

# 1 THE IMPACT OF THE CISG ON THE DOMESTIC LAW OF ELECTRONIC TRANSACTIONS IN THE ARAB WORLD

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## 1.1 INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) was drafted roughly four decades ago to regulate the relationship between sellers and buyers having places of business in different countries. During the last 15 years, the internet has facilitated international commercial dealings by reducing the cost of cross-border trade. The development of electronic transactions raises questions about the suitability of CISG provisions to e-commerce. In a 2003 opinion, the CISG Advisory Council answered some of these questions.<sup>1</sup>

Additionally, the United Nation Commission on International Trade Law (UNCITRAL) has paved the way for a legal environment suitable for e-commerce by drafting the Model Law on Electronic Commerce 1996 (MLEC),<sup>2</sup> This was followed by the United Nation Convention on the Use of Electronic Communications in International Contracts 2005 (e-CC).<sup>3</sup>

In the Middle East, e-commerce is becoming increasingly significant.<sup>4</sup> Many Arab legislatures are creating a suitable legal environment by developing a legal framework for e-commerce. They have formulated national legislation either adopting the MLEC,<sup>5</sup> or

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1 CISG Advisory Council, Opinion No. 1 ‘Electronic Communications Under CISG’, 2003, Rapporteur: Professor Christina Ramberg.

2 *UNCITRAL Model Law on Electronic Commerce 1996*, GA Res. 51/162 UN Doc. A/51/162 (MLEC).

3 *New York Convention on the Use of Electronic Communications in International Contracts*, adopted 23 November 2005, UN Doc. A/60/515 (entered into force 1 March 2013) (e-CC).

4 E-commerce in the Middle East reached \$14 billion in 2014 and is expected to total more than \$20 billion by 2020; it is, moreover, growing faster than in any other region of the world according to a study released this month by Pay Fort. See R. Shuqum, ‘E-Commerce a Fast Growing Trend in the Arab World’, *The Arab Weekly*, 2015, No. 6, p. 18.

5 Eight Arab countries have adopted the UNCITRAL Model Law on Electronic Commerce 1996 (Bahrain, Jordan, Saudi Arabia, Syria, UAE, Kuwait, Qatar and Oman). See UNCITRAL, *Status: UNCITRAL Model Law on Electronic Commerce* available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html)>.

addressing the key issues raised by the Model Law.<sup>6</sup> Arab states are still reluctant concerning the e-CC, with only two Arab countries having signed it.<sup>7</sup> However, e-commerce constitutes a matter of fact in the Arab world, irrespective of the legal environment in each country.<sup>8</sup>

The CISG has proven somewhat luckier in the Arab world. Although the CISG plays a significant role in creating uniformity in international sales law and has been ratified by 84 countries,<sup>9</sup> a total of only 6 out of 22 Arab states have ratified the instrument.<sup>10</sup> Nevertheless, CISG provisions may apply to contracts for the sale of goods in Arab states even if the requirements for application of the Convention are not met.

Almost all Arab states are civil law countries. Thus, civil codes, national legislation on e-commerce and the CISG are likely to constitute part of the legal environment for international electronic contracts for the sale of goods (hereafter, such contracts are referred to as IESG). National laws play an important role in interpreting IESG clauses and fill gaps in this context within the historical background of Islamic Sharia.<sup>11</sup>

This chapter represents an attempt to explore the CISG precepts and their relevance for IESG in the Arab world, having regard for general principles of law, civil codes and Arab laws on electronic transactions (ALET). Recent developments in e-commerce, such as IESG being concluded through smart phones applications and websites, will be considered. Different Arab laws may be included, irrespective of the ratification of the CISG, given the fact that the CISG could be applied in any Arab state directly or indirectly. In Part 1.2, the chapter explores the problems in applying the CISG requirement of the internationality of a contract on the sale of goods to electronic contracts. Also addressed is the harmonization of CISG provisions – with regard to the opinion of the CISG Advisory Council concerning electronic communications under the CISG – and the Arab laws on electronic transactions that take into account the principle of informality (Part 1.3). Finally, the chapter examines issues arising out of the formation of IESG in the light of CISG provisions and the Arab legal environment (Part 1.4).

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6 See e.g., Iraqi Law on Electronic Signature and Electronic Dealings No. 78/2012; Egyptian Law on Electronic Signature No. 15/2004.

7 Saudi Arabia on 12 November 2007 and Lebanon on 22 May 2006. See UNCITRAL, *Status: United Nations Convention on the Use of Electronic Communications in International Contracts* available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html)>.

8 Some Arab States have not enacted any legislation to regulate e-commerce as of the date of drafting this chapter, e.g., Libya and Mauritania.

9 UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods*, available at <[www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

10 Egypt on 1 January 1988, Syria on 1 January 1988, Iraq on 1 April 1991, Mauritania on 1 September 2000, Lebanon on 1 December 2009 and Bahrain on 1 October 2014.

11 S. Majid & F. Lenzen, 'Application of Islamic Law in the Middle East', *International Construction Law Review*, Vol. 20, 2003, p. 177.

## 1.2 THE INTERNATIONAL CHARACTER OF IESG IN THE ARAB WORLD

Article 1 CISG sets out the general scope of the Convention.<sup>12</sup> Provisions of the CISG apply to contracts for the international sale of goods. The requirement that the contract be ‘international’ is met when the places of business of the parties are in different Contracting States.<sup>13</sup> The CISG may also apply to the contract of sale if the rules of private international law lead to application of the law of a CISG Contracting State.<sup>14</sup> Special characteristics in e-contacts may conflict with this prerequisite for application of the CISG as regards the place of business.

### 1.2.1 *The International Character and Direct Application of the CISG in the Arab World*

Article 1(1)(a) CISG lays down two requirements to consider in international contracts of sale:

1. The places of business of the contracting parties should be in different states.
2. The states are Contracting States.

Regarding the first requirement, it obviously means that the places of business of the seller and the buyer themselves should be in different states at the time of concluding the contract.<sup>15</sup> The former requirement might not be satisfied when the places of business of agents of the seller and buyer are in different states.<sup>16</sup> The wording of Article 1(1)(a) expressly considers the places of business of the contracting parties.

As a general rule it was accepted that the place of business is where the contracting party has its stable business organization. Consequently, this is the place where the company has its establishment of some duration with certain authorized powers.<sup>17</sup>

If the seller or buyer or both parties have multiple places of business, the CISG considers the relevant place to be the place of business with the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by

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12 See P. Schlechtriem, ‘Requirements of Application and Sphere of Applicability of the CISG’, *Victoria University of Wellington Law Review*, Vol. 36, No. 4, 2005.

13 Art. 1(1)(a) CISG.

14 Art. 1(1)(b) CISG.

15 A. Rosett, ‘Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods’, *Ohio State Law Journal*, Vol. 45, No. 2, 1984, p. 274.

16 K. Siehr in H. Honsell (Ed.), *Kommentar zum UN-Kaufrecht: Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)*, 1st edition, Springer, Berlin, 1997, Chapter 1, p. 48.

17 B. Borisova, ‘Geographic Sphere of Application of the United Nations Convention on Contracts for the International Sale of Goods’, *Pace Essay Submission*, September 2002, available at <[www.cisg.law.pace.edu/cisg/biblio/borisova.html](http://www.cisg.law.pace.edu/cisg/biblio/borisova.html)>.

the parties<sup>18</sup> at any time before or at the conclusion of the contract. The habitual residence of the contracting party should be considered if it does not have a place of business.<sup>19</sup>

The location of each party in different states must be known or at least may not be unknown to the parties before or at the time of concluding the contract. Accordingly, the CISG might be excluded if a buyer or a seller proves that he was unaware at the time of conclusion of the contract that the other party's place of business was located in a different state.<sup>20</sup> The parties may know about the location of each other's places of business from the contract itself or from any event before or at the time of concluding the contact.

Regarding the second requirement, the different states in which the places of business of both parties are located must also be Contracting States to the CISG. If the two different states in which the seller and the buyer have their places of business are Contracting States, whether Arab or non-Arab states, the Convention applies.<sup>21</sup> Regionally, the CISG has been ratified by and has entered into force in six Arab states since 1980. Accordingly, any contract concluded between parties located in Arab states could be subject to the CISG as long as both are located in two of the six different Arab Contracting States.

### 1.2.2 *The International Character and Indirect Application of the CISG in Arab World*

Pursuant to Article 1(1)(b), the CISG may apply indirectly when the private international law (PIL) of the national court or procedural rules applied by the arbitral tribunal refer to the law of a Contracting State.<sup>22</sup> In such a case, the CISG will be applied as a part of the national law of each state that has ratified the Convention. The national court or arbitral tribunal may apply the CISG as *lex specialis* in connection with the international sale of goods.<sup>23</sup>

The national court may apply the CISG as a law referred to by PIL rules on different bases. The CISG could be *lex contractus*; almost all Arab laws consider the law chosen by

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18 Art. 10(a) CISG.

19 Art. 10(b) CISG.

20 F. Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing', *Journal of Law and Commerce*, Vol. 15, No. 1, 1995, p. 57.

21 For more information about the application of Art. 1(1)(a) CISG in the Arab world, see A. Dawwas & Y. Shandi, 'The Applicability of the CISG to the Arab World', *Uniform Law Review*, Vol. 16, No. 4, 2011, p. 823.

22 For more information on Art. 1(1)(b) CISG as applied in practice in the Arab world, see Dawwas & Shandi, *supra* note 21, p. 831.

23 L. Spagnolo, 'The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers', *Melbourne Journal of International Law*, Vol. 10, No. 1, 2009, p. 143.

the parties as the law applicable to the contract.<sup>24</sup> In the absence of a choice by the contracting parties, the majority of Arab laws refer to the law of the place of conclusion unless the parties agreed otherwise.<sup>25</sup> A few Arab laws refer to the law of the country of residence of the principal actor carrying out the contract.<sup>26</sup>

When a national court or arbitral tribunal applies the CISG pursuant to Article 1(1)(b) CISG, it does not matter whether or not the contracting parties' place of business is located in a Contracting State.<sup>27</sup> The CISG will be the applicable law in any event, provided the PIL rules in the state of the national court refer to the law of a CISG Contracting State, unless that state has declared that it will not be bound by Article 1(1)(b) pursuant to Article 95 CISG.<sup>28</sup> None of the six Arab Contracting States to the CISG have used the Article 95 reservation. Hence, if the PIL rules of the state of the national court or the procedural rules of the arbitral tribunal refer to the law of any of these six countries, the CISG will be the applicable law for the contract.

Whether the basis of application is through Article 1(1)(a) or Article 1(1)(b), Article 1(1) still requires that the parties respective places of business be in 'different States'. Hence applicability of the CISG depends on examination of circumstances indicating places of business of each contacting party at the time of contract.<sup>29</sup> In cases of e-commerce, it might not be easy to find such indicators.

### 1.2.3 *The Internationality of IESG in Arab Laws*

In IESG, it might not be easy to determine the place of business of the contracting parties, and therefore internationality may be difficult to establish. Unlike a contract concluded by traditional means, where the parties have to include their address in the contract, contracting parties in IESG might proceed through all contractual stages – from negotiations to performance – with no need to declare their place of business or any other location related to the transaction. Moreover, in some IESG, the goods, e.g. software,<sup>30</sup> might be shipped and delivered electronically; in such cases contracting parties need declare neither the place of shipment nor the place of delivery.

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24 See e.g., Art. 21 Omani Civil Code, Royal Decree No. 29/2013; Art. 20 Egyptian Civil Code, No. 131/1948; Art. 21 Jordanian Civil Code, No. 34/1976; Art. 62 Tunisian Code of Private International Law, No. 97/1998.

25 See Art. 19 Egyptian Civil Code; Art. 25 Iraqi Civil Code, No. 40/1951; Art. 20 Omani Civil Code; Art. 20 Syrian Civil Code.

26 See e.g., Art. 62 Tunisian Code of Private International Law.

27 E. Jayme, in C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law; The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, Art. 1, para. 2.5.

28 In such a case, the national court or the arbitral tribunal has to apply the national law of that state.

29 See Art. 10(a) CISG.

30 For further discussion on the sale of software, see: J. Mowbray, 'The Application of the United Nations Convention on Contracts for the International Sale of Goods to E-Commerce Transactions: The Implications for Asia', *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 7, No. 1, 2003, p. 126.

The UNCITRAL Working Group on E-Commerce has suggested the effect of country indicators in domain names and e-mail addresses should be considered in determining a place of business of the contracting parties.<sup>31</sup> Some scholars have criticized this suggestion, arguing that the domain name or e-mail address is not a true indication of the location of the seller, and also that some domain names or email addresses make no indication to a certain country.<sup>32</sup>

Regarding the fact that the CISG does not define a definite meaning for the term 'place of business', one could easily interpret this term in light of the circumstances of the contract and in consideration of other CISG articles. Article 1(2) CISG may open the door for a broad interpretation of this term.

Article 1(2) CISG states that

[t]he fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by, the parties at any time before or at the conclusion of the contract.

According to the wording of Article 1(2) CISG, the fact that the parties have different places of business could appear from different circumstances, including any information disclosed by the parties at any time before or at the time of concluding the contract. In IESG, the fact that the parties have their places of business in different states may appear from the declaration of the place of shipment and the place delivery. Declarations on the places of shipment and delivery might be needed to enable performance, such as calculating the cost of shipment and the required time for delivery, means of transport, etc.<sup>33</sup>

In some e-transactions where the obligation of delivery might be performed electronically, the place of shipment and the place of delivery are not mentioned in the contract, such as in a sale of software or with other sorts of digital content transmitted by internet like music, images, video and e-books. However, such transactions might not constitute a problem in this context given that the majority of contracts featuring digitally transmitted contents might not be subject to the CISG in the first place. Specifically, some requirements to apply CISG might not be met:

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31 UNCITRAL Secretariat, *Possible Future Work in the Field of Electronic Contracting: An Analysis of the United Nations Convention on Contracts for the International Sale of Goods – Note by the Secretariat*, UN GAOR, 38th sess, UN Doc. A/CN.9/WG.IV/WP.91, 9 February 2001, p. 4, para. 10.

32 Mowbray, *supra* note 30, p. 131.

33 Shipment is required in almost all international sales of goods, including a sale concluded electronically. Accordingly, the international character of the contract could be gathered from places of shipment and delivery. In case there is no indicator to the place of business, places of shipment or delivery could be part of the circumstances that may indicate place of business where no other indicators exist.

1. Arguably, the subject matter of these transactions may not satisfy the requirement of 'goods' as a tangible movable.<sup>34</sup> It is worth mention that some scholars prefer not to limit the concept of 'goods' to tangibles, since provisions of CISG do not limit its substantive sphere of application solely to tangibles. Consequently, any item, including software, that can be commercially sold and in which property can be passed on and which is not explicitly excluded from the CISG's sphere of application by Art. 2 CISG, can be the subject matter of an international contract of sale and subject to CISG.<sup>35</sup>
2. The agreement underlying such a transaction may not constitute a 'contract of sale'. Such transactions may entitle the buyer to a limited right to use the content transmitted electronically and not to the title of such content. In this situation, the transaction looks 'less like a sale and more like a license'.<sup>36</sup>
3. The majority of contracts featuring digital content transmitted by the internet are business-to-consumer (B2C) contracts. Such contracts are excluded from the scope of application of the CISG by Article 2(a).<sup>37</sup>

Once the international character of the contract appears from the circumstances of the contract, the CISG may apply directly. Also, the CISG may apply indirectly if PIL rules make reference to the law of a Contracting State: Article 1(1)(b) CISG. That indication would depend upon the PIL and civil law in the state of the court. Civil law rules concerning the time of conclusion of the contract may help to specify both the time of conclusion and the place of conclusion of the contract.

In the Arab world, the majority of PIL rules consider the law of the place of conclusion of the contract as being applicable to the contract.<sup>38</sup> Arab civil codes, similarly to CISG Article 23, consider a contract concluded between parties not in each other's presence as having been made at the time and place at which the offeror learns of the acceptance. The offeror shall be deemed to have learned of the acceptance at the time and place at which such acceptance reaches him.<sup>39</sup> A few Arab civil codes consider a contract concluded

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34 See F. Verzoni, 'Electronic Commerce and the UN Convention of International Sale of Goods', *Nordic Journal of Commercial Law*, 2006, No. 2, p. 21.

35 Frank Diedrich, The CISG and Computer Software Revisited, *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 6, Supplement, 2002, p. 64; Joseph Lookofsky, in J. Herbots & R. Blanpain (Eds.), *International Encyclopedia of Laws – Contracts*, The 1980 United Nations Convention on Contracts for the International Sale of Goods, Kluwer L. Intl., 2000, p. 37.

36 See J.D. Gregory, 'The Proposed UNCITRAL Convention on Electronic Contracts', *The Business Lawyer*, Vol. 59, No. 1, 2003, p. 322.

37 See Mowbray, *supra* note 30, p. 132.

38 See *supra* note 25.

39 See Art. 97 Egyptian Civil Code; Art. 87 Iraqi Civil Code; Art. 80 Omani Civil Code; Art. 67 Algerian Civil Code.

between parties not in each other's presence as having been made at the time and place at which the acceptance was addressed by the offeree.<sup>40</sup>

### 1.3 HARMONIZATION BETWEEN THE CISG AND ARAB LAW CONCERNING INFORMALITY

The conclusion of contract is not subject to any particular requirement as to form, either in the CISG or under Arab laws. The informality principle found in many civil law regimes in Europe<sup>41</sup> and in the Middle East, exists as a general principle, but the principle does not apply if the contract, usages or practices provide otherwise. Arab domestic laws on electronic communications state that electronic contracts shall have the same legal effects associated with contracts concluded in more traditional ways in respect of validity, evidential value, enforceability and any other rules.

Articles 11 and 13 CISG constitute the basis of the informality principle. Article 11 establishes a general principle of informality by stating that a contract of sale: (1) need not be concluded in or evidenced by writing; (2) is not subject to any other requirement as to form; and (3) may be proved by any means, including witnesses. Article 13 presents an explanation of the term 'writing' that appears in other parts of the CISG.

Almost all civil codes in the Arab world codify the informality principle. The majority of Arab civil codes have adopted the principle expressly by stating that a contract can be concluded solely by virtue of the confluence of offer and acceptance, without any additional requirements, unless the law states otherwise.<sup>42</sup> A contract of sale of goods would be qualified as a consensual contract in the Arab world, regardless whether it is national or international.

Irrespective of the fact that validity is a matter excluded from the scope of the CISG by Article 4(a), Article 11 CISG complies with Arab laws concerning the validity of a consensual contract of sale. All Arab laws state that a contract can be concluded by exchanging offer and acceptance, this occurring at the time of the acceptance communicated to the offeree pursuant to the general rule governing acceptance in this context.<sup>43</sup>

The third part of Article 11 CISG 'gives a procedural dimension to informality when it provides that the contract can be evidenced by any means'.<sup>44</sup> The scope of application of the principle of informality in the CISG is not limited to the formation of contract; it

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40 Art. 184 Lebanese Code of Obligations and Contracts (Civil Code); Art. 98 Syrian Civil Code.

41 See, J.M. Smits, *Contract Law – A Comparative Introduction*, Edward Elgar, Cheltenham, 2014, p. 101.

42 Art. 89 Egyptian Civil Code; Art. 69 Omani Civil Code; Art. 92 Syrian Civil Code; Art. 30 Bahraini Civil Code.

43 See K. O'Shea & K. Skeahan, 'Acceptance of Offer by E-mail – How Far Should the Postal Acceptance Rule Extend', *Queensland University of Technology Law Review*, Vol. 13, 1997, p. 247.

44 Verzoni, *supra*, note 34, p. 28.



may govern all stages of the contract, including performance, modification and termination. National courts or arbitral tribunals may accept any electronic evidence to prove conclusion or modification.<sup>45</sup>

Arab laws adopt the same dimensions for the principle of informality in regards to commercial dealings based on the principle of freedom of proof in commercial dealings.<sup>46</sup> Accordingly, any evidence concerning an international contract for the sale of goods could be admitted by national courts or an arbitral tribunal in the Arab world based on the commerciality of the contract.

#### 1.4 PROBLEMS IN THE FORMATION OF E-CONTRACTS IN THE CISG AND ARAB LAWS

Many of the difficulties concerning the application of CISG provisions to electronic contracts for the international sale of goods have been solved by CISG Advisory Council Opinion No. 1 of 2003.<sup>47</sup> Additionally, the MLEC provides guidelines for many Arab legislators as to how to set up their national laws on electronic transactions or electronic signature. This part of the present chapter discusses the harmonization of CISG provisions applicable to electronic contracts as interpreted by CISG Advisory Council Opinion No. 1 and Arab laws on electronic transactions.

##### 1.4.1 *Electronic 'Writing' in the CISG and Arab Laws*

Article 13 CISG provides a broad interpretation of the term 'writing' that considers the technological developments in the field of telecommunications existing at the time of the drafting of the Convention. In view of the fact that the majority of international contracts of sale are concluded between parties not in each other's presence and mainly by telecommunication, the Convention declares that the meaning of writing 'includes' telegram and fax.

Since 1980, technological developments have resulted in new and different means of electronic communications and simultaneously raised questions about the possibility of concluding a contract by these modern means of communication, including e-mail and different mobile applications.

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45 Verzoni, *supra*, note 34, p. 29.

46 See e.g., Art. 60 Egyptian Law of Evidence in Civil and Commercial Matters, No. 25/1968; Art. 54 Syrian Law of Evidence, No. 25/1968.

47 See, CISG Advisory Council, Opinion No. 1, *supra* note 1.

Many scholars consider that there is a 'gap' in the CISG concerning this issue.<sup>48</sup> Different legal techniques have been used to fill this gap. The CISG Advisory Council attempted to fill the gap in 2003 with Opinion No. 1, stating that:

The prerequisite of 'writing' is fulfilled as long as the electronic communication is able to fulfil the same functions as a paper message. These functions are the possibility to save (retrieve) the message and to understand (perceive) it.<sup>49</sup>

Moreover, general CISG provisions could be used as a legal technique to fill the gap in Article 13. Alternatively, the problem of a writing could be settled by the contracting parties themselves. Article 9 CISG binds the contracting parties to any usage or practice they have agreed on. Consequently, using any modern electronic method as a means of communication between contracting parties could qualify as a usage or practice agreed upon between the parties, expressly or impliedly.

Additionally, Article 8(3) CISG considers the circumstances of the contract, including the negotiations, practices and usages parties have established between themselves – which in turn encompasses the conduct of the parties – to determine the intentions of the contracting parties. Hence, if the contracting parties have adopted e-mail or mobile applications as a means of communication in their negotiations over a recent contract, or in connection with their previous dealings, neither of them can deny the legal effects of these communications.

In the Arab world, judicial analogy (*Qiyas*) can be used as a legal technique to fill the gap in any legal text, including sources of Islamic law (Quran and Hadith):

In case of the lack of direct text, from the Quran or Hadith, on any contemporary issue, making judgment based on analogy is permissible by Sharia. Analogical reasoning can be deduced from a known Islamic judgment and then applied to the unknown problem within the Islamic model of the Quran, Hadith, and the Islamic consensus.<sup>50</sup>

Legal analogy is used by courts in different jurisdictions,<sup>51</sup> including the Middle East, to reach a judgment on an issue in the event of a lack of direct legal text; *Qiyas* has been used

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48 S. Eiselen, 'Electronic Commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980', *Electronic Data Interchange Law Review*, Vol. 6, 1999, p. 35; Mowbray, *supra*, note 30, p. 142; Verzoni, *supra* note 34, p. 30.

49 See, CISG Advisory Council, Opinion No. 1, *supra* note 1, *Commentary*, para. 13.1.

50 A. Firak, 'Analogy (Islamic)', in D.A. Leeming (Ed.), *Encyclopedia of Psychology and Religion*, Springer, New York, 2014, p. 56.

51 J. Farrar, 'Reasoning by Analogy in the Law', *Bond Law Review*, Vol. 9, No. 2, 1997, p. 152.

by scholars in Islamic jurisprudence for many years.<sup>52</sup> A similar technique could be used to fill the gap in Article 13 concerning modern types of communication. E-mails and mobile applications could be acceptable by courts as long as they provide the main functions of writings as a means of evidence, namely:<sup>53</sup>

1. The information included in the document is capable of being retrieved and used in the future;
2. The sender of each document is capable of being identified easily; and
3. The document cannot be modified without any modifications being apparent.

It is not permissible to use interpretive techniques found in domestic law to interpret the CISG, since looking at the CISG through ‘domestic lenses’ would soon result in it losing its uniform character. Nonetheless, it can be observed that *Qiyas* can perhaps be likened to the accepted use of analogical reasoning pursuant to Article 7(2) CISG.<sup>54</sup> Thus the CISG’s own interpretative method of reasoning by analogy could be used to fill the gap in Article 13 and any other gap in the CISG on the ground of Article 7(2) CISG, which provides general principles of law as a means of filling gaps in the CISG. Article 7(2) recognizes the use of principles in the CISG to fill gaps, such principles can be identified in the informality principle, in Article 11 CISG and in the principle of recognizing trade usage and contractual circumstances in accord with Article 9 CISG. In the absence of CISG principles, Article 7(2) recognizes the domestic law becomes applicable by virtue of the rules of PIL.

The concept of domestic law extends to the legislative history and background of each domestic law. The environment of legislation plays an important role in interpreting any legal text. ‘In many civil law countries, the use of legislative history has been accepted’.<sup>55</sup> Almost all Arab countries are considered to be civil law countries. In any Arab or Islamic country, Sharia principles constitute one of the most important bases of legislative history. *Qiyas* is considered as one of the sources of Islamic Sharia in the Middle East and is used by courts to fill gaps in legal text.

Where domestic Arab law governs an international contract for the sale of goods, *Qiyas* could be used as a legal technique to interpret the term ‘writing’ in domestic law, and

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52 C. Standk, ‘Sharia – The Islamic Law’, Seminar Paper, University of Hildesheim (Institut für Angewandte Sprachwissenschaft), 2008, p. 5.

53 Verzoni, *supra* note 34, p. 31.

54 The use of analogy in interpretation of the CISG is discussed by M.J. Bonell, in C.M. Bianca & M.J. Bonell (Eds.), *Commentary on the International Sales Law; The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987, Art. 7, para. 2.3.2; I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods*, Oxford University Press, Oxford, 2016, Art. 7, para. [31] (supporting analogical reasoning but only as a secondary method of interpretation).

55 J. Honnold, in H. Flechtner (Ed.), *Uniform Law for International Sales Under the 1980 United Nations Convention*, 4th edition, Kluwer, Deventer, 2009, p. 120.

modern types of electronic communication could be accepted as long as they fulfil the legal functions of a writing as a means of proof.

Similarly, analogical reasoning and general principles of the CISG can also be used to fill gaps in its text, as mentioned earlier. To a certain extent the mechanism works with gaps in the CISG concerning e-commerce. Problems in respect of e-commerce have convinced national and international legislators to enact special rules regulating electronic transactions. Concluding an international sale of goods contract with Arab traders could be governed by the CISG as mentioned previously, but the national laws on electronic transactions may influence such a contract and be used to settle some conflicts arising out of the relationships between the parties, such as validity of e-signature or errors in the computer's behavior.

#### 1.4.2 *Conclusion of E-Contracts in the CISG and ALET*

Arab legislators have been inspired by international texts in the field of electronic commerce. Many Arab laws regulating electronic dealings have been influenced by the MLEC.<sup>56</sup>

The CISG in the Arab world applies within the context of the legal environment of Arab countries, this including Arab laws on electronic communications (ALET) (regulating the conclusion of electronic transactions) and civil codes (regulating all matters concerning the formation of contracts, rights and obligation of contracting parties and the termination of the contract). Rules of Islamic Sharia may play an important role in interpreting domestic texts or filling domestic legal gaps in this regard. Rules in the e-CC may not constitute an important part of the legal environment in the Arab world to the extent that this instrument has been ratified by a limited number of Arab countries. When applying CISG provisions to electronic transactions, different rules in Arab domestic laws on electronic communications may fill any external gaps in the CISG in regard to matters not governed by the CISG concerning e-commerce and create a legal link to Opinion No. 1 of the CISG-Advisory Council.

##### 1.4.2.1 **Validity of Electronic Means of Concluding E-Contracts in ALET**

ALET uphold the legality of contracts concluded by electronic means. Arab laws might be divided into two groups in this regard, the first group of laws upholds the legality of electronic dealings expressly; they entitle the contracting parties to conclude their agreements

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56 Kuwaiti Law on Electronic Dealings, No. 20/2014; Omani Royal Decree No. 69/2008 issuing the Law on Electronic Dealings; Syrian Law on Electronic Dealings, No. 3/2014; Qatari Law on Electronic Commerce, No. 16/2010.

by electronic means.<sup>57</sup> The second group of laws upholds the legality of electronic signatures and states some requirements for validating an electronic signature.<sup>58</sup> Some of these laws define the e-signatures, and state certain requirements for the validity of e-signatures, influenced by UNCITRAL Model (MLES) 2001.<sup>59</sup>

The wording of the first group of laws takes different forms in order to assert the validity of contracts concluded by electronic means. Some ALET uphold the validity of contracts concluded by electronic means in general,<sup>60</sup> and other assert the validity of, specifically, offer, acceptance, withdrawal of offer or acceptance and modification of contract.<sup>61</sup> Some of these laws state certain requirements for the validity of an e-signature.<sup>62</sup> One such ALET provision has equated contracts concluded by electronic means and contracts concluded by traditional means.<sup>63</sup>

Many ALET state three requirements to validate an electronic signature or electronic documents. ALET legalize e-signatures, e-writings and e-documents if they meet these requirements:

- a. The e-signature is in the sole control of the signer;
- b. The signer has sole control over the electronic medium;
- c. It is possible to discover any modification or replacement of data in an electronically written message or e-signature.<sup>64</sup>

Both groups of ALET fill gaps in the CISG concerning e-commerce and provide the required regulations to validate an electronic contract for the sale of goods. ALET are consistent with the opinion of the CISG Advisory Council – concerning Article 11 CISG – entitling the contracting parties to conclude and evidence contracts by electronic means.<sup>65</sup> Also,

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57 See Art. 5 Kuwaiti Law on Electronic Dealings; Art. 10 Bahraini Law on Electronic Dealings; Art. 18 Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012; Art. 5 Draft Lebanese Law Regulating Electronic Dealings; Art. 4 Syrian Law on Electronic Dealings.

58 See Art. 18 Egyptian Law on Electronic Signature, No. 15/2004; Arts. 2 and 3 Syrian Law On Electronic Signature and Network Services.

59 See definition of 'E-signature' as that which: 'That which is on an electronically written message in the form of letters, digits, codes, signals or others and has a unique identity that identifies the signer and uniquely distinguishes him/her from others': Art. 1(C) Egyptian Law on Electronic Signature, No. 15/2004; Art.1(4) Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012; Art. 1 Syrian Law on Electronic Signature and Network Services.

60 Art. 18 Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012.

61 Art. 10 Bahraini Law on Electronic Dealings; Art. 4 Syrian Law on Electronic Dealings; Art. 11 UAE Law on Electronic Dealings, No. 1/2006.

62 Art. 5 Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012.

63 Art. 13(2) Omani Law on Electronic Dealings, No. 69/2008.

64 Art. 13 Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012; Art. 18 Egyptian Law on Electronic Signature, No. 15/2004; Arts. 2 and 3 Syrian Law on Electronic Signature and Network Services; Art. 9 Kuwaiti Law on Electronic Dealings.

65 See, CISG Advisory Council, Opinion No. 1, *supra* note 1, *Commentary*, para. 11.1.

ALET are consistent with the broad interpretation of the CISG Advisory Council as to the term 'writing' in Article 13 CISG.

ALET state the main requirements for upholding the validity of any electronic means that could be used to conclude a contract; these requirements might be applied with the legal technique of *Qiyas* to check the validity of any electronic means that might be created in the future. Similarly, analogical reasoning under Article 7 could perform the same task within the context of the CISG.

#### 1.4.2.2 E-Offers in the CISG and Arab Laws

The first step in an electronic transaction is often accomplished by an offer sent directly by email to the offeree or directly by a chat through an electronic application. Bulletin board postings and advertisements sent to an electronic mailing list and also passive websites containing the details of a transaction may similarly constitute the first step in an electronic transaction, and the question is raised as to whether such online activities constitute an offer.

The CISG Advisory Council does not provide any interpretation as to emails. By analogy to written letters and considering that ALET uphold the validity of contracts concluded by electronic means, emails may meet the requirements for an offer as stated in Article 14 CISG, namely that they be addressed to one or more specific persons, be sufficiently definite and indicate the intention of the offeror to be bound in the event of acceptance.

Direct chat through an electronic application may also constitute an offer if it satisfies the requirements of Article 14 CISG. The Advisory Council qualifies direct chat as 'instantaneous means of communications' and considers it subject to Article 20 CISG.

Bulletin boards and advertisements sent to an electronic mailing list could be considered as an invitation to treat as they lack the essential details of the transaction and lack the requisite indication of the intention of the offeror to be bound in the event of acceptance.<sup>66</sup>

Proposals found on a passive web site may contain the essential details of the transaction, such as a form to be filled out by the buyer including personal information of the buyer (e.g., identity and address), details of the offered goods and an indication of the seller's intention to be bound in the event of acceptance by the buyer. Almost all proposals on passive websites state that acceptance should be accompanied with e-payment. Proposals on passive websites may constitute an offer addressed to the public at large;<sup>67</sup> in accord with the wording of Article 14(2) CISG, the party who makes the proposal is entitled to declare his intention to have the proposal function as an offer and to have the contract concluded by any acceptance. Additionally, an offer in a passive website could be considered

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66 Mowbray, *supra* note 30, p. 135.

67 *Contra, id.*, p. 135.

as an irrevocable offer in light of Article 16(2)(b) CISG, providing that an offer cannot be revoked ‘if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer’.

The majority of websites use ‘clickwrap’ or ‘shrinkwrap’ agreements to ensure that the contractual terms of their offers reach their clients.<sup>68</sup> In such cases, the buyer may fill out an electronic form on the web, insert the required details for e-payment and press an ‘I accept’ or ‘I Agree’ button. Once the details of acceptance reach the server of the seller, the contract is concluded.

ALET assert the validity of all electronic means of communications that express the will of the contracting parties in an offer and an acceptance, regardless of whether this relates to the will to create, transfer, modify or terminate obligations.<sup>69</sup> A few of the rules in ALET condition the validity of an electronic public offer on the seller either declaring some details about his identity<sup>70</sup> or declaring the essential details regarding the transaction.<sup>71</sup> These laws state the requirements for validity of an electronic public offer under the rules of consumer protection and such protection may not extend to business-to-business IESG.<sup>72</sup> General principles of law – found in Arab civil codes – concerning defects of consent, such as mistake and misrepresentation, may provide the required protection to buyers in business-to-business IESG in instances where a passive website contains a misrepresentation.

#### 1.4.2.3 Time of Concluding E-Contracts in Arab Laws

According to the CISG, a contract is concluded at the time when the acceptance reaches the offeror.<sup>73</sup> Regarding electronic transactions, the CISG Advisory Council has declared that the acceptance becomes effective at the time the electronic indication of assent enters the offeror’s server.

The Advisory Council requires the express or implied consent of the offeror to receiving electronic communications of that type, in that format and to that address.<sup>74</sup> As regards the general timing of a contract’s conclusion, to some extent Arab civil codes have different approach that that in the CISG, with some countries having reference to the time the

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68 For more details about the contractual nature of ‘clickwrap’ or ‘shrinkwrap’ agreements, see: G. Hughes & I. Oi, ‘Shrinkwraps, Clickwraps and Webwraps: The Overseas Experience’, *Law Institute Journal*, Vol. 79, No. 1-2, 2005, p. 34.

69 Art. 4 Syrian Law on Electronic Dealings; Art. 10 Bahraini Law on Electronic Dealings; Art. 18 Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012.

70 Arts. 17 and 18 Draft Lebanese Law Regulating Electronic Dealings.

71 Art. 25 Tunisian Law on Electronic Dealings; Art. 17 Syrian Law on Electronic Dealings.

72 The wording of Arts. 21 and 22 Draft Lebanese Law Regulating Electronic Dealings permits application of the validity requirements for electronic public offers to all types of contracts, whether business-to-business or business-to-consumer contracts.

73 Arts. 18(2) and 23 CISG.

74 CISG Advisory Council, Opinion No. 1, *supra* note 1, paras. 15.6 and 18.3.

acceptance is issued.<sup>75</sup> Other Arab civil codes look to the time when the acceptance reaches the offeror.<sup>76</sup>

The influence of e-commerce has unified the attitude in ALET regarding the time of conclusion of e-contacts. Regardless of the general rules of Arab civil codes concerning the time of conclusion of contracts, almost all ALET consider the time when the acceptance was received as the time of conclusion for e-contacts.<sup>77</sup> ALET declare that the time of receipt is the time when the electronic message entered either the electronic system of the consignee or an electronic system outside the control of the consignor;<sup>78</sup> this is similar to the CISG Advisory Council's interpretation of Articles 18(2) and 23 CISG.

#### 1.4.2.4 Electronic Agents in the CISG and ALET

IESG might be concluded with or without a minimum of human intervention. The submission of an order by the buyer through the seller's website may conclude the contract for an international sale of goods with regards to an irrevocable offer placed on the web by the seller. Electronic Data Interchange (EDI) allows the traders to conclude a contract for the sale of goods by exchanging data between two computers.<sup>79</sup> The validity of such contracts concluded by electronic means without human intervention was considered by the UNCITRAL Working Group during the preparation of the MLEC. The Working Group was of the opinion that 'data messages that are generated automatically by computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the computer is operated'.<sup>80</sup>

ALET allow contracting parties to conclude contracts by electronic media without human intervention. Some ALET consider a contract concluded by electronic media, without human intervention, as a contract concluded between the contracting parties.<sup>81</sup> The wording of the Bahraini Law of Electronic Dealings considers electronic media in this context as an electronic agent of the contracting parties.<sup>82</sup>

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75 Art. 98 Syrian Civil Code; Art. 184 Lebanese Code of Contracts and Obligations.

76 Art. 97 Egyptian Civil Code; Art. 45 Bahraini Civil Code; Art. 87 Iraqi Civil Code.

77 Art. 10 Syrian Law on Electronic Dealings; Art. 5 Draft Lebanese Law Regulating Electronic Dealings.

78 Art. 8 Syrian Law on Electronic Dealings; Art. 15 Bahraini Law on Electronic Dealings; Art. 10 Draft Lebanese Law Regulating Electronic Dealings.

79 D.L. Kidd & W.H. Daughtrey, 'Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions', *Rutgers Computer and Technology Law Journal*, Vol. 26, No. 2, 2000, p. 227.

80 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, 12 June 1996, *supra* note 2, p. 27.

81 Art. 12 UAE Law on Electronic Dealings; Art. 5 Syrian Law on Electronic Dealings; Art. 18(2) Iraqi Law on Electronic Signature and Electronic Dealings, No. 78/2012; Art. 11 Kuwaiti Law on Electronic Dealings; Art. 13(2) Omani Law on Electronic Dealings.

82 Art. 12(1) Bahraini Law on Electronic Dealings.



Regarding the fact that the CISG looks to the place of business of contracting parties and not to the place of business of their agents,<sup>83</sup> almost all ALET are consistent with the CISG in this respect. The place of the server exchanging the information will be considered as the place of business of the contracting party. In cases where the servers exchanging the information are in different countries, the CISG requirement of internationality could be met, such that the place of business would be deemed to be the place where the server is located.<sup>84</sup>

Regarding the Bahraini law considering the server as an agent of the contracting party, the CISG's internationality requirement for places of business still be satisfied, since the circumstances of the contract may nonetheless indicate different places of business for the seller and buyer, such as the place of shipment and delivery, which might sometimes be considered as establishing the internationality of the contract.

ALET do not resolve all the potential difficulties that may arise when offers, acceptances or any other data is exchanged between two electronic servers, *e.g.*, bugs in the server causing errors in the computer's behavior.<sup>85</sup> The general principles of contract found in Arab civil codes may entitle the contracting parties to avoid the contract in the event of electronic mistake.<sup>86</sup> The wide interpretation of rules of defective consent in Arab civil codes may permit the contracting parties to avoid the contract due to an error in the transmission of data. It is only the Bahraini law of electronic transactions that specifically considers dealings concluded between individuals and electronic agents as voidable in certain cases, those being as follows:

- (a) where the individual makes a material error in any electronic information or electronic record used in or which was a part of the transaction;
- (b) the electronic agent did not give the individual an opportunity to prevent or correct the error;
- (c) on becoming aware of the error, the individual promptly notifies the other party; and
- (d) in a case where consideration is received as a result of the error, the individual returns or destroys the consideration in accordance with the instructions agreed upon between the parties or according to the other person's instructions

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83 Siehr, *supra* note 16, p. 48.

84 See Assaduzzaman, 'Legal Issues in the Application of CISG in Online Sale (e-commerce) Contracts', *Computer Law and Security Review*, 2016, p. 11, para. 5.3, available at <[www.sciencedirect.com](http://www.sciencedirect.com)>.

85 See Mowbray, *supra* note 30, p. 134.

86 Art. 120 Egyptian Civil Code; Art. 84 Bahraini Civil Code; Art. 121 Syrian Civil Code; Art. 119 Iraqi Civil Code; Art. 203 Lebanese Code of Obligations and Contracts; Art. 43 Tunisian Code of Obligations and Contracts; Art. 109 Omani Civil Code.

or, if there are no instructions, deals with the consideration in a reasonable manner and does not benefit materially by receiving the consideration.<sup>87</sup>

## 1.5 CONCLUSION

The CISG governs electronic contracts for international sales of goods concluded in Arab world, whether directly or indirectly applicable according to Article 1 CISG. Arab civil codes, ALET and principles of Islamic Sharia may fill external gaps in the CISG, such as validity, concerning electronic transactions. Most ALET are consistent with Opinion No. 1 of the CISG Advisory Council concerning electronic communications. Also, the technique of legal analogy known as *Qiyas*, may play an important role in validating contracts concluded by various means of electronic communications under ALET.

Concluding an electronic contract for the sale of goods may raise some difficulties concerning the places of business of the parties, an aspect that is essential for satisfying the CISG requirement of the contract's internationality. As the CISG does not define the term 'place of business', the term may be interpreted broadly with regard to the circumstances of the conclusion and performance of the e-contract. Places of shipment and delivery may sometimes indicate the internationality of the contract.

Harmonization between the rule of consensual contracts, found in Arab civil codes, and the principle of informality, found in the CISG, allows the contracting parties to e-contracts to validly conclude their agreement by any means of electronic communication, including mobile applications, as long as the document resulting from such means of communication satisfies the requirements of ALET, namely that the information included can be retrieved in the future, the sender can be identified and the document was not capable of being modified.

The influence of e-commerce unified the different approaches of Arab civil codes concerning the time of conclusion of contracts. Just as in the CISG, ALET consider an e-contract to be concluded at the time when the acceptance is received.

Furthermore, the legal environment of e-transactions in the Arab world is harmonized with CISG provisions, irrespective of the different approaches of Arab civil codes concerning the time and place of conclusion of the contract. As with the CISG, most ALET consider the conclusion of e-contracts to be at the time and place where the offeror learns of the acceptance, in other words at the time and place the acceptance entered the server of the offeror.

ALET are consistent with the opinion of the CISG Advisory Council equating contracts concluded by e-writing and contracts concluded by traditional means. Additionally, ALET

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87 Art. 12(2) Bahraini Law On Electronic Dealings.

confirm the validity of a proposal on passive websites being deemed an irrevocable offer addressed to the public at large. This is consistent with the wording of Article 14(2) and Article 16(2)(b) CISG. General principles of law concerning defects of consent included in Arab civil laws, such as mistake and misrepresentation, may provide the buyer in business-to-business IESG with the required legal protection in the event of any misrepresentation made by the seller as to his product on a passive website.

ALET allow contracting parties to validly conclude contracts by electronic media without human intervention. In almost all ALET, the electronic media itself is considered to stand in the place of the contracting parties, the exception being under Bahraini law. In such cases lacking human intervention, where the servers of the contracting parties – which exchange offer and acceptance – are in different Contracting States, the CISG will apply, such that the place of business would be deemed to be the place where the server is located.

ALET do not provide an express solution in cases of errors in the transmission of data, with the exception of Bahraini law on electronic transactions. However, a broad interpretation of the rules on defect of consent in Arab civil codes may permit the contracting parties to avoid the contract in such situations.