an advantage to the UCTA by providing protection to consumers in both negotiated and non-negotiated contracts</i>

<sup>643</sup> UTCCRs, s 4 (1).

<sup>644</sup> SI 1999/2083.

<sup>645</sup> UTCCRs, reg 5(1).

<sup>646</sup> UCTA, s 3(1).

<i>They solely apply where one party acts for purposes relating to his/her business and the other is a consumer<sup>647</sup></i>	<i>It applies in all types of contractual relationships (e.g. B2B and B2C)<sup>648</sup></i>
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On the other hand, the UCTA is narrower in scope than the UTCCRs in relation to the type of contract terms that it covers. Whereas the UCTA deals with indemnity clauses<sup>649</sup>, the UTCCRs deals with all types of terms that relate to consumer contracts.

Therefore, in the UK, three comprehensive legal frameworks govern the T&Cs in a consumer contract; these were automatically applied to the area of e-commerce as the UK adopts the medium neutrality principle. The three different frameworks are (i) the UCTA, which controls the reasonableness of T&Cs in consumer contracts and prohibits, excludes or limits their liability unless they satisfy the requirement of reasonableness; (ii) UTCCRs which contain the so-called 'transparency principle'<sup>650</sup> and which require that T&Cs be written in plain and intelligible language, be accessible, and, if a term appears ambiguous, require that the court must interpret it in a way that best favours the consumer, and; (iii) the DSD which puts into place several specific requirements that businesses must comply with, when they practice their business at a distance (e.g. over the internet); these include the requirement to ensure the clear display of relevant information on the supplier's website and a prohibition on any contractual term limiting or excluding the legal liability of a supplier regarding those requirements.

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<sup>647</sup> UTCCRs, reg 4 (1).

<sup>648</sup> UCTA s. 6(3), 7(3).

<sup>649</sup> UCTA, s 4.

<sup>650</sup> UTCCRs reg 6 (2).

The most specific legal framework that provides protection in this area is the UTCCRs where the scope of protection is reasonably evident and wide and contains a test of fairness and a clear model of enforcement.

The UCTA and UTCCRs may cause confusion in the area of consumer protection due to the overlapping in some areas<sup>651</sup>. Further, the Department of Trade and Industry (DTI) also mentioned that consumers will be uncertain as to whether clauses are unenforceable under the Act or under the Regulations<sup>652</sup>. Notwithstanding this, others have argued that these enactments complement each other whereby the reasonableness in the Act and the test of fairness in the Regulations may produce the same outcome<sup>653</sup>.

Nevertheless, UTCCRs provides a rule that may reduce the uncertainty in determining the fairness of terms where consideration must be given to the nature of the goods or services for which the contract was concluded and, by referring to the time that the contract was concluded, to all the circumstances surrounding the conclusion of the contract<sup>654</sup> and to all the other terms of the

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<sup>651</sup> For instance see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433. A clause held to be unincorporated under English law. According to Howells and Weatherill this clause would be unassailable under the UCTA and the UTCCRs. "*The act will not touch it because it was not an exclusion clause. The Regulation/Directive would not touch it because it did not appear in a consumer contract*". See Howells and Weatherill (n 22) 314.

<sup>652</sup> DTI, Modern Market: Confident Consumers, para 6.15 available on <http://webarchive.nationalarchives.gov.uk/20050302082351/http://dti.gov.uk/consumer/whitepaper/pdf/constrat6.pdf>.

<sup>653</sup> DTI, Implementation of the EC Directive on Unfair Terms in Consumer Contracts 93/13/EEC: A Further Consultation Document, 1994, p 3. See also Weatherill S, 'Prospects for the Development of European Private Law Through Europeanisation in the European Court - the case of the Directive on Unfair Terms in Consumer Contracts' [1995] 3 ERPL 322. Cited on Kasassbeh (n 21) 68.

<sup>654</sup> The fairness test must be made taking into account the circumstances existing at the time of the contract's conclusion, such as whether the consumer had, at that time, examined the goods or not. See Kasassbeh (n 21) 143.

contract or of any other contract upon which it is dependent<sup>655</sup>. In addition to the regime adopted to consider whether the term is unfair (i.e. if it is contrary to the requirement of good faith or it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer<sup>656</sup>), the Regulations have implemented an indicative and non-exhaustive list of terms that may be regarded as a 'grey list' and which the court is able to use as an interpretive aid<sup>657</sup>. The OFT has stated that "*the Regulations lists some types of standard term that may be found unfair. The list is only illustrative, not a blacklist. It is not exhaustive, and a term is not necessarily unfair just because it appears in it*"<sup>658</sup>.

In order to test the fairness of terms under the UTCCRs, two elements are relevant; the concept of "good faith"<sup>659</sup> and a significant imbalance causing detriment to the consumer. In assessing good faith, four factors seem to be relevant under the Regulations, as suggested by Collins; three of them can also be found under the UCTA. These are: "(a) *the strength of the bargaining positions of the parties; (b) whether the consumer had an inducement to agree to the term; and (c) whether the goods or services were sold or supplied to the special order of the consumer*"<sup>660</sup>. The fourth factor makes a distinction between the UTCCRs and the UCTA, namely; (d) *the extent to which the seller or supplier has dealt fairly*

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<sup>655</sup> UTCCRs, reg 6 (1).

<sup>656</sup> UTCCRs, reg 5 (1).

<sup>657</sup> Howells and Weatherill (n 22) 323.

<sup>658</sup> Office of Fair Trading, Unfair Contract Terms Guidance, Unfair Standard Contract.

<sup>659</sup> The principle of 'good faith' is not recognised by the UK lawyer, however, it has been entered into UK legislation in order to comply with the EU requirements.

<sup>660</sup> Brian Collins, 'Unfair Terms in Consumer Contracts Regulations 1994' [1995] Web Journal of Current Legal Issues available on <[http://caselaw.lp.findlaw.com/data/law\\_reviews/57web\\_journal/articles3/collins3.html](http://caselaw.lp.findlaw.com/data/law_reviews/57web_journal/articles3/collins3.html)> Accessed on April 2013.

*and equitably with the consumer*<sup>661</sup>. This factor requires businesses to deal conscionably with consumers (for example; not using unfair tactics against a consumer in order to induce them to enter into a contract). On the other hand, the second element relates to the significant imbalance between the contracting parties and this has given rise to a debate concerning the word 'imbalance'. Whilst the Regulations used it as a consequence of unfairness, others argue that the 'imbalance' is the cause<sup>662</sup>. Further, the wording 'significant' may also raise a problem regarding interpretation due to the UTCCRs not providing a clear distinction between the terms 'imbalance' and 'significant imbalance' and the different levels of imbalance.

### **5.3.2.2 France**

Firstly, the French jurisdiction was keen to regulate those contracts where consumers had no right to negotiate T&Cs, and adopted a new regime in order to prevent the unfair terms *imposed* by businesses affecting the weaker contracting parties too harshly<sup>663</sup>. Thus, nowadays, the protection provided by French legislation is based on both negotiated and non-negotiated contract, but not on the traditional notion of adhesion contracts, which are considered as French doctrinal theory. However, the French system no longer considers that the elements of an adhesion contract, as discussed *supra*, protect consumers from unfair T&Cs. This is the result of the French legislature recognising that freedom of contract restricts the will of the weaker party to the contract, particularly when it is presented on a take-it-or-leave-it basis. Consequently,

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<sup>661</sup> *Ibid.*

<sup>662</sup> *Ibid.*

<sup>663</sup> Kasassbeh (n 21) 38.

*contrat d'adhésion* is based on no more than one element, namely standardisation. This means that the whole idea of contract has been transformed by a new method of providing protection which distinguishes between *contrats négociés et contrats non-négociés* (negotiable and non-negotiable contracts)<sup>664</sup>.

However, it is worth mentioning that at the beginning of the enactment of the French Civil Law in 1804, there were no provisions governing unfair T&Cs or exemption clauses. This was due to the French Civil Law being based upon two principles; namely freedom of contract and the equal treatment of contracting parties regardless of the inequality of bargaining or economic power. This means that the law of contract was the law of the contracting parties, hence the adage “*qui dit contractuel, dit juste*” (what is contractual is fair)<sup>665</sup>. This ground benefits the party who imposes the T&Cs (i.e a business) but leaves the other party, the consumer, with no choice but to reject or comply with the proposed terms.

In the 1970s, the *Cour de Cassation*<sup>666</sup> controlled only two types of T&Cs, namely those which excluded guarantees and exempted liability<sup>667</sup>. In addition, the governance of T&Cs was based on two general rules. Firstly, in case of ambiguity, judges should interpret T&Cs according to the common intention of the contracting parties, rather than pay attention to the literal meaning of the

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<sup>664</sup> See Al Sarhan and Khatir (n 579) 72.

<sup>665</sup> See Vigneron (n 629) 1.

<sup>666</sup> The Highest Civil Court

<sup>667</sup> See Capitant, Terré, Lequette, *Les grands arrêts de la jurisprudence civile* (Paris: Dalloz, 11 th ed, 2000) 97. Cited in Vigneron (n 629) 9.

terms<sup>668</sup>. Secondly, in the case of doubt, judges should interpret the T&Cs in favour of the debtor<sup>669</sup>. Until this time, the French situation was very similar to that in Jordan.

Many reasons, such as the widespread use of standard form contracts and the lack of judicial control regarding unfair terms, have encouraged the French legislature to enact regulations to fill the legislative gap and limit unfair T&Cs; this was done by introducing '*Loi Sur la Protection et L'information des Consommateurs de Produits et de Service*'<sup>670</sup>, also known as '*Loi Scrivener 2*' in 1978. This law is considered to be the first legal framework that contains specific rules to cover unfair terms in consumer contracts. *Loi Scrivener* renders certain T&Cs ineffective after their interpretation by the *Cour de Cassation*; this therefore gives the Courts the power and scope to assess unfair terms<sup>671</sup>. The law applies to B2C relationships (*professionnels et non-professionnels ou*

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<sup>668</sup> FCL, s 1156 "One must, in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms". This article is similar to the article 239 (2) of JCL which states that "If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in (such) dealings".

<sup>669</sup> FCL, s 1162 "In case of doubt, an agreement shall be interpreted against the one who has stipulated, and in favour of the one who has contracted the obligation". This article is similar to the Article 240 of JCL which states that "A doubt shall be resolved in favour of the obligor".

<sup>670</sup> *Loi Scrivener 2 no 78-23 of 10 January 1978 modifiée sur la protection et l'information des consommateurs de produits et de services (qualification des produits, clauses abusives)* modified on consumer protection and information on products and services (qualification of products, unfair terms) was consolidated in the *Code de la Consommation in 1993* (FCC) which was amended in 1995 (*Loi no 95-96* ) to implement the Unfair Terms Directive. It becomes section L.132-1 to L. 134-1 of the FCC. The Act was named because of its founder 'Monsieur Scrivener'

<sup>671</sup> *Loi Scrivener 2*, s 35; Civ. (1) 14 May 1991, JCP 1991.II.21763 note Paisant. Cited in Appendices A to D of Issues Paper, Unfair Terms in Consumer Contracts: A New Approach?, The Law Commission and The Scottish Law Commission, 25 July 2012, p 1

*consommateurs*)<sup>672</sup> and, in 1988, the Act began to allow consumer groups to bring legal action against businesses in order to suppress unfair T&Cs in standard form contracts<sup>673</sup>.

All statutes governing consumer issues in France were gathered in a Consumer Code (FCC) in 1993. The last version of the FCC is a result of the implementation of the Unfair Terms Directive in 1995 which was not a new legal framework regarding consumer protection but a combination of previous legislation. The main advantage that can be derived from the Directive is the clear definition of unfair terms. The FCC is wider than the Directive and UTCCRs in two main areas. Firstly, it includes businesses who act outside their business (either legal or natural persons). Secondly, it applies to all contract terms whether or not individually negotiated<sup>674</sup>.

In addition to these two aspects, another difference is that the FCC considers that a term is unfair if it creates a significant imbalance in the parties' rights and obligations, even if it does not implement the notion of good faith from the Directive. This is clear from Article L. 132-1 paragraph 1 where the FCC speculates on the definition of unfair terms:

*“In contracts concluded between a business and a non-business or consumers, clauses which aim to create or result in the creation, to the detriment of the*

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<sup>672</sup> FCC, s L 132-1(1) of the Code de la Consommation. It also includes businesses acting outside their business activities.

<sup>673</sup> Law n. 78-23, 10 January 1978, JO 11 January 1978 at 301 and L. n. 88-14, 5 January 1988, JO 6 January 1988 at 219.

<sup>674</sup> FCC L 132-1 of the Code de la Consommation.

*non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair*<sup>675</sup>.

The French legislature did not adopt the notion of good faith from the Act by definition because it considered that, if there was a significant imbalance between the rights and obligations in the contract, businesses could not have been acting in good faith; the contractual balance would be breached in favour of the business which in itself would be contrary to good faith<sup>676</sup>. It is clear from this that the French legislature provides a higher level of protection than the Directive due to the broader applications that require a significant imbalance without reference to bad faith. However, the benefit of implementing the Act over the Directive is that it provides the minimum standard of protection for consumers because of the prevention of abuse of any T&Cs in all member states.

After the first implementation of the UCTD, the FCC has provided, for the first time, a grey list of terms which are considered to be potentially unfair and could be subject to the fairness test. Nevertheless, the FCC was amended in 2010 when a blacklist of unfair terms was added which automatically declares the listed terms as ineffective. Currently there are three types of list of unfair T&Cs in France<sup>677</sup>. Firstly, there are three blacklisted terms, which are always considered to be unfair and which a judge should declare void; these were enacted by the French government and introduced by *Loi Scrivener* in Section 35. Two of these are still valid, namely; limiting the amount of damages

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<sup>675</sup> FCC, s, L132-1.1.

<sup>676</sup> See Vigneron (n 629) 7.

<sup>677</sup> *Ibid.*

recoverable when a professional does not fulfil his obligations<sup>678</sup>; and forbidding a professional to modify the contract unilaterally; the third has been excluded by the *Conseil d'Etat*. Secondly, there is a list in the annexe to the Directive which is copied in the FCC and considered as a grey list (i.e. informative but not compulsory). Thirdly, there is a list provided by an administrative body named the *Commission des Clauses Abusives* (Unfair Terms Commission) which provides a grey list of unfair terms.

An essential difference where the FCC can be distinguished from the UTCCRs is in relation to the burden of proof. It has been mentioned *supra* that the UK regulations place the burden of proof upon businesses whereas the FCC explicitly placed the burden of proof regarding unfairness on the consumer<sup>679</sup>. However, due to the previous amendment to the FCC, it now imposes a burden on businesses who must therefore establish that the term in question is not unfair or prove that the terms are not within the grey list of clauses which are presumed to be unfair. With regard to the grey list and the courts' interpretation, it could be said that the UTCCRs is more consistent because they explicitly impose the principle of 'plain intelligible language' upon businesses in order to prove their good faith; accordingly, in cases of dispute, businesses can easily prove their assertions. In the FCC, this principle has been ignored by *la Cour d'Appel de Toulouse* and Article 132-1 merely states, "provided that the terms are written in a clear and comprehensible manner"<sup>680</sup>.

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<sup>678</sup> FCC 132-1.

<sup>679</sup> Art 132-1 of the FCC as amended in 1995.

<sup>680</sup> *Christian X vs. Sylvie Y*, Cour d'appel de Toulouse, 25 Septembre 2007, N° de RG: 06/02410. Available on <http://www.legifrance.gouv.fr/>.

Finally, the scope of the protection afforded by the FCC is wide and clear as it has been stated that all terms, whatever their form or medium, can be deemed unfair in certain, non-exclusive examples provided by Article L132-1 (e.g. purchase orders, invoices, performance bonds, delivery notes or slips, travel vouchers or tickets). In addition, in some cases such as ECCC, where a consumer is supposed to read the T&Cs which should consequently be easily accessible and understandable, the *Cour de Cassation's* case law shows that terms unknown by the consumer were not accepted<sup>681</sup>.

#### 5.4 Conclusion

As the majority of ECCCs are presented on a *take-it-or-leave-it* basis where consumers have no choice but to either accept or reject the entire contract or accept and comply with the pre-formulated and non-negotiated terms dictated by sellers who represent the stronger bargaining power, legislature intervention that aims to rebalance the contractual relationship has become essential for consumer protection purposes. Legislature intervention is not only required to ensure that contractual terms are lawful and do not contradict public policy but also to ensure that the stronger bargaining power does not exploit the weaker position of the consumer in order to obtain an excessive advantage.

The classical law of contract, which is basically founded upon the freedom of contract principle, does not adequately protect consumers against unfair T&Cs; this is because, in ECCC, the will of a consumer is restricted to whether or not to

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<sup>681</sup> See Ghestin/Marchessaux-Van Melle, para. 9. Cited in Vigneron (n 629) 8.

enter into a contract rather than having the ability to negotiate its terms. Further, the T&Cs in such contracts are not, and are not designed to be, read by consumers; even if consumers read the relevant terms, they are often not comprehensible enough to be understood. Moreover, consumers are not usually in a position to choose better terms as sellers often use very similar clauses.

The modern law of contract goes much further than simply distinguishing between voluntary and involuntary choices, as stated by Collins<sup>682</sup>; it imposes compulsory terms, prohibits others and puts other terms into a questionable area in order to be subject to a test of fairness to ensure that there is no significant imbalance between parties' rights and obligations. This cannot be done without legislature intervention which imposes clear restrictions and limitations on freedom of contract by providing specific protection that addresses blacklist terms that are automatically ineffective, a grey list of potentially unfair terms, and other terms that cannot be excluded.

With regard to Jordan, the absence of a specific law that deals with consumer issues renders the JCL the main legal framework that governs unfair T&Cs. The main problem that faces consumer protection on the Internet is the classification of ECCC under the Jordanian legal system. After the analysis of the legal nature of ECCC as a pre-formulated and non-negotiated contract that is conducted between parties who have unequal bargaining power, it was observed that such a contract needed to be treated differently to that of an ordinary contract conducted between businesses (B2B commercial contracts). Thus, the weaker party (i.e. the consumer) deserved specific protection.

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<sup>682</sup> Collins, *The Law of Contract* (n 58) 13.

Generally, ECCC should be classified as an adhesion contract, as the alternative form of classification, that of an ordinary contract, does not best serve the interests of consumer protection; this is because, in an ordinary contract, parties have the right to include any terms beneficial to them. However, as mentioned *supra*, consumers cannot exercise such rights in ECCC which therefore makes this right exclusively exercised by businesses. As the Jordanian legal system adopts the traditional theory of adhesion contract which requires that three main conditions must be met before protection becomes available, (that the contract is pre-formulated and non-negotiated; that its subject matter is essential to the consumer and that the seller or supplier is a monopolistic power), ECCC is therefore treated as an ordinary contract as it only complies with one of the conditions i.e. that it is pre-formulated and non-negotiated. However, no other conditions of the traditional theory are present. As a result it can be said that Jordanian consumers are not protected from *unfair* T&Cs but they are protected from *unlawful* T&Cs.

On the other hand, the above situation will change once the PCPL comes into force; this is because it is wider in scope than the traditional notion of an adhesion contract as it does not require any conditions to be met in order to protect consumers from unfair T&Cs. Further, the PCPL does not only apply to pre-formulated and non-negotiated contracts but also extends to all contracts where a consumer is a party to the contract, regardless of whether it is negotiated or non-negotiated.

With regard to the UK and France, the situation is completely different as there are comprehensive legal frameworks that deal with the issue of unfair T&Cs in

consumer contracts. It is true that the notion of adhesion contracts was raised at the beginning of the nineteenth century as a result of the particular economic situation at that time. However, the development of contract law in the UK and France resulted in legislatures recognising that the purpose of intervention was in order to protect consumers and was based upon no more than the inequality of bargaining power and the standardisation element (pre-formulated and non-negotiated). Therefore, the theory of adhesion contracts has been developed accordingly and, as a result, the freedom of contract principles regarding such contracts have been restricted by prohibiting certain terms, imposing other terms that cannot be excluded and considering other terms to be potentially unfair.

The next Chapter will empirically examine the consumer issues studied in the previous chapters with regard to the willingness of consumers to participate in e-commerce and their confidence when concluding ECCC's.

## **CHAPTER SIX**

### ***THE IMPACT OF INADEQUATE CONSUMER PROTECTION ON THE DEVELOPMENT OF E-COMMERCE IN JORDAN: AN EMPIRICAL STUDY***

#### **6.1 Introduction**

This Chapter embodies an empirical study to support the findings of the legal analysis that has answered the research questions in this thesis. This methodological step is important for the study for three reasons. Firstly, the study supports the answers to the research questions. Epstein and King have stated that:

*“In fact, in terms of legal scholarship, it is only the purely normative or theoretical that is not empirical. But even many articles whose main purpose is normative often invoke empirical arguments to shore up their normative points -- such as offering the positive empirical implications of adopting their preferred policy”<sup>683</sup>*

Secondly, this study seeks to make a descriptive inference for two reasons. The first is that it attempts to determine the weakness in the legal infrastructure in a specified area of law and investigate whether the problem regarding the unsuccessful development of e-commerce in Jordan is also caused by physical and human infrastructures. The second is that this research aims to use the outcomes of the empirical study to learn from other jurisdictions.

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<sup>683</sup> Epstein and King (n 30) 2.

Thirdly, this study seeks to make a causal link in order to examine whether or not the absence of specific consumer protection hinders the growth of B2C e-commerce in Jordan.

It has been argued by several studies that Jordanian consumers have not been granted special protection by Jordanian legislation when participating in any e-commerce activity<sup>684</sup>. This is due to the fact that Jordanian consumers are also not protected in the off-line environment, as discussed *supra*<sup>685</sup>.

This Chapter discusses the research design and the methods used in this study to achieve the research objective. In addition, it also describes the various procedures involved in the data collection. Issues of readability and validity in the research methodology are also discussed. In the final part of the Chapter, a short summary is presented.

The empirical research uses a quantitative approach in order to identify the impact of the absence of consumer regulations on the engagement of Jordanian consumers in e-commerce and its subsequent effect on the success of e-commerce. In addition, this quantitative study will prove or disprove the hypothesis suggested in the research and which is based on the research questions. Such empirical research is necessary as laws are an increasingly important feature of modern life and help to promote new methods of doing fair business.

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<sup>684</sup> See for example Dahiyat (n 252) 423, 436.

<sup>685</sup> See *supra* 2.3.2 and 3.9.

## 6.2 Research Design

The empirical legal study is important in order to evaluate the function of the law in the real world and for underpinning many areas of legal and social policies<sup>686</sup>. Furthermore, the study could be a way to discover how laws can contribute to the overall well-being of society. Researchers are able to address legal or other questions in empirical legal research<sup>687</sup>. Thus, the empirical study in this research does not address pure legal questions but attempts to investigate how the law reflects consumers' perception of their legal protection and their resulting levels of confidence which, in turn, has a direct effect on the success of e-commerce. Last but not least, this empirical study will be applied in order to investigate whether the existence of physical and human infrastructures regarding e-commerce in Jordan, are able to promote B2C e-commerce or whether they can also be considered as vulnerable factors.

## 6.3 Research Paradigm

In light of the empirical part of this study, the definition of the term 'paradigm' can be borrowed from the social sciences and humanities<sup>688</sup>. Thus, the term 'paradigm' can be defined as "*the progress of scientific practice based on people's philosophies and assumptions about the world and nature of knowledge*"<sup>689</sup>. As this part of the study is based upon a quantitative approach, it should adopt a

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<sup>686</sup> See Dame Hazel Genn and Martin Partington, Sally Wheeler, 'Law in the Real World: Improving our Understanding of How Law Works' (1st, Final Report and Recommendations, The Nuffield Foundation, London 2006) 1 Para 2.

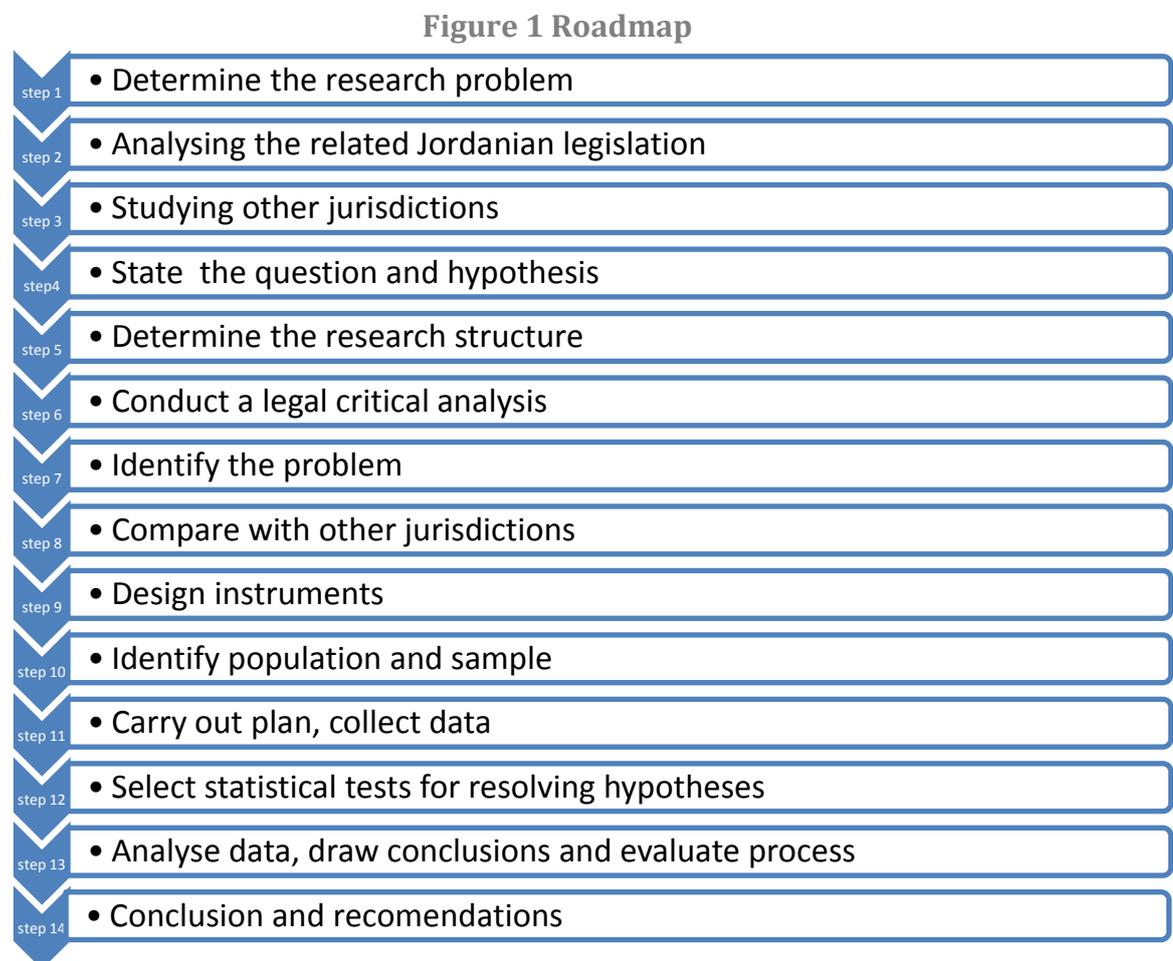
<sup>687</sup> See Lee Epstein and Andrew D. Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), 'The Oxford of Empirical Legal Research' (1st, Oxford University Press, Oxford 2010).

<sup>688</sup> Hutchinson 'Developing Legal Research Skills: Expanding the Paradigm' (n 25) 1065, 1095.

<sup>689</sup> Jill Collis and Roger Hussey, 'Business Research' (2nd, Basingstoke, Macmillan 2003) 46.

positivism philosophy due to its importance in examining a cause-and-effect relationship<sup>690</sup>. According to Hutchinson “Qualitative research is based on a positivist tradition, where the researcher is searching for ‘objective’ truth”<sup>691</sup>. On the other hand, this approach could also be classified under exploratory and descriptive research due to the quantitative research aiming to gain an initial insight into the research problem<sup>692</sup> and describing a phenomenon interest.

**Figure (1) describes a set of procedures for explaining the roadmap of this research**



<sup>690</sup> McConville and Hong Chui (n 26) 49.

<sup>691</sup> Hutchinson, *Researching and Writing in Law* (n 27) 91.

<sup>692</sup> McConville and Hong Chui (n 26) 50.

#### 6.4 Research Hypotheses

Firstly, according to Gibbs, Kraemer and Dedrick B2B e-commerce seems to be driven by global forces, whereas B2C seems to be more of a local phenomenon<sup>693</sup>. Their study has posited two major factors regarding the adoption of e-commerce, namely; national environmental and national policy factors<sup>694</sup>. It has also covered all the potential factors that have influence on the growth of e-commerce on several different levels, in a number of countries (e.g. economic, cultural, governmental etc.). With regard to consumer issues, which have also been considered as a factor in the aforementioned study, it states that *“Consumers have significant reservations about purchasing on-line, which stems from lack of trust in business practices, privacy/security...”*<sup>695</sup>; these concerns arise when no legal consumer protection exists.

Several factors can play crucial roles in the growth of e-commerce in Jordan but not all factors are important in all countries. Another recent study has determined four factors that can be used to measure the prevalence of web and e-commerce in Jordan, namely; the e-commerce user, legal factors, economic factors and product or service factors<sup>696</sup>. It has confirmed that the availability of

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<sup>693</sup> *“B2C diffusion seems to be less affected by global forces and more affected by variables specific to the national and local environment, such as consumer preferences, retail structure, and local language and cultural factors”*. See Gibbs, Kraemer and Dedrick (n 2) 5, 18.

<sup>694</sup> The study meant that demographics, economic and financial resources, information infrastructure, industry structure and competition, organizational environment, and social and cultural factors such as consumer preferences fall under the national environment factor, whereas liberalization of telecommunications and IT markets, government promotion initiatives for e-commerce and IT in general, and e-commerce legislation fall under the national policy factor. See Gibbs, Kraemer and Dedrick (n 2) 5, 18.

<sup>695</sup> *Ibid.*

<sup>696</sup> Al-Khaffaf (n 2) 66, 70.

regulations that are concerned with all electronic transactions is a critical factor for the success and prevalence of e-commerce in Jordan; however, there is still a lack of regulations that cover all issues in e-commerce<sup>697</sup>.

Furthermore, a published report regarding e-commerce and information technology determined that the main general barriers to the development of e-commerce in developing countries were legal, physical and human infrastructures<sup>698</sup>. The legal infrastructure, as has already been mentioned, can be described as the legal frameworks that cover every aspect of e-commerce. Physical infrastructure, according to the same report, is "*computers and other types of hardware, software, telecommunications services, and Internet access services*"<sup>699</sup>. Human infrastructure can be described as citizen awareness, education and skills. These factors will be used in this empirical research in order to determine, generally, the main barriers to the development of e-commerce in Jordan from a consumer's point of view.

Moreover, another recent study has shown four key factors that play a major role in shaping the adoption and usage of e-commerce in Jordan, namely; technological, social, legal and economic factors<sup>700</sup>. The study has described legal factors as "*the role of government in creating legislation, initiatives and funding to support the use and development of e-commerce and information technology*". On the other hand, a study by Shannak and Al-Debei has revealed that Jordan has adequate and efficient e-commerce requirements, such as IT

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<sup>697</sup> *Ibid.*

<sup>698</sup> Wunsch-Vincent and McIntosh (n 2) 61 – 65.

<sup>699</sup> *Ibid* 28.

<sup>700</sup> Al Rawabdeh (n 10) 1, 11.

infrastructure, institutional and governmental support, the support of organisations, and community culture in general. However, the weakness could be represented by the human infrastructure<sup>701</sup>.

Until recently, there were no studies providing an empirical determination of the weakest factor affecting consumers' engagement with e-commerce in Jordan, in relation to consumer protection. This Chapter provides an empirical determination of the weakest factors that may be hampering the growth of B2C e-commerce transactions in Jordan by covering the issues that relate to consumer empowerment.

In most research, hypotheses are based on the researcher's observations, opinions or beliefs (personal observations) or those of others. Research hypotheses provide specific elements for the research problem and tell us what data should be collected in order to achieve the objective and answer the questions.

The previous Chapters have examined the effectiveness of the Jordanian legislation in terms of providing an appropriate level of consumer protection in the e-environment in order to rebalance the contractual relationship between the parties. Accordingly, this Chapter will empirically examine the impact of that lack of regulation on consumers' participation in e-commerce activities. This Chapter aims to investigate the relationship between consumer perception regarding protective measures and consumer participation in e-commerce activities.

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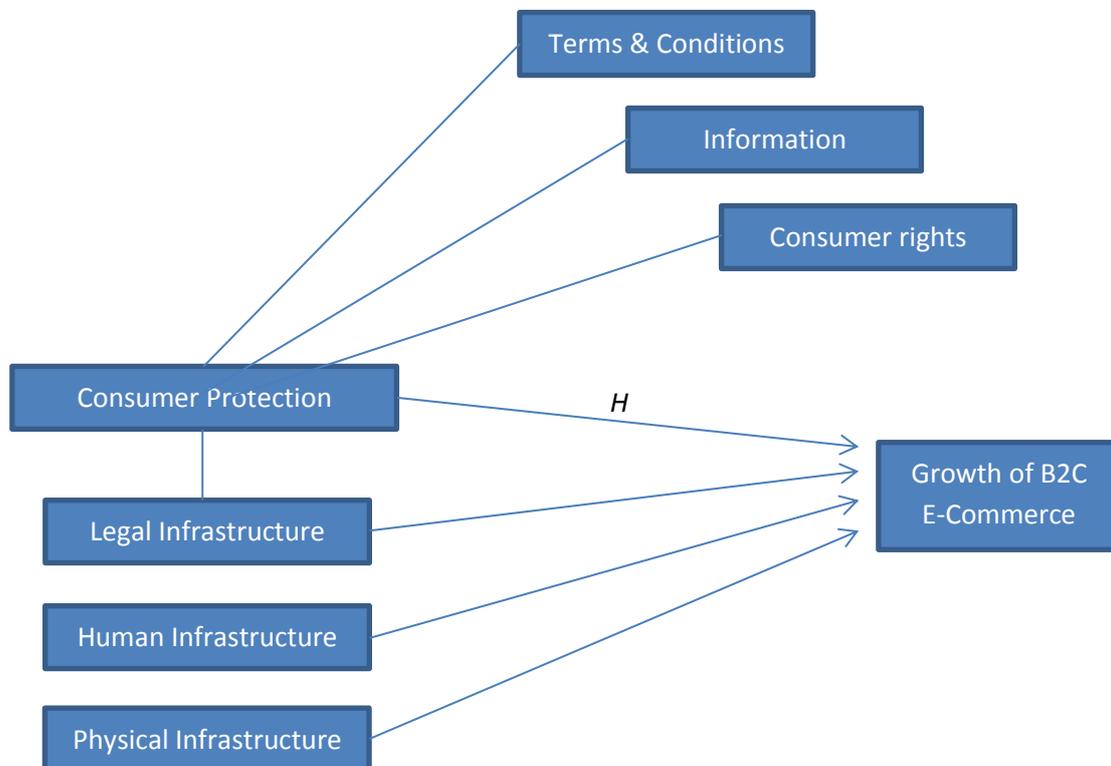
<sup>701</sup> O. Shannak and Al-Debei (n 10) 457, 489.

In order to achieve this objective, the following hypothesis has been formed:

*“There is a positive correlation between measures on behalf of consumer and the growth of B2C e-commerce in Jordan”*

A model has been developed to illustrate the main consumer issues that have been examined in the previous Chapters and which may negatively affect the growth and development of e-commerce in Jordan (see Figure 2). The reason for including physical and human infrastructure within the developed model is to ensure that the represented participants are able to engage in electronic transactions, and also have a PC and the adequate level of required skills regardless of their perception regarding protection.

**Figure 2 Model**



The framework of this study exhibits the relationship between independent variables (consumer protective measures that aim to empower consumers and rebalance the contractual relationship in B2C transactions) comprising of information, terms and conditions, rights of cancellation and a consumer's right of redress on one side, and on the other, dependent variables comprising of the growth of B2C e-commerce which is represented by whether or not Jordanian consumers participate in e-commerce activities.

With regard to the information provided at both the contractual and pre-contractual stage, e-commerce raises its own rationale for providing clear and sufficient information about the product or service being supplied and the contact details for the trader<sup>702</sup>. In addition, Hamilton stated that *“the primary rationale behind the [disclosure] regime is the recognition that there are additional risks ... The purpose of the regime is therefore to enable consumers to make better, more informed investment decisions”*<sup>703</sup>. This means that consumers rely on the information provided and use it in their decision making. In the section regarding information, five questions have been addressed to cover information relating to: the product, business identity, the transaction (i.e. steps to conclude the contract), information relating to consumer rights and insufficient information.

With regard to consumer rights, this thesis addresses the important rights that lead to consumers becoming empowered. These rights are represented by the right of cancellation and the right of redress. The right of cancellation, where

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<sup>702</sup> Scholes, 'Information Requirements' (n 277) 214.

<sup>703</sup> Hamilton and Gillies (n 350) 329, 348.

consumers can change their mind regarding their on-line purchases and be refunded within a specific period of time, has a positive impact on consumer confidence and the growth of e-commerce<sup>704</sup>. In addition, it has been argued that the lack of adequate consumer protection puts consumers at potential risk and reduces their confidence in e-commerce<sup>705</sup>. Furthermore, one of the most important features of the right of cancellation is allowing consumers to gain redress without the need to take expensive, complex or lengthy court action. Here, three questions have been addressed to cover the right of cancellation, right of redress and the right to return or replace the product.

With regard to unfair T&Cs in ECCC's, the rationale is related to the nature of the contract where consumers are not usually able to negotiate the T&Cs. This means that consumers are only able to accept or reject the contract based on the T&Cs imposed by a business. In addition, even if consumers know how to access T&Cs, they are likely to proceed without reading them for many reasons (i.e. difficulties in understanding legal terms, lengthy T&Cs which are therefore considered to be a waste of time etc.). Further, although businesses may not introduce terms that contradict the law (unlawful terms), they may impose unfair terms. This can also be considered as one of the reasons behind the necessity for consumer protection against unfair T&Cs in ECCC. Here, four questions have been addressed regarding the accessibility of T&Cs, the ability to

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<sup>704</sup> See also Department for Business Innovation & Skills, Reform of Consumer Law: Draft Regulation, Government Response to Consultations on Misleading and Aggressive Practices and the European Consumer Rights Directive, August 2013.

<sup>705</sup> See Panagiota Kontogeorgou and Michael G. Alexiou, 'Enhancing Consumer Confidence in Electronic Commerce: Consumer Protection in Electronic Payments' (17 Bileta Annual Conference 7 2002).

understand them, the ability to avoid unfair T&Cs after the conclusion of the contract and the fair expectation of T&Cs on the Internet.

With regard to the issue of infrastructures, frequencies will be calculated to investigate the weakest factor within the selected sample. The physical infrastructure covers the availability of computers, Internet connections, and e-mail addresses, electronic methods of payment, delivery and shopping websites. Human infrastructure covers the skills of using computers, the Internet, navigating shopping websites and the participant opinion regarding the attraction of e-commerce. Legal infrastructure covers the main legal frameworks regarding consumers, for example, the validity of concluding contracts on-line, consumer protection, e-payments, personal data protection, certainty and general opinion regarding the role of the Jordanian legislation in B2C e-commerce development.

In order to test the hypothesis, a sample should be determined from the population and thereafter analysed statistically. In addition to using simple statistics, such as the average of a distribution of value, the study looks for differences between ages and qualifications. *“To measure whether these differences did not occur through chance alone, a pre-determined acceptable level of confidence (sometimes called significance level) such as 90 (or  $p < 0.10$ ), 95 (or  $p < 0.05$ ) or 99 (or  $p < 0.01$ ) per cent should be used to reject or accept a hypothesis or hypotheses about a difference”*<sup>706</sup>. The majority of researchers use the level of 95% confidence and this figure has been used in this study.

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<sup>706</sup> McConville and Hong Chui (n 26) 57.

## 6.5 Questionnaire Survey

Questionnaires are considered to be the most popular means of data collection. As a piece of legal research, this study considers law as a social fact. On the other hand, law aims to order society and influence human behaviour<sup>707</sup>. This means that laws are the rules imposed by the legislature to influence human behaviour and improve its activities or benefit society. According to Ruiter;

*“The issue is no longer how the concept of legal system can help us to legitimize legal norms of conduct. It must be replaced with the question what kind of results stemming from human activity, can obtain legal validity as elements of a legal system”<sup>708</sup>.*

To describe and understand this approach, this research conducts a questionnaire survey<sup>709</sup>. According to Hutchinson,

*“The objective of the survey may be to gather descriptive data regarding some issues, activities or group of people or it may be that the survey attempts to establish opinions of particular phenomena”<sup>710</sup>*

A full description of the questionnaire survey will be explained in order to show how the survey attempts to investigate the relationship between Jordanian consumer behaviour and attitudes in relation to e-commerce activities and the

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<sup>707</sup> See Julie De Coninck's, 'Behavioural Economics and Legal Research' in in Mark Van Hoecke (eds), *Methodologies of Legal Research* (1st, Hart Publishing, Oxford, Portland, Oregon 2011).

<sup>708</sup> Ige F. Dekker & Ramses A. Wessel, 'Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions' in Ige F. Dekker and Wouter G. Werner (eds), *Governance and International Legal Theory* (1st, Martinus Nijhoff, 2004) 215-236.

<sup>709</sup> McConville and Hong Chui (n 26) 60.

<sup>710</sup> Hutchinson, *Researching and Writing in Law* (n 27) 94.

Jordanian legislation through the consumer protection lens. Thus, this survey looks for a correlation between variables.

According to McConville and Hong Chui;

*“Surveys are usually carried out as part of a non-experimental design and are ideal methods of understanding people’s attitudes, beliefs, views and opinions on different aspects of social life”<sup>711</sup>*

The survey in support of this study was conducted using a questionnaire that consisted of closed questions. In response to each closed question was a set of pre-designed replies for the research participant to choose from. These included multiple-choice, ‘strongly agree, agree, neutral, disagree or strongly disagree’ responses and ‘Yes or No’ responses.

The reason for choosing a questionnaire survey to test the hypothesis in this research is the flexibility of data collection. This meant that data could be collected by different methods (e.g. post, e-mail, on-line, face to face, telephone ... etc). In addition, it was able to cover a large number of people and a wide geographic area. Furthermore, the additional advantages were the lower cost in comparison to other means of data collection and the fact that no prior arrangements were needed.

There are two main types of data collection methods for any questionnaire survey, namely, self-administrated and interviewer administrated<sup>712</sup>. This study used both of these methods of data collection. The self-administrated

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<sup>711</sup> *Ibid* 59.

<sup>712</sup> *Ibid* 50. See also David E. Gray, 'Doing Research in the Real World' (London, Sage, 2004) 18.

questionnaire included an on-line survey (for the pilot study) and normal self-distribution, whereas the interviewer administrated questionnaire included a face-to-face and telephone survey. The mixed method model, or the multi-channel questionnaire, has been used for many reasons. Firstly, on-line methods have many advantages (i.e. low cost, less time consuming, automation and real-time access, no interviewer and convenience for the respondent). Secondly, a number of questionnaires were submitted to the Professional Associations Complex of Jordan as well as to several universities. These associations have been targeted due to the large number of people who have different qualifications (i.e. lawyers, engineers, pharmacists etc.) Thirdly, a number of questionnaires have been conducted by telephone due to it usually being faster to contact someone over the telephone than via other methods. Fourthly, face-to-face questionnaire surveys were conducted in the main shopping mall in Jordan. This method allowed the interviewee to see and discuss the issues with the interviewer and allowed the interviewer to find the target population.

Table (13) shows the advantages and disadvantages of using a questionnaire survey as a method of collecting data.

**Table 13 Advantages and disadvantages of using a questionnaire survey as a method of collecting data**

<i>Collection method</i>	<i>Advantages</i>	<i>Disadvantages</i>
<i>Face-to-face Interview</i>	<i>Explain questions, explore issues, make observations, use visual aids, allows for</i>	<i>Expensive, need interviewer training, required training for</i>

	<i>random sampling</i>	<i>questionnaire</i>
<i>In public places</i>	<i>Cheaper, more people in less time, allows for random sampling</i>	<i>Less representative sample, required training for questionnaire</i>
<i>Telephone survey</i>	<i>Accurate, cheap, allows for random sampling, good response rate</i>	<i>No personal observations, required training for questionnaire</i>
<i>Mail</i>	<i>Allows anonymity</i>	<i>Slow</i>
<i>E-mail</i>	<i>Cheaper, quicker results</i>	<i>Less representative sample, low response rate</i>
<i>Web survey</i>	<i>Quicker data processing, allows for random sampling, very high response rate, does not require training for questionnaire</i>	<i>Need computing expertise</i>

## 6.6 The Design of the Questionnaire

In order to test consumers' attitudes in relation to the legislation in Jordan, the questionnaire used in this study was constructed and structured by the researcher. The first and final drafts of the questionnaire were written and prepared in English and thereafter translated into Arabic. It was felt that translated questionnaires would be better understood and more easily answered by the respondents as most of the respondents would not be familiar enough with the English language to fully comprehend the questions being asked (both the English and Arabic versions of the questionnaires can be found in the Appendix).

## 6.7 Field Study Plan

In order to conduct the questionnaire survey, a plan was determined with regard to how, where and when to collect data. All data was collected randomly from anyone over the age of 18 years (this is the age of majority in Jordan). There was no specific selection of people as, for the purposes of the research, anyone was considered to be a consumer. Data was collected from different shopping centres; different cities; and different organisations and householders. In addition, the on-line survey was published on different governmental and non-governmental websites.

## 6.8 Sample Population

The selection of a sample is an essential element for a quantitative study.

According to Collis and Hussey;

*“A sample is made up of some of the members of a population. A population may refer to a body of people or to any other collection of items under consideration for research purposes”<sup>713</sup>.*

The population of this study represents Jordanian consumers. According to the Department of Statistics in Jordan, in 2010 the Jordanian population numbered 6,113,000. This research does not target everyone in Jordan but does target those who are over 18 years' old. According to the same department; 48% of the Jordanian population are under 18 years; this means that this study applies to 3,178,760 people. The sample size is a crucial issue in any quantitative study for the purpose of thereafter generalising the result upon the main population.

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<sup>713</sup> Collis and Hussey (n 689).

For this purpose, a random sample calculation<sup>714</sup> has been made for this study.

The random sample size has been calculated by using the following formula:

$$n = \left( \frac{z}{m} \right)^2 p(1-p)^{715}$$

As a result of this calculation, 384 consumers should participate in this study in order to generalise the result and test the research hypothesis.

### 6.9 Pilot Study

In order to test the research instrument, a questionnaire survey was published on-line for pre-test purposes. The choice of an on-line method in order to conduct a pilot study was for two reasons; firstly, it would produce a fast response rate and, secondly, it would be less expensive. 212 participants completed the on-line questionnaire. After testing these completed questionnaires, the researcher discovered that there were many weaknesses and ambiguous questions. In addition, the variables were unclear and were mixed in different sections. As a result of these findings, the structure of the whole questionnaire was re-developed, several questions were deleted, and the number of questions was reduced.

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<sup>714</sup> Sample size calculation is a calculation whose result is an estimate of the size of sample that is required to test a hypothesis

<sup>715</sup> Where: n is random sample size  
 z is the z value (e.g. 1.645 for 90% confidence level, 1.96 for 95% confidence level, and 2.575 for 99% confidence level);  
 m is the margin of error (e.g. .07 = + or - 7%, .05 = + or - 5%, and .03 = + or - 3%); and  
 p is the estimated value for the proportion of a sample that will respond a given way to a survey question (e.g. .50 for 50%).

### 6.10 Response Rate<sup>716</sup>

As was mentioned above, a multi-channel questionnaire was adopted in order to collect the required data for this study. However, the number of responses was more than expected. Because of this, another random sample table, or random number generator<sup>717</sup> was used to minimise the result to 384 responses. The total number of responses over all the methods of data collection was 467 divided into the following table, Table (14).

**Table 14 Response Rate of Study**

<i>Method of data collection</i>	<i>Number of questionnaires</i>	<i>Number of returned questionnaires</i>	<i>Number of responses</i>	<i>Used</i>	<i>Unused</i>	<i>Response rate</i>
<i>Telephone</i>	<i>150</i>	<i>63</i>	<i>87</i>	<i>71</i>	<i>16</i>	<i>58%</i>
<i>Face to face</i>	<i>150</i>	<i>57</i>	<i>93</i>	<i>76</i>	<i>17</i>	<i>62%</i>
<i>Manual self-distribution</i>	<i>400</i>	<i>113</i>	<i>287</i>	<i>237</i>	<i>50</i>	<i>71.75%</i>
<i>Total</i>	<i>700</i>	<i>233</i>	<i>467</i>	<i>384</i>	<i>85</i>	<i>66.7%</i>

**All the responses were multiplied by  $\approx 0.822$  in order to minimise the sample collected to 384 ( $384/467 \approx 0.822$ )**

As shown in Table (14) above, the total number of distributed questionnaires was 700 and the number of returned questionnaires was 233. As a result, the

<sup>716</sup> Response rate can be defined as “the proportion of people who have participated in a study, or who have completed a question / questionnaire. It is calculated by dividing the total number of people who have participated by those who were approached or asked to participate” see Nick Fox, Amanda Hunn and Nigel Mathers, Sampling and Sample Size Calculation, The NIHR RDS for the East Midlands / Yorkshire & the Humber 2007.

<sup>717</sup> Number 5 was chosen in order to minimise the collected sample.

total number of questionnaires completed was 467. According to Babbie<sup>718</sup>; a response rate of 50% is adequate for analysis and reporting, a response rate of 60% is good and 70%, very good. Based on these percentages, the response rate for this research could be regarded as sufficient and between good and very good.

### **6.11 Data Processing**

Upon the completion of the data collection, the questionnaires have been kept in a confidential cabinet, where security measures have been enforced. Data entry and verification began 10 days after the data collection. The manual data entry has been done by using a computer and SPSS software.

### **6.12 Description of Questionnaire**

The questionnaires used in this study<sup>719</sup> have been published in Arabic. The questionnaire survey includes 35 questions in total (3 demographic questions, 12 main questions to measure three independent variables, and 15 questions to give frequencies regarding the weakest factor (legal, physical or human infrastructure) within the selected sample). There is a further question representing the dependent variables and three additional questions to measure the general feeling about protection, comparing prices on the Internet in order to give an indication of whether Jordanian consumers navigate the shopping websites, the general level of consumer confidence on the Internet and, finally, a general question on whether the suggested independent variables affect their confidence on the Internet.

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<sup>718</sup> Earl Babbie, *The practice of social research* (1st, Wadsworth Publishing, California 1998).

<sup>719</sup> Can be found in the Appendix

The questionnaire is composed of 7 x A4 pages. The first page is the front cover which includes details of the title of the project, the logo of the University of Portsmouth, the student's name, department and the years of study. The second page contains an invitation letter, consent form and participant information sheet.

### 6.13 Validity of Questionnaire

In order to verify the validity of the questionnaire, it was reviewed by a number of academics and university lecturers within different faculties in Jordan (i.e. law, business and computer science) in order to make sure that each item measured exactly what it intended to measure. After receiving comments from the panel, a number of questions were deleted. In addition, several questions were modified. All the comments have been taken into consideration by the researcher in order to compile the final draft of the questionnaire, including the following paragraphs, as shown in Table (15) below:

**Table 15 the Main Domain of the Study with the Number of Questions Asked**

<i>Domain</i>	<i>Number of questions</i>	<i>Question number</i>
<i>Physical infrastructure</i>	5	7 - 11
<i>Human infrastructure</i>	5	12- 16
<i>Legal infrastructure</i>	5	17 - 21
<i>Consumer rights</i>	3	22 - 24
<i>Information</i>	5	25 - 29
<i>T&amp;Cs</i>	4	30 - 33

This research used the typical five level Likert<sup>720</sup> scale, a scale containing 1-5 points which goes from strongly disagree to strongly agree, as shown in Table (16) below:

**Table 16 Likert Scale**

<i>Level</i>	<i>Scale</i>
<i>Strongly agree</i>	<i>5</i>
<i>Agree</i>	<i>4</i>
<i>Neutral</i>	<i>3</i>
<i>Disagree</i>	<i>2</i>
<i>Strongly disagree</i>	<i>1</i>
<i>Yes</i>	<i>2</i>
<i>No</i>	<i>1</i>
<i>Never</i>	<i>4</i>
<i>Rarely</i>	<i>3</i>
<i>Occasionally</i>	<i>2</i>
<i>Often</i>	<i>1</i>

#### **6.14 Data Analysis Techniques**

To analyse the collected data and to test the hypothesis, the following statistical methods were used throughout (SPSS):

- Cronbach Alpha test: to measure the internal consistency of questionnaire statements;
- Means: to measure the central tendency scales;

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<sup>720</sup> “A psychometric response scale primarily used in questionnaires to obtain participants' preferences or degree of agreement with a statement or set of statements. Likert scales are a non-comparative scaling technique and are unidimensional (only measure a single trait) in nature. Respondents are asked to indicate their level of agreement with a given statement by way of an ordinal scale” see Dane Bertram, Likert Scales, CPSC 681 – Topic Report. Available on <http://poincare.matf.bg.ac.rs/~kristina//topic-dane-likert.pdf> accessed on April 2012

- Standard Deviations: to measure the dispersion of any set of observations; and
- Bivariate correlation: to determine if two variables are linearly related to each other.

### 6.15 Reliability

The internal consistency reliability of each of the dimensions was assessed by Cronbach's Alpha. The Alpha values for all dimensions vary from 0.618 to 0.859. The reliability for all domains together is 0.793 which is considered to be good according to Sekaran, 2003.

**Table 17 Cronbach's Alpha**

<i>No</i>	<i>Domain</i>	<i>Alpha</i>
<b>1</b>	<i>Buying from the Internet</i>	<i>0.618</i>
<b>2</b>	<i>Consumer rights</i>	<i>0.672</i>
<b>3</b>	<i>Information</i>	<i>0.737</i>
<b>4</b>	<i>T&amp;Cs</i>	<i>0.859</i>

### 6.16 Data Analysis and Results

Firstly, it is important to profile the sample before beginning to discuss the results of the data analysis. The demographic features of the random sample of Jordanian consumers are exhibited in Table (18) below.

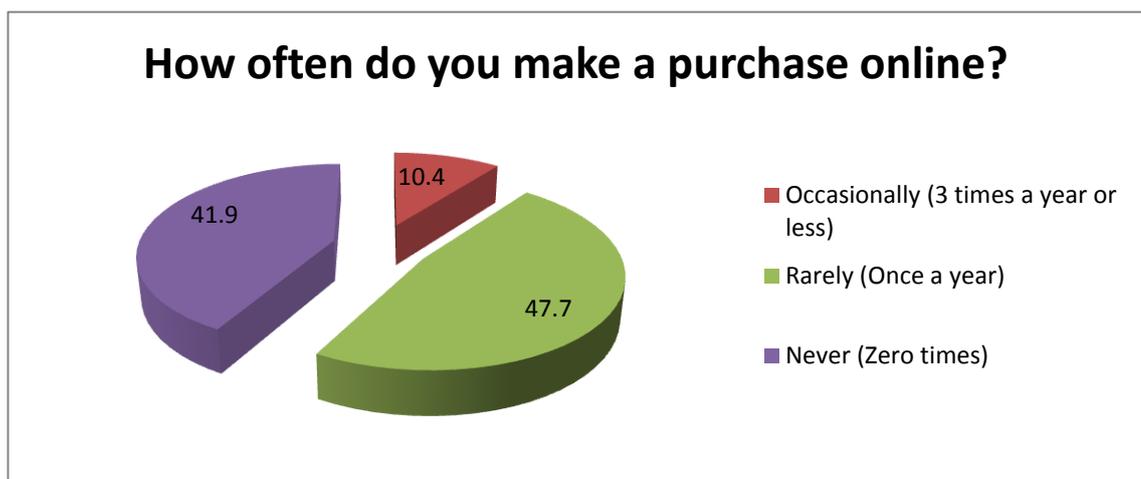
**Table 18 Sample Profile**

	<i>Categories</i>	<i>Count</i>	<i>Percentage</i>
<i>Age</i>	<i>18-24</i>	<i>50</i>	<i>13.0%</i>
	<i>25-34</i>	<i>77</i>	<i>20.1%</i>
	<i>35-44</i>	<i>114</i>	<i>29.7%</i>
	<i>45-54</i>	<i>97</i>	<i>25.3%</i>
	<i>+55</i>	<i>46</i>	<i>12.0%</i>

<i>Occupation</i>	<i>Employed</i>	<i>134</i>	<i>34.9%</i>
	<i>Self-employed/Business Owner</i>	<i>118</i>	<i>30.7%</i>
	<i>Student</i>	<i>82</i>	<i>21.4%</i>
	<i>Not Working</i>	<i>50</i>	<i>13.0%</i>
<i>Educational attainment</i>	<i>Post graduates</i>	<i>53</i>	<i>13.8%</i>
	<i>Under graduates</i>	<i>154</i>	<i>40.1%</i>
	<i>College</i>	<i>103</i>	<i>26.8%</i>
	<i>Secondary school</i>	<i>35</i>	<i>9.1%</i>
	<i>No qualifications</i>	<i>39</i>	<i>10.2%</i>

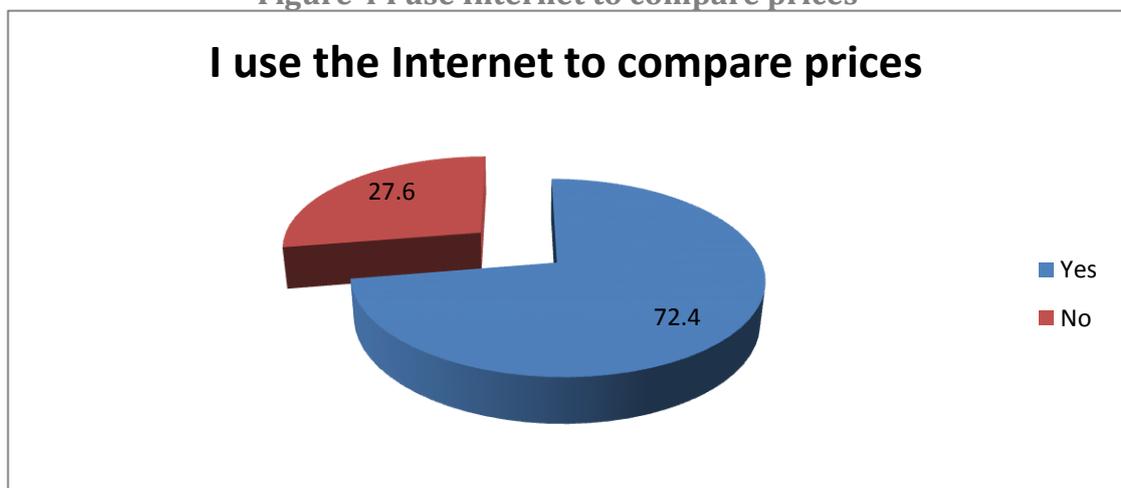
Before testing the hypothesis, it is worth mentioning that only 10.4% of the respondents answered that they would occasionally buy over the Internet, 41.9% have never purchased anything on-line, and 47.7% have rarely used the internet or used it once a year to make an on-line purchase. Interestingly, as shown in the chart below, 0% responded that they would regularly use the internet to make a purchase.

**Figure 3 How often do you make a Purchase on-line?**



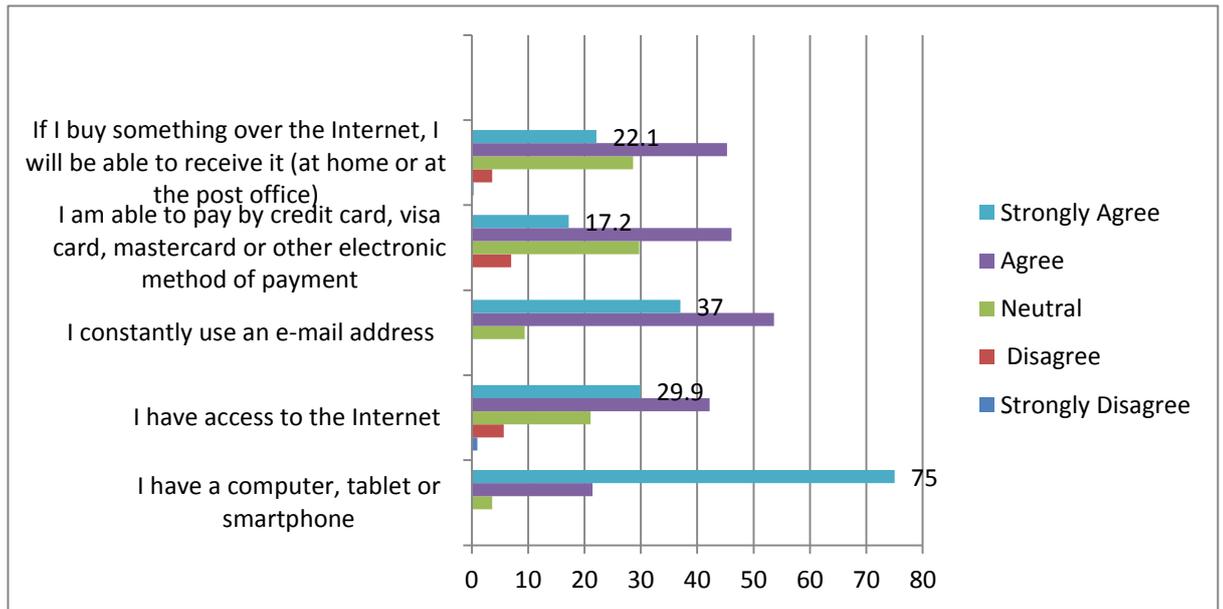
On the other hand, 72.4% of respondents use the Internet to compare prices, as shown in the chart below. The vast majority of those who use the internet in this way have had the means to engage in e-commerce activities; however, they have chosen not to do so and, consequently, this indicates that despite the existence of physical and human factors, they have disregarded on-line engagement.

**Figure 4 I use Internet to compare prices**



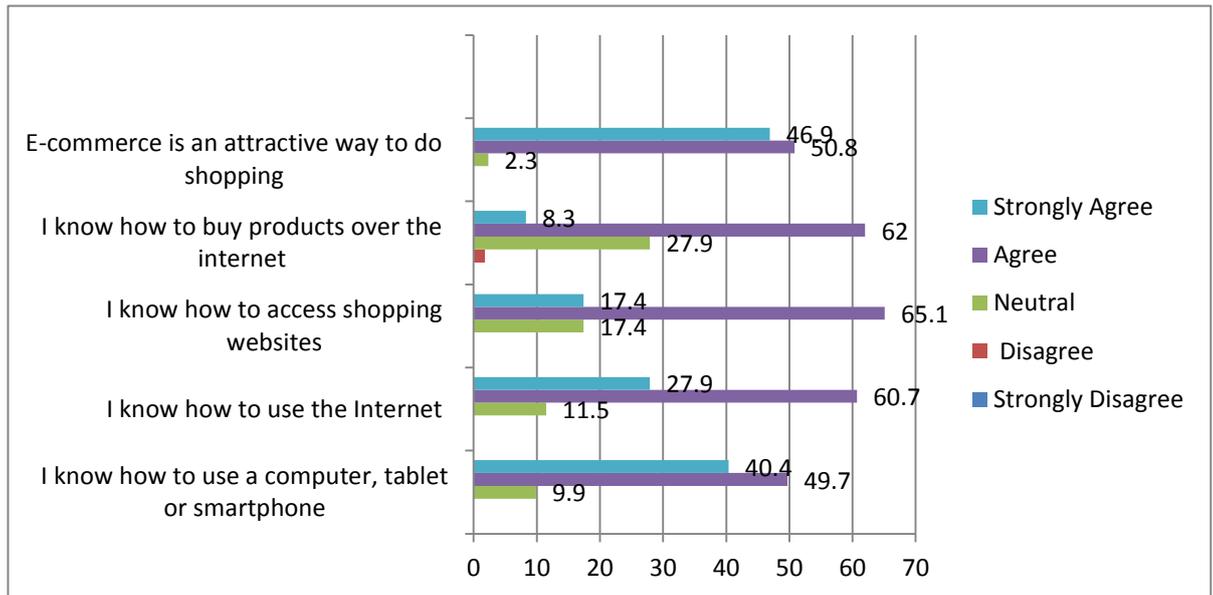
In addition, the next three Figures show that, generally, consumers are able to make purchases on-line from the perspective of physical and human infrastructures. However, their concern is regarding the legal infrastructure, particularly with regard to the consumer protection issues that are within the scope of this study.

Figure 5 Physical Infrastructure



The chart above shows that more than 95% of respondents have a computer, tablet or smart phone and more than 72% of respondents. One of the problems that faced the development of e-commerce in Jordan was a consumer's inability to pay by electronic methods. However, the situation has now changed, thanks to a pre-payment card that is provided by banks without the necessity of having a bank account. As a result, this survey shows that more than 54% of respondents now have the ability to pay by an electronic method and 29.7% have not denied their ability to do so. The majority of respondents acknowledged that they would be able to receive their purchases if they bought something over the Internet. Interestingly, the measured variables in the domain of physical factors are proving the aforementioned analysis, which has noted that Jordanian consumers do not lack access to technologies that facilitate on-line engagement. However, despite their accessibility, consumers have chosen not to use the internet for e-commerce activities.

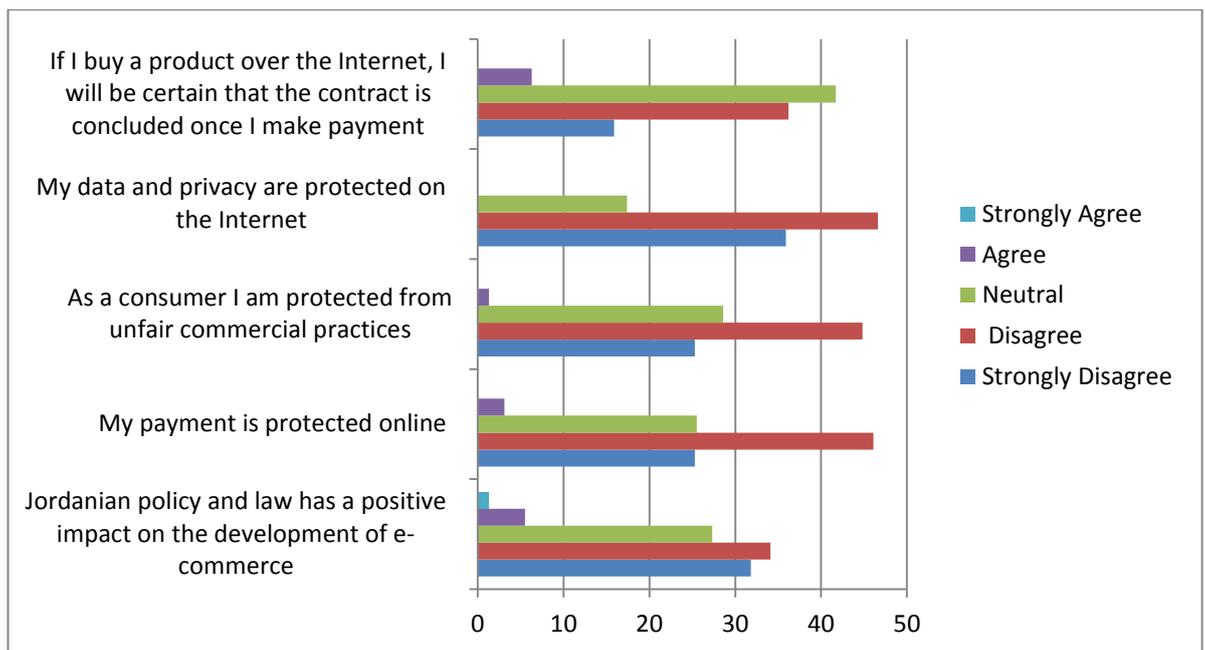
Figure 6 Human Infrastructure



With regard to the human infrastructure, it is clear from the chart above that the selected sample does not have problems with IT or knowledge of the Internet as approximately 90% of respondents have the required skills. They also know how to access shopping sites and how to buy products over the Internet, as approximately 75% of respondents have these skills. Finally, a majority of more than 90% considers e-commerce to be an attractive way to do shopping; this reflects the propensity of Jordanian consumers to buy on-line.

As mentioned above, this thesis only focuses upon consumer protection. However, it is worth mentioning that from the Jordanian consumers' point of view, the main barriers to e-commerce are not represented by the human or physical infrastructures.

Figure 7 Legal Infrastructure



The chart above gives an indication that the general view of the respondents is that they are not satisfied with the governance system that covers the main areas of e-commerce. This means that the majority of the random sample believes that Jordanian legislation does not play an active enough role in the development of B2C e-commerce in Jordan. With regard to the protection of payments made on-line, personal data protection and consumer protection in general, between 72% and 82% of respondents believe that they are not protected. In addition, more than 70% feel that they are not protected from unfair commercial practices.

In order to examine the correlation between the growth of B2C e-commerce and the protective measures that seek to empower consumers and redress the imbalance of power between the parties; the mean scores for information, T&Cs

and the selected consumer rights have been compared, as shown in Table (19) below.

**Table 19 Means and Std. Deviation**

	<b>Categories</b>	<b>Mean</b>	<b>Std. Deviation</b>
<b>Consumer rights</b>	<i>I can easily resolve a dispute with the seller on-line</i>	2.07	.682
	<i>I can cancel the transaction and get my money back before delivery</i>	1.68	.652
	<i>I have the right to return the product I ordered and get my money back, without giving any reason</i>	1.39	.530
	<b>Overall mean</b>	1.7144	.45802
<b>Information</b>	<i>Sellers provide sufficient information about the products over the Internet</i>	2.47	.956
	<i>It is easy to obtain the contact details of the seller for enquiries or solving problems</i>	1.68	.652
	<i>Sellers provide clear information about the technical steps to conclude the contract and the correction of any errors</i>	1.73	.672
	<i>Sellers provide clear information about my rights and their obligations</i>	1.69	.663
	<i>I am adequately protected if a business has provided me with insufficient information about their identity or about the product</i>	1.68	.652
	<b>Overall mean</b>	1.8526	.39028
<b>Terms and conditions</b>	<i>It is easy to find and access terms and conditions on a shopping website</i>	2.53	.985
	<i>Terms and conditions are generally easy to understand</i>	1.65	.801
	<i>Businesses normally introduce fair terms and conditions</i>	2.12	.977
	<i>It is easy to void any unfair terms after concluding the contract</i>	1.68	.652
	<b>Overall mean</b>	1.9954	.42423

<b>Overall mean of the three factors</b>	1.8542	.32009
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To test the hypothesis, the Bivariate Correlation (Pearson) was used, and, according to SPSS analysis it was found that the highest absolute person correlation coefficient = 0.826 and was between buying on-line and consumer rights; this therefore means that there is a strong, positive correlation between buying on-line and consumer rights as shown in table (20).

**Table 20: Bivariate correlation (Pearson) between buying on-line and consumers' rights**

		<b>How often do make a purchase on-line</b>	<b>consumer right</b>
<b>How often do make a purchase on-line</b>	<i>Pearson Correlation</i>	1	.826**
	<i>Sig. (2-tailed)</i>		.000
	<i>N</i>	384	384
<b>consumer right</b>	<i>Pearson Correlation</i>	.826**	1
	<i>Sig. (2-tailed)</i>	.000	
	<i>N</i>	384	384

\*\* . Correlation is significant at the 0.01 level (2-tailed).

The second strong correlation was between buying on-line and information (0.703) as shown in table (21).

**Table 21: Bivariate correlation (Pearson) between buying on-line and information**

		How often do make a purchase on-line	information
<b>How often do make a purchase on-line</b>	<i>Pearson Correlation Sig. (2-tailed) N</i>	1  384	.703**  .000 384
<b>information</b>	<i>Pearson Correlation Sig. (2-tailed) N</i>	.703**  .000 384	1   384

\*\* . Correlation is significant at the 0.01 level (2-tailed).

The third correlation was the lower by 0.339 and was between T&Cs and buying on-line; this means that there is a moderately positive correlation between the two categories as shown in table (22).

**Table 22: Bivariate correlation (Pearson) between buying on-line and terms and condition**

		How often do make a purchase on-line	Terms and conditions
<b>How often do make a purchase on-line</b>	<i>Pearson Correlation Sig. (2-tailed) N</i>	1  384	.339**  .000 384
<b>Terms and conditions</b>	<i>Pearson Correlation Sig. (2-tailed) N</i>	.339**  .000 384	1   384

\*\* . Correlation is significant at the 0.01 level (2-tailed).

Finally, overall correlation between the selected protective measures and buying on-line was 0.830 which gives an indication that there is a strong positive relationship between the protective measures that aim at rebalancing the contractual relationship between parties in ECCC and buying on-line in Jordan as shown in table (23).

**Table 23: Bivariate correlation (Pearson) between buying on-line and protective measures**

		<b>How often do make a purchase on- line</b>	<b>Protective measures</b>
<b>How often do make a purchase on-line</b>	<i>Pearson Correlation</i>	1	.830**
	<i>Sig. (2-tailed)</i>		.000
	<i>N</i>	384	384
<b>Protective measures</b>	<i>Pearson Correlation</i>	.830**	1
	<i>Sig. (2-tailed)</i>	.000	
	<i>N</i>	384	384

\*\* . Correlation is significant at the 0.01 level (2-tailed).

### 6.17 Discussion

Several limitations should be mentioned in order to avoid any misleading conclusions. As there were no statistical reports showing the number of Jordanian consumers who engage under ECCC, the empirical study attempted to establish a number of people who were able to engage under ECCC within a random sample; however, some legal barriers may have prevented them from doing so. Furthermore, with regard to information, consumer rights and T&Cs, this study did not determine all the related issues of each factor. However, it targeted questions regarding specific issues which are not covered by Jordanian

legislation. This empirical study determined whether the lack of regulations aimed at rebalancing the contractual relationship in B2C transactions affected the participation of Jordanian consumers in e-commerce activities.

The study revealed that people who have a computer and can access the Internet use the internet for purposes such as comparing prices; however, they did not tend to buy on-line or engage in any e-commerce activities. This is mainly because, within the subject matter of this study, they do not feel that they are adequately protected. The random sample of Jordanian customers showed a tendency to buy on-line, and the vast majority found the internet an attractive platform to buy and do shopping; nevertheless, the general feeling of insecurity and uncertainty regarding laws and regulations has prevailed throughout the analysis.

Jordanian consumers believe that information provided by a seller is not sufficient for an informed decision to be made and that there would be difficulty in obtaining contact details if they were to have enquiries or need to resolve problems. In addition, consumers' perception is that they would not be adequately protected if a seller provided them with insufficient information regarding their identity or regarding a product. This can be explained on the basis that the information disclosure regime under the Jordanian legal system does not impose an obligation upon businesses to provide consumers with certain information prior to the conclusion of the contract.

Moreover, as consumers are aware of the difficulty in resolving disputes with businesses in the off-line environment, their perceptions make analogous

presumptions regarding the situation in the on-line environment; more than 73% of the participants believed that it was not easy to resolve disputes with sellers. In addition, as the Jordanian legislation does not give a right to consumers to cancel a contract once it has been accepted, and particularly after payment has been made, approximately 90% of the participants believed that they could not withdraw from the contract. This empirical evidence supports the argument that the 'option of inspection', which has been discussed *supra*<sup>721</sup>, does not offer the right of cancellation for consumers in the e-environment. A similar situation occurs when consumers wish to change their mind about the product and want to change it.

Furthermore, the Jordanian legislation does not get involved in issues regarding T&Cs in consumer contracts, except in the event of the elements of an adhesion contract not being met (i.e. a pre-formulated and non-negotiated contract where the subject matter is essential for the life of the consumer, and monopolise by single or multiple businesses for example, gas and electricity) and the protection provided is merely represented by voiding unfair terms; the Jordanian legislation does not therefore address the issue of how T&Cs must be provided to consumers. As a result, more than 67% of the participants believed that it was difficult to access T&Cs on shopping websites. In addition, the majority of participants, more than 88%, believed that T&Cs were not easy to understand. Finally, the vast majority of consumers did not trust businesses as they believed that businesses did not usually introduce fair T&Cs and that it was not easy to void them thereafter.

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<sup>721</sup> See *supra* section 3.6.5.

Finally, it is worth mentioning that the majority of participants, more than 90%, did not have confidence in e-commerce. Of that 90%, approximately 78% acknowledged that their confidence was affected by issues such as; information obligations, protection from unfair T&Cs, the right of redress and the right of cancellation. This therefore means that, once the targeted protective measures have been improved under Jordanian legislation, consumer confidence will increase accordingly.

### **6.18 Conclusion**

This Chapter has shown the adopted methods of research and the type of data required to test research hypotheses. In addition, it has illustrated the procedure followed in the distribution of the questionnaire and the main research tools used for data collection. A mixed method model has been used for collecting data from 384 participants for data analysis purposes.

The empirical section revealed that Jordan has sufficient physical and human infrastructures. It is true that consumers are concerned about some protective measures, for example, payment protection and personal data protection; however, this study focused on the protective measures that aim to empower consumers and rebalance the contractual relationship in B2C transactions. One of the factors that prevents consumers engaging in e-commerce activities and thus undermines their confidence is their perception of the protection provided by the law. The lack of adequate protection provided for consumers has negatively affected the growth of e-commerce in Jordan. As a result, the absence of consumer protection must be considered when other studies assess the barriers that face e-commerce development in Jordan.

## **CHAPTER SEVEN**

### ***CONCLUSION***

#### **7.1 Introduction**

*“Legislation and enforcement provide the backbone for consumers’ confidence in the marketplace.”<sup>722</sup>*

The starting point of this thesis, which, in the author's view, is not subject to any counter-argument or suspicion, is that consumer protection is necessary for the development of e-commerce. The main objectives of this thesis are; to examine to what extent Jordanian legislation protects consumers in ECCC, to explore whether the current Jordanian legal frameworks adequately protect consumers in the B2C e-commerce sector and to explore whether the shortcomings of the Jordanian legislation in relation to consumer protection has a negative impact on the growth of e-commerce in Jordan.

The method of assessment used to answer the first question has been an analysis of an advanced area in the field of consumer protection policy, namely, EU legislation with particular reference to the UK and France. An analysis has also been undertaken with regard to the shortage of legal frameworks that govern ECCC in relation to consumer protection in Jordan. Consequently, the objective has been to convey the experience of a developed and advanced region in relation to certain aspects of B2C

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<sup>722</sup> Commission of the European Communities, Commission staff working document, Consumer Confidence in E-Commerce: Lessons Learned from the E-confidence Initiative, Brussels, 8.11.2004, SEC(2004) 1390.

contracts in the e-commerce sector, in comparison to Jordan, which lacks a competent consumer protection legal framework.

In order to examine the impact of the shortage of legal frameworks upon the growth of e-commerce in Jordan, an empirical study has been conducted by way of a questionnaire survey in order to test the following hypothesis “*there is a positive correlation between protective measures on behalf of consumers and the growth of B2C e-commerce in Jordan*”. Consequently, the objective of this empirical study has been to determine the correlation between the issues that seek to redress the imbalance between parties in ECCC and the growth of e-commerce in Jordan, in order to determine whether or not there is a relationship between the two and whether such a relationship is positive or negative.

This closing Chapter will be divided into three main sections. The first section will discuss the results achieved by the extensive discussion carried out in this thesis in order to create a full insight and to assist in constructing the final section. At the end of the first section, a comprehensive table has been added to summarise both the differences and the similarities between the studied legal systems. The second section will propose a suitable legislative model for Jordan which would cover critical consumer issues that are not adequately addressed by the current legal framework and which would benefit from following the example shown in some EU legal frameworks. The last section will cover further recommendations and closing comments.

## 7.2 Achieved Remarks

Firstly, the Internet, which introduced the concept of e-commerce, is no more than a new communication tool that allows contracting parties to conclude transactions in an e-environment. This means that the law of contract does not vary merely because the transaction takes place on-line. In relation to the B2C e-commerce sector, the legal system that governs consumer issues and which aims to ensure that consumers are sufficiently protected and the relationship between the parties adequately rebalanced, must not deviate dramatically from the traditional rules governing contracts made in the off-line environment. However, in general, in order for a legal system to provide an appropriate level of consumer protection in an on-line environment, it must be sufficiently developed in order to accommodate new challenges that may arise from consumer contract in general and the Internet in particular. This is because the lack of physical interaction between contracting parties results in the transaction being uncertain for consumers; this uncertainty could seriously restrict the growth of B2C e-commerce as it may deter potential e-commerce participants, unless the uncertainty has been reduced by ensuring that consumers are adequately protected.

Generally, to a great extent, the legal rules which apply to off-line transactions do not necessarily differ to those which apply to a transaction that takes place on-line. Therefore, the principle of medium neutrality has been widely adopted by governments and supported by commentators<sup>723</sup>. However, in order to ensure that the application of the principle of medium neutrality is able to

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<sup>723</sup> See footnote 35.

govern ECCC, legislation should recognise the concept of consumer contracts by distinguishing them from other commercial contracts concluded between businesses who have equal bargaining power. This cannot be achieved within the context of the classical law of contract, which provides general rules and emphasises the freedom of contract principle, for the following reasons.

Firstly, ECCC is conducted between contracting parties who have unequal bargaining power whereby the consumer represents the weaker party to the contract. The unequal bargaining power principle is not only represented by an economic power, but also by bargaining skills, experience, knowledge and sometimes competence in understanding the exact meaning of the terms of a contract. This situation allows businesses to exploit the consumer's position by taking an excessive benefit or unfair advantage. Therefore, the modern law of contract emphasises legislature intervention, in order to redress such imbalances by imposing certain limitations on the freedom of businesses to ensure that the transactions are fairly conducted. Thus, it can be said that the concept of consumer protection is derived<sup>724</sup> and justified<sup>725</sup> from the perspective of the unequal bargaining power principle that undermines the ancient dogma of equality.

Secondly, ECCC, as with many other consumer contracts, is usually presented on a *take-it-or-leave-it* basis, which means that the contract is pre-formulated, non-negotiated, and does not give the consumer a realistic opportunity to bargain. This situation raises the necessity to provide consumers with a specific form of

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<sup>724</sup> Barral-Vinnals (n 157) 53.

<sup>725</sup> Ramsay (n 22) 157.

protection as, otherwise, the role of the consumer is limited to whether or not they enter into the contract. Further to the inability of the consumer to negotiate the T&Cs of an ECCC, they are also, on occasions, inaccessible or not comprehensible enough to be understood. Therefore, as the classical law of contract distinguishes between voluntary and involuntary choices by ensuring that the consent of the contracting parties is not defective, mistaken or deceived, the modern law of contract goes much further by imposing compulsory terms and limiting the freedom of businesses in order to redress the imbalance between the contracting parties.

Thirdly, the asymmetries of information between parties in B2C transactions raises the rationale of contractual and pre-contractual information requirements in order to ensure that a consumer is able to make an informed decision. This can be considered as a powerful justification for intervention as such requirements reduce the imbalance of knowledge between the contracting parties in consumer contracts<sup>726</sup>. Particularly in relation to ECCC, e-commerce gives rise to its own rationale for information requirements; this is on the basis that a consumer is dealing with a remote trader about whom s/he knows little, and regarding a product which is not physically examined or touched. Therefore, in order to conclude an ECCC with informed consent, legislation must ensure that consumers are supplied with all relevant information that is essential for them to make an informed transactional decision, as well as any additional information that may be needed to facilitate contact with the seller/supplier for the purpose of making enquiries or complaints.

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<sup>726</sup> See: Howells and Weatherill (n 22) 64 and Ramsay (n 22) 64.

Fourthly, within the scope of this thesis, other issues that are related to ECCC help to increase the level of consumer protection. However, these are not generally considered by the classical law of contract as it provides general rules that are designed to be applied to traditional methods of concluding contracts, such as *face-to-face* transactions. The form of legislative intervention that is needed is that which organises the issues that may not arise in relation to B2B contractual relationships or in the off-line environment. These are, among others; acknowledgements or confirmations for contracts that are concluded by electronic means in order to remove any uncertainty for consumers in relation to the conclusion of the contract; the right of withdrawal which assesses the wisdom of choices made by a consumer in order to redress any problem or dispute without needing to take court action or even give a legal reason; performance, where the law specifies a fixed period of time in order to execute the contract due to a consumer not being able to impose such terms in non-negotiated contracts; and the right of redress, where the lack of feasible redress, other than the traditional route of litigation, reduces consumer confidence in e-commerce and undermines the fostering of e-commerce as a tool for further integration of the internal market<sup>727</sup>.

The above issues will be linked to the achieved remarks within the context of the Jordanian legislation and in connection to the results of the empirical study.

### **7.2.1 Consumer Protection in Jordan in Relation to E-commerce**

Firstly, the empirical study conducted in this thesis has investigated the correlation between certain aspects of consumer protection (i.e. information requirements,

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<sup>727</sup> Hornle (n 346)143, 145.

protection against unfair T&Cs, the right of cancellation and the right of redress) and the participation of consumers in e-commerce activities in Jordan. The investigation has shown a strong and positive relationship between the protective measures mentioned above and the willingness of consumers to buy on-line. The majority of the consumers questioned within the selected sample did not make purchases on-line as they did not feel adequately protected. Two of the more significant findings that emerged from the study are that; firstly, the majority of those who do not buy on-line use the Internet in order to compare prices but do not buy goods or services; this is notwithstanding the fact that they consider e-commerce to be an attractive way to do shopping; secondly, the majority of the participants believed that their confidence would be increased once they felt that they were protected. There are strong, positive correlations between buying online and protective measures on the one hand, and consumer protection and consumer confidence on the other. Accordingly, as consumer confidence is an important factor for the growth of e-commerce, the legislature should reconsider the legal framework for consumer protection in order to help with the improvement and development of e-commerce in Jordan.

Accordingly, as the core of this thesis has been the legal analysis in evaluating Jordanian legislation regarding consumer protection, the first issue raised here is the absence of a comprehensive legal framework that protects consumers and governs consumer contracts. This situation has resulted in the JCL being the main piece of legislation that governs consumer contracts, including ECCC. This is the natural result of the absence of a specific legal framework and the fact that the JETL does not address consumer issues but only acknowledges contracts that are concluded by electronic means. The main problem with the JCL is represented by the non-distinction between consumer and commercial contracts; this is as a result of the

legislation's reliance upon the principle of freedom of contract and the lack of intervention by the legislature or judiciary, except in the case of adhesion contracts as provided in Article 204 of the JCL. Otherwise, the JCL provides protection on the basis of whether the contract and its terms are lawful or unlawful rather than on whether the contract and its terms are fair or unfair; this is regardless of the inequality of bargaining power that may exist between the contracting parties.

The classification of ECCC under the current Jordanian legal system is that of an ordinary contract; this means that the protection provided to adhesion contracts cannot be extended to ECCC, except in cases where the product is essential for the consumer and monopolised by a stronger bargaining power. This is because the JCL adopts the traditional theory of adhesion contracts which requires that three main conditions be met before protection becomes available for the weaker party to the contract (i.e. that the contract is pre-formulated and non-negotiated; that its subject matter is essential to the consumer and that the seller or supplier is a monopolistic power). Usually, these conditions are not available in ECCCs except if the contract is related to, for example, electricity or gas.

Moreover, the Jordanian legislation does not recognise the right of cancellation, except in the event of parties agreeing to cancel the contract by mutual consent (the 'option of conditionality' in Articles 177-183 of the JCL). However, a consumer will not be able to impose or request such a term as ECCC is a non-negotiated contract and presented on a *take-it-or-leave-it* basis. Therefore, a consumer cannot cancel the contract but s/he will be able to rescind the contract if they can prove one of the defects of consent provided in Articles 135-156 of the JCL (i.e. duress, mistake and fraud).

The situation in e-commerce raises the necessity for such a right due to the consumer not being physically able to examine the product before the conclusion of the contract, which may have affected his/her decision. Further, the 'option of inspection' in Articles 184-188 of the JCL does not offer consumers the right of cancellation as businesses are able to claim that they have provided details of the distinguishing characteristics, as required by the provisions. The same situation arises with regard to the period for executing the contract and the issue of acknowledgements. Jordanian law does not provide rules that regulate such issues for consumers who are unable to impose a term for a fixed period of time to execute the contract. In addition, a consumer is also not in a position to request an acknowledgement.

Furthermore, the Jordanian legislature has failed to implement an effective information disclosure regime as it is not sufficiently developed to ensure that consumers are able to make informed decisions. This failure is as a result of three issues. Firstly, the reliance upon the defects of consent theories in Articles 135-156 of the JCL, particularly mistake and fraud, does not seek to redress the imbalance of knowledge between contracting parties in order to ensure that the consumer is able to make informed decisions; rather, they seek to redress the consent if it was deceived or mistaken. Secondly, the general principle in Article 466 is uncertain as it merely requires that a business make the item sold known to the buyer. It is true that Article 161 (1) provides that the subject matter of the contract must be known; this requires the seller to provide the essential characteristics of the item sold if it was not presented at the time of sale. However, the JCL does not define the information that falls under the concept of 'the essential characteristics of the goods or services' and

this may therefore lead to another uncertainty with regard to the information disclosure regime.

As a result of the PCPL being rejected by the Jordanian parliament, the JCL remains the main piece of legislation that governs ECCC. However, although the JCL provides solutions for certain problems, it does not properly cover all the related issues regarding consumer contracts (i.e. information requirements, the right of cancellation, performance and acknowledgement). The main advantage for enacting the PCPL is that it would provide an acknowledgement of the concept of consumer contracts in the Jordanian legal system for the first time, and provide specific protection for consumer contracts without requiring that the conditions of an adhesion contract be met. Further, the scope of protection in the PCPL is wide as it is afforded to consumers regarding both negotiated and non-negotiated contracts; the PCPL adopted the notion of providing protection in situations where there is unequal bargaining power between the parties. In addition, the PCPL provides methods of controlling and policing unfair contract terms and is considered to be an advanced piece of legislation in comparison to the JCL. It also provides a blacklist of terms that are always considered ineffective, although does not go as far as to provide a grey list of terms that are considered to be potentially unfair.

However, there are disadvantages to the PCPL which are discussed below.

Firstly, the information disclosure regime provided by the PCPL is uncertain due to the use of the phrase *'a consumer has the right to obtain information ...'*<sup>728</sup> in Article 3(A). This wording does not suggest that there is a positive obligation upon the

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<sup>728</sup> PCPL, s 3 (A) (2).

seller to provide information, but rather that there is a mere ‘incentive’ to do so or a requirement that the seller make the relevant information available upon a request by the consumer. In comparison, EU legislation provides that information requirements are a mandatory duty. For example, Article 6 of the CRD uses the phrase “[b]efore the consumer is bound by a distance or off- premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner”<sup>729</sup>. The wording of Article 6 of the CRD removes any uncertainty regarding the duty to provide information, by directly imposing an obligation upon the seller to provide certain information to the consumer.

Secondly, the PCPL leaves uncertainty in relation to the use of the phrase ‘*complete information*’ in Article 3(A) (2) as it does not define what information falls within the definition of ‘*complete information*’. This is the same problem that exists within the JCL with regard to the phrases ‘*essential characteristics*’ in Article 161(1) and ‘*distinguishing characteristics*’ in Article 466(1), both of which are not defined. This can be compared to the UK regulations, for example, Regulation 5(4)(b) of the CPUTRs that defines the phrase ‘*main characteristics*’ in Regulation 5(5)(a)-(r) by listing all the information that must be considered as ‘*main characteristics*’ and where businesses should comply by providing all the listed information.

Thirdly, in order to educate and inform consumers about their rights, the information disclosure regime, generally, requires that businesses inform consumers about their statutory and contractual rights. For example, Article 4 of the DSD, Article 7(4) (e) of the UCPD and Article 6(1) (h) of the CRD require businesses to inform consumers about the existence of a right of withdrawal. The Jordanian legal system,

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<sup>729</sup> CRD, art 6 (1).

in general, and the PCPL, in particular, do not provide an unconditional right of cancellation; however, consumers can rescind a contract in two situations, namely where there is a defective contract or a defective product<sup>730</sup>. The PCPL does not seek to educate consumers or inform them about these rights as Article 3(A) (3) gives the consumer the right to obtain complete information about their obligations, but not their rights. Moreover, the PCPL limits the concept of a pre-contractual information obligation regarding consumer obligations and traders rights, but not the related information regarding the product, for example, to ensure that consumers are able to make an informed transactional decision.

Fourthly, although the JETL does not provide rules of information that specifically relate to e-contracts, in general, and ECCC, in particular, the PCPL has also not addressed such issues despite their importance in e-commerce. In comparison, the CRD<sup>731</sup>, DSD<sup>732</sup> and the ECD<sup>733</sup> impose obligations upon sellers to provide specific information relating to the context of ECCC in order to ensure a high level of consumer protection and the ability for the consumer to make better and informed decisions with full consent.

In relation to *Shari'a*, which, according to the JCL is the second source of law in Jordan<sup>734</sup>, it is not sufficiently developed in order to become an alternative solution to govern ECCC. The first reason for this is that there is much debate and controversy between different Islamic schools of thought regarding the validity of contracts concluded in different places and at different times. Secondly, the

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<sup>730</sup> PCPL, s 7.

<sup>731</sup> CRD, art 6.

<sup>732</sup> DSD, art 4.

<sup>733</sup> E.g. ECD, art 10.

<sup>734</sup> JCL, s 2.

cornerstone of the Islamic doctrine of contract is freedom of contract which totally contradicts the situation with regard to consumer contracts. A contract, in *Shari'a*, is considered to be the law of the contracting parties, with the exception of contracts or terms that contradict *Shari'a*. Thus, the situation with regard to *Shari'a* is similar to that under the JCL, namely; both legal sources accept all contractual terms except those which purport to make lawful that which is unlawful and vice versa. Moreover, in relation to the information disclosure regime, the JCL is already based upon *Shari'a* in terms of the general principle that requires that the item being sold must be known to the buyer. However, this provision does not assist the consumer in ECCC to make an informed transactional decision and, consequently, does not serve consumer protection in general.

Finally, as the intervention in a contract under *Shari'a* is limited to ensuring that the contract does not contradict *Shari'a* and has been concluded with a consent that is free of defects (i.e. duress, mistake and fraud), the contemporary consumer rights, such as the right of withdrawal, due to requiring legislative intervention, is not available under the *Shari'a* regime.

As a result of the above, the following conclusion can be drawn; the current Jordanian legal system does not provide sufficient protection for consumers in ECCC. Evidence from this study suggests that the lack of consumer protection is affecting the growth and development of e-commerce in Jordan. Taken together, the above achieved remarks suggest that there is a significant necessity to introduce a consumer protection law in Jordan that considers the nature of ECCC. This is due to the fact that current Jordanian legislation has failed to afford consumers the

appropriate level of protection that seeks to rebalance the contractual relationship between the parties and increase consumer confidence.

Having said this, the author will be guided in the next two sections, firstly to suggest a model that covers the issues discussed in this thesis, which play a crucial role in consumer protection and have been taken seriously by the EU and, secondly, to provide additional recommendations and closing comments to suggest improvements to consumer protection that will help the development of e-commerce in Jordan. However, prior to undertaking this, it would be useful for other researchers to summarise both the differences and the similarities between the selected legal systems in this thesis, as shown in the following table.

**Table 24: The main differences between the selected legal systems in relation to the main issues in this thesis**

	<b>Jordan</b>	<b>Ottoman Empire</b>	<b>Shari'a</b>	<b>France</b>	<b>England</b>	<b>EU</b>
Legal system	Civil Law System influenced by <i>Shari'a</i> and <i>Majalla</i>	Islamic legal system influenced by <i>Shari'a</i>	Islamic legal system	Civil Law system (codified)	Common Law system (precedent)	Common policies
Comprehensive legal framework that covers consumer issues	Unavailable			Available		
Main legal frameworks that govern ECCC in relation to consumer protection	JCL and JETL	<i>Majalla</i> and Islamic jurisprudence	Doctrines based on several schools of thought	FCC and FCL	E-commerce Regulations, CPUSTRs, CPRs, UCTR, UTCCRs	CRD, ECD, DSD, UCPD, UCTD
Recognising consumer contracts	No Consumer contract is subject to general principles			Yes A specific set of rules govern consumer contracts		
Distinction between B2B and	Unavailable			Available		

B2C contracts in terms of protection		
Legislature intervention to rebalance the contractual relationship	Unavailable	Available
Special rules for online consumers	Unavailable	Available Most notably information requirements. See table (7)
Legislative approach for governing consumer contracts	Classic	Modern
Classical law of contract vs. Modern law of contract	Freedom more than fairness	Fairness more than freedom
Information disclosure regime	Defect of consent theory	Pre-contractual and contractual information requirements
Defect of consent theory vs. Pre-contractual information duty	(i) Defect of consent theory is related to false knowledge (ii) In the event of fraud or mistake the consumer can obtain a remedy if the information was wrong; however, with regard to the pre-contractual information duty a consumer would not have entered into the contract and therefore the consequences of non-compliance are the same	(i) Pre-contractual information is related to lack of knowledge (ii) a pre-contractual information duty is not based on the assumption that the consumer would regard this information as material in deciding whether or not to conclude the contract, although it will often assist the consumer in making up his mind (iii) the pre-contractual information duty encompasses a broad obligation to provide information
Defect of consent theory vs. Pre-contractual information requirements in relation to ECCC	Defect of consent theory seeks to redress consumer consent after the conclusion of the contract in cases of fraud and mistake	Pre-contractual information (i) protects the real consent of a consumer where contract law should attempt to equip the consumer with sufficient information in order that the ECCC is based on real consent (ii) assists consumers to make choices between various options (iii) upholds the clarity of information as it requires that the information concerning the ECCC is preserved for consumers in an adequate manner (iv) is not actually a duty to avoid or prevent harm or losses. However, it attempts to ensure that the content of the ECCC can be achieved,

		particularly in relation to the disclosure of negative information, where one of its main functions can be considered as an incentive for businesses to improve their standards (v) supports the moral duty of honesty for stabilising B2C contractual relationships which might lead to increased consumer confidence in the Internet marketplace (vi) obtains better remedies for breach of contract (vii) improves consumer autonomy and freedom of choice (viii) assists in resolving disputes; this functionality can be described as a 'contract synopses'
Information requirements for online consumers	Unavailable	Available
Comprehensive list of information requirements	Unavailable The item sold must be known to the purchaser	Available Specific information related to the product, transaction and seller identity as mentioned in table (7)
Distinguishing characteristics (information)	Not Defined	Defined See table (7)
Distinction between information requirement and pre-contractual information requirement	Unavailable	Available The pre-contractual information requirement must be fulfilled prior to the conclusion of the contract and before the consumer is bound by either an off-line or on-line contract, or any corresponding offer. Contractual information that can be given to a consumer during or after the conclusion of the contract is less likely to influence a consumer's behaviour and his/her decision making; rather, it serves as a record to what has been agreed in the contract
Unfair contract terms test	Test of oppression	Test of fairness
Test of oppression vs. test of fairness	Test of oppression - only for adhesion contracts	Test of fairness - all consumer contracts
Test of oppression vs. test of fairness	Test of oppression: contract term is void if it is contrary to public policy	Test of fairness: contract term is void if it is contrary to the requirements of good faith and causes a significant

		imbalance in the parties' rights and obligations
Adhesion contract vs. consumer contract	Adhesion contract: (i) contract is pre-formulated and non-negotiated, (ii) its subject matter is essential to the consumer, (iii) the seller or supplier is a monopolistic power	Consumer contract: (i) it is standardised and offered to the public, (ii) it is pre-formulated, (iii) non-negotiated, and (iv) concluded within a relationship of unequal bargaining power
Blacklist unfair terms in consumer contracts	Unavailable	Available See for example the UTCCD
Grey list (informative) contract terms	Unavailable	Available See for example the UTCCRs, reg 5 (5)
Term that are void	Unlawful terms	Unlawful terms and unfair terms
Unconditional cancellation rights	Unavailable	Available
Cancellation rights	Only by mutual consent (option of conditionality) This cannot happen in the case of consumer contracts as they are non-negotiated/pre-formulated contracts	Statutory rights
Acknowledgement	Optional	Compulsory
Performance period	Not specified	Specified by legislature

### 7.3 Proposing a Model that Addresses the Lack of Consumer Issues in Jordan

The abovementioned achieved remarks has lead the author to propose, to the Jordanian legislature, that a comprehensive model be designed to specifically address the main issues that would lead to a rebalance in the contractual relationship in a consumer contract and empower a consumer who participates in ECCC.

The proposed model is not only limited to those who conclude ECCC, but also extends to all consumer contracts by introducing a set of rules to reform the current shortage in Jordanian law, namely; in relation to the information disclosure regime, unfair terms and other issues (i.e. rights of cancellation, acknowledgements, performance and right of redress). The way to approach this objective is to modify the current PCPL or introduce a new electronic transaction law with a specific section that addresses consumer protection issues. There is also a necessity to modify the JCL, as will be highlighted in the final recommendations in this thesis. The model proposes that the B2C transaction in Jordan requires a comprehensive law that addresses the following issues.

### **7.3.1 Information Disclosure Regime**

This model proposes that the next potential consumer protection law should include a comprehensive information disclosure regime that addresses three types of information, namely; pre-contractual information requirements; contractual information/written disclosure at or soon after the conclusion of the contract; and information that is specifically related to ECCC. This type of information must be imposed in an unambiguous way by using a phrase such as “*the trader shall provide the consumer with the following information in a clear and comprehensible manner*”; this type of wording indicates the mandatory nature of the obligation and avoids any misinterpretation. Further, the information requirement in general must be provided in a clear and comprehensible manner. Moreover, Jordanian legislature should avoid using general phrases such as ‘*essential characteristics*’ or ‘*distinguishing characteristics*’ unless their meanings are defined and clarified. For example, the legislature could refer the phrase ‘*essential characteristics*’ to another article and impose a list of information that a seller must comply with in order to

ensure that s/he provides the '*essential characteristics*.' This list could contain such requirements as usage; quantity; specification; benefits; risks; execution; composition; accessories; availability; delivery; after-sale customer assistance; the handling of complaints; the method and date of manufacture of the product; fitness for purpose of the product; geographical or commercial origin; results to be expected from use of the product; and the results and material features of tests or checks carried out on the product.

The pre-contractual information requirement must be fulfilled prior to the conclusion of the contract and before the consumer is bound by either an off-line or on-line contract, or any corresponding offer. Legislation should ensure that all relevant information regarding the goods or services is provided, as well as information that relates to the identity of the trader, such as an address and contact details. Contractual information that can be given to a consumer during or after the conclusion of the contract is less likely to influence a consumer's behaviour and his/her decision making; rather, it serves as a record to what has been agreed in the contract. In addition to the pre-contractual and contractual information, legislation should consider the nature of e-commerce by imposing an information duty that is specifically related to ECCC. This includes the following three types of information; firstly, information relating to the nature of the distance contract, such as the total price, delivery, payment methods and restrictions, the cost and the means of communication etc. Secondly, information relating to the right of cancellation such as whether there is such a right, the period within which to exercise it and the cost of returning the goods. Thirdly, information relating to the methods of concluding an ECCC, such as the technical steps to follow to conclude the contract and the technical means to correct input errors.

### **7.3.2 Unfair Terms**

As discussed earlier, with regard to unfair contract terms, the PCPL has made impressive progress in terms of controlling unfair contract terms in consumer contracts; this has been achieved by introducing, for the first time, a blacklist of unfair terms that must always be deemed to be ineffective. However, the Jordanian legislature limits the number of unfair terms, as stipulated in Article 22(B) of the PCPL. There is a necessity to introduce a list of terms that are potentially unfair in order that they can be used as an information resource and guideline by the judiciary; this is an important issue due to Jordan not having a judicial system that is based upon judicial precedent. Moreover, the Jordanian legislature should determine the mechanism for testing contractual terms in order to determine whether or not they are unfair. Other issues also need to be considered, such as the necessity for businesses to provide T&Cs in a clear and comprehensible way, with the use of simple language, in order that they can be understood by the consumer. Further, requirements such as the easy access to T&Cs, avoiding the use of small font, and highlighting important terms in bold or a different coloured font would also benefit the consumer.

### **7.3.3 Other Issues**

Firstly, in order to remove rash decision making by consumers, the legislature should address the issue of the right of withdrawal. It is still to date the right of withdrawal is not recognised by the Jordanian legal system; however, by giving a consumer the right to cancel a contract without giving any legal cause or reason, it gives the consumer a chance for quiet reflection regarding a contract that may have been agreed 'in the heat of the moment'.

Secondly, the Jordanian legislature should determine a fixed period of time for the execution of a contract. In order to ensure that consumers feel that the transaction is safe and trustworthy, businesses must be limited to a specified period of time in order to conclude the performance of the contract. This must be imposed by legislation instead of leaving it to the mutual consent of contracting parties; this is due to the fact that ECCC is a non-negotiated contract that is concluded between parties who have unequal bargaining power.

#### **7.4 Further Recommendations and Closing Comments**

Other than the proposed model, which is the main recommendation of this thesis, other recommendations will be dedicated to other issues that have been investigated during the study. Firstly, additional observation, which has also been discussed by others<sup>735</sup>, is related to the JCL as it is not a detailed piece of legislation. The reliance upon the general principles without giving any further clarification creates uncertainty regarding several rules, for example, adhesion contracts, particularly in a codified system such as Jordan where the Jordanian courts have a limited role due to them solely applying laws rather than setting legal precedents. In relation to adhesion contracts, and in order to make the general principle of the JCL clearer, the legislature should provide a clear definition of an adhesion contract and what constitutes that type of contract (i.e. what conditions it requires in order to ensure that protection is available to a consumer). Further, in relation to judicial intervention, in order to provide weaker parties (whether a legal or natural person) with appropriate protection under Article 204 of the JCL, the legislature should provide a definition for the

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<sup>735</sup> Among others: Kasassbeh and Hayajneh.

term 'oppression' and guidance on how and when it is constituted. For example, the Jordanian legislature could adopt the European approach regarding the test of fairness which relies upon two main pillars (i.e. if the term is contrary to the requirement of good faith or it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer). Further, public policy and good faith, that are main general principles and considered as restrictions upon the freedom of contract principle, should be more specific, or at least defined or clarified by the JCL in order to provide clear limitations on the freedom of contract approach.

Secondly, as Article 2 of the JCL has expressly announced that Islamic jurisprudence is the second source of law, the legislature should select one specific school of thought to follow in order to avoid any conflict in court rulings. Further, it would be practical if the legislature limited such sources for transactions that are concluded between parties who have equal bargaining power rather than in B2C transactions; this is because B2C contracts need to be the subject of modern and specific rules that limit the freedom of contract. Moreover, generally, as it is four decades since the introduction of the first edition of the JCL, there is an urgent need to revise it in order that it can be restructured to avoid repetition and redundancy; for example, Article 161 (1) and 466 (2) which are derived from *Majalla* and related to the information disclosure regime. These Articles need to be revisited by the Jordanian legislature as they give a seller the right to refrain from giving a buyer any information regarding the item being sold if it was presented at the time of sale.

Thirdly, there is a need to include undue influence, which occurs between parties who have unequal bargaining power, as a defect of consent.

Finally, other suggestions and criticisms made throughout the study regarding specific points but not mentioned in the recommendations, here or in the proposed model, are also relevant and it is recommended that they should be taken into consideration by the Jordanian legislature when amending or introducing laws in relation to consumer protection and e-commerce. The recommendations mentioned are hopefully considered to be a modest guide that will contribute to creating a strong system of consumer protection in Jordan that is based on the advanced experience in the EU region. Further studies covering other areas are certainly needed in order to improve the entire consumer protection system and enable the development of e-commerce in Jordan, at least by introducing a developed legal framework that governs consumer issues. It is hoped that this study is one of the first steps toward achieving this goal.

## **BIBLIOGRAPHY**

### **Books**

- Abdulawy I, *General Theory of Obligations: The Theory of Contract* (1st, Dar Alma'aref Aljame'yah, Casablanca 1996) (in Arabic)
- Ahmad M, *Consumer Protection in Islamic Jurisdictions* (1st, Dar Al-Kotob Al-ilmiyah, Beirut 2004) (in Arabic)
- Al Badawi M, *General Theory on Obligation* (1st, the Open University Publications, Cairo 1991) (in Arabic)
- Al Obidi A, *Explanation of Sales and Lease Contracts* (1st, Almarkez Alqawmy Lelnasher, Irbid 2000) (in Arabic)
- Al Sarhan A and Khatir N, *Sources of Obligations in the Jordanian Civil Code* (1st, Daruth Thaqafah, Amman: 2000) (in Arabic)
- Al Zuhaili W, *The Doctrine of Legitimate Necessity: Comparative Study with the Positive Law* (1st, Dar Alfikr , Damascus 1997) (in Arabic)
- Al-Far A, *Sources of Obligations in the Civil Code*, (Amman: Daruth Thaqafah, 1998) (in Arabic)
- Aljaza'ery A, *'The Doctrine Book on the Four Schools of Thought'* (2nd, Dar Al-Kotob Al-ilmyah, Beirut 2004) (in Arabic)
- Alsada A, *Source of Obligations: A Study in the Lebanese and Egyptian Laws* (Dar Alnahda, Beirut 1974) (in Arabic)
- Alsarhan A, *Jordan Civil Code: Sources of Obligations* (1st, DarAlthaqafah, Amman 2005) (In Arabic)

- Al-Shekh O, *The Meeting Place of the Contract and its Impacts on Electronic Contracts: a Comparative Study between Islamic Jurisprudence and Man-made Law* (1st, Umm Al-Qura University, Mecca 2007) (in Arabic).
- Al-Zarqa M, *The General Introduction of Jurisprudence* (1st, Dar al-Qalem, Damascus 2004) (in Arabic)
- Aubin G and Bouveresse J, *Introduction historique au droit du travail* (1st, PUF, Paris 1995) (in French)
- Babbie E, *The practice of social research* (1st, Wadsworth Publishing, California 1998)
- Bainbridge D, *Introduction to Information Technology Law* (5th, Longman, Essex 2008)
- Berlioz G, *Le Contrat D'Adhésion* (2nd, L.G.D.J., Paris 1973) (in French)
- Cane P and M. Kritzer H (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, forthcoming 2010)
- Cartwright P, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (1st, Cambridge University Press, Cambridge 2001)
- Catenae C, *Cyber Consumer Law and Unfair Trading Practice: Markets and the Law* (1st, Ashgate, England 2004)
- *Chitty on Contracts* (31th, Vol 1, Sweet and Maxwell, London 2013)
- *Chitty on Contracts* (29th, Vol 1, Sweet and Maxwell, London 2004)
- Collins H, *The Law Of Contract* (4<sup>th</sup> edition, Butterworths, London, 2003)
- Collins H, *The Law of Contracts* (4th, Lexis Nexis Butterworths, London 2003)

- Collis J and Hussey R, '*Business Research*' (2nd, Basingstoke, Macmillan 2003)
- Coteanu C, *Cyber consumer law and unfair trading practice, Markets and the law* (1st, Ashgate Publishing, England 2004)
- Dicey A.V., *Law and Opinion in England* (2<sup>nd</sup> ed. 1914)
- El Sanhuri A, *Medium commentary on the new Civil Code: Part 1* (1st, Dar Alnashr, Cairo 1952-1970)
- El Sanhuri A, *Sources of Justice in Islamic Jurisprudence* (1st, Cairo, Dar A-Hana 1960) 90 (in Arabic)
- El Sanhuri A, *The Sources of the Right Under the Islamic Law: a Comparative Study with the Western Jurisprudence* (1st, Dar Unnahdah Alarabiah, Cairo: 1967)
- Edwards L, *The New Legal Framework for E-Commerce in Europe* (1<sup>st</sup> ed, Hart Publishing 2005)
- Furmston M, *Law of Contract* (14th ed London: Butterworths, LexisNexis, 2001)
- Genbihi M and Genbihi M, *UNCITRAL Model Laws in Electronic Commerce* (Dar Alfekr Aljame'y, Alexandria 2006)
- Gillies P, *Concise contract law* (1st, Federation Press, Sydney e.g. 2005)
- Gray D, '*Doing Research in the Real World*' (1<sup>st</sup>, London, Sage, 2004)
- Gringas C, *The Law of the Internet* (1st, Butterworths, London 1997)
- Haider A, *The Explanation Ottoman Courts Manual* (1st, Dar Ala'am Alkotb , Beirut 2003)

- Howells G and Schulze R, *Modernising and Harmonising Consumer Contract Law* (1st, Sellier, Munich 2009)
- Howells G and Weatherill S, *Consumer Protection Law* (2nd, Ashgate, Aldershot 2005)
- Howells G and Wilhelmsson T, *EC Consumer Law* (1st, Ashgate, Dartmouth 1997)
- Hutchinson T, *Researching and Writing in Law* (2nd, Thomson Lawbook Co, Pyrmont, N.S.W 2006)
- Imran M, *Consumer Protection During the Conclusion of the Contract* (1st, Monsha'at Al-Ma'arif, Alexandria 1986) (in Arabic)
- Jamal M, *Toward Contracting in Comparative Law* (1st, Manshurat Alhalani Alhoqoqyah , Beirut 2002) (in Arabic)
- Klinger P and Burnett R, *Drafting and Negotiating Computer Contracts* (1st, Butterworths, London, Edinburgh, Dublin 2005)
- Lasasmeh A, *Civil Liability for Injurious Acts: Base and Conditions* (1st, Dar Althaqafah, Amman 2006)
- Lloyd I, *Legal Aspect of the Information Society* (1st, Butterworths, London 2000)
- Mahmassani S, *The General Theory of the Law of Obligations & Contracts under Islamic Jurisprudence: A Comparative Study of the Islamic Rites from the Modern standpoint* (Part 1, Dar El Ilm Lil Malayin, Beirut 1983)
- Martin Elizabeth, *A Dictionary of Law* (5th, Oxford, Oxford 2003)
- McConville Mand Hong Chui W, *Research Methods for Law* (1st, Edinburgh University Press, Edinburgh 2007)

- Micklitz H, Stuyck J and Terryn E, *Cases, Materials and Text on Consumer Law* (1st, Hart Publishing, Oxford and Portland 2010)
- Oughton D and Lowry J, *Textbook on Consumer Law* (2nd, Blackstone, London 2000)
- Rainer R and Cegielski G, *Introduction to Information Systems: Supporting and Transforming Business* (John Wiley & Sons, 3<sup>rd</sup> Edition, USA, 2009)
- Ramsay I, *Consumer Protection and Policy: Text and Material on Regulating Consumer Markets* (2nd, Hart Publishing, Oxford 2007)
- Raymond Saleilles, *De La Déclaration De Volonté; Contribution A L'Etude De L'Acte Juridique Dans Le Code Civil Allemand* (1st, Librarian Cotillon, Paris 1901) (in French)
- Reed C and Angel J, *Computer Law: the Law of Regulation of Information Technology* (6th, Oxford University Press, Oxford 2007)
- Rousseau J, *Du Contrat Social ou Principe du Droit Politique* (1st, Chapitre 2.6 De la loi, France 1762) (in French).
- Shalhoub Z, Al Qasim S, *The Diffusion of E-commerce in Developing Economies, A Resource-based Approach* (1st, Edward Elgar Publishing, Cheltenham 2006)
- Shelly G and Rosenblatt H, *System analysis and design* (Shelly Cashman Series, 8<sup>th</sup> Edition, USA 2010)
- Shim J and Siegel J et al, *The International Handbook of Electronic Commerce* (1st, Routledge, USA 2000)
- Smith S, *Contract Theory* (Oxford University Press, Oxford, 2004)
- Standing C, *Internet Commerce Development* (1st, Artech House, Boston & London 2000)

- Stone R, *The Modern Law of Contract* (9th, Routledge , Abingdon 2011)
- Treitel G.h, *The Law of Contract* (11th, Aweet & Maxwell, London 2003)
- Vogel F and Hayes S, *Islamic Law and Finance: Religion, Risk, and Return* (1st, Kluwer Law International, Hague 1998).
- Wang F, *Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China* (1st, Routledge, Abingdon 2010)
- Willett C, *Fairness in Consumer Contracts: The Case of Unfair Terms* (1st, Ashgate, Aldershot 2007)
- Wunsch-Vincent S and McIntosh J, *WTO, E-commerce, and Information Technologies, From the Uruguay Round through the Doha Development Agenda: A Report for the UNICT Task Force* (Markle Foundation, New York, 2005)

### **Chapters and Articles in Books**

- Atiyah, P.S, 'Freedom of Contract and the New Right' in, *Essays on Contract* (1st, Oxford University Press, Oxford 1990)
- Barral-Vinnals I, 'Freedom of contract, unequal bargaining power and consumer law on unconscionability' in Kenny M, Devenny J, O'Mahony L (eds), *Unconscionability in European Private Financial Transactions* (1st, Cambridge University Press, Cambridge 2010)
- Beatson J and Friedmann D, 'Introduction: From 'Classical' to Modern Contract Law' in Beatson J and Friedmann D (eds), *In Good Faith and Fault in Contract Law* (1st, Oxford University Press, Oxford 1997)

- Boldeman L, 'The Doctrine of Freedom of Contract' in Lee Boldeman (ed), *The Cult of the Market: Economic Fundamentalism and its Discontents* (1st, ANU E Press, Australia 2007).
- Brownsword R, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in Brownsword R, G Howells and T Wilhelmsson (Eds), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994)
- Cartwright P, 'Consumer Protection Rationales' in Cartwright P (eds), *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (1st, Cambridge University Press, Cambridge 2004)
- Craswell R, 'Freedom of Contract' in Posner E (eds), *Chicago Lectures in Law and Economics* (1st, Foundation Press, New York 2000)
- De Coninck's J, 'Behavioural Economics and Legal Research' in Hoecke M (eds), *Methodologies of Legal Research* (1st, Hart Publishing, Oxford, Portland, Oregon 2011)
- Dekker I & Wessel R, 'Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions' in Dekker I and Werner W (eds), *Governance and International Legal Theory* (1st, Martinus Nijhoff, 2004) 215-236.
- Ebers M, 'The Notion of "Consumer" ' in Schulte-Nölke H, Twigg-Flesner C, Ebers M (eds), *EC Consumer Law Compendium: Comparative Analysis* (1st, Sellier European Law Publishers, Munich 2008).
- Epstein L and Martin A, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford of Empirical Legal Research* (1st, Oxford University Press, Oxford 2010)

- Henry P, 'Is the Internet Empowering Consumers to Make Better Decisions or Strengthening Marketers' Potential to Persuade?' in Haugtvedt C, Machleit K and Yalch R (eds), *Online Consumer Psychology: Understanding and Influencing Consumer Behavior in the Virtual World* (1st, Lawrence Erlbaum Associates, New Jersey 2005)
- Howells G, 'Information and Product Liability - A Game of Russian Roulette' in Howells G, Janssen A, Schulze R (eds), , *Information Rights and Obligations a Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate , Hants 2005)
- Koops B, 'Should ICT Regulation be Technology-Neutral' in Koops B, Lips M, Prins C & Schellekens M, *Starting Points for ICT Regulation: deconstructing prevalent policy one-liners* (The Hague: TMC Asser Press 2006)
- Loos M, 'Right of Withdrawal ' in Howells G, Schulze R (eds), *Modernizing and Harmonizing Consumer Contract Law* (1st, Sellier, Munich 2009)
- Newton J, 'System Supply Contracts' in Reed C, Angel J (eds), *Computer Law: The Law and Regulation of Information Technology* (6th, Oxford, Oxford 2007)
- Quirk P and Rothchild J, 'Consumer Protection and the Internet' in Howells G, Ramsay I, Wilhelmsson T (eds), *Handbook of Research on International Consumer Law* (1st, Edward Elgar Publishing, Cheltenham 2010)
- Riefa R and Hornle J, 'The Changing Face of Electronic Consumer Contracts' in Lilian Edwards and Charlotte Waelde (eds), *Law and the Internet* (3rd, Hart Publishing, Oxford 2009)

- Salvatore Mancuso, 'Consumer Protection in E-Commerce Transactions: A First Comparison between EU Law and Islamic Law' in L Padmavathi (eds), *E-Commerce Consumer Protection* (1st, The Icfai University Press, Hyderabad 2009)
- Scholes A, 'Information Requirement in the E-commerce: Directive and the Proposed Directive on Unfair Commercial Practices' in Howells G, Schulze R et al (eds), *Information Rights and Obligations a Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate, Hants 2005)
- Scholes A, 'Information Requirement' in Howells G and Schulze R (eds), *Modernizing and Harmonizing Consumer Contract Law* (1st, Sellier, Munich 2009)
- Sefton-Green R, 'General Introduction' in Sefton-Green R (eds), *Mistake, Fraud and Duties to Inform* (1st, Cambridge University Press, Cambridge 2004)
- Tenreiro M and Karsten J, 'Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive' in Schulte-Nölke H and Schulze R (eds), *Europäische Rechtsangleichung und Nationale Privatrechte* (1st, Baden-Baden, Nomos 1999)
- Twigg-Flesner C, 'Information Disclosure about the Quality of Goods -- Duty or Encouragement?' in Howells G, Janssen A and Schulze R (eds), *Information Rights and Obligations* (1st, Aldershot: Ashgate, 2005)
- Weatherill S, 'Market Transparency and Consumer Protection' in Weatherill S (ed), *EU Consumer Law and Policy* (1st, Edward Elgar Publishing, Cheltenham 2005)

- Willett C, 'Autonomy and Fairness: The Case of Public Statements' in Geraint Howells, Andre Janssen, Rriner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (1st, Ashgate, Hant 2005)
- Winn J, 'Islamic Law, Globalization and Emerging Electronic Commerce Technologies' in the International Bureau of the Permanent Court of Arbitration (eds), *Strengthening Relations with Arab and Islamic Countries through International Law: E-Commerce, the WTO Dispute Mechanism and Foreign Investment* (1st, Kluwer Law International, Hague 2002).

### **Articles**

- Abu Karky H , 'Consumer Protection in Jordan: What Do We Have and What Do We Need?' [1992] ECLR 489, 491
- Ahmed M, Hussein R, Minakhatun R and Islam R, 'Building Consumers confidence in adopting e-commerce: A Malaysian case' [2007] Int. JBSR 236, 255
- Al Bakri A, 'An Overview of Information and Communication Technology (ICT) in Jordan: Review the Literature of Usage Benefits and Barriers' [2013] IJIDS 9, 15
- Al Farfour M, 'Adhesion Contract in the Islamic Jurisprudence' IJGJ 214/3 (IN Arabic)
- Al Jawaheri H, 'Adhesion Contracts' [2000] IJGJ 37, 73 (in Arabic)

- Al Sarayra M, 'The Legal Framework for Contract Concluded via Electronic Means: Study in Jordanian Legislation' [2009] JELS, Damascus University 821, 846 (in Arabic)
- Al Sarayrah M, 'The Legal Framework of Contract Concluded Over the Electronic Means' [2009] DUJ 821, 845 (in Arabic)
- Ali R, 'Technological Neutrality ' [2009] LE 1, 14
- Allard N & Lauerhass T, 'Debalkanize the Telecommunications Marketplace' [1991-2] Cal WL Rev 231, 262
- Alzaagy A, 'The Islamic Concept of Meeting Place and its Application in Electronic Commerce' [2007] MUJLT 27, 42
- Bamodu G, 'Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary' [2004] JILT
- Bolgar V, 'The Contract of Adhesion: A Comparison of Theory and Practice' [1972] AJCL 53, 78
- Boom W, 'Price Transparency in Consumer Decision Making and European Consumer Law' [2011] JCP 359, 376
- Brownsword R, 'The two laws of contract' [1981] 125 SJ 279
- Burgess A, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion' [1986] AALR 255, 280
- Cachard O, 'Electronic Commerce Law: Legislative Comment' [2004] IBLJ 678, 694
- Campbell D, 'Reflexivity and welfarism in the modern law of contract' [2000] OJLS 477, 498

- Catchpole J, 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment' [2001] IJLIT 1, 20
- Chang C, 'Reviewing and Conceptualising Customer-Perceived Value' [2012] MR 253, 274
- Christopher Hodges, 'Collective Redress in Europe: The New Model' [2010] CJQ 370, 395
- Collins H, 'The Unfair Commercial Practices Directive' [2005] E.R.C.L. 417, 441
- Crabit E, 'La Directive sur le Commerce électronique. Le Projet 'Méditerranée' [2000] Revue du Droit de l'Union Européenne 749, 818
- Dabit M, 'The Protection of Electronic Payments Systems under Jordanian Law' [2004] JIBLR 359, 360
- Dahiyat E, 'Consumer Protection in Electronic Commerce: Some Remarks on the Jordanian Electronic Transactions Law' [2011] JCP 423, 436
- Donnelly D and White F, 'Regulation and Consumer Protection: A Study of the Online Market' [2006] DULJ 27, 52
- El-Hassan A, 'Freedom of Contract, the Doctrine of Frustration, and the Sanctity of Contracts in Sudan Law and Islamic Law' [1985] ALQ 51, 59
- Epstein L and King G, 'Exchange: Empirical Research and the Goals of Legal Scholarship' [2002] U. Chi. L. Rev. 2
- Gawith D, 'Model Laws Relevant to Preparation for the International Regulation of International Consumer Transactions' [2010] JBL 474, 501
- Gibbons L, 'Creating a Market for Justice; A Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due

- Process, and Fair Play in Online Consumer Arbitration' [2002] *NJL & Bus1*, 62
- Gibbs J, L. Kraemer K and Dedrick J, 'Environment and Policy Factors Shaping Global E-Commerce Diffusion: A Cross-Country Comparison' [2003], *The Information Society: An International Journal* 5, 18
  - Goodman B, 'Shrink Wrapped the Consumer: the Shrink Wrap Agreement as an Adhesion Contract' [1999] *Cardozo L. Rev.* 319, 360
  - Hadad N, 'Adhesion Contracts in the Islamic Jurisprudence' [2004] *Al'adl* 52, 78 (in Arabic)
  - Halaweh M, 'Adoption of E-commerce in Jordan: Understanding the Security Challenge' [2011] *EJISDC* 1, 13
  - Hall E, 'Cancellation rights in Distance-Selling Contracts for Services: Exemptions and Consumer ' [2007] *JBL* 683, 700
  - Hall E, Howells G and Watson J, 'The Consumer Rights Directive — An Assessment of its Contribution to the Development of European Consumer Contract Law' [2012] *ERCL* 139, 166
  - Hamilton J and Gillies L, 'The impact of e-commerce developments on consumer welfare - information disclosure regimes' [2003] *JFR & C* 329-348
  - Hayajneh A, 'Legal Surgery: the Need to Review Jordanian Civil Law' [2012] *BJHSS* 45, 53
  - Hayajneh A, 'The Awarding of Punitive Damages under the Jordanian Civil Law: Is it Possible?' [2010] *EJSS* 606, 612

- Hayajneh A, 'Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law' [2011] *EJSS* 277, 278
- Henderson K, Poulter A, 'The Distance Selling Directive: Points for Future Revision' [2002] *ILR Computers and Technology* 289, 300
- Hornle J, 'The European Extra Judicial Network — Overcoming the Obstacles' [2002] *Communications Law* 143, 145
- Howells G and Wilhelmsson T, 'EC Consumer Law: has it come of age?' [2003] *ELR* 370, 388
- Howells G, Micklitz H, Wilhelmsson T, 'Towards a Better Understanding of Unfair Commercial Practices' [2009] *Int. JLM* 69, 90
- Howells G, 'The Potential and Limits of Consumer Empowerment by Information' [2005] *JLS* 349, 370
- Hutchinson T, 'Developing Legal Research Skills: Expanding the Paradigm' [2008] *MULR* 1065, 1095
- Jarvenpaa S, Tractinsky N and Vitale M, 'Consumer trust in an Internet store' [2000] *ITM – Special Issue on Electronic Commerce* 45, 72
- Jawahitha Mancuso S, 'Consumer Protection in E-commerce Transactions: a First Comparison between European Law and Islamic Law' [2007] *JICLT* 1, 8
- Jawahitha S, 'Consumer Protection in e-commerce: Analysing the Statutes in Malaysia' [2004] *JAAB* 55, 63
- Kamel S and Hussein M, 'The Development of e-commerce: The Emerging Virtual Context within Egypt' [2001] *Logistics Information Management, University Press* 119, 126

- Kassasbeh F and Qudah M, 'The Efficiency of the Project of Consumer Protection Law: Analytical Critical Study for the Scope of the Project and its Enforcement' [2009] LSL 141, 193 (in Arabic).
- Kessler F, 'Contracts of Adhesion--Some Thoughts A bout Freedom of Contract' [1943] 43 Colum. L. Rev 629, 640
- Khan M, 'The Role of the Islamic State in Consumer Protection' [2011] PJIR 31, 44
- Kimel D, 'Neutrality Autonomy, and Freedom of Contract' [2001] OJLS 473, 494
- Kresse J, 'Privacy of Conversations over Cordless and Cellular Telephones: Federal protection under the Electronic Communications Privacy Act of 1986' [1987] Geo Mason L Rev 335
- Lefebvre B, 'Le Contract D'Ahesion' [2003] La Revue du Notariat, Montréal 439, 451 (in French)
- Marella M, 'The Old and the New Limits to Freedom of Contract in Europe' [2006] ERCL 257, 274
- Masadeh A and Bashayreh M, 'Contemporary Legal Issues of Contract Formation by Online Order' [2006] Journal of Sharia and Law 19, 21
- Masadeh A and Khaswaneh A, 'The Option of Consumer to Withdraw the Domestic Sale and Distance Sale' [2011] SLJ 157, 210 (in Arabic)
- Mehren A, 'The French Civil Code and Contract: A Comparative Analysis of Formation and Form' [1955] 15 La. L. Rev 687, 711
- Miller G, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information' [1956] PR 81, 97

- Nimmar R, 'The Legal Landscape of Electronic Commerce: Redefining Contract Law in an Information Era' [2007] JCL 1, 22
- Orabi G, 'The Protection of Consumer Consent A Comparative study of the Emarati Consumer Protection Law, The French Legislation on Consumption, and the Jordanian Draft Law on Consumer Protection' [2009] SLJ 187, 204
- Owaidi A and Mahafza Q, 'Different Legal Implications of Consent Defects under Jordanian Civil Law: An Attempt to Unification' [2011] EJSS 218, 226
- Partington M, 'Law's Reality: Case Studies in Empirical Research on Law: Introduction' [2008] JLS 1, 7
- Peppet S, 'Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts' [2012] 59 UCLA L. Rev 676, 733
- Powell M, 'Electronic Commerce: An Overview of the Legal and Regulatory Issues, Int. TLR 85, 93
- Rabahi Ahmad, 'The Legal Nature of Electronic Contract' [2013] ASHS 96, 105 (in Arabic)
- Rakoff T, 'Contract of Adhesion: an Essay in Reconstruction' [1983] Harv. L. Rev 1173, 1284
- Ramberg C, 'The E-commerce Directive and Formation of Contract in a Comparative Perspective' [2001] E.L. Rev. 429, 450
- Reed C, 'Online and Offline Equivalence: Aspiration and Achievement' IJLIT 248, 273.
- Reed C, 'Taking Sides on Technology Neutrality' [2007] Script-ed 263, 284

- Riefa C, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' [2009] LE 1, 41
- Rischkowsky F and Döring T, 'Consumer Policy in Market Economy: Consideration from the Perspective of the Economics of Information as well as Behavioural Economics' [2008] JCP 285, 313
- Roettinger M, 'Towards a European Code Napoleon/ABGB/BGB? Recent EC Activities for a European Contract Law' [2006] ELJ 807, 827
- Rothchild J, 'Making the Market Work: Enhancing Consumer Sovereignty Through the Telemarketing Sales Rule and the Distance Selling Directive' [1998] 21 JCP. 279, 295
- Saleh M, 'Adhesion Contract and Defective Practices' [2004] SISJ 272, 363
- Scholes A, 'Does Harmonisation Go Far Enough? The E- Commerce Directive 2000/31/EC: Implementation and Sanctions' [2007] IJLSE 1 (1-2) 114
- Schulte-Nölke H, 'EC Law on the Formation of Contract — from the Common Frame of Reference to the Blue Button' [2007] ERCL 332, 349
- Slawson D, 'Standard Form Contracts and Democratic Control of Lawmaking Power' [1971] Harv. L. Rev 529, 566
- Sookman B, 'Legal Framework for E-commerce Transactions' [2001] CTRLR 85, 95
- Sorensen K, 'Disclosure in EU Corporate Governance - A Remedy in Need of Adjustment?' [2009] EBOR 255, 283
- Steyn J, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' [1997] L.Q.Rev. 433, 438

- Stone R, 'The Modern Law of Contract' [2009] ICCLR 23, 24
- Stuyck J, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' [2000] CML.Rev 367, 400
- Tobriner M and Grodin J, 'Individuals and the Public Service Enterprise in the New Industrial State' [1967] Cal. L. Rev. 1247, 1251
- Van Esch S and Roosendaal A, 'Commercial websites: consumer protection and power shifts' [2007] JITLP 13, 20
- Vernadaki Z, 'Consumer Protection and the Reform of the European Consumer Acquis' [2010] ICCLR 21(9) 316, 322
- Veysey G, 'The Perils of On-line Contracting' [2000] CTLR. 6(5) 121, 122
- Vigneron S, 'The Implementation of Standard Contract Terms Directive in France' [2006] CIL Volume 8, Issue 2/3
- Walden I, 'Regulating Electronic Commerce: Europe in the Global Economy' [2001] E.L. Rev. 26(6) 529, 547
- Weidenbaum M, 'The Case Against the UN Guidelines for Consumer Protection' [1987] JCP 425, 425
- Welchman L, 'The Development of Islamic Family Law in the Legal System of Jordan' [1988] International & Comparative Law Quarterly 868, 886
- Wilhelmsson T and Twigg-Flesner C, 'Pre-contractual Information Duties in the Acquis Communautaire' [2006] ERCL 441, 470
- Winn J and Haubold J, 'Electronic Promises: Contract Law Reform and E-commerce in a Comparative Perspective' [2002] E.L. Rev. 27(5) 567, 588

### **Conference and working papers**

- Al Rawabdeh W, 'Key Internet Characteristics and E-commerce Factors in Jordan' (ACIT, Oman 2013)
- Al-Ibraheem M, Tahat H, 'Regulating Electronic Contracting in Jordan' (21st BILETA Conference: Globalization and Harmonization in Technology Law 2006)
- Carey P, 'The Internet and E-commerce, A Specially Commissioned Report' (Thorogood, London 2001)
- Donini V, 'Bridging the Gap: Privatization Policy, Internet and E-commerce in Jordan' [2006] EUI-WP RCCAS
- Eang C, 'Means of Redress in Business-to-Consumer E-Commerce Environment' (27th Int. Conf. Information Technology Interfaces ITI 2005, Croatia – June 20-23)
- El Gawady Z, 'The Impact of E-commerce on Developed and Developing Countries Case Study: Egypt and United States' (international conference of Globalization , Technology and Sustainable Development, Al Ain - United Arab Emirates, 2005)
- Kontogeorgou and Alexiou M, 'Enhancing Consumer Confidence in Electronic Commerce: Consumer Protection in Electronic Payments' (17 Bileta Annual Conference 7 2002)
- Loos M, Helberger N, et al, 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer

- protection in relation to digital content contracts' (Final Report, University of Amsterdam 2011)
- Olwan M, 'The Three Most Important Features of Jordan's Legal System' (IALS Conference Learning From Each Other: Enriching the Law School Curriculum in an Interrelated World 2007)
  - Shannak R and Al-Debei M, 'The Current State of E-commerce in Jordan: Applicability and Future Prospects 'An Empirical Study' [2011] *Internet and Information Technology in Modern Organizations: Challenges & Answers* 457, 489
  - Tahat H, 'Factors affecting E- commerce contract law' (20<sup>th</sup> BILETA Conference: Over-Commoditised; Over-Centralised; Over-Observed: the New Digital Legal World? 2005)

### **Theses**

- Al-Husban M, 'The Internet Shopping Sites, Implementation and Applicability in Jordan's Market: The Propensity to Buy Online, Master Dissertation' (Master Dissertation, University of Huddersfield 2004).
- Aljaber M, 'The Impact of Privacy Regulations on the Development of Electronic Commerce: Jordan and the UK Comparative Study' (Phd Thesis, De Montfort University, 2012)
- Alqudah M, 'Consumer Confidence in Online Cross-Border Business-to-Consumer Arbitration' (PhD Thesis, University of Leicester 2008)

- Alzaagy A, 'Electronic Contract: A Study of its Application in the Light of Islamic Law with Particular Reference to Saudi Arabia Case' (PhD Thesis, University of Wales 2009)
- Gustavsson Mand Johansson A, 'Consumer Trust in E-Commerce' (Bachelor Dissertation, Kristianstad University 2006)
- Huffmann H, 'Consumer Protection in E-Commerce: An examination and comparison of the regulations in the European Union, Germany and South Africa that have to be met in order to run internet services and in particular online-shops' (Master dissertation, Faculty of Law – School for Advanced Legal Studies 2004)
- Kasassbeh F, 'Consumer Contract against Unfair Contract Terms: In the Light of the Jordanian Civil Code and the English Regulations on Unfair Terms in Consumer Contracts 1999' (PhD Thesis, University of Newcastle Upon Tyne 2006)
- Khalah M, *The Rules of Adhesion Contract in Islamic Jurisprudence* (Master Dissertation, Islamic University , Gaza 2008) (in Arabic)
- Nuserah K, 'The legal protection for Consumer on the Internet: Comparative Study' (Master Dissertation, Université Mouloud Mammeri 2013) (in Arabic)
- Tahat H, 'Legal Issues Related to the Formation of Electronic Contracts: A comparative Study of English and American Law' (PhD Thesis, University of Aberdeen 2006)

### **Reports and Official Documents and other Publications**

- CAB evidence briefing: Redressing the balance, why consumers need better means of resolving problems with faulty goods and services (Citizen Advice Bureau December 2012)
- CAB, Can You Cancel It, (CAB Evidence Briefing December 2005)
- Committee to Study Global Networks and Local Values, Computer Science and Telecommunications Board, National Research Council, 'A Comparative Look at Germany and the United States' (The National Academic Press 2001)
- Department for Business Innovation & Skills, Reform of Consumer Law: Draft Regulation, Government Response to Consultations on Misleading and Aggressive Practices and the European Consumer Rights Directive, August 2013
- DTI, Modern Market: Confident Consumers, para 6.15 available on <http://webarchive.nationalarchives.gov.uk/20050302082351/http://dti.gov.uk/consumer/whitepaper/pdf/constrat6.pdf>
- Fox N, Hunn A and Mathers N, Sampling and Sample Size Calculation, The NIHR RDS for the East Midlands / Yorkshire & the Humber 2007
- Genn D and Partington M, Wheeler S, '*Law in the Real World: Improving our Understanding of How Law Works*' (1st, Final Report and Recommendations, The Nuffield Foundation, London 2006)
- Jordanian Department of Statistics, census on using communication and information technology, 2011

- King Abdullah II, Speech from the Throne, Opening the Non-Ordinary Session of the 17th Parliament, Amman, Jordan, 10 February 2013 < <http://www.kingabdullah.io/>>
- OECD, 'Jordan Adherence to the OECD Guideline for Multinational Enterprise ' in *OECD Investment Policy Reviews: Jordan 2013* (OECD Publishing, 2013)
- OECD, 'Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy: Background Report' (Washington DC, DSTI/CP (2009) 20/FINAL, 2009)
- OCDE, Measuring Electronic Commerce, OCDE/GD(97)185
- OFT, 'Mapping UK Consumer Redress: A Summary Guide to Dispute Resolution Systems' (Crown 2010)
- The Explanatory Memorandum of the JCL, Part One, published by the Jordanian Bar Association, Amman
- The Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999
- United Nations, *United Nations Conference on Trade and Development: E-commerce and Development Report* (United Nations Publication, New York and Geneva, UNCTAD/SDTE/ECB/2003/1)
- University of Lincoln, Lincoln Law School (2008): Representative Actions and Restorative Justice. Report for the Government Department for Business, Enforcement and Regulatory Reform

### **European Union Communications, Proposals and Reports**

- A European Initiative in Electronic Commerce: Communication of 15 April 1997 to the European Parliament, the Council, the Economic and Social Committee of the Regions COM (1997) 157 Final
- Commission of the European Communities, 'Consumer Confidence in E-Commerce: lessons learned from the e-confidence initiative: Commission Staff Working Document' Brussels, 8.11.2004.
- Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, Healthier, Safer, More Confident Citizens: a Health and Consumer Protection Strategy (2005), COM(2005) 115 final; Proposal for a Decision of the European Parliament and of the Council establishing a Programme of Community Action in the Field of Health and Consumer Protection 2007-2013, SEC(2005)
- Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Consumer Policy Strategy 2002–2006, COM (2002) 208
- EC Commission, Healthier, safer, more confident citizens: A Health and Consumer Policy Strategy (Brussels, 6.4.2005 COM (2005) 115 final 2005)
- European Commission, 'Green Paper on Consumer Collective Redress' COM (2008) 794 final
- European Commission, 'Commission Staff Working Paper: Consumer Empowerment in the EU' (Brussels 8 2011) SEC(2011) 469 final

- European Commission, 'Study on The Economic Impact of the Electronic Commerce Directive' [Final Report 2007] Ramboll Management
- European Commission, 'Towards a Coherent European Approach to Collective Redress' (Public Consultation SEC(2011)0173 2011)
- European Consumer Centre Network (2005) The European Online Market Place: Consumer Complaints 2005
- European Union Committee, EU Consumer Rights Directive: Getting it Right (Session 2008-09, Eighteenth Report)
- First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), COM(2013) 139 final
- Nielsen C, Jervelund C et al, European Commission, DG Internal Market and Services Unit E2, Study on the Economic Impact of the Electronic Commerce Directive: Final Report (Ramboll Management September 2007)
- Report of the European Consumer Law Group "consumer transactions on the internet" (ECLG/194/2000)
- Treaty on European Union and of the Treaty establishing the European Community

### **Newspaper articles**

- Ad-Dustour Newspaper, PMs transfer 'consumer protection' to the legal committee after a widespread controversy (Amman 18 March 2013) available on < <http://www.addustour.com/>>.
- Nazih Qusos, 'The Limitation of Liability' Ad-Dustour Newspaper (Amman-Jordan, 20 August 2013) available on <http://www.addustour.com>>.

### **UK cases**

- *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433
- *L'Estrange v Graucob* [1934] 2 KB 394
- *Printing and Numerical Registering v Sampson* (1875) LR 19 Eq 462-465.
- *R & B Customs Brokers Ltd v United Dominions Trust Ltd.* [1988] 1 WLR 321
- *Thornton v Shoe Lane Parking* [1971] 2 QB 163
- *Wallis, Son & Wells v Prett & Haynes* [1911] A.C. 394

### **French Cases**

- Case C-362/88, *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] E.C.R. 667

- Cass. 1ère civ. 25 mai 1992
- *Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 Juris-classeur periodique)*
- *Christian X vs. Sylvie Y, Cour d'appel de Toulouse, 25 Septembre 2007, N° de RG: 06/02410*
- *Cour de Cassation, N° 93-10514, 1ère civile du 24 Janvier 1995*

### **Jordanian Cases**

- Supreme Court of Cassation (1990/1202) – Jordanian Bar Association, Vol 1 and 2, p 1713

### **Websitess and blogs**

- Bertram D, Likert Scales, CPSC 681 – Topic Report. Available on <http://poincare.matf.bg.ac.rs/~kristina//topic-dane-likert.pdf> accessed on April 2012
- Brian Collins, 'Unfair Terms in Consumer Contracts Regulations 1994' [1995] Web Journal of Current Legal Issues available on [http://caselaw.lp.findlaw.com/data/law\\_reviews/57web\\_journal/articles3/collins3.html](http://caselaw.lp.findlaw.com/data/law_reviews/57web_journal/articles3/collins3.html)
- Connolly C and van Dijk P, 'An Overview of E-Commerce Legal Infrastructure' (Galaxia 2005) available at [http://www.galexia.com/public/research/articles/research\\_articles\\_pa04.html](http://www.galexia.com/public/research/articles/research_articles_pa04.html) Accessed January 2011

- <http://ec.europa.eu>
- <http://www.businessdictionary.com/>
- <http://www.dos.gov.io>
- <http://www.oecd.org>
- <http://www.publications.parliament.uk/>
- <http://www.senat.fr>
- <http://www.unctad.org>
- <https://www.uncitral.org/>
- President John F. Kennedy 'Consumer Rights' (the Global Voice for Consumer, 1962) Available on <http://www.consumersinternational.org/who-we-are/consumer-rights>. Accessed on June 2011
- Rosner N, 'Features - International Jurisdiction in European Union E-Commerce Contracts' [2004] available on [http://www.llrx.com/features/eu\\_ecom.htm](http://www.llrx.com/features/eu_ecom.htm) Accessed June 2013
- [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)

### **European Directives**

- Directive 2011/83/EU on Consumer Rights
- Directive 2000/31/EC on electronic commerce
- Distance Selling Directive 97/7/EC
- Directive 2005/29/EC on Unfair Commercial Practices
- Directive 93/13/EEC on Unfair Contract Terms

### **UK Laws**

- The Electronic Commerce (EC Directive) Regulations 2002
- Consumer Protection from Unfair Commercial Practices Regulations 2008
- Unfair Contract Terms Act 1977
- Unfair Terms in Consumer Contract Regulations 1999

### **French Laws**

- French Civil Code
- French Consumer Code
- Loi Scrivener 2 no 78-23 of 10 January 1978

### **Jordanian Laws**

- Arbitration Act No 31/2001
- Civil Procedures Act No 24/1988
- Companies Act No 22/1997
- Competition law of 2004
- Jordanian Civil Law 43/1976
- Jordanian Commercial Law 12/1966
- Jordanian Electronic Transactions Law 85/2001

- Jordanian Penal Code 1960
- Magistrate Courts Act No 15/1952
- Patents Act No 32/1999
- Public Congregations Act No 7/2004
- Standards and Metrology Law 2000
- The Media Act No 71/2002
- Trade Names Act No 22/2003

### **Other laws**

- Egyptian Civil Cassation 208/1954
- Electronic Communications and Transactions Act 2002 of South Africa
- The Civil Code of the Ottoman Empire, Majallah al-Ahkām al-adliyyah
- UNCITRAL Model Law on Electronic Commerce 1996

### **Personal communication**

- Lisa Webley, Workshop about How to get a PhD in Law: What Legal Research Skills Will I Need? Literature reviews, qualitative and quantitative research and comparative legal research, Institute of Advanced Legal Studies, 17 March 2012

## **APPENDIX**

### **Ethical Approval**

From: "Sharman Rogers"  
Date: Tue, 11 Oct 2011 15:03:35 GMT  
Subject: Re: Ethics application ref E185 : Ahmad Alhusban  
To: "Alhusban, Ahmad"

Dear Ahmad

I am pleased to be able to confirm that Ethics Committee have now approved your application reference E185.

Best wishes,

Sharman Rogers

Senior Administrator  
Faculty Office  
University of Portsmouth Business School  
T: [+44\(0\)23 9284 4202](tel:+44(0)2392844202)

**Questionnaires, Consent Form and Information Sheet (Arabic Version)**



استبيان

عنوان البحث

أهمية حماية المستهلك في تطور التجارة الإلكترونية: الحاجة إلى الإصلاح في الأردن

أحمد الحسينان

طالب دكتوراه في كلية القانون

جامعة بورتسموث

أتم مدعون للمشاركة في دراسة بحثية عن تشريعات التجارة الإلكترونية في الأردن. يقوم بهذه الدراسة أحمد الحسبان من كلية القانون في جامعة بورتسموث. كجزء من الأطروحة، مشرف هذه الدراسة السيد جو سيخون، كلية القانون، مبنى ريشموند، شارع بورتلاند، بورتسموث PO13DE. هذه الدراسة تعتبر جزء من مشروع درست عليا.

[joe.sekhon@port.ac.uk](mailto:joe.sekhon@port.ac.uk)

إذا كان لديكم أي استفسارات عن هذه الدراسة، يرجى الإتصال

Ahmad Alhusban, 100 Marmion Road, Southsea, Portsmouth, PO52BB, UK, Tel: 00 44

(0) 78 60 55 39 60, [Ahmad.alhusban@port.ac.uk](mailto:Ahmad.alhusban@port.ac.uk)

هذا البحث يسعى إلى ايجاد حلول لزيادة مستوى ثقة المستهلك عند الشراء على الإنترنت في الأردن. ثقة المستهلك يمكن أن تبنى من قبل الحماية المقدمة من قبل المشرع. في هذا البحث، استبيان سوف يوزع على أي شخص عمره يتجاوز الثانية عشر عام، رجال و نساء، و سوف يتم طرح عدة اسئلة عليهم. بعد اعلامك المزيد عن هذه الدراسة، إذا وافقت، سيبدأ الاستبيان بطرح الأسئلة.

لا يوجد أي خطر أو تكاليف في حال لو قررت أن تشارك في هذه الدراسة البحثية. المعلومات المقدمة في هذا البحث سوف يتم الاحتفاظ بها بشكل آمن وسري و لن تستخدم إلى لأغراض أكاديمية بحتة.

هذا الإستبيان سوف يستغرق عشر دقائق. المعلومات المجموعة قد لا تفيدك بشكل مباشر، و لكن سوف يكن لها أثر اجابي على المستهلكين بشكل عام.

هذا الإستبيان لا يتطلب الإفصاح عن الهوية، لذلك لا تكتب اسمك عليه. لا يمكن لأحد أن يحدد فما لو شاركت في هذه الدراسة أو أن يحدد اجابتك. المعلومات المجموعة بشكل عام سوف تنشر من دون نشر أي معلومات شخصية.

مشاركتم في هذه الدراسة إرادية و بشكل تطوعي. لكم كامل الحرية في رفض الإستبيان او عدم إجابة اسئلة معينه. لستم مجبورين على إتخاذ قرر المشاركة في الحال. قبل أن تتخذ قرر المشاركة يمكنك التحدث مع أي شخص عن الاستبيان لإتخاذ قرار.

إذا قررت أن تشارك في هذا الإستبيان، الرجاء قراءة الأسئلة بشكل حذر وإختيار الإجابة الأكثر ملاءمة. المطلوب إختيار إجابة واحدة فقط.

هيئة أخلاقيات البحث في جامعة بورتسموث رجعت طلبي للقيام في هذه الدراسة وتمت الموافقة. إذا كان لديكم أي استفسارات عن حقوقكم في هذه الدراسة، الرجاء الاتصال بالسيدة شرمان روجرز مديرة مركز أخلاقيات البحوث في جامعة بورتسموث على:

[sharman.rogers@port.ac.uk](mailto:sharman.rogers@port.ac.uk)

شكرا جزيلاً لأخذ الوقت الكافي لقراءة ورقة المعلومات هذه. مشاركتكم محل تقدير.

من المهم بالنسبة لك أن تعلم لماذا يجري البحث وما سوف ينطوي عليه. يرجى أخذ الوقت الكافي لقراءة المعلومات التالية بعناية وأن تقر ما إذا كنت ترغب في المشاركة.

أنا حالياً أقوم بإجراء دراسة لبحث العلاقة بين حماية المستهلك ونمو التجارة الإلكترونية في الأردن. ويركز هذا البحث على ثلاث قضايا في حماية المستهلك، وهي التزامات المعلومات، والحماية ضد الشروط غير العادلة والحق في الإلغاء. السبب لدراسة هذه القضايا هو استكشاف ما إذا كان المستهلكون يشعرون بأنهم محميون عند إبرام عقود على الإنترنت، وبالتالي ما إذا كانت تؤثر على قابليتهم في المشاركة في أنشطة التجارة الإلكترونية.

الهدف الرئيسي من الأطروحة هو دراسة مدى حماية المستهلك في التشريع الأردني بالنسبة لعقود المستهلك والتجارة الإلكترونية، وعما إذا كانت حماية المستهلك التي يقدمها الإطار القانوني الحالي يساعد على تطوير التجارة الإلكترونية في الأردن.

عموماً، الأطر القانونية تلعب دوراً هاماً لنمو التجارة الإلكترونية وتطورها. ومع ذلك، فإن الأنظمة المحيطة بالتجارة الإلكترونية في الأردن تعاني من نقص بالتشريعات، على وجه الخصوص، مجموعة محددة من القواعد لعقود المستهلكين وحماية المستهلك.

من أجل جعل أنظمة التجارة الإلكترونية في الأردن أكثر شمولاً وفعالية فيما يتعلق بحماية المستهلك، من المهم أن هذه القواعد تسعى لإعادة التوازن في القوى بين الأطراف المتعاقدة، وبالتالي فإنها تساعد في بناء الثقة وتعزيز الثقة للمستخدمين الأردنيين على شبكة الإنترنت.

وقد اعتمدت هذه الدراسة على افتراض أن المستهلك سوف يشارك في التجارة الإلكترونية إذا تم توفير مستوى عالٍ من حماية المستهلك.

## التفاصيل الديموغرافية

1. العمر :
- 18-24
- 25-34
- 35-44
- 45-54
- +50
2. مهنة
- موظف
- صاحب عمل
- طالب
- عاطل عن العمل
3. التحصيل العلمي
- دراسات عليا
- بكالوريوس
- كلية
- مدرسة الثانوية
- لا مؤهلات

		1 أبدا	2 نادرا	3 أحيانا	4 غالبا
		مره 0	مره 1 / بالسنة	مرات 3 / بالسنة	مرة أو أكثر بالشهر
4.	كم من المرات تشتري عن طريق الإنترنت؟				

5. يمكنني استخدام الإنترنت لمقارنة أسعار
- نعم
- لا

N	حماية المستهلك	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
6.	أشعر انني محمي بشكل كافي كمستهلك بموجب القانون					

N	البنية التحتية المادية	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة

7.	لدي جهاز كمبيوتر أو الهاتف الذكي					
8.	لدي إنترنت					
9.	أنا باستمرار استخدم عنوان البريد الإلكتروني					
10.	أنا قادرة على الدفع عن طريق بطاقة الائتمان، وبطاقة فيزا، ماستر كارد أو أي وسيلة الدفع الإلكترونية					
11.	لو قمت بشراء شيء عبر الإنترنت، سوف أكون قادر على الحصول عليها (في المنزل أو مكتب البريد)					

N	البنية التحتية للإنسان	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
12.	أنا أعرف كيفية استخدام الكمبيوتر، أو الهاتف الذكي					
13.	أنا أعرف كيفية استخدام الإنترنت					
14.	أنا أعرف كيفية الوصول إلى مواقع التسوق					
15.	أنا أعرف كيفية شراء المنتجات عبر شبكة الإنترنت					
16.	التجارة الإلكترونية هي وسيلة جذابة للتسوق					

N	البنية التحتية القانونية	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
17.	السياسات والقوانين الأردنية له تأثير إيجابي على تنمية التجارة الإلكترونية					
18.	الدفع عبر الإنترنت محمي					
19.	أنا محمي ضد سياسات التجار الظالمة					
20.	معلوماتي الشخصية و خصوصيتي محميات على الإنترنت					
21.	إذا قمت بعمليات الدفع على الإنترنت، ساكون على يقين أن العقد قد تم					

N	حق المستهلك	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
22.	يمكنني بسهولة حل نزاع مع البائع على الإنترنت					
23.	استطيع إلغاء العقد وإرجع نقودي قبل التسليم					
24.	و لدي الحق في إعادة المنتج إرجاع نقودي دون إبداء أي سبب					

N	معلومات	1 لا أوافق	2 لا أوافق	3 محايد	4 أوافق	5 أوافق

		بشدة				بشدة
25.	التجار يقدمو عادةً معلومات كافية عن السلعة في الإنترنت					
26.	فمن السهل الحصول على بيانات الاتصال الخاصة ب البائع للاستفسار أو حل المشاكل					
27.	التجار يقدمو عادةً معلومات واضحة عن خطوات واجراءات إنعقاد العقد وتصحيح الأخطاء					
28.	التجار يقدمو عادةً معلومات واضحة عن حقوقي وعن التزاماتهم					
29.	أنا محمي بما فيه الكفاية إذا قام التاجر بتقديم معلومات غير كافية عن هويته او عن السلعة					

N	الأحكام والشروط	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
30.	من السهل الوصول لأحكام و شروط التعاقد على مواقع على الانترنت					
31.	عادة تكون الشروط مفهومة					
32.	تقوم الشركات عادة بإدراج شروط عادلة					
33.	من السهل أن تبطل أي شروط غير عادلة بعد إبرام العقد					

N	ثقة المستهلك	1 لا أوافق بشدة	2 لا أوافق	3 محايد	4 أوافق	5 أوافق بشدة
34.	أشعر بالثقة إذا أريد شراء عبر الإنترنت					
35.	الأسئلة 29-25 تؤثر على ثقتي عبر الإنترنت					

شكرا لمشاركتكم

**Questionnaires, Consent Form and Information Sheet (English Version)**



University of  
**Portsmouth**

**Questionnaires Survey**

**Research title**

**The Importance of Consumer Protection in Relation to Electronic Commerce  
Development: The Need for Reform in Jordan**

Ahmad Alhusban

PhD student at School of Law

University of Portsmouth

You are being invited to participate in a research study about e-commerce regulations in Jordan. This study is being conducted by Ahmad Alhusban from the School of Law at the University of Portsmouth and forms part of a dissertation. The supervisor of this dissertation is Mr. Joe Sekhon from the School of Law, Portsmouth Business School, Richmond Building, Portland Street, Portsmouth, PO1 3DE, [joe.sekhon@port.ac.uk](mailto:joe.sekhon@port.ac.uk). This study is conducted as part of a postgraduate project.

If you have any questions about the study, please contact:

Ahmad Alhusban, 100 Marmion Road, Southsea, Portsmouth, PO5 2BB, UK, Tel: 00 44 (0) 78 60 55 39 60, [Ahmad.alhusban@port.ac.uk](mailto:Ahmad.alhusban@port.ac.uk)

This research seeks to find solutions in order to increase the trust and confidence of Internet users when buying online in Jordan. The trust and confidence of Internet users can be built by there being adequate protection provided by legislation. As part of this research, a questionnaire survey will be distributed to anyone over the age of 18 years and either male or female, which will ask a number of questions. After you have heard more about the study, and if you agree, I will begin to ask you the questions.

There are no known risks or costs if you decide to participate in this research study. The information you provide will be used for academic purposes and will be kept securely.

The questionnaire will take approximately 10 minutes. The information collected may not benefit you directly, but it should provide a benefit for Jordanian consumers in general.

This survey is anonymous. Do not write your name on the survey. No one will be able to identify you or your answers, and no one will know whether or not you have participated in the study. Should the data be published, no individual information will be disclosed.

Your participation in this study is voluntary. You are free to decline to answer any particular question if you do not wish to do so. You do not have to decide today whether or not you agree to participate in this research. Before you decide, you can talk to anyone you feel is appropriate.

Once you decide to complete this questionnaire ***please*** read each question carefully and tick the relevant box to indicate your answer. You are only required to tick one box.

Once you have finished the questionnaire please take a minute to check you have answered all the questions that you should have done.

The ethics committee at the University of Portsmouth has reviewed my request to conduct this project. If you have any concerns about your rights in relation to this study, please contact Sharman Rogers, the administrator of the ethics committee, at the University of Portsmouth on [sharman.rogers@port.ac.uk](mailto:sharman.rogers@port.ac.uk)

*Thank you very much for taking the time to read this information sheet. Your participation in the research is very much appreciated.*

***It is important for you to understand why this research is being undertaken and what it will involve. Please take the time to read the following information carefully in order to decide whether or not you wish to take part.***

I am currently undertaking a study that involves the investigation of the relationship between consumer protection and the growth of electronic commerce in Jordan. This research focuses on three issues of consumer protection, namely; information obligations, protection against unfair terms and the right of cancellation. The reason for studying these issues is to explore whether or not consumers feel that they are protected when concluding contracts on-line and, thus whether they affect the willingness of consumers to participate in e-commerce activities.

The main objective of the thesis is to examine to what extent Jordanian legislation protects consumers involved in e-commerce consumer contracts, and whether the consumer protection provided by the current legal framework helps the development of e-commerce in Jordan.

Generally, legal frameworks play an important role in the growth of e-commerce and its development. However, the regulations surrounding Jordanian e-commerce are lacking, in particular, a defined set of rules for consumer contracts and consumer protection.

In order to make e-commerce regulations in Jordan more practical and comprehensive in relation to consumer protection, it is important that these regulations rebalance the power between contracting parties in a business-to-consumer relationship, thus helping to build trust and bolster the confidence of Jordanian Internet users.

This study has been based on the assumption that a consumer would participate in e-commerce if the Jordanian legislature provided a high level of consumer protection in business-to-consumer transactions.

### Demographic details

1. Age:
  - 18-24
  - 25-34
  - 35-44
  - 45-54
  - +50
  
2. Occupation
  - Employed
  - Self-employed/Business Owner
  - Student
  - Not working
  
3. Educational attainment
  - Post graduate
  - Undergraduate
  - College
  - Secondary school
  - No qualifications

		1 Never 0 Times	2 Rarely 1 Time / Year	3 Occasionally 3 Times / Year	4 Often Once a month or more
4.	How often do make a purchase on-line				

5. I use internet to compare prices
  - Yes
  - No

N	<b>Consumer protection</b>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
6.	I feel that I am adequately protected by law as a consumer					

N	<b>Physical infrastructure</b>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
7.	I have a computer, tablet or smartphone					
8.	I have access to the Internet					
9.	I constantly use the e-mail address					
10.	I am able to pay by credit card, visa card, master card or any electronic method of payment					

11.	If I buy something over the Internet, I will be able to receive it (in home or post office)					
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N	<b>Human infrastructure</b>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
12.	I know how to use computer, tablet or smartphone					
13.	I know how to use Internet					
14.	I know how to access shopping websites					
15.	I know how to buy products over the internet					
16.	e-commerce is an attractive way to do shopping					

N	<b>Legal infrastructure</b>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
17.	Jordanian policy and laws has a positive impact on e-commerce development					
18.	My payment is protected on-line					
19.	I am protected as a consumer from unfair commercial practices					
20.	My data and privacy on the Internet are protected					
21.	If I buy a product over the internet, I will be certain that contract is concluded once I make payment					

N	<b>Consumer right</b>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
22.	I can easily resolve a dispute with the seller on-line					
23.	I can cancel the transaction and get my money back before delivery					
24.	I have the right to return the product I ordered and get my money back, without giving any reason					

N	<i>information</i>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
25.	Sellers provide sufficient information about the products over the Internet					
26.	It is easy to obtain the contact details of the seller for enquiries or solving problems					
27.	Sellers provide clear information about the technical steps to conclude the contract and the correction of any errors					
28.	Sellers provide clear information about my rights and their obligations					
29.	I am adequately protected if a business has provided me with insufficient information about their identity or about the product					

N	<i>Terms and conditions</i>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
30.	It is easy to find and access terms and conditions on a shopping website					
31.	Terms and conditions are generally easy to understand					
32.	Businesses normally introduce fair terms and conditions					
33.	It is easy to void any unfair terms after concluding the contract					

N	<i>Consumer confidence</i>	1 Strongly disagree	2 disagree	3 neutral	4 Agree	5 Strongly agree
34.	I feel confident if I buy over the Internet					
35.	Questions 25-29 affect my confidence over the internet					

*Thank You For Your Participation*